# Consumer Finance Monitor (Season 7, Episode 14): The Federal Trade Commission: Looking Back at 2023 and Looking Ahead to 2024 and Beyond

Speakers: Alan Kaplinsky, John Culhane, and Malini Mithal

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 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'm delighted to be moderating today's program.

For those of you who want even more information, don't forget about our blog, which also goes by the name of Consumer Finance Monitor. We launched our blog on July 21, 2011 when the CFPB became operational. There is a tremendous amount of content on our blog. We also host webinars on subjects of interest to those in the industry. So if you want to subscribe to our blog or to get on our list for our webinars, please visit us at ballardspahr.com. And if you like our podcast show, please let us know about it. You can leave us a review on whatever platform you use to access your podcast shows. 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 show.

And finally, I want to mention something to our listeners that I'm very proud about, and that is that our podcast show was recently ranked by Good2bSocial as the number one podcast show among law firm podcast shows in the US that's devoted exclusively to consumer financial services. Good2bSocial is a prominent law firm that provides consulting to law firms and it's now owned by Best Lawyers. We're very gratified by this recognition from one of the country's leading social media consultants.

This is a repurposed webinar we produced on February 28th entitled The Federal Trade Commission: Looking Back at 2023 and Looking Ahead to 2024 and Beyond. So let me now introduce our very special guest. We are joined today by Malini Mithal. Malini is associate director of the FTC's Division of Financial Practices. She supervises investigations, enforcement and policy work, challenging unlawful conduct in the financial services arena. The work involves fintech issues, cash advanced products, crypto platforms, auto financing, debt collection, small business financing, education financing, and much more.

Malini also supervises matters that cut across financial and other markets or design tricks used to manipulate consumers into making choices that they would otherwise wouldn't have made. She also has held numerous positions at the commission, including council of the director of the Bureau of Consumer Protection. She received her law degree from Columbia and her undergraduate degree from Georgetown. First of all, very warm welcome to you, Malini. Delighted to have you on the program today.

We're also joined by my colleague John Culhane. John and I have practiced together for a longer period of time than I want to even mention. Suffice to say, John and I practiced together practically for our entire careers. John has expertise in such a wide range of areas of consumer financial services law that I hate to even get into describing all of them. There are just so many.

Before John joined me in private practice, he was in-house at the former Mellon Bank. It got acquired long ago. He was also associate counsel with Bank of America. And began his career as a senior attorney, the section chief with the National Credit Union Administration.

Now we have a lot of questions for Malini. And John and I and Malini have put our heads together to figure out what really are the most important things that you need to know if you deal with the Federal Trade Commission. We're not talking about the antitrust division. I think that's clear to everybody. We're talking about consumer protection. So Malini, can you start by giving us a very brief overview of the FTC's authority and their work?

Malini Mithal:

Absolutely. I'm happy to do that, Alan. And I wanted to thank you both for having me today. So I wanted to start with a disclaimer that the remarks I'm making are my own and not those of the commission or any individual commissioner. And now that I've gotten that out of the way, I can answer your question.

So the FTC is a Federal Consumer Protection Agency. We have broad jurisdiction over non-bank financial service providers and that includes lenders, debt collectors, auto finance companies, and many more financial products and services providers. But we also have jurisdiction outside of the financial context. So for example, we have brought actions against Apple, Amazon, and Google for charging consumers without consent. And we've gone after a number of other retailers as well. We've had scores of cases involving lead generation and data brokers, whether they are providing a financial service or not, for not safeguarding consumers information.

And this is important because regardless of what industry you're engaged in, there are lessons you can draw from our cases, even if they're not financial services specific. So for example, privacy and data security should always be at the top of mind. You should also not charge people without consent for whether it's a financial product or service or anything else.

Now, the FTC engages in primarily three activities. First, we enforce various statutes. Key among them is the FTC Act, which prohibits UAPs or unfair or deceptive acts or practices, but we enforce a number of other financial statutes such as TILA, FCRA, EFTA, FDCPA, GLB, and more. We also enforce other statutes and rules like the FTC's Telemarketing Sales Rule, which prohibits unwanted calls. ROSCA, the Restore Online Shoppers Confidence Act, which require certain steps be taken if you're offering programs where people are going to be getting recurring charges like for subscription plans. And many other statutes that apply across markets.

The second thing we focus on at the FTC is rulemaking and other initiatives. So for example, Alan mentioned earlier that we've issued a car's rule that we're going to be talking about more in a moment. We've also proposed a rule that combats junk fees. Other initiatives include reports. For example, we did a report on dark patterns, and I'm going to be talking more about dark patterns today. And third, we focus on outreach and education. So that means we hold workshops, we participate in each other's events, or in others events. And we have a very popular business blog post that I highly recommend you subscribe to. It's available at ftc.gov. It's our Business Blog post and it highlights the key takeaways from just about every single FTC action. And I'll stop right there.

Alan Kaplinsky:

Okay. I guess the one thing you don't deal with that don't fall under your jurisdiction are banks, right?

Malini Mithal:

That's exactly right, Alan,

Alan Kaplinsky:

And credit unions. So John, you have a question I know for Malini?

John Culhane:

Yeah, I thought we'd jump in and ask about the new companies that we see emerging in this space and they're frequently offering new types of banking or financial products. And they often say things like their services are superior because they're quicker or they're better in some way and more consumer-friendly. Can you talk about the FTC's work here and how you react to statements like that?

