Consumer Finance Monitor Podcast (Season 8, Episode 59): The Future of Shareholder Arbitration in Light of SEC's New Policy Statement

Speakers: Alan Kaplinsky, Mark Levin and Mohsen Manesh

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 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.

For those of you who want even more information, don't forget about our blog, consumerfinancemonitor.com. We've hosted the blog since 2011 when the Consumer Financial Protection Bureau became operational. So there's a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those in the industry. So to subscribe to our blog or to get on the list for our webinars, please visit us at ballardspahr.com. And if you like our podcast, please let us know about it. You can leave us a review on whatever platform you are using. Also, please let us know if you have any ideas for other topics that we should consider covering or speakers that we should consider as guests on our program.

So let me take a few minutes here just to introduce our topic for today and our speakers. So on September 17th of this year, the SEC issued a policy statement that mandatory arbitration provisions requiring investors to arbitrate securities law claims will not impact SEC decisions to accelerate the effectiveness of registration statements. This new policy reversed the agency's previous position that it would not use its authority to accelerate the effective date of a company's registration statement when the company's governing documents contained a mandatory arbitration provision covering disputes under the federal securities laws.

One commentator observed that this represents the most significant development in securities law arbitration policy in decades. It's also an issue that I've been personally been focusing on for about four decades. It began about 30 years ago when I, who was then at a different law firm and a former partner of mine represented a mutual thrift institution, which had converted from mutual to stock form and included an arbitration provision, actually one without a class action waiver. It was before the idea of a class action waiver surfaced, which was a couple of decades later.

So as I said, the arbitration provision in the constituent documents of this particular thrift institution, mutual thrift, that we were representing in connection with its conversion to stock form and the organization of the holding company in connection with it, we put it in there not knowing what reaction we would get from the SEC about it. Unfortunately, we found out, much to our chagrin, that the SEC staff told us that, unless we removed the arbitration provision, they would not accelerate the effective date of the registration of the new issue of stock under the Securities Act of 1933.

And without having the SEC accelerate the effectiveness of the registration statement, the conversion could not go through and the stock could not be issued. Pursuant to the plan of conversion, everything would essentially come to a screeching halt if we and our client didn't agree to delete the arbitration provision and there was no way to challenge it. There was nothing in any of the securities laws, in the Securities Act of 33 and any of the regulations promulgated by the SEC, any policy statements that had been issued, there was absolutely nothing other than the staff telling us they don't like arbitration provisions, so you got to take it out. And any arguments that we made to them about the primacy of the Federal Arbitration Act and the preemptive effect of that statute fell on deaf ears.

More recently with Ballard Spahr, Mark Levin, who is one of our presenters today, who I'll introduce in a moment, and I issued an alert and blogged about this subject and we did a webinar about it a dozen years ago. This coincided with pioneering work regarding the use of arbitration provisions including class action waivers in consumer contracts, mostly consumer finance contracts. And several weeks ago, we blogged about the SEC's new policy statement and also a subsequent speech made by the SEC's chairman concerning it. But the ramifications of the SEC's new policy are not clear cut.

First, the SEC was clear it was not giving approval to the substance of any particular arbitration provision. Instead, it said that it would closely examine the company's disclosures concerning the arbitration provision. Second, the SEC itself acknowledged that significant state law issues might weigh against including arbitration provisions in corporate governing documents. In particular, Delaware, which is the state of incorporation for many, if not most large companies, recently amended its general corporation law in Senate Bill 95 to essentially prohibit such provisions in corporate charters and bylaws effective August 1 of this year.

While the SEC policy statement noted this development, it expressly avoided taking a position on whether Delaware's restrictions are consistent with the Federal Arbitration Act or as we'll refer to it here after the FAA and that, of course, creates a lot of uncertainty about implementation mechanisms. So let me introduce our very special guest today, and that is Mohsen Manesh. Mohsen is the L.L. Stewart professor of Business Law at the University of Oregon School of Law where he also currently serves as the associate dean of Faculty Research and Programs. He's authored numerous law review articles that are focused on the intersections of corporate contract and LLC law.

His scholarship has been cited in leading case books and more than 40 court decisions, including opinions of the US Court of Appeals for the Second, Ninth and 11th Circuits, the Delaware Supreme Court and the Delaware Court of Chancery. And for purposes of the program today, he has written a law review article, which I'll get to in just a minute, but first of all, Mohsen, a very warm welcome to you.

Mohsen Manesh:

Well, thank you very much, Alan. I very much appreciate being here and I look forward to the opportunity to discuss the article and the developments in shareholder arbitration.

Alan Kaplinsky:

Yeah, great. And let me introduce someone who probably is no stranger to people who regularly listen to our podcast show, my colleague, Mark Levin. Mark and I have practiced together for many, many years. As I mentioned earlier in my remarks, we did a lot of pioneering work in connection with the rollout of arbitration provisions by a number of major credit card issuers and other consumer lenders. A pleasure to have you back on our program today.

Mark Levin:

Happy to be here, Alan. Thank you.

Alan Kaplinsky:

Okay. So Mohsen, as I indicated, you're our special guest here today because you're the author or the co-author, I should say, of a recent law review article which deals with how the FAA intersects with state law, particularly Delaware state law in the context of corporate governance documents. Your article is entitled The Corporate Contract and Shareholder Arbitration and it was published in 2023 in the New York University Law Review. Can you please tell us about your article and what conclusions you draw from it?

Mohsen Manesh:

Sure. So this was written with my co-author, Joe Grundfest, and the article was in response to some consternation following the Delaware Supreme Court's 2020 decision in Salzberg versus Sciabacucchi. Sometimes that case is also referred to as the Blue Apron case reflecting the first named corporate defendant in that case. The Salzberg case involved a forum selection provision that was set forth in a corporation's charter requiring shareholders making claims under Section 11 of the Securities Act of 1933 to bring those claims in federal district court rather than in state courts.

Although the forum provision at issue in Salzberg purported to govern shareholder rights to bring claims arising under federal securities law rather than under Delaware corporate law, the Delaware Supreme Court affirmed the validity of this forum provision and their reasoning in Salzberg rested on two grounds. First, the court explained that a corporation's charter and bylaws represent a binding contract between the corporation and its shareholders and that shareholders assent to this contract when they purchased shares of the corporation.

The second ground on which the Salzberg case rested was this belief by the Delaware Supreme Court that Delaware corporate law affords broad contractual freedom in the corporate contract to regulate shareholder rights. And looking to the Delaware corporate statute, the Delaware General Corporation Law, which is commonly referred to as the DGCL, the court explained that there's nothing in the DGCL that prohibits the corporate contract from regulating matters that fall outside of the internal affairs doctrine and therefore fall outside of Delaware law, matters like shareholder rights arising under federal securities law.

