Consumer Finance Monitor (Season 6, Episode 19): A Close Look at the Impact of Antitrust Laws on the Consumer Financial Services Industry

Speakers: Alan Kaplinsky, Ed Rogers, and Erin Fischer

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. I'm your host, Alan Kaplinsky. I'm the former practice group leader for 25 years, and now senior counsel of the Consumer Financial Services Group at Ballard Spahr and I will be moderating today's program. For those of you who want even more information about anything in the world of consumer finance, don't forget to subscribe to our blog, consumerfinancemonitor.com.

We've posted the blog since 2011 when the CFPB became operational, and there is a lot of relevant industry content on that blog. Literally, you'll find three to four blog posts almost every day of the week. We also regularly host webinars on subjects of interest, 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 show today, please let us know about it. Leave us a review on Apple Podcast, Google or wherever you get your podcast, whatever platform you use. 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 for our show. So we have a very, very interesting and important topic to talk about today.

Something we've never covered before on our podcast show, and I don't think we've ever done a webinar about it, but the time is right, right now for us to get into this subject. What it's all about is the impact of the antitrust laws on the consumer financial services industry. So let me just give you a little introduction, then I'll introduce to you to our speakers and then, we will get into this topic. So regulatory scrutiny and class action litigation relating to consumer financial services and to the industry have typically focused on issues relating to disclosure, customer privacy and fees that are charged to consumers. Consumer finance lawyers are familiar with this regulatory regime and its goals of present preventing deception and promoting substantive fairness to consumers.

Within the past several years, however, regulators and class action plaintiffs have broadened their focus to challenge various consumer financial services industry practices, with increasing frequency on the grounds that they undermine competition. This expanded focus utilizes the antitrust laws and the substantial remedies that are associated with them, which includes injunctive relief to block mergers and treble damages and counsel fees in private litigation. In this new climate, it behooves all consumer finance lawyers, not just litigators, but those that have a regulatory practice or a transactional practice, to become very familiar with the least the general principles of antitrust law and how they have been and how they probably will be applied to the industry in the future.

A fuller understanding of these laws will enable consumer finance lawyers and law firms to minimize risk for their clients, to provide advice and counsel to their business units, and to enhance the likelihood of prevailing in litigation aimed at various revenue enhancing practices. So let me introduce our speakers to you. First is Ed Rogers. He's a partner in the litigation department at Ballard Spahr and a member of the Antitrust and Competition Practice Group. For much of his 30-year career at Ballard Spahr, Ed has specialized in complex business litigation with particular focus on the antitrust laws. He's had substantial experience in defending credit card issuers in class actions, alleging claims under the antitrust laws, as well as federal and state disclosure laws and unfair and deceptive trade practices claims.

By way of example, he represented a major credit card issuer in a multi-defendant class action, alleging antitrust and Truth in Lending Act violations based on foreign currency conversion fees that we're often charged and still are charged by some credit card issuers. He's also defended credit card companies in multiple federal cases involving class actions based on late fees and

credit card posting practices. So before I introduce our next speaker, Ed, a very warm, welcome to you. I remember very fondly working with you on that antitrust class action that got filed against one of our clients several years ago.

Ed Rogers:

Thank you, Alan. It's nice to be back talking to you and working with you on these issues. The foreign currency case, it's been some time since we litigated that case, but it did go on for a long time and it actually provides some important lessons that we'll be able to talk about today because it involved both antitrust claims and the more traditional consumer finance claims under the Truth in Lending Act.

Alan Kaplinsky:

Good, good. Next, I want to introduce to you Erin Fischer. Erin is an associate in the firm's litigation department, focusing on antitrust matters. She attended University of Pennsylvania Law School where she worked as a research assistant and later as a teaching assistant for Professor Herbert Hovenkamp. Professor Hovenkamp is widely regarded as the dean of antitrust law. Erin has a particular interest in merger enforcement policy and private merger enforcement, and has published articles on the topic. So let's start at the very beginning and build a foundation for our listeners, Ed and Erin. So let's start with the basics, Ed. Can you give us a very brief overview of the antitrust laws and then, we'll get into the specifics?