Malini Mithal:

Yeah, no, John, I appreciate you asking this question because many companies are supposedly leveraging technology to innovate to consumers benefit, and they're trying to distinguish themselves from traditional competitors by promising quicker access to money and faster loans. But sometimes they fall far short of these promises, and other times they also try to evade credit statutes or exploit regulatory gaps. And many of the companies that we're talking about here, they target the unbanked or underbanked and cause significant harm.

So one example I want to talk about where we've had some cases lately involves cash advance products. These have been described as emerging payday loan alternatives that target consumers who are struggling to meet their next paycheck. So for example, last year we brought an action against Brigit. Brigit operates a personal financial app. We said that it promised short-term cash advances if consumers enroll in a $10 a month membership plan. We said that Brigit debits the monthly membership fee directly from consumers bank accounts and automatically renews the plan until consumers cancel.

We said that Brigit advertised that members would have the option to receive cash advances of up to $250, that the membership includes instant delivery of these cash advances and then it allows consumers to cancel at any time. But in reality, we said that few consumers were eligible to receive cash advances of up to $250. Many were not eligible to receive cash advances at all, and those who wished to receive cash immediately that they were promised had to pay extra.

We also said that once consumers subscribed to Brigit, Brigit made it hard for them to cancel and stop the monthly charges that they were paying. We said specifically on that point that Brigit used design tricks, sometimes referred to as dark patterns, to make consumers navigate a confusing process to cancel. For example, we said it was hard to find how to cancel online and in the app. There are a lot of prompt buttons that we said allowed you to upgrade, but you'd have to search for lighter text a few screens in and click on it and then answer several survey questions. And even then you had to do more to navigate cancellation.

We also said that Brigit outright prohibited consumers with an outstanding advance from canceling and instead required them to continue paying $10 a month while they attempted to pay down their balance. We said that these were UDAP issues that violate the FTC Act and they also invite ROSCA, which requires companies that sell subscription plans over the internet to disclose material terms, get consent for charges, and provide a simple method for canceling charges. Under the settlement there, the company is paying 18 million and has to stop the alleged misconduct.

Now, we had a similar case last month that we announced. Like Brigit, the company FloatMe promised cash advances of $50, but instead, consumers could only get 20. They had to pay extra if they wanted the money instantly. There were also dark patterns and cancellation issues there. And under that order, the company has to pay 3 million.

So the quick takeaway here is that claims have to be true for your general audience, not just a few consumers in your audience. If you say cash advances of up to $250 are available, but they're only available for a subset of your consumers, that's a problem. Another tip, make cancellation of recurring charges at least as simple as sign up. If you don't and your plans are offered over the internet, you might be violating ROSCA. And I'll stop there.

Alan Kaplinsky:

Okay. Let's talk about another type of alternative lending product that the FTC has targeted recently, Malini, and that is so-called income-share agreements or ISAs. Can you talk about what those products are and the FTC's work with respect to them?

Malini Mithal:

Sure. So these are being used to finance education, and basically under ISA's the thought is you repay based on your future income. So recently we brought our first action involving ISAs against Sollers College. This is a for-profit school in New Jersey. And we said it made inflated job placement rate claims. But we also said that it encouraged students to pay for their education using ISAs. We said that the ISAs were unlawful because they omitted disclosures that are required in credit contracts under the Holder Rule. And I think many in our audience are probably familiar with the Holder rule. It contains key protections for consumers, but briefly, it requires creditors to include a provision in their contracts which preserves the consumer's claims and defenses against subsequent holders of a contract. Now under the settlement, Sollers has to stop making deceptive claims, it has to fix its contracts, and it has to cancel 3.4 million in student debt because of those defective contracts.

So in general, for alternative banking and financing products, whether it's an ISA, a cash advance or something else, there are some things that are important to keep in mind, and I'll give one tip here. The FTC has very broad jurisdiction regardless of how the product is structured. For example, whether you pay a membership instead of a finance charge to get a cash advance or whether you pay a portion of your future income under an ISA, the FTC Act and other statutes we enforce apply, like ROSCA and the Holder Rule.

Alan Kaplinsky:

Okay,

John Culhane:

Well, can we follow up with a few questions then about ISAs and...

Alan Kaplinsky:

Absolutely.

John Culhane:

... maybe to the extent that relevant, you could comment about other products, similar products as well. Are ISAs something you're only seeing in the for-profit school space? Are you seeing them elsewhere?

Malini Mithal:

Yeah, so we don't have cases regarding ISAs and other contexts, but there are similar products out there where you're supposed to pay based on how much you earn. For example, we're going to talk about merchant cash advances later. So there are all sorts of different products on the market that structure the way you pay and how you pay differently.

John Culhane:

So one other question about ISAs. The CFPB has been fairly active here as well, and as I'm sure you know, they entered into a consent agreement with Better Future Forward over the ISAs that BFF was offering and required some restructuring of those agreements. Could you comment on how your relief is different from what the relief the CFPB sought?

Malini Mithal:

I think both orders are similar. They prohibit misreps and require contractual changes. To the extent there are any big differences, those might depend on the specific facts of each matter.

Alan Kaplinsky:

I'm going to turn now Malini to another area where the FTC has been very active as well as the CFPB, namely the area of discrimination and credit discrimination. Like the CFPB, you enforce the Equal Credit Opportunity Act, but you also have interpreted the unfairness prong of Section 5 of the FTC Act to encompass discrimination, something which got the CFPB into, at least from the standpoint of the industry, a lot of hot water a couple of years ago when they amended their UDAP exam manual to say that their unfairness prong encompassed discrimination. And that's now ended up in litigation that got brought in federal court in Texas. So I want to ask you about the first federal case that you brought under this theory of liability against a company called Passport Auto Group. Can you describe what that action was?