So putting all this together, the Salzberg court concluded that forum provisions in a corporation's charter or bylaws directing federal securities law claims to a specified forum are both valid and enforceable against shareholders. Now, let me be clear, Salzberg was not a case about an arbitration provision, but in the immediate wake of the decision, many onlookers, myself included, looked at the reasoning and the language of the decision and thought that it could inadvertently open the door to arbitration provisions in corporate charters or bylaws. After all, as the Supreme Court of the United States has recognized, an arbitration provision is just another type of forum provision, like the one that the Salzberg court affirmed.

Worse yet, if a corporation's charter and bylaws are a contract, as the Salzberg Court insisted, then any arbitration provision included in the corporate contract would be subject to the FAA, meaning that even if a state like Delaware wanted to prohibit arbitration provisions in the governance documents of Delaware corporations, Delaware would be powerless to do so because it would be preempted by the FAA. Now, to set the table a little bit here, the DGCL currently has two separate sections barring arbitration provisions in corporate bylaws and charters. There's DGCL Section 115(a). That section was enacted in the year 2015 when forum provisions first started becoming a more common feature of corporate charters and bylaws.

DGCL 115(a) prohibits arbitration provisions covering state corporate law claims, what the statute refers to as internal corporate claims, claims that under the internal affairs doctrine would be governed by Delaware law, claims that Delaware, as a policy matter, wants to see adjudicated in its state courts rather than through private arbitration. There is a separate section of the DGCL, DGCL Section 115(c), that was enacted as part of SB 95, which, Alan, you earlier mentioned. This was enacted in summer 2025. DGCL 115(c) is the section of the statute that prohibits an arbitration provision covering other types of claims that a shareholder might bring, including claims made under federal securities law.

Commented [MM1]: I misspoke during the recording. The statute was actually enacted in summer 2025.

So this would include class actions that might be brought under Rule 10b-5 of the Exchange Act or under Section 11 of the Securities Act, the type of claim that was at issue in the Salzberg case. The concern that I and others expressed in the immediate wake of the Salzberg decision was that, given the language of that decision, both parts of Delaware statute, DGCL 115(a), which existed at the time of the Salzberg decision, and DGCL 115(c), which was only enacted after the Salzberg decisions, both these sections could be preempted by the FAA. So in 2021, I published an article expressing these reservations and my future co-author, Joe, saw that article and called me up to tell me that I was wrong, that my

concerns were misguided and that Salzberg was not about arbitration and that nothing in Salzberg green lights shareholder arbitration or has the FAA preempt Delaware law in this respect.

And so our joint project for the NYU article, that we'll talk about today, became to formulate a legal argument for why any Delaware law precluding arbitration provisions in a corporation's charter or bylaws is not preempted by the FAA. And the argument that we formulate in the NYU article is one that's based on a bedrock understanding of the corporate form and understanding that dates back to Chief Justice Marshall's celebrated decision in trustees of Dartmouth College from 1819. The basic insight of that decision is this, that individuals cannot form a corporation through private agreement. Rather, a state action through the grant of a corporate charter is necessary to bring a corporation into existence.

Thus, Justice Marshall in the Dartmouth College decision ruled and ever since courts have reaffirmed the fact that a corporation's charter represents a contract between the corporation, its shareholders and the state that chartered the corporation. The reason the chartering state is a party to the corporate contract is precisely because the state's assent is needed to bring the corporation into existence. Indeed, the chartering state's assent is needed to give the corporate form the unique attributes that today we take for granted. Attributes like legal personhood, limited liability, perpetual life, none of these things could be created by private agreement alone. Instead, all of these things are made possible because the state grants them to the corporation that the state creates.

So to put it differently, the chartering state, in assenting to the grant of a corporate charter, gets to dictate the terms of the corporation's existence. Now, what does this mean for the FAA? Quite simple. Where the chartering state has through its corporate law barred an arbitration provision in the charter of that corporation, there can be no agreement to arbitrate for the simple fact that the chartering state has withheld assent to arbitration. To put it in a different way where a party to the corporate contract has withheld its assent to an arbitration provision, there is no agreement to arbitrate. And if there is no agreement to arbitrate, then the FAA never comes into the picture.

Alan Kaplinsky:

Okay. Well, now your article states, Mohsen, that it should be, and this is a quote from your article, "Trivially easy for courts to find that there's no agreement to arbitrate if the state that chartered the company has not assented to the inclusion of an arbitration clause in the corporate governance documents," but are there any court decisions at all that have expressly so held? And is it really fair to say that your theory is just that, a theory that's not yet been tested in the real world?

Mohsen Manesh:

Well, if there was a court precedent directly on point, I'm not sure I would be here today to talk about my theory. So it's absolutely a theory, but as I said, it's a theory that's grounded on a bedrock principle of corporate law, a principle that was established more than 200 years ago and has been reaffirmed in an unbroken line of Supreme Court precedents since. You see this principle voiced not just in decisions from 200 years ago, you see it voiced in more recent Supreme Court decisions, decisions like Cort versus Ash, Kamen versus Kemper Financial, Santa Fe Industries versus Green, CTS versus Dynamic Corporation. These are cases that any corporate securities law attorney would be familiar with.

In Cort versus Ash, a 1975 decision, the court said that corporations are creatures of state law. And consequently, that the court in Cort versus Ash ruled that, except where federal law expressly conflicts with state law, the presumption is that state law will govern the internal affairs of the corporation. In CTS versus Dynamics Corporation, the court said that states create corporations, prescribe their powers and define the rights that are acquired by purchasing their shares. Thus, state regulation of corporate governance is the regulation of entities whose very existence and attributes are a product of state law. Given the longstanding prevalence of state regulation of internal corporate affairs, if Congress had intended to preempt state corporate laws, it would have said so explicitly.

And most famously perhaps, Santa Fe Industries versus Green, a 1977 decision where the court said that, absent a clear indication of congressional intent, the court will not interpret a federal statute to override established state policies of corporate regulation. But the upshot of these decisions and what the court has repeatedly said is that when it comes to the regulation of internal corporate affairs, there is a strong presumption that state law governs because it's state law that brings the corporation into existence. And that if Congress wants to displace state law in this realm, it must be explicit.