Ed Rogers:

Sure, Alan. The antitrust laws, there are federal and state antitrust laws, and today, we're going to be focusing principally on the federal antitrust laws because they are of greater significance and pose greater exposure. There are three basic federal antitrust statutes that we'll talk about today, and that consumer finance lawyers should become familiar with. One is the Sherman Act, which dates back before the turn of the 20th century. There are two major aspects of the Sherman Act. There is section one, which addresses group conduct, in other words, coordinated conduct among businesses to fix prices or divide markets. Then, there is section two of the Sherman Act, which focuses on monopolization, which is typically single firm conduct.

There are private and public antitrust actions under the Sherman Act. There are broad civil remedies that we'll get into. There are also criminal actions that are brought by the government. The second major Antitrust Act is the Clayton Act that focuses on mergers and discriminatory pricing. There also are private and public actions brought under the Clayton Act. Then, finally there is the Federal Trade Commission Act, the so-called FTC Act, which is only enforced by the FTC and which focuses on unfair competition more broadly. In addition, as I mentioned, many states have statutes that are built on and mirror the federal antitrust laws.

Alan Kaplinsky:

I guess the one thing I would add to the litany of statutes that you mentioned, although not many people would've thought that this was the case, but the Consumer Financial Protection Act, which CFPB administers, says something in there about fostering competition, and the current director of the CFPB, Rohit Chopra, having come from the Federal Trade Commission, has really taken that to heart, and it seems like just about everything that he pronounces or comes out with these days, he talks about how something is an anti-competitive practice and it hurts small institutions, various things that larger institutions are doing. So I guess I would throw that in the mix too. So Erin, why is it now, why is it all of a sudden, is this the time for consumer financial services lawyers to start focusing on competition law?

Erin Fischer:

Thank you, Alan, for having us. I think a good place to start this answer is in the summer of 2021, President Biden issued a widely publicized executive order. In that executive order, he kind of pronounced a focus on competition. In that executive order, he called for a whole of government approach to competition issues, and the federal government really responded. As part of this kind of developing focus over the last two years, CFS firms have increasingly found themselves the focus of competition related enforcement and just as a kind of a flavor of the enforcement landscape, we'll get more into CFS specific

stuff in a second. One of the two major antitrust enforcers, the Department of Justice has litigated more this year than it has since the 1980s.

The other major enforcement agency, the FTC has spearheaded new initiatives to reach more behaviors that the commission deems anti-competitive. Then, as you just mentioned, Alan, the CFPB has kind of newly taken a heightened interest in competition issues.

Alan Kaplinsky:

Yeah, thanks Erin. So Ed, we could go back to you for this next question that I have. What are the practical effects of using the antitrust laws as a way to challenge business practices in the consumer finance industry?

Ed Rogers:

Sure, Alan. That's a very good question because some of the practices that we'll be talking, in fact, many of the practices we'll be talking about have previously been the focus of regulatory and private litigation challenges. What is new is the use of the antitrust laws, and what that means in practical terms for consumer financial services firms is that you've got a set of very strong remedies that both the government and private plaintiffs have, in terms of treble damages. There can be criminal prosecutions brought, there are injunctions that are brought to block mergers, and there is a long tradition in the antitrust industry of there being follow-on civil litigation.

So when the Department of Justice brings a government enforcement action, the government has actually done a lot of the work for the private plaintiffs on the liability side. The plaintiffs then come in, bring class actions and those class actions, and we'll get to these in a little bit, are notoriously expensive for reasons that we can cover. They also involve great exposure as we saw in the foreign currency case.

Alan Kaplinsky:

I take it, Ed, that this sort of reemergence of antitrust being sort of top of mind right now in a lot of industries, but particularly in consumer finance, this is a result of the change in administration. I assume during the four years while President Trump was our president, that there wasn't hell of a lot going on in the area of antitrust, am I right?

Ed Rogers:

That's correct, and it typically does ebb and flow with the administration, and part of that is because of the follow-on litigation and also, the membership of the appellate and the Supreme Courts, which have a big role in antitrust policy because as we'll get to in a little bit, antitrust policy really is judge-made. It's not regulatory in nature and it's not even really ... although there is a statutory underpinning, the statute doesn't provide all that much in the way of specifics.

Alan Kaplinsky:

Right, right, right. So a little bit earlier, right at the beginning of our podcast, we talked a little bit about the agencies that are involved in this, but which of these agencies has been especially active in applying the antitrust laws in the consumer finance industry and are there particular regulators of these agencies who have signaled increased interest in applying the antitrust laws to the industry? And for that question, I'm going to go to you, Erin.