Malini Mithal:

Sure. So Passport was the first federal case alleging discriminatory conduct as unfair. Now in that case, we said that Passport Auto Group and imposed higher certification fees and other fees on Black and Latino consumers than on other consumers. So specifically, we said it would advertise vehicles at specific prices to lure consumers to the lot. For example, a certified used car for 15,000. But once consumers were there, it would charge them an additional fee for certification. So instead of getting the certified car for 15,000 as promised, consumers had to pay thousands more. In addition to deceptively double charging for certification fees, we said that Passport did it in a discriminatory manner by imposing higher fees on Black and Latino consumers.

Alan Kaplinsky:

Am I right this was the type of case that it didn't involve an extension of credit necessarily, so you could not have brought it under ECOA?

Malini Mithal:

That's a great question, Alan. Actually, they were financed and non-finance deals. So both. Maybe a way to look at it is for some of these fees, they would've fallen under ECOA since it applies to any aspect of the credit transaction, but maybe for other aspects, if it was a cash transaction, then it wouldn't be covered by the credit transaction coverage under ECOA.

And now I'll get to something that was always credit, the markups, the interest rate markups. So we said the company had a discretionary pricing policy where on top of the credit risk buy rate the financing source would take the contract for, the dealer could mark up the interest rate up to 200 basis points. And it could charge different markups if it followed certain policies and documented the reasons for the differences. But we said that Passport didn't follow its own policy. For example, it failed to document reasons for differences in markups according to our complaint. In addition, we said that they ignored warnings from a financing partner about statistically significant disparities in markups, and they charged higher markups to Black and Latino consumers.

We said that the higher fees and charges to protected classes violated ECOA and the FTC Act because the conduct was unfair. We also said that the CEO and vice president were aware of these practices but took no action to stop them, and the individuals and Passport had to pay more than 3 million to settle these charges.

So some big takeaways here. Companies have to make sure they're not discriminating, not just on markups, but on any aspect of the credit transaction and even outside of credit transactions on anything that's likely to cause substantial injury, hearkening back to what Alan was just asking about. And that includes add-ons and certification fees.

Second, I just wanted to make a small side note. This is not necessarily discrimination specific, but whenever a company has a written policy that's great on paper, that's fabulous, but it's really important to make sure that it's actually being followed in practice. So that was one thing at issue here. We said there was a policy but it was not being followed. And I'll stop there.

John Culhane:

Well, we want to ask about what's happened since Passport, but before we get into that, I think there were some signals from the FTC that this kind of an action might be forthcoming and maybe some statements from commissioners. Could you comment a little bit about that?

Malini Mithal:

Yeah, absolutely, John. So that's exactly right. So even before Passport, we were bringing auto finance cases where there were elements of discrimination. So for example, we brought the Napleton matter, I'd say maybe a year or so before Passport came out. And in that action, Chair Khan and Commissioner Slaughter issued a statement saying they supported the case, but they would've supported an unfair discrimination count as well. They noted that the conduct meets the three-part test for unfairness. So they noted that there are substantial injury, there's monetary harm at issue in these cases. Second, they talked about how the injury is not reasonably avoidable. Consumers didn't know they were being discriminated against. And third, they addressed that there were no countervailing benefits to the practice. So they did start talking about that even before Passport came out. It was definitely something on their radar, or on the FTC radar I should say.

John Culhane:

So what's been happening since Passport came out?

Malini Mithal:

Absolutely. Okay. So since the Passport decision, we have continued to bring actions alleging discriminatory conduct as unfair, and these include actions that we brought after the Chamber of Commerce decision and the CFPB matter. So I will highlight two actions here.

First, in October we and the state of Wisconsin announced an action against another auto dealer group, Rhinelander, and its general manager. So Rhinelander is in a rural area where there are relatively few nearby automobile dealerships and consumers sometimes have to drive hours to get there. According to Census data, American Indians are the largest minority group in the city of Rhinelander, and several American Indian tribes have homelands near Rhinelander. So many of the American Indian consumers purchased cars at the Rhinelander Auto Dealerships that live in the area.

So we said that Rhinelander and the GM discriminated against these customers by adding more markups to their interest rates. And we also said there were issues with add-on charges. So the add-on charges here involve things like vehicle service contracts, GAP agreements, nitrogen tire fills. These charges can range from several hundred to a few thousand dollars. And with the add-ons, we said that Rhinelander charged for add-ons consumers never agreed to purchase by hiding the charges in lengthy contracts. And on top of that we said that they charged American Indian consumers more for these hidden terms, or hidden items. We said that American Indian consumers paid on average approximately $1,300 more in credit transactions than in others. Under the settlement, Rhinelander and the GM have to pay a million dollars and institute a fair lending compliance program.

Now second and most recently, we alleged unfair discrimination outside of the auto context in a cash advance case and the FloatMe action that I mentioned briefly earlier. So I mentioned that FloatMe like Bridget charged a monthly subscription fee, consumers who wanted cash advances. But according to our complaint against FloatMe, FloatMe declined advances to consumers whose income came from public assistance like Social Security, military and unemployment benefits, and yet it still charged these consumers the monthly fee. The complaint alleges that this context is unfair and violates the FTC Act and ECOA. Under the order in addition to the $3 million it's paying, it has to institute a fair lending compliance program.

So the takeaway here is that we're continuing to take action against discrimination and we're going to look closely at the conduct to see if it meets the test for unfairness.

Alan Kaplinsky:

And you're not... Am I right Malini, that the FTC is not bound by the injunctive relief that was issued by the judge in Texas against the CFPB that dealt with their exam manual?