Now, applying this interpretive principle that the court has repeatedly stated to the FAA, there's nothing in the statutory text of the FAA, its legislative history or the court's prior decisions to suggest that, in enacting this federal statute in 1925, Congress intended to strip states of their historical powers to create corporations and to define the terms of corporate existence. To interpret the FAA any differently, that is to interpret the federal statute to preempt a state corporate law limiting the enforceability of a shareholder arbitration provision would be to coerce states to assent to shareholder arbitration where a state has in fact objected to it. It would be to compel states to grant corporate charters on terms to which a state has not assented.

As the Supreme Court of the United States has repeatedly explained, arbitration is a matter of consent and not coercion. Applying that principle to the corporate contract where a state has, through its corporate law, withheld its consent to shareholder arbitration, a state cannot be coerced into granting corporate charters that allow for shareholder arbitration.

Alan Kaplinsky:

So your article, Mohsen, was published before the SEC issued the new policy statement that I mentioned during my introductory remarks that happened in September of this year and the amendment, Delaware's amendment, to its corporate law through SB 95 to effectively ban arbitration in corporate governing documents. Do either of those two events impact your article at all? Would you change anything as a result of them?

Mohsen Manesh:

Sure. Well, so yes and no. There are things that I think are the same despite these developments and some things that would be changed. So let me start with what does not change, which is our ultimate conclusion about how state corporate law interacts with the FAA. That is that a state law barring shareholder arbitration, a shareholder arbitration provision in a corporation's charter or bylaws is not subject to preemption by the FAA. And that's because our basic insight still holds that where a state chartering a corporation has through its corporate law withheld its assent to shareholder arbitration, there is no agreement to arbitrate.

There is no agreement to arbitrate because a party to the contract in which that arbitration provision would appear has withheld its assent to arbitration. And where there is no agreement to arbitrate, the FAA never comes into the picture. So that conclusion doesn't change. How state corporate law interacts with the FAA, I think that part of the article is the same. Now let me talk about what I think does change. Well, one significant part of our article dealt with whether Delaware law would preclude an arbitration provision that covered federal securities law claims. And at the time we wrote our article, there was no statutory provision in the DGCL that barred such provisions. And so in the absence of any kind of definitive statutory guidance, we look to case law and analyze case law to come to the conclusion that under existing case law, Delaware would not permit a arbitration provision in a corporation's charter or bylaws covering federal securities law claims.

Now, of course, we do have a statutory provision, DGCL 115(c), and so that whole case law analysis has been superseded in that respect. But remember, as I said earlier, there are two statutory provisions in Delaware law now that bar arbitration provisions in corporate charters and bylaws. There's DGCL 115(a), which covers arbitration provisions that would address state corporate law claims, and there's the newer 115(c), which covers claims arising outside of Delaware

corporate law, that is federal securities law claims. With respect to DGCL 115(a), which prohibits again arbitration provisions in charters or bylaws that would cover state corporate law claims, these are claims that Delaware, as a policy matter, still wants to see adjudicated in its state courts, so that its state courts can generate new precedents, which will keep Delaware law updated, which will allow the courts to address new topics or trends as they emerge in market or practice.

New precedents will enhance the perceived certainty and predictability of Delaware corporate law and create the network effects that make Delaware corporate law so attractive to corporations as compared to the corporate law of other states where there is a dearth of judicial precedents. So I think, with respect to 115(a), Delaware's policy and how Delaware thinks about 115(a), that is barring arbitration provisions covering state corporate law claims, I think nothing changes there. However, with respect to 115(c), and again, this is the newer provision in the statute that bars an arbitration provision covering other types of claims, namely federal securities law claims, at the time that Delaware enacted this provision, that was a time when the SEC's stated policy was to oppose shareholder arbitration of federal securities law claims.

And so when Delaware enacted 115(c), that represented Delaware's attempt to align its state corporate law with federal policy. But now that the SEC is saying that it's no longer opposed to shareholder arbitration, I don't know if Delaware courts and ultimately Delaware's lawmakers will be as interested in barring shareholder arbitration provisions covering federal securities law claims. These are claims that are not governed by Delaware law, that claims that the SC says are just fine to arbitrate and so I don't see what incentive or policy aim Delaware would accomplish by continuing to bar these kinds of claims from arbitration.

Alan Kaplinsky:

So now, a later development on October 9th, SEC Chairman Atkins delivered a speech in Delaware where he essentially was involved in lobbying the state to change its statute that you've described to allow shareholder arbitration in corporate governance documents. He said he was disappointed with SB 95 because mandatory arbitration has many benefits such as quicker payments to harm shareholders and reduced litigation costs. He said, "Unfortunately for public companies that consider mandatory arbitration to be a vital aspect of their dispute resolution strategy, the Delaware laws effectively eliminated Delaware as an option for incorporation."

He called it a giant step backward and he went on to say, "I recognized that SB 95 was developed and became law at a time when the SCC had not made its views a mandatory arbitration clear to the public. With the benefit of clarity now under the federal securities laws, I hope that the Delaware legislature will revisit the prohibition of mandatory arbitration with respect to federal securities law claims. Doing so can help Delaware be a leader in the reform of securities litigation." Although I think I know the answer, but the question I'm about to pose to you, the question is, do you agree or disagree with Chairman Atkins' comments?

Mohsen Manesh:

Well, let me step back. I think a bit of history or context could be useful here. So SB 95, which enacted DGCL 115 Part C that I've been discussing, was passed at the end of 2024, just months after a bruising and high-profile fight in Delaware earlier that year in which the state legislature pushed through a set of enormously controversial defendant-friendly changes to the DGCL, changes that were fiercely criticized by both the plaintiff's bar and by a vocal majority of corporate law academics nationally. In fact, I just published a whole article chronicling the pitched battle over those earlier legislative changes.

But given that context, SB 95 was seen as something of a peace offering by Delaware. It was Delaware's attempt to demonstrate to the plaintiff's bar and to the critics of the earlier legislation that Delaware law is not somehow beholden to corporate defendant's side interests. It was an attempt to demonstrate that Delaware's lawmaking organs can also

enact plaintiff-friendly provision, like what we see in SB 95. And so SB 95 was passed with little or no debate. Now you have to understand what SB 95 was trying to accomplish. SB 95, DGCL 115(c), which it brought into play, were never about arbitration. Instead, SB 95 was intended to deal with a relatively narrow issue, one that arose in a 2023 decision of the Ninth Circuit in a case called Lee versus Fisher.