Erin Fischer:

Thanks, Alan. So the big three that I'm going to talk about are the FTC, the DOJ Antitrust Division, and the CFPB. And I'll just take them in order, give a little overview of what's happening at those departments. So the FTC is currently led by Lina Khan, who is not particularly popular at the moment, at least in the eyes of business. So when she was a student at Yale Law School, she wrote what was considered at the time, a revelatory paper about how to get at the activities of Amazon as a platform using the antitrust laws. Ever since then she's quite young, but she's been well-known. She surprisingly was nominated to be chair of the FTC by President Biden, surprising because she's quite young.

Alan Kaplinsky:

Is she in her 30s?

Erin Fischer:

She's in her 30s, yeah and Rohit Chopra is 40. They're young. So she's been at the FTC for a little over a year and she has quite progressive views about how the antitrust laws should be used to address the anticompetitive behavior of platforms, and that's actually prompted other commissioners to leave. So recently the lone Republican commissioner on the FTC, Christine Wilson left the commission and she cited Lina Khan as the reason. They've had a large number of staff resignations during the last year as well. So there is a climate of heightened enforcement at the commission, but there's also some internal conflict about the direction that the commission is taking. And I'm going to discuss that a little bit later when we talk about FTC section five.

Alan Kaplinsky:

So right now, there are only three Democratic commissioners. There should be two Republicans, right? There should be five altogether. So there are now two vacancies, both of which have to be filled by Republicans, appointed by Biden, I think and confirmed by the Senate, but nobody seems to be in any hurry to do that.

Erin Fischer:

Absolutely not. So that's kind of what's happening at the FTC. Department of Justice is equally progressive, but seemingly from the outside, much more functional and effective at the present moment. So it's being led right now by Jonathan Kanter, who is a longtime antitrust attorney. He was at the FTC for some time then he was on the private side. He has been very active, I think notably in the criminal space. So as Ed mentioned earlier, under the Sherman Act, the DOJ has the power to bring criminal charges against individuals for anticompetitive practices. It's not common, and he has brought 20 criminal cases since November of 2021, and that's as of a couple of months ago. That's more than any time since the 1980s. So he is using the full extent of the law. He's quite aggressive. He also is trying to pivot the focus of the DOJ away from traditional measures of market power to look more loosely at the ways that behaviors can be anti-competitive.

We'll discuss that later when we discuss changes to merger enforcement. He has signaled through speeches and policies that he's interested in trying to go after big tech in any way that he can. He has experience from his private practice actually in the tech space, he represented Microsoft and Yelp when he was in private practice, so he is familiar with the industry and he is well-equipped to face these issues. He brought a chief technologist on staff. He's the first assistant AG of the DOJ Antitrust Division to do that. Then, Chopra from the CFPB, so he was a commissioner at the FTC, as you mentioned Alan, from 2018 to 2021, so he has a background in competition enforcement. He has taken those lessons with him to the CFPB and has really, through policy and speech since joining and leading the CFPB, has focused increasingly on competition issues. He's also known for combing laws and regulations for loopholes and-

Alan Kaplinsky:

He's not a lawyer, by the way,

Erin Fischer:

Right, but he has an impressive knack for poring through laws, regulations and finding new ways to get at behaviors. Sometimes it's not always popular, but he is clearly crafty and clearly up on big tech, and he has strong ties still to the FTC, and there's some joint initiatives between the CFPB and the FTC that I think are based largely on the strength of his personal relationships at the FTC.

Alan Kaplinsky:

And I wouldn't be surprised if there's a certain senator that might also be involved in that relationship in terms of making sure that things are being done the way she wants them done, and I'm referring to Elizabeth Warren, of course, who was a very strong supporter of Rohit Chopra and Lina Khan. Okay. So Ed, you mentioned a little bit earlier about private litigation and

class action litigation. How, if all, does this new antitrust focus inform plaintiff's class action litigation against banks and other consumer financial services firms?

Ed Rogers:

Alan, I think this particular question is critically important for lawyers in the industry, because private class actions can, in certain antitrust cases, they are bet the company cases in many instances. Just by way of illustration, the foreign currency case that we worked on together, and this is about eight years ago, it settled, so you have to account for inflation since then. There was a 336 million dollar settlement fund agreed to and approved by the court.