Malini Mithal:

Yeah, the FTC continues to bring unfair discrimination cases and that case has not affected our bringing those cases.

Alan Kaplinsky:

Yeah, yeah. And that case by the way, for people who are wondering, it's up before the Fifth Circuit Court of Appeals, but it's been stayed pending the resolution of the case before the Supreme Court against the CFPB challenging the constitutionality of the CFPB's funding.

I think you may have answered this question already, but I want to just make sure because this is really important. The definition of unfairness, you do have a definition that you rely upon am I right in assessing...

Malini Mithal:

That's right.

Alan Kaplinsky:

... whether something's discriminatory?

Malini Mithal:

Absolutely, Alan. And I can just go through it very quickly here because I do think we've covered a lot of it, but the first part is substantial injury. It's a three-part test and part one is substantial injury. We have to show that it causes or is likely to cause that type of injury.Here I would just say higher charges for add-ons and interest rates, that's clearly substantial injury and so is paying monthly fees for a service that you're not even permitted to use. It's important to remember that substantial injury can take the form of lost time as well. It does not have to be monetary harm. So this is something that Amazon court found in a case we brought years back in the auto context. For example, consumers spend hours driving to dealerships and that can be part of the unfair substantial injury conduct.

The second thing we'd look at is whether the injury is reasonably avoidable. Consumers don't know how much they're being charged as compared to consumers in other classes. And in FloatMe, we said that consumers didn't know that they would be denied the very service they were paying on a monthly basis for.

Third, on a cost-benefit analysis, we'd look to what the purported benefits are and see if they outweigh the costs of fixing the practice. But we'd also look at are there ways to fix the practice that don't diminish those benefits? Sometimes we've gone against companies where they've said, "Oh, if we were to add more steps to the payment process that would make it kind of unstreamlined for consumers, it wouldn't be as seamless an experience." And we've seen courts reject arguments like that saying things like, "Look, you can get consent to charges and do it in a way that's still seamless." And that's not going to be enough to defeat an FTC claim for unfairness. So that's a brief thing about how we would look at this.

Alan Kaplinsky:

Okay. John, we're going to get to a new area now. Why don't you ask Malini the next question?

John Culhane:

Sure. So Malini, you mentioned merchant cash advances earlier, so I thought we should ask you about the FTC's interest in and its jurisdiction over small business financing and how it's approaching those situations, those cases.

Malini Mithal:

Oh, absolutely. Thanks, John. So the FTC gives, the FCT Act, I should say, gives the FTC broad jurisdiction over companies engaging in UDAPs against consumers, and that includes small business consumers. This is of course not the case for many other consumer protection statutes like TILA that exclude business financing from their coverage, which means that key protections consumers rely on when shopping and comparison shopping are absent in the small business financing space.

Another thing to keep in mind is even though the transaction between the borrower and the lender is B2B, it's business to business, it's not necessarily happening on an even playing field. The small business borrower is often the sole proprietor and not any different from the average consumer.

So we've been bringing actions protecting small businesses for decades. There's a newer product that John was just asking about, merchant cash advances or MCAs. These products have been compared to payday loans. Under these plans or type of financing, businesses must repay the amount they are advanced plus a factor often between 20 to 50% of the amount advanced. And the amount is debited daily from the merchant's bank account.

We've heard some concerns about these products. Some businesses might take out an MCA, which can have an estimated APR in the triple digits, not understanding that there are less expensive alternatives. Another concern we've heard is that MCA providers and the brokers and lead generators they use might make deceptive marketing claims. Also, we've heard that MCA providers might continue to take daily debits even after payoff and there may even be abusive collection practices involved. And I will say we have seen all of those things in some actions we brought involving MCAs.

Alan Kaplinsky:

Okay. Anything else with the respect to small business financing or do you think we've covered the main things, Malini?

Malini Mithal:

Let me just briefly give you an example of a case that covered those things and that's the Richmond Capital Group matter. There we said they were deceptive representations including about personal guarantees and no collateral when those things were required. We said that the company continued debiting merchants accounts even after payoff. And we said they were really abusive collection practices including threats of physical violence, things like, "I'm from New Jersey. I know where to bury the body, so you better pay up."

Now, we recently won summary judgment in that case. The court found that the company, its owner not only violated the FTC Act but also a provision of GLB that prohibits the use of false, fraudulent, or fictitious statements to get consumers bank account information. The final judgment requires the individual behind the scheme to pay 20 million and the court noted that the individual had an utter disregard and contempt for his customers.

The other action, just I don't want everyone to think that it's all about MCAs. So the other thing I will mention briefly is we brought small business financing cases involving other products as well, such as payment cards. There was our case against Fleetcor, which is a large publicly traded company that markets payment cards to businesses around the country. And we won summary judgment against the company and its CEO. There, there were a lot of issues we said about junk fees that consumers weren't aware of. Fleetcor tried to point to really small disclaimers it had in its terms and conditions and the court didn't buy it and ruled in the FTC's favor.

So a tip I have there is just like with individual consumers, if a company is making a misleading claim or engaging in unfair conduct, the company shouldn't expect that a disclaimer will absolve it from liability. Unclear, small disclosures just like they're a problem with individual consumers, they're a problem with businesses as well.

John Culhane:

So in discussing the one merchant cash advance case, you mentioned a pretty large dollar figure and individual liability. Could you talk a little bit about the FTC's focus on individual liability when that's appropriate or when it considers [inaudible 00:30:56]?