The plaintiff in Lee had brought proxy fraud claims under Section 14(a) of the Exchange Act in federal district court against the managers of the apparel maker. And importantly, the claims brought by the plaintiff were brought not as a class action, but instead brought as a derivative action, that is an action brought in the name of the corporation. The Gap defendants moved to dismiss the derivative claims pointing to a forum provision set forth in the company's bylaws, which required that all derivative claims must be brought in the Delaware Court of Chancery where the Gap is incorporated.

The effect of the forum provision would be to essentially preclude the plaintiff's federal proxy fraud claims because the chancery court lacks the jurisdiction to hear claims made under the Exchange Act. The Ninth Circuit en banc adopting reasoning that was laid out by me and Joe in a separate article, an amicus brief, ruled in favor of the Gap defendants holding that a forum provision specifying that all derivative claims must be brought in the Delaware Court of Chancery could be used to eliminate the plaintiff's federal derivative claim. The concern that was animating Delaware's passage of SB 95 was the Ninth Circuit's ruling.

The concern was that the Ninth Circuit's ruling would allow corporations to use Delaware law to waive shareholder rights to bring derivative suits under the Exchange Act. And so to avoid a potential conflict with federal law, Delaware lawmakers passed SB 95 to effectively undo the Ninth Circuit's ruling in Lee versus Fisher. So Lee versus Fisher had nothing to do with arbitration. It was a case about the viability of derivative claims made under federal law. And indeed, nothing in the statutory text or the legislative history of SB 95 mentions arbitration. There's no indication that Delaware's lawmakers, when they enacted SB 95, were thinking about arbitration. Instead, all SB 95 says, "DGCL 115(c) is the section that it created."

All that section says is that, for any federal securities law claims, you can't do what happened in Lee versus Fisher. You cannot use a forum provision to preclude shareholders from bringing federal securities law claims in a court that has jurisdiction to hear such claims. Now, the irony is that that same statute now stands in direct conflict with the SEC's new pro-arbitration policy because a side effect of DGCL 115(c) is that you cannot use an arbitration provision to force federal securities claims into arbitration. So I guess I agree with Chair Atkins that SB 95 was a giant step backwards with respect to arbitration, but it's important to understand that that was not Delaware's intent when they enacted SB 95.

SB 95 was never about arbitration. It was about ensuring shareholders retain the right to bring derivative claims arising under federal securities law. But as I said, the side effect is that it also now precludes forcing those kinds of claims into arbitration.

Alan Kaplinsky:

Right. So do you have any idea whether as a result of the speech that Chairman Atkins gave in Delaware, is Delaware considering changing its statute in any respect or nothing happened as far as you know?

Mohsen Manesh:

I'm not aware of any imminent proposal to amend Delaware statute, though I'm absolutely certain that the council on corporation law in Delaware, which is the bar group that typically drafts amendments to Delaware statute, is going to be looking at this issue very closely. As I've said, Delaware has two statutes that bar arbitration, DGCL 115(a), which bars arbitration provisions covering state corporate law claims like fiduciary duty claims or other kinds of statutory claims that might be brought under the DGCL and then there's DGCL 115(c), which was enacted as a result of SB 95, which prohibits an arbitration provision governing federal securities law claims.

With respect to 115(a), as I said earlier, Delaware has every reason to want to see shareholder claims that arise under Delaware corporate law, to continue to be brought in and adjudicated by the Delaware Court of Chancery rather than in private arbitration. So I cannot imagine that Delaware will consider repealing DGCL 115(a). The only way that ban goes away is if it's preempted by the FAA, if I'm wrong about how the FAA interacts with state corporate law. Otherwise, that ban remains in play. With respect to DGCL 115(c) however, this is again the provision that prohibits an arbitration provision covering federal securities law claims, I'm not certain which way this will go.

On the one hand, historically at least, Delaware's lawmakers have been exceedingly cautious to make changes to their state's all important corporate law statute, particularly if those changes involve repealing a statutory provision that was enacted only a few months earlier. And so I think it's unlikely that we would see any move in that direction to repeal 115(c), unless Delaware's lawmakers see that there's market demand for it. That is unless Delaware's lawmakers start seeing corporations wanting to adopt arbitration provisions and incorporating outside of Delaware in order to accomplish it.

So maybe we might see some movement to repeal 115(c). There's another separate reason which I can see would lead to the repeal of 115(c), which is that unlike 115(a), with respect to 115(c), that is the provision that bars arbitration of federal securities law claims, as I said earlier, Delaware simply doesn't have a strong interest in how federal securities law claims are resolved, whether they're resolved in federal courts or in arbitration. The only reason, as I said earlier, that Delaware enacted 115(c) was to avoid getting crosswise with federal policy. But if the federal regulators are now saying that they don't see a problem with arbitration of federal securities law claims, it's hard for me to see what Delaware gains by continuing to bar arbitration of those claims.

Alan Kaplinsky:

Okay. So you said or made reference to the fact that there are other states, but Nevada is the state that comes to mind that expressly permit arbitration to be included in corporate governance documents or at least don't prohibit their usage. So even if the theory in your article is valid, a company could moot the issue by reincorporating in a state like Nevada that allows arbitration provisions to be included in corporate governance documents. I take it you agree with that. It's something could be done whether corporations weighing all the factors in favor of incorporating in Delaware versus another state, whether they weigh so strongly in favor of Delaware that company wouldn't want to reincorporate simply to avoid the prohibition on use of arbitration, but that is a strategy that could be pursued, right?

Mohsen Manesh:

I think that's correct. I don't profess to be an expert in Nevada corporation law, Texas corporation law, but both of these states have, in recent years, taken a number of steps, including the development of specialized business courts to compete with the Delaware Court of Chancery in an attempt to try to lure corporations from Delaware and into incorporating within their states. And there are certainly states that might allow for arbitration provisions in their corporation's charter or bylaws. But let me add that a public company seeking to impose arbitration doesn't even need to leave Delaware.

Delaware's LLC and limited partnership statutes clearly authorize arbitration provisions in the governing documents of those kinds of noncorporate alternative entities and a number of Delaware LLCs and limited partnerships are currently publicly traded. And as I said, there's nothing in Delaware's law that prohibits these kinds of publicly traded alternative entities from including an arbitration provision in their governing document. Instead, historically, it's been the SEC that has prevented Delaware LLCs and limited partnerships from including arbitration provisions in their governing documents.

Most famously, I think it was in 2012, the Carlisle Group proposed making a public offering as a Delaware limited partnership and it included an arbitration provision in its limited partnership agreement, but it was forced to drop that

provision after facing pushback from the SEC. But now, if that same S1 was filed by Carlisle Group today, the SEC has said that it will no longer stand in the way of the arbitration provision and there's nothing in Delaware limited partnership law that would bar mandatory arbitration of any investor claims. So yes, it's true that a company that wants to seek imposing arbitration on its investors has easy ways to do it. It can go to states outside of Delaware, or even within Delaware, it could form its business as something that is not a corporation.