Alan Kaplinsky:

That was for all the defendants -

Ed Rogers:

It was seven banks. Seven banks and then, Visa MasterCard. Yes, that was divided, although not on a pro rata basis. The other important aspect of class action litigation and antitrust, which is a little bit different from class action litigation in the consumer finance area more generally is that the discovery is extensive. In the credit card cases that I've handled, without antitrust claims, the universe of documents is relatively discrete. These are form agreements. They're form credit card statements. They're solicitations that are sent. In the antitrust field, the plaintiffs go deep into the bowels of these businesses and they focus on communications and emails and business plans and discussions with competitors. In addition to that, this is expert intensive litigation. The typical large antitrust case will have multiple economists on each side, a liability expert, a damages expert, often a class action expert.

Those economists, they charge as much or more as any expert witness in litigation. And traditionally many of them are professors, others are with the big ... there are a number of expert consulting think tank type shops that do this work. With those issues, you combine the cost of the litigation with a potential exposure, and what you often see in antitrust cases are, what we would call in terrorem settlements. Settlements where the defendants overpay simply to get out and they will often overpay early to get out because they would rather not risk the exposure and the certain multimillion dollar expense of paying a law firm and experts and paying for all the discovery and all the depositions. You've also got, not surprisingly given what's at stake, there is a robust national antitrust plaintiffs class action bar.

That they're very well funded, they are very aggressive and they are in most of the major markets that we see. I mean New York, Washington, Philadelphia, San Francisco, Chicago, all have antitrust plaintiffs boutiques that are repeat players in this space. Finally, the antitrust injury, which is actually a term of art, that you need to establish liability, is actually defined fairly broadly. So it's not just paying more or having fewer alternatives. I'm reminded of the conspiracy to impose arbitration clauses, Alan, you probably remember that case.

Alan Kaplinsky:

Yeah, unfortunately, I do.

Ed Rogers:

And the theory of injury there was not that consumers were actually paying more for credit cards in terms of interest or fees, but that because the product, the credit card they were purchasing had an arbitration clause with a class action waiver. It was worth less in economic terms, it was a less valuable product. And that was enough for the second circuit to allow that case to go forward, ultimately to a bench trial in which the defense prevailed, but not until they had extracted a substantial litigation cost from consumer financial services firms.

Alan Kaplinsky:

And I think a few banks agreed for some period of time not to put arbitration in their credit card agreements or to take it out if they had it in there. I can't resist making a little pitch here, Ed, because arbitration is very near and dear to my heart. In fact,

I just got back from a presentation I made in DC today in front of a group of bankers and the subject was consumer arbitration and what's going on in that area. It is very clear under a US Supreme Court precedent that if you do have an arbitration agreement in a consumer-facing agreement, an agreement between consumer and a bank or a consumer financial services company, that is enforceable, even in an antitrust case and a class action waiver is enforceable. So I can't resist urging clients and non-clients that are in this consumer finance business.

Now, after listening to you and Erin about what you've already talked about and what we're going to continue to talk about, I guess one of the things I would say if I was an in-house general counsel, I'd say to management, "We ought to rethink the use of arbitration. It's not going to help us if the agencies come after us. It's not going to repel the CFPB, DOJ, the FTC, but it can be very helpful in private litigation."

Ed Rogers:

Absolutely.

Alan Kaplinsky:

Yeah. Let's go on to the area of FinTech, which seems to be ... FinTech companies are a growing part of the consumer financial services industry, or some of what we're talking about are companies that operate almost entirely online or completely online, many of them involved in credit cards and other kinds of payment devices, other kinds of lending and they continue to grow. I'm wondering whether or not, Erin you think they present any special antitrust issues?

Erin Fischer:

Yes, I do.

Alan Kaplinsky:

I thought you might. Yeah, what are they? What are those issues?

Erin Fischer:

So I'm going to start by saying a couple of things that will be obvious to your listeners, but then, I'm going to explain why they're relevant to the antitrust analysis. So FinTech in the 21st century was mostly backend systems of established financial institutions. In the last few decades, there's been a shift, consumer-oriented, direct to consumer services, education, retail banking, fundraising and nonprofit. Those services have become a part of our day-to-day lives, but the interesting thing about those company's services is that they exist almost entirely in the digital space. So they're platform companies. Like you said, Alan, they're online. Antitrust concerns itself greatly with market definition.