Malini Mithal:

Oh, absolutely. Yeah, that's a great time to talk about that, John. So we have been bringing cases against companies and individuals for decades in various areas, including the ones I've discussed today. Now when an individual controls or has the authority to control the practice of issue or participates in misconduct, that person can be held liable for violations of the FTC Act. And if the individual acts with knowledge, they can be liable for monetary relief as well. And that doesn't mean actual knowledge by the way.

For example, in a debt collection case that was upheld by the Second Circuit in the FTC's favor, one of the defendants argued that he had no actual knowledge because he spent so little time in the office. The court disagreed because of his role as a corporate officer and also because he had signed a prior agreement with the New York state involving debt collection. The [inaudible 00:31:50] said that after signing he should have made sure that defendants were complying with the FTCPA instead of putting his head in the sand.

Now more recently, FTC commissioners have emphasized the importance of individual liability, noting that executives of big companies who call the shots while companies break the law should be held accountable. Great example there is Fleetcor, the case I was just talking about, the small business case involving payment cards. So in their briefs, defendants said it was an unprecedented move to hold the CEO of a multinational publicly traded company individually liable solely by virtue of his title. The court rejected that argument finding that the CEO was in the apex position and plainly paid close attention to the company's payment card business practices. The court further found that there was unrefuted evidence that the conduct was intentional and that it came straight from the top.

Alan Kaplinsky:

Okay, we're going to turn now to telemarketing. And can you tell us about the FTC's work in that area?

Malini Mithal:

Sure. So here Alan, it's worth it to take a moment to talk EduTrek. This is an action the FTC brought against that company and its owners. It's a telemarketer and a lead generator. And one thing I just want to emphasize big picture is that we've seen telemarketers and lead generators sometimes try to evade liability by saying they are not responsible for the misconduct because they're not the ultimate seller of the product, or sometimes they blame other partners for what went wrong. But the FTC has reminded companies time and again that the complexity of partner relationships is not a shield against liability and it doesn't exempt companies from observing fundamental consumer protection principles.

All right, so back to EduTrek specifically We and the court agreed that EduTrek made calls to consumers on the Do Not Call Registry without consumers consent to fit pitch for-profit schools. We also said that it assisted and facilitated its partners calls to DNC. Basically, consumers would go online to look for jobs, they'd type in their info, but then all of a sudden they'd get calls from a lead generator marketing a for-profit school.

Now whenever a company is making calls or using a lead generator that does, it has to make sure it is complying with the Telemarketing Sales Rule, which prohibits calls to consumers on the DNC list unless there is an existing relationship or consent to be called on behalf of the specific seller. That wasn't the case here. We said that EduTrek didn't get that kind of consent and it knew consumers weren't consenting. We said it got complaints. We said it had scripts that instructed its telemarketers on how to overcome objections from consumers who didn't know why they were being called when they hadn't agreed to be called.

The court ruled in favor of FTC and ordered the defendants to pay more than 28 million in penalties and also permanently banned the defendants from telemarketing or assisting and facilitating others in telemarketing. So again, the big lesson here is whether you're behind the scenes or interacting directly with consumers or working with partners, make sure you're not engaging in UAPs or other violations of the law like the TSR.

John Culhane:

Partner seems to be tricky regardless of which end of the partnership you're on. Could you talk a little bit about some of the concerns that companies should keep in mind either when they're doing the marketing or when they're engaging in marketing or lead generation companies?

Malini Mithal:

That's a great question, John. As for tips that you should keep in mind when you're working with partners and there are some complex relationships involved, the first thing we always remind people is start with how you're getting the information from consumers. What claims are you making to get consumers to provide their contact information or to click on a link? Are those claims [inaudible 00:35:30]?

We brought a case against the former owners of the site army.com because we said that they were pretending to get consumer information to recruit people to the military. They were actually getting consumer information to pitch products like for-profit schools. Another example, we brought a case from Credit Karma for promising consumers they'd been pre-approved for third-party credit card offers, but that wasn't the case. Another example is we brought cases against payday loan lead generators for asking for consumers information supposedly to send it to trusted lenders, but then instead selling it to the highest bidder, whether they were lenders or not, and not requiring those buyers to safeguard the data.

So this leads me to my next tip. Companies also have to vet and monitor the companies they're selling consumer information to. Vetting requires getting basic information from the company, including about what it does and verifying that it's true. For example, by looking at a company's websites and scripts.

For example, if you're saying you're sending consumer information to a company that offers loans, make sure that you go to the website, make sure that's what they're offering, see if it's been sued by the FTC or others. Monitoring requires ongoing procedures to make sure that the information is being used the way it's supposed to be by doing things like conducting periodic audits, looking at documents from the company and third parties, following up on complaints and other warning signs.

Another key thing is making sure that contracts with the companies you're selling leads to have protections in them. So for example, contracts say that the buyers can only use information for the reason the consumer gave it to you. For example, for loans and not marketing other offers. Make sure there are provisions about safeguarding consumer info. Make sure there are provisions about monitoring. And take action if companies don't abide by your paper policies because again remember, it's what's in practice that matters as well as what's on paper.

Alan Kaplinsky:

We talked earlier, Malini, about how companies continue to offer new types of banking products. An example is crypto platforms promising banking type services. What's the FTC been doing in that area?

Malini Mithal:

Sure, Alan. So we've seen crypto platforms saying they're as safe as banks, so they're a good place to store and access funds, but then they fail to live up to those promises. So recently we brought an action against Celsius, which marketed and sold DOE-based financial services to consumers including interest-bearing crypto accounts and crypto secured loans.