Yet note that we haven't seen companies do this. Either before or after the adoption of SB 95, I've personally not seen a rush of companies leaving Delaware for other jurisdictions for the purpose of adopting arbitration provisions. We have seen some companies reincorporating out of Delaware and into Nevada and into Texas for reasons that are apart from arbitration, but none of those companies in choosing to reincorporate out of Delaware have cited the availability of arbitration as a reason why they chose to leave Delaware, which mean, and this is a point that I think we'll talk about a little bit more, to me, this suggests that maybe there's not actually much market demand among managers, among investors for arbitration of any disputes that might arise.

Alan Kaplinsky:

Okay. Well, no, thank you very much, Mohsen. I'm now going to turn to you, Mark. We haven't had an opportunity to hear your side of this issue, Mohsen's argument that, if the state doesn't assent to the inclusion of arbitration agreements and corporate governance documents, there's no agreement to arbitrate, which is a prerequisite in order for the FAA to apply. There's got to be a contract and whether or not a contract exists is a matter of state law. Therefore, Mohsen argues there can be no contention that the FAA preempts Delaware law. What would be the basis for contending that SB 95 is preempted by the FAA?

Mark Levin:

Mohsen's argument is clever, but I think it's too clever by half. He admits that he's really cherry-picking the attributes of being a "party" that he claims the state has. And let me just read a little bit lengthy segment from his article, "To say that chartering state as a party to the corporate contract is not to say that a corporation's governing documents are exactly like contracts made in other commercial contexts, quite the opposite. It would be absurd, for example, to assert that the state, as a contract party, may be sued or impleaded in any dispute among a corporation, its directors or shareholders, nor does it mean that because the corporation is state chartered, it is a state actor subject to constitutional constraints.

The corporate contract is an atypical contract, one that relies on the state for its formation and once formed, places the state in a unique regulatory position, but those facts do not make the corporation a state actor. Instead, they reflect the basic truth of corporate law. Because state assent is necessary for incorporation, the state may, through its corporate law, dictate the terms of a corporation's existence and thus the terms of intra-corporate relationships." Well, when I read that, the thing that first comes to mind is that the professor has created a theory that singles out arbitration for special adverse treatment, which is absolutely prohibited by the FAA.

In other words, he's saying the state is a contracting party only in the context of forbidding arbitration and not in lots of other contexts. Now, the SEC, although it didn't really make a decision on the issue, recognized in its policy statement that, under US Supreme Court rulings, a state law that targets the enforceability of mandatory arbitration agreements, either by name or by more subtle methods, such as by interfering with fundamental attributes of arbitration may be preempted by the FAA. The FAA preempts incompatible state laws that preclude contracting parties from controlling which claims are subject to arbitration. So query, is there any difference between a state not permitting arbitration in a company's governing documents and a state enacting a statute that expressly states that shareholder disputes cannot be arbitrated?

The latter is clearly preempted by the FAA, so why not the former since the effect on arbitration is the same?

Mohsen Manesh:

So, Mark, clearly state law could not bar a private shareholder agreement between a shareholder and a corporation in which the shareholder agrees to arbitrate federal security law claims. If Delaware had a state law, like the one you described, which says that shareholders may not agree to arbitrate any claims, that would clearly be preempted by the FAA. We expressly acknowledge that in our NYU article. What we're saying is that a corporation's charter and bylaws are fundamentally different than a private shareholder agreement between a shareholder and the corporation.

The fundamental difference is that the state is not a party to the private shareholder agreement. And so if a shareholder wants to enter into a private agreement with the corporation that includes an arbitration provision, Delaware, because of the FAA, is powerless to preclude that. But with respect to the corporate charter and bylaws, Delaware is a party to that contract. Delaware must assent to the grant of the corporation's charter and therefore must assent to any term that might appear in that charter or the bylaws that are promulgated thereunder.

If a state like Delaware withholds its assent to any provision in that charter, for example, an arbitration provision, then there can be no agreement to arbitrate and the FAA cannot and does not coerce a state like Delaware into assenting to the grant of a corporate charter on terms that Delaware opposes.

Mark Levin:

Well, again, when I read your words, which I quoted at length, I still come to the conclusion that you want the state to be a "party" where it helps your argument, but admits that it's really not a party in lots of other contexts. So to me, that's singling out arbitration for special adverse treatment and the FAA preempts it.

Mohsen Manesh:

It's not so ... And we can move on. What I would say in response is that it's not singling out arbitration because there's lots of things that the state through its corporate law can say about what a corporation can or cannot do. And so if arbitration is among those things, it's simply the state saying, "We will grant corporate charters, but on these terms and conditions." The basic premise is that, because the state must assent to the terms of the corporate charter, the state gets to decide whether arbitration is a part of the corporate charter or not. And if the state withholds the assent, then this fundamental principle of the FAA, that there must be an agreement to arbitrate before there's anything to enforce never comes into play.

There was never an agreement to arbitrate because a party to the relevant contract withheld its assent to arbitration.

Mark Levin:

If we were sitting at a law school seminar table, we could probably go back and forth on that all afternoon, but given that our time is limited, we'll let Alan go back to the questions.

Mohsen Manesh:

Yeah, and luckily I have the privilege of doing that, but ultimately I agree that this is a question that will one day get litigated.

Alan Kaplinsky:

Yeah, that's for sure. So, Mark, I have a follow-up question for you. The SEC's new policy statement says that, even though the SEC will not examine the substance of the arbitration provisions, it will focus on the disclosures that the company makes to potential investors. What disclosures would you recommend? Also, in drafting the arbitration clause, what substantive issues should be kept in mind?

Mark Levin:

In terms of disclosures, issuers will want to ensure that there are prominent plain English explanations of who is bound by the arbitration clause and which claims are covered, where and how disputes proceed, the effect on class actions and state law dependencies, if any, for example, SB 95. I think the goal here is to provide clarity and completeness, but let me also add, those are disclosures that we would recommend for the most part in all of the arbitration clauses, consumer or commercial for clients. In terms of substance, arbitration clauses are going to be heavily scrutinized given all these recent developments.

So drafters will absolutely need to draft a clause that is "fair." So clauses that shorten limitations periods, eliminate substantive remedies or otherwise curtail substantive rights will likely invite serious challenge even under the FAA's pro-arbitration framework. So in a nutshell, draft conservatively and preserve statutory remedies, and again, those are guidelines we always provide to clients when drafting arbitration clauses.

Alan Kaplinsky:

Right. In other words, bend over backwards to try to, in effect, not just make the arbitration clause fair, but make it even more fair to the consumer or in this case shareholders than it would seem to be to the company itself.

Mark Levin:

Absolutely, yup.

Alan Kaplinsky:

Yeah. So I've got a bunch of questions that I want to ask you and I want to actually ask Mohsen to answer these questions and then I'd like to get a reaction from you, Mark. So you were, Mohsen, at a large Seattle law firm, very prominent firm, that primarily represented businesses. And if you were counseling a company, what advice would you provide on whether an arbitration provision should be included in the corporate governance documents, or put differently or I should say in addition, does arbitration benefit the company if included in government documents? Does it benefit shareholders and investors? What are the pros and cons?

Mohsen Manesh:

So I really look to the practicing attorneys here on the advice to give to businesses. Here's how I would think about it from my admittedly academic lens, which is that it's going to be ... Well, let's start first with private companies or companies with a small number of shareholders. As I said earlier, there's nothing in Delaware law and nor could there be anything in Delaware law that precludes a company from entering into a private contract, a shareholders agreement among its shareholders in which they agree to arbitration of any disputes. What we're talking about here is instead including an arbitration provision in the governing documents, in the charter or bylaws of the corporation.

And of course, the advantage of that is, for public companies where it would be impractical to try to enter into a private agreement with all of your shareholders, given the fluid and disaggregate nature of public company shareholders, given the infeasibility of entering into a private contract with each shareholder, you could maybe bind all of them to an arbitration provision set forth in the governing documents of the entity. As far as what are the cost or benefits and whether it would be worth it, when I think of the benefits, I think the benefit is very straightforward, which is an arbitration provision would allow the business to avoid the cost of defending or settling securities class actions, class actions that would be precluded altogether if forced into individualized arbitration.

Note that an arbitration provision wouldn't eliminate securities fraud claims entirely. Institutional investors will have enough at stake to be worth their while to pursue arbitration claims individually outside of a class action setting and the SEC can continue to bring enforcement actions, but an arbitration provision would more or less eliminate private class

action lawsuits alleging federal securities law claims. So that would be the benefit. The cost would be that, to the extent an arbitration provision would preclude otherwise meritorious class actions, the effect of the arbitration provision would be to insulate the issuer and its managers from liability for fraud or other bad acts.

And from the perspective of an investor, when you have that kind of insulation for fraud or other kinds of bad acts, the securities of that issuer will be deemed riskier, right? You're going to be subject to the risk of fraud or other unlawful conduct for which you might have no remedy. And if the securities are deemed riskier, investors will discount the value of the issuer's securities to be compensated for that risk. And if investors discount the value of the issuer's securities, the upshot for the issuer will be an increased cost of capital. So I think for public companies, for issuers, the question will be whether the increased cost of capital will be worth the cost savings involved in precluding class action lawsuits.

I think different companies might come to different conclusions about this question, so it's hard to say whether arbitration makes sense for any particular business.

Mark Levin:

I absolutely agree that there are benefits to including an arbitration provision. First of all, it promotes predictability and efficiency because arbitration is faster, less costly and more confidential than shareholder litigation, particularly in class actions. It also helps reduce frivolous or opportunistic lawsuits. Arbitration reduces the leverage that plaintiff's lawyers have to extract settlements through costly discovery or public pressure. It also promotes investor certainty because companies can provide consistent dispute resolution mechanisms that minimize uncertainty and litigation risk, which benefits all shareholders in the form of lower legal costs and more stable governance and class action waivers, which of course the US Supreme Court has explicitly upheld since 2011.

These help avoid duplicative or overlapping suits and ensure that shareholder disputes are handled on an individualized basis consistent with the FAA's pro-arbitration policies. And I think for institutional investors, they should not object to the inclusion of an arbitration clause or at least not oppose it. There are cost savings to be realized because arbitration reduces the overall legal expenses of the company, expenses that would otherwise dilute shareholder value. There's procedural fairness in arbitration because modern arbitration procedures ensure neutrality, transparency and appellate safeguards. And there are numerous reputable arbitration institutions who can handle the specifics.

Also, there's a focus on long-term values. Institutional investors benefit from stable, efficient corporate governance and dispute resolution that avoids the distraction and expense of litigation-driven activism. And finally, arbitration permits corporations and their investors to determine their own dispute resolution mechanisms and that's consistent with principles of freedom of contract and state corporate law flexibility that institutional investors often advocate. I'd also just like to note that the Consumer Financial Protection Bureau in 2015 in its landmark empirical study of consumer arbitration that was over 700 pages long concluded that arbitration is faster, less expensive and a more effective way for individuals to resolve disputes with companies than either class action or individual litigation. Also true in this context.

Alan Kaplinsky:

So let me ask, let me go back to you, Mohsen. Can a company whose shares are already registered with the SEC, we're not talking about an IPO now, we're talking about company that's already a public company, could they amend their existing corporate governing documents to add an arbitration provision? This is something that companies do routinely in other contexts such as credit cards and bank account agreements. There always are terms that are getting changed. Doesn't your article acknowledge that the SEC has less control over an already public corporation amending its charter or bylaws to adopt a shareholder arbitration provision?

Mohsen Manesh:

I think that's right, that the SEC can't readily stop a already public company from going in that direction. However, remember that for public companies incorporated in Delaware, which is where a majority of public companies are incorporated, DGCL 115 (a) and (c) together have the effect of barring any kind of arbitration provision. So there's still the state law issue with respect to Delaware businesses. Yet for many public companies that are not incorporated in Delaware, there may be no similar state law bar, and again, the SEC has stepped out of the way at the federal level.

At the same time, I'm not aware of any company that has adopted or is seeking to adopt an arbitration provision among those that are not incorporated in Delaware. And so I take this to be the market signaling to us that maybe there's simply not much appetite among corporate managers or shareholders to go toward the direction of arbitration. Consider the recent example, this was back in 2019 when a shareholder of Johnson & Johnson, this is a New Jersey corporation, submitted a shareholder proposal under Exchange Act Rule 14a-8, asking Johnson & Johnson to amend their bylaws, to adopt a shareholder arbitration provision.