According to our action, Celsius and its execs induced consumers into transferring their crypto assets onto Celsius' platform by promising that Celsius was safer than a bank or other traditional financial institutions, saying that Celsius made only secured loans, that it had billions in liquidity and maintained reserves, and that it had a $750 million insurance policy that covered consumers assets and that consumers could access their funds at any time.

One exec said, "All coins are returned to their owners even in the case of bankruptcy." I think that's going to foreshadow where this is going. But in reality we said that the defendants squandered consumer deposits including by engaging in uncollateralized and undercollateralized lending. We said that it didn't have the liquidity, reserves, or insurance policy it promised. And suddenly five days after reinforcing those promises, defendants halted all withdrawals from the platform leaving hundreds of thousands of consumers without access to billions. And we said that shortly after that, Celsius declared bankruptcy.

We said that this conduct violated the FTC Act and the GLB Act by making false statements to obtain consumers information. We're in litigation against the execs, but we settled with the companies including the ones that declared bankruptcy. If any assets are not returned to creditors, then the debtors will owe a $4.7 billion judgment.

Now a second crypto action that I'll go over more briefly is our case against Voyager. There we said that Voyager got consumers to transfer their crypto assets to Voyager platform by promising that their funds were insured by the FDIC. In reality, we said that Voyager was not an FDIC insured institution and the FDIC does not insure crypto assets. So we settled with the company [inaudible 00:39:48] and are in litigation CEO.

Now taking a step back, there are some broader takeaway from these cases. A lot of the lessons in our crypto cases are repeatable across fintech companies and others. So for example, if companies want to distinguish themselves from the competition, they have to do it on things that actually make their product better. You can't pretend to be safer than a bank if there's no safety net for consumers deposits in case things go wrong. Second, many of these cases involve making false statements to get consumers bank account information and that means the GLB Act applies, which exposes companies to hefty fines and to redressing consumers. I'll stop there.

John Culhane:

Don't stop there. Since you mentioned the GLB Act and we've noticed that GLB is being cited in more FTC actions, especially since the Supreme Court's decision in the AMG case regarding the scope of your authority to pursue remedies, could you talk about that a little bit?

Malini Mithal:

Sure, John. So a few years back, the Supreme Court ruled that the FTC can't use one part of the FTC Act to get money back to consumers when they have been victims of UAPs. But the FTC enforces other laws as well that do let us get money back to consumers and that includes ECOA, the TSR, Section 521 of the GLB Act, and more. So I'm going to focus on the GLB Act here on Section 521.

That part of the GLB Act prohibits the use of false, fraudulent, or fictitious statements to get consumers financial account information. Now as I mentioned, we've alleged it in crypto actions. I might've mentioned we also alleged it in the MCA case that I talked about earlier, against Richmond Capital. And we won on that count in that case. There, Richmond Capital Group was representing that they would withdraw from consumers bank accounts a specific amount, but in fact they regularly used consumers financial information to debit more than what they promised. The court awarded us more than 20 million for the GLB violations. It's actually how we got the money in that case. Some of that is going to be redressed for consumers and the rest is going to be penalties.

I think the big takeaway here, John, is even post that Supreme Court case that put some limitations on us, we are going to use all the tools at our disposal to get refunds back to consumers.

Alan Kaplinsky:

Malini, we've noted that the FTC has brought more administrative actions after the Supreme Court decided the AMG case. Is that also a strategy that you're deploying in order to get money that you can return to consumers?

Malini Mithal:

That's absolutely right, Alan. I briefly mentioned the Credit Karma case earlier. There the company told consumers they had been pre-approved for third party credit offers when they had not yet been approved. We brought that action in an administrative court and when we win actions in an administrative court, we can then go to federal court seeking money for the misconduct including for out-of-pocket money losses, but also for time spent pursuing deceptive offers. So in Credit Karma we settled for 3 million, the time consumers spent applying for credit card offers for which they had not been approved, and that was an action that we brought in admin court.

Another example of an administrative action was our recent case against Epic for charging users of the game Fortnight in unexpected ways during regular gameplay. And in that case we secured 245 million for refunds for consumers.

John Culhane:

So while we're talking about administrative actions, obviously there's been a lot of attention to the administrative process generally by the courts and particularly by the Supreme Court. There have been cases focusing on various aspects of the constitutionality of administrative proceedings, including the constitutionality of administrative law judges. How have those cases been affecting the FTC, if at all?

Malini Mithal:

Very good question, John. So here I want to talk about our action against Illumina. That's actually a merger case. And I'm glad Alan mentioned at the beginning that we're not going to be focusing on antitrust because that's not my area of expertise. But very briefly on those facts here, the ALJ ruled a merger could go through. The FTC Commission reversed, and then it went to the Fifth Circuit. Illumina actually ended up abandoning the merger after the Fifth Circuit ruling. Fifth Circuit had vacated and said the commission should reconsider an issue, but it also made a number of findings in favor of the commission. And I'm going to focus on one here, the Jarkesy issue.

Jarkesy refers to an earlier action in the Fifth Circuit involving the SEC. In that case, the court said that allowing the SEC to choose between administrative or federal court was an unconstitutional delegation Congress. And in Illumina, the Fifth Circuit sided with the FTC on this point. In the FTC action, the Fifth Circuit noted that choosing between administrative versus federal court brings about different remedies and FTC actions. In an administrative court, the FTC can get cease and desist orders, but in federal court the FTC can get money and other types of relief.

So again, we got a favorable ruling here on that issue and that's a positive development for our admin cases.