Johnson & Johnson's directors fiercely resisted this proposal. They brought legal action seeking to quash it and sought and ultimately were successful in obtaining an SEC no action letter to exclude the shareholder's proposal from the company's proxy statement. And so that example shows where a large non-Delaware corporation directors fiercely resisted the idea of adopting a mandatory shareholder arbitration provision and note the J&J example is not atypical. Every time in recent history that I'm aware of when a shareholder has submitted a proposal to a public company to adopt a mandatory arbitration provision, the company's management has opposed it. This experience suggests to me at least that managers, perhaps reflecting the will of investors, are not particularly eager to impose arbitration on shareholders.

Mark Levin:

One point that I would make, especially since we've been talking so much about Delaware, is that Delaware was a pioneer in codifying bank's rights to change terms in consumer agreements, specifically 5 Delaware Code Section 952, which basically says a bank may, at any time and from time to time, amend such agreement in any respect, whether or not the amendment or the subject of the amendment was originally contemplated or addressed by the parties or is integral to the relationship between the parties without limiting the foregoing such amendment may change terms by the addition of new terms or by the deletion or modification of existing terms, whether relating to arbitration or other alternative dispute resolution mechanisms or other matters of any kind whatsoever.

And I remember writing lots of briefs that really highlighted Section 952 because there were lots of court cases coming out of California and other states that imposed severe restrictions on the ability to, for example, add an arbitration clause if the existing agreement between the bank and its customers didn't already contain a dispute resolution provision. Delaware got you over that hurdle if your agreement is governed by Delaware law.

Alan Kaplinsky:

Okay. So we're going to go back to you, Mohsen, and the question is, will your theory encourage companies to reincorporate the states that either expressly permit arbitration clauses in corporate or governing documents or are silent on the issue? I guess you probably have already answered that by saying you're not aware of anybody that's reincorporated in a state expressly to adopt arbitration.

Mohsen Manesh:

That's right. Our theory is fundamentally about how state corporate law interacts with the FAA and whether the FAA preempts state corporate law, and of course, our conclusion is that it does not. But our argument says nothing about the desirability of arbitration and whether companies might want to incorporate outside of Delaware to pursue shareholder

arbitration in another state where its corporate law does allow for shareholder arbitration. As we said earlier, there's nothing that would stop a company from organizing in a jurisdiction outside of Delaware and imposing shareholder arbitration on its investors.

But again, we simply haven't seen companies clamoring for this. We haven't seen companies incorporating out of Delaware for the purposes of including an arbitration provision in their governing documents or companies leaving Delaware for the same purposes.

Alan Kaplinsky:

Right. Do you have anything to say to that, Mark, or should I move on?

Mark Levin:

All I can say is I think time will tell whether that's going to happen or not because all of the developments that we've been talking about have been very, very recent. And it would take, I think, some time before a company could make a fairly momentous decision whether to reincorporate it in another state. So time will tell whether they're going to do that.

Alan Kaplinsky:

Okay. So, Mohsen, let's assume you had never written your article or thought about there is no agreement to arbitrate theory purely on the merits of the issue of FAA preemption. Would you advise the company incorporated in Delaware to include an arbitration clause in its corporate governance documents not withstanding SB 95 because the Delaware court is likely to conclude that SB 95 is preempted by the FAA, especially in light of the Salzberg and Boilermakers decisions holding that government documents may stipulate the form for shareholder lawsuits?

Mohsen Manesh:

I can't imagine a Delaware court, a Delaware state court ruling that a section of its statutory law is preempted by the FAA. I suppose, if it's going to happen, it's going to happen at the federal level where a federal district court and eventually a court of appeals and perhaps the US Supreme Court makes that ruling. Delaware's corporate law is so important to the state that the Delaware courts are going to take very seriously any claim that any aspect of their corporate law is preempted by federal law. And so I cannot imagine a Delaware court coming to the conclusion that Sections 115(a) or c are unenforceable or invalid or superseded somehow by the FAA.

Mark Levin:

I've heard similar arguments before in the context of state laws that consumers and state residents cannot waive their right to a jury trial and they're very adamant in arguing that the right to a jury trial is inviolate and cannot be preempted. Of course, the US Supreme Court has held otherwise because the FAA preempts inconsistent state law, whether the state courts agree to that or not. So I agree, on the federal level, it would be preempted, but I also argue that, on the state level, there are great arguments for arguing that it could be preempted.

Mohsen Manesh:

Yeah. And, Mark, you're right. That's a pattern we've seen play out before in arbitration jurisprudence where state courts are very adamant that their laws are not preempted by the FAA and the federal courts say otherwise.

Mark Levin:

Right.

Alan Kaplinsky:

So, Mohsen, why does your article contend that an arbitration provision in the corporate contract would be inequitable because it would deprive shareholders of the ability to bring class actions in order to vindicate their rights under the federal securities laws? Didn't the US Supreme Court reject such a notion in several opinions, including Concepcion, Italian Colors, Rodriguez and McMahon?

Mohsen Manesh:

That's absolutely right. Now again, as I said earlier, our article was written at a time when Delaware did not have a statutory provision barring arbitration agreements covering federal securities law claims. And so we look to state corporate law, decisional law, judicial law, case law to determine whether Delaware corporate law would bar an arbitration provision covering federal securities law claims. And to come to the conclusion that the Delaware law does, we engage in this equity analysis. But before I dive into it, let me just make the point again that there would be no need to do that kind of equitable analysis today because now we do have a statutory provision enacted by SB 95, DGCL Section 115(c), which does expressly prohibit an arbitration provision governing federal securities law claims.

But the policy, or excuse me, the equitable analysis that we lay out in the paper is one that, you are absolutely right, was rejected by the US Supreme Court in a number of FAA decisions. However, the equitable analysis is ... The one we're applying is not under FAA law, it's under state corporate law, right? Our fundamental premise is that state corporate law is not preempted by the FAA. And if state corporate law comes to a different conclusion about the equity of forcing retail investors, small investors who might have negative value claims into individualized arbitration as opposed to a class action, given the inequity of that kind of situation, given the economics of pursuing that kind of claim in individualized arbitration, we could very easily see a Delaware court concluding that this is inequitable and indeed a form of self-dealing to the extent that the effect of the arbitration provision would be to insulate the corporation's managers from potential liability to those shareholders who hold negative value claims.

As I said earlier, that was our analysis in 2023 when we published the article and I think all of that still is correct, but there is one big difference, which is that the SEC has shifted its policy with respect to arbitration. The SEC has now said that it sees no problem with the forced arbitration of federal securities law claims, which does undercut any argument that a Delaware court might want to make about how arbitration is somehow intrinsically unfair, so unfair that it requires Delaware law to intervene in what is largely a federal law matter. So I'm not as confident today that, in the absence of DGCL 115(c), the statutory provision, a Delaware court would come to the same conclusion.