Alan Kaplinsky:

Before turning to rulemaking, which of course is another big area that you mentioned that the FTC is very active in, I want to ask you about, and you mentioned earlier that you had joined with I think the Wisconsin Attorney General or some other attorney general, just wanted you to comment very briefly on your collaboration with state AGs or the CFPB.

Malini Mithal:

Absolutely. So we absolutely coordinate with our federal and state partners. So for example, with the CFPB, we have an MOU. We notify each other on investigations. We also meet regularly. Sometimes with our federal partners, we partner on cases or we announce parallel actions. So for example, the crypto action against Voyager I mentioned earlier, the CFTC announced a parallel action when we brought our action. Our action involves UAPs, GLB, theirs involves registration failures and other issues.

With the states, we also partner on things like sweeps that involve multiple cases, but we also partner on individual cases as well. Alan, like you noted, the Rhinelander case is one example. The Sollers case that I talked about earlier, the for-profit school case, is another example as well. So we definitely coordinate with our partners.

John Culhane:

Well, let's turn to junk and I'd like to ask you about the FTC's work involving junk fees and particular how the FTC views fees and determines whether fees are junk fees.

Malini Mithal:

Absolutely, John. So unfortunately we've seen junk fees or unnecessary or surprise charges in various markets. So junk fees can occur in a variety of different ways. It can be adding hidden fees to contracts or during the checkout process. So for example, in Rhinelander we talked about hidden fees in contracts. Another thing can be securing fees under false pretenses, suggesting that fees are required or that they'll be used for one purpose like paying off a loan balance but then using it for another, just taking it as a fee.

Other contexts where this happens is where you're purchasing tickets or booking a hotel room. We've all seen you go on a site to get tickets to a concert and then all of a sudden at checkout the price goes up by a lot of money or a high percentage or whatever. In the hotel industry, we've said that these types of junk fees generated $2.9 billion in a single year. So in October, the FTC announced a proposed rule that would prohibit this conduct, require disclosure of total price when stating any other amount a consumer might pay. And total price means the maximum of all fees or charges and any mandatory additional products. There are some charges that can be excluded, notably government charges can be excluded. The rule would also prohibit misleading fees. Sellers wouldn't be able to misrepresent fees or use vague descriptions.

So we are carefully considering comments there and expect to see more junk fees work from us in the meantime.

Alan Kaplinsky:

I was going to turn to the CARS Rule. Can you tell our listeners a little bit about that? I know we don't have much time left. And what the status is of it.

Malini Mithal:

Okay, so let me give a brief overview first. So the CARS Rule focuses on two practices that cause significant harm. Bait and switch tactics where one price is advertised, but then consumers are charged much more once they've spent hours getting to and on the lot. And then for junk fees where certain charges are buried in contracts and long transactions, lengthy paperwork and consumers don't know about them.

So the FTC estimates the rule will save $3.4 billion and 72 million hours each year for consumers. That includes service members who unfortunately have even higher auto debt than civilians and whose steady paychecks make them an attractive target for unscrupulous dealers. Indeed, when the rule was announced, DOD stated that it will help fight predatory practices that target our men and women in uniform.

The rule also benefits honest dealers who will be able to compete on a level playing field. We heard from dealers on that, which I'll get to in a moment. But first the rule itself lays out basic principles that are already business as usual for honest dealers. Dealers can't lie about key information under the rule, whether it's cost or financing terms. Next, there are three disclosures. First, dealers have to disclose the offering price, which is the actual price anyone can buy the car for. Second, if dealers are pitching optional add-ons, they have to say they're optional. And third, if they're talking about monthly payments, they have to provide total payment information. So those are the disclosures.

The rule also prohibits junk fees for items that provide no benefit to the consumer. A classic example here is service contracts for oil changes for electric vehicles. So that's an example of a junk fee there. And finally, dealers can only charge for items with the consumer's consent.

Now this rule comes after the FTC heard from the public. Many consumers said they dreaded the car shopping process. Service members talked about deceptive and predatory practices near military installations. And car dealers talked about losing business to dishonest dealerships. Others raised concerns about the proposal, particularly because we were proposing extra forms. And after hearing from the public, the FTC focused on combating scams and took out some of the things that it was proposing, including extra forms and lengthy disclosures. This way honest dealers that are already making truthful claims and only charging for things consumers know about and want won't have to change their practices.

Now as for the status of the rule, two groups are challenging the rule and they've petitioned for a stay in the meantime. The commission noted that the dealer group's petition mischaracterized what the rule requires and made inaccurate claims that it will substantially increase compliance costs. The commission was concerned that their suggestion that honest dealers have to overhaul their practices has created uncertainty. And because of that and because the petitioners are seeking an expedited ruling on their challenge, the commission issued a stay.

But in the meantime, it's important for all dealers to do what honest dealers are already doing now and when the rule goes into effect, tell the truth, provide accurate price and payment info, don't charge for junk items, and only charge for things consumers actually agree to. That way consumers can shop with confidence and honest dealers won't lose out.

John Culhane:

So there's actually, for dealers there's an interrelationship between the junk fee rule and the CARS Rule. And I guess the stay could rub up that relationship. Could you comment on that briefly?

Malini Mithal:

Oh, so basically the CARS Rule is stayed. The junk fees rule is right now in the proposal stage and the junk fees rule would apply to everyone who's in the rule. I think right now, I can't remember exactly what it says, but it would apply to auto dealers as well as long as there's not a separate auto dealer rule in effect. So if there was any issue with this rule, et cetera, then the junk fees rule would cover that conduct if it becomes final.