By the way, it's for the same reason why I could see the Delaware legislature perhaps moving to repeal 115(c). Simply, as I said earlier, the Delaware policymakers don't have much of an interest in how federal securities law claims are adjudicated, whether they're adjudicated in federal district courts or in arbitration. And so if the SEC is saying they don't care, I'm not sure what Delaware gains by barring arbitration of federal security law claims.

Alan Kaplinsky:

Right. So let me ask you this, Mohsen. Do you think it could be argued that the inclusion of an arbitration clause in corporate governance documents constitutes a breach by the directors of their fiduciary obligations of loyalty and good faith because it's a form of self-dealing?

Mohsen Manesh:

Well, that is part of the argument we make in the paper when we engage in the equitable analysis of whether an arbitration provision covering federal securities law claims would be enforceable under Delaware law. As I said, that equitable analysis has been now superseded by DGCL 115(c), which has a statutory bar on those kinds of arbitration provisions. And so the equitable analysis has been superseded in that respect. And at the same time, as I said just earlier, to the extent the SEC has said that it sees no problem with requiring investors to arbitrate securities fraud claims, it does undercut or complicate any argument that a Delaware court might want to make that adopting an arbitration provision for federal securities law claims is a form of bad faith or self-dealing.

The SEC doesn't seem to think so. The SEC seems to be fine with arbitration and so it's not clear why Delaware law would need to intervene in a largely federal matter.

Alan Kaplinsky:

Okay. I think, Mark, I know you said you had one question you wanted to ask me.

Mark Levin:

That's right, Alan. Are there special considerations that come into play when private company shares are bought and sold on the secondary market? I know that's something you've thought about before.

Alan Kaplinsky:

Yeah, we certainly did when I described in my introductory remarks that we were representing a mutual drift institution that was in the process of converting from mutual to stock form to forming a holding company. And we had to ... While the SEC did not permit us to go ahead and we didn't have to worry about that Delaware law at the time, in fact, this particular company was incorporated in Pennsylvania, I did worry about people who bought the shares in the secondary market, not in the IPO, but after they started to trade, it would be likely that most of them would not be aware of an arbitration provision that is tucked away in articles of incorporation or bylaws.

And so I had to give thought to the question of how do you deal with that? Even though there is general corporate law to the effect that shareholders who buy stock are bound by what's in the articles of incorporation and bylaws, that, in effect, they have constructive notice of what's in there and very often there are things in there that shareholders are not aware of like shark-repellent provisions and a whole range of things. Yet, I'm not aware of any court saying they're not bound because they weren't aware of it. Much in the same way that in the simple contract context, if a consumer signs an agreement that contains an arbitration clause, in most circumstances, they're going to be bound by it, whether they're aware of the fact that there's an arbitration clause or not.

What we did in order to ... We bent over backwards and we had planned to very frequently remind the public market that there is an arbitration provision in the articles of incorporation and we were going to do that through regular disclosures, 10Q disclosures, 10K disclosures, annual quarterly disclosures, and through whenever press releases were issued on different things, we could put something in there about there being an arbitration provision. Much in the same way, Mark, as you and I in the consumer contract context, we were constantly hitting consumers over the head saying, "Be careful, you sign this, you're giving up your right to go to court, you're giving up your right to class action, you're giving up your right to a jury, et cetera, et cetera, et cetera." Do either of you have any reaction to that, either you, Mohsen, or you, Mark?

Mark Levin:

Well, I think that's especially a prudent way to handle the situation, particularly since the SEC in its policy statement went out of its way to emphasize that disclosures are extremely important. They're important not only to the parties

involved, but to the SEC itself in making regulatory decisions. So I think, for all the times that we've been drafting arbitration clauses for consumer agreements, we have gone out of our way to disclose the existence of arbitration, not hide it, because sure enough, no matter what you do, somebody's going to say, "I didn't see it or I didn't realize." But it's very hard when the word arbitration is two lines away from a person's signature that they weren't aware of the arbitration clause.

Alan Kaplinsky:

Yeah. And as I'm thinking about it, Mark, you and I very often have counseled clients to include opt-out provisions in their arbitration clauses, that is that consumers are given the right to, through notification to the company, reject the use of arbitration. And I'm wondering whether that could be done here, whether you could say to shareholders, "Within 60 days after you purchase stock in this company, you've got the right to opt out."

Mark Levin:

Sounds like a plan.

Mohsen Manesh:

I'll add on the topic of constructive notice, Delaware law at least, is clear that, once you buy shares in a corporation's stock, it doesn't matter if you didn't read the charter or bylaws, you are bound to the terms set forth in the charter or bylaws. So the corporate law there is quite clear. And indeed, it's in the context of public companies strongly supported by economic theory that these shares trade on a informationally efficient market that prices the value of the shares, including whatever rights might be attached to those shares pursuant to the corporation's charter or bylaws.

And so in that respect, the idea of constructive notice is even stronger for terms attached to corporate shares than it might be for consumer contracts, because of course, consumer contracts don't trade on informationally efficient markets in the way corporate shares do.

Alan Kaplinsky:

All right. Well, we've come to the end of our program. First, I want to thank you for taking the time to be with us today and to share your thoughts on your law review article that you've written and related issues and so thanks again. Appreciate it.

Mohsen Manesh:

Well, thank you for again inviting me. It was my pleasure. And it's always interesting to see your scholarship play out in the real world. So I will be watching this space very closely, as I'm sure that both of you will.

Alan Kaplinsky:

Yup. And Mark, my thanks to you as well. I really appreciate your input and I'll always enjoy having discussions with you about one of our very favorite topics, arbitration and class action waivers.

Mark Levin:

The same here too. And, Mohsen, I have to say your article was extremely well written, really well documented and I encourage people to read it. It's very thought-provoking.

Mohsen Manesh:

Well, I appreciate that, Mark.

Alan Kaplinsky:

Is that damning with faint praise, Mark?

Mark Levin:

No, it's praising with praise.

Alan Kaplinsky:

All right. So to make sure you don't miss any of our future episodes, please subscribe to our show on your favorite podcast platform, whatever it might be. And don't forget to check out our blog, which also goes by the name of Consumer Finance Monitor, for daily insights on the consumer finance industry and this particular topic that we've been talking about today. We've blogged about it on several occasions. And if you have any questions or suggestions for our show, please email us at podcastsingular@ballardspahr.com. Stay tuned each Thursday for a new episode of our show. Thank you very much for listening and have a good day.