John Culhane:

Yeah, I think we've pointed that out, but I'm not sure everybody realizes that the exemption in the junk fees rule may not actually operate if the effective date of the CARS Rule continues to be stayed. I think we could talk about the CARS Rule a lot, but we want to get to some of our other topics. So recurring themes in these cases that have cut across markets, and you've mentioned in particular cases involving dark patterns and the FTC's case against Amazon and your rulemaking activity here. Could you talk about that a little bit more?

Malini Mithal:

Oh sure, John, thanks so much. So that's right, I mentioned dark patterns earlier. So dark patterns are design practices that trick or manipulate consumers into making choices they wouldn't have otherwise made. Now, an example here besides the case that I've talked about already, I just wanted to focus on Amazon for a moment. So recently we sued Amazon saying that it used several dark patterns to trick people into subscribing to Prime. We said that it highlighted the benefits of Prime many times in easy-to-see text while disclosing the terms and conditions only once in small, easy-to- miss print. We said that it made it hard to find the button to decline Prime enrollment and used a maze- like cancellation process requiring users to navigate at least eight separate web pages to cancel.

Internally, the company referred to this as the Iliad Flow, an allusion to the arduous epically long Trojan War. Whenever companies design, purchase and cancellation flows to steer consumers away from their desired action, whether it's completing a purchase without signing up for current charges or canceling unwatched charges, those are examples of dark patterns. So as John alluded to in his question, we do have a proposed rulemaking on this topic. This rule would prohibit misrepresentations and require disclosures and consent to charges and require simple cancellation of recurring charges.

So here, I just want to focus on one piece of that proposal regarding subscription plans and that's cancellation. The proposals would curb the type of dark patterns I discussed in Amazon just now and also that were an issue in Brigit and FloatMe. So it proposes specific requirements on a simple cancellation mechanism, which it calls click to cancel. The mechanism has to be at least as simple as the one used to initiate the charge, and the mechanism has to be through the same medium that was used to initiate the agreement, whether it's through the internet, phone, mail, in person, or something else.

Also, companies can't curb unreasonable delays on cancellation efforts if the rule goes through. So that's things like the survey and Brigit that I mentioned. You finally found the cancellation path and then you had to answer a series of survey questions before you could cancel according to our complaint.

So in a nutshell, my tip here is to think about this consumer. If you've ever had difficulty canceling recurring charges, I know I have. I don't want to have to hunt for the cancel screens, navigate through a confusing process, et cetera. So just keep those things in mind when you're designing your cancellation flows and other parts of your websites.

Alan Kaplinsky:

Malini, the FTC has also done work in the area of dark patterns and privacy. And can you briefly talk about what you've done there?

Malini Mithal:

Absolutely. So dark patterns, like you're saying, Alan doesn't just come up in a charges context. It comes up with privacy as well. So for example, we sued the company BetterHelp, which is an online counseling company that targeted teens in the LGBTQ community. We said that it pushed them to provide sensitive mental health information such as whether they have suicidal thoughts and are on any medications by repeatedly promising that it wouldn't disclose health information except for limited purposes, such as for counseling, and by nudging them with unavoidable prompts to sign up for counseling. But then we said that it revealed teens email addresses, IP addresses and health information to Facebook, Snapchat, and others for advertising purposes.

So the tip here is don't use dark patterns to push people to provide information for supposedly one purpose, but then use it for another.

John Culhane:

Well, we can't have any discussion of developments in the law these days without talking about artificial intelligence. And we know the FTC has been very active in this space and I think actually had some recent proposals and maybe even a recent consent order that just came out. Could you talk a little bit about the FTC and AI?

Malini Mithal:

Yeah, I'm happy to do that, John. So a lot of companies are saying that they're leveraging technology to consumers benefit, and the big tip here, I've said it before today, is if you say something, it has to be true. So this is a good way to segue into AI.

So if a company is promising that it's using AI to personalize consumer's experience or provide better customer service or doing something else, but it's not doing those things, that's an area of concern for the FTC. Another type of concern for the

FTC is if AI is being used to make credit-worthiness determinations. There, the FTC has reminded companies to make sure to look at inputs as well as outputs. If a model uses ethically based factors or proxies for such factors, such as zip codes that result in disparate impact, that's a problem. Companies should test their algorithms both before and after use to make sure that it doesn't create a disparate impact.

Now John, as you mentioned, one of the cases that we brought recently has an AI component. It's actually the FloatMe case that I was talking about earlier, the one where cash advances were promised of $50 but the company was providing less. We said that when consumers contacted FloatMe to request a larger amount, the company said the advance limit would be increased by an algorithm over time. But we said that the algorithm didn't exist. In fact, one company's supervisor admitted that the company's claim was a lie in an email to colleagues. Instead of an algorithm, we said the company used a complicated series of steps that required manual intervention to increase the consumer's limit, and that that rarely happened. So if you're promising to use technology to help consumers or benefit them in some ways, but you're not doing that, that's a problem.

Alan Kaplinsky:

Yeah. So before we wrap things up, Malini, I know we've covered a lot of territory today. Is there anything that we missed, something that is new to the FTC agenda and maybe hasn't ripened into an actual development?

Malini Mithal:

Alan, yours and John's questions have been so fantastic. I think this is the exact kind of stuff you should expect from the FTC. We're going to continue combating discrimination, junk fees and dark patterns, protecting consumers seeking financing, protecting consumers in auto transactions, and all of the stuff we talked about today.

Alan Kaplinsky:

So I want to thank Malini Mithal, associate director of the Federal Trade Commission Division of Financial Practices, and my colleague John Culhane for joining us today.

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