So when you're trying to decide if somebody is doing something that is anti-competitive, you look at the market that they're acting in, geographic market, product market like corn in Nebraska, that kind of discreet market. Digital platforms don't lend themselves to that. They don't have direct peers all the time that are obvious. They don't have direct vertical relationships that are obvious. Their levels of activity are multiple. One company can do five levels of things that used to be 100 years ago, five firms. So it is difficult to define a market, and when it's hard to define a market, it's hard to condemn anti-competitive behavior as the antitrust laws are currently enforced. So the antitrust laws don't say anything about market definition.

They say to lessen competition. They say vague things like that, but they don't say you must product market and geographic market, kind of tying it back to what Ed said before, that's all judge made. So there's been a push in recent years to abandon that approach, that formulaic brown shoe is the case, that formulaic approach to market definition and look at other ways that we can measure the anti-competitive nature of an activity because digital markets are going basically unpoliced in the eyes of the regulators. So that's, I think, the biggest issue and something that I see the agencies turning an eye to and being ready to try to challenge, and the ways that they might do that are at this point, relatively unknown and it should be something that CFS firms are thinking about.

Alan Kaplinsky:

So the geographic market in an online environment is not only the entirety of United States, it's the entire world.

Erin Fischer:

Right, but there's some companies that have more subscribers in the United States and so, how do you measure that geographically? I mean, that's just kind of the start of it. Then, there's other kind of smaller issues but that make a big difference for certain claims. So what if Instagram is free? How do you measure the anti-competitive nature of a product that's free because normally in antitrust, you're looking at the price, you're looking at output reduction and price increase. What do you do when Instagram is free? Do we think they're monopolizing customer data? Is that something that antitrust should concern itself with at all? Those are the issues that have been floating around for the past few decades, but nobody is really engaged and it seems like they are ready to.

Ed Rogers:

Well, Erin, maybe just by way of example, for people like me who were sort of Luddites, you could talk for a minute about the Visa-Plaid merger because that to me is the biggest, the most noteworthy example of the antitrust laws being used in the FinTech area. Now back when we did the foreign currency case, the focus was on Visa and MasterCard, they're horizontal competitors, they're in the same market and Visa and its member banks, and MasterCard and its member banks. There was no Plaid back then, but if you could talk to us a little about that, that merger and what happened there.

Erin Fischer:

Absolutely. So in November of 2020, the DOJ's antitrust division filed a lawsuit to prevent Visa from acquiring the payments platform, Plaid that most of your listeners will be very familiar with. Plaid, for those that don't know, allows developers to plug into consumers various financial accounts and with consumer permission, aggregate spending data, look up balances and verify other personal financial data. Plaid connects to over 200 million bank accounts and has become a leading player in this field. The thing that was unique about the DOJ's challenge to the Visa-Plaid merger is what we were just talking about, it's not clear that they are direct competitors. It's clear that they do some similar things, but I think 20 years ago that transaction would not have been condemned.

And what the DOJ pointed to when they filed this complaint was people at Visa saying internally at board meetings, they're going to cut into our profits. They're a competitor to us. We consider them a competitor, and I think looking at who tech firms actually believe their competitors are is a new focus for ... or not necessarily new, but a way that these agencies are trying to get at the anti-competitive nature of various conduct or mergers, and that was surprising. That challenge was surprising to a lot of people and the proposed merger was abandoned, so their challenge was effective. I think that kind of illustrates this move away from horizontal market, vertical market and into this kind of amorphous space where we're trying to decide if something is anti-competitive in the unknown area.

Ed Rogers:

So in other words, the antitrust regulators are now keeping up with these new business strategies, and another example is the MasterCard E-wallet routing case that the FTC brought and ultimately settled with MasterCard, that was when MasterCard was allegedly forcing merchants to route debit card payments through MasterCard's network as a way to block competing payment networks. It's conceptually similar to the Visa-Plaid because Visa's concern with Plaid was that Visa would lose some of its debit card business because of the information that Plaid could amass and then they could ultimately compete. The fact that the antitrust regulators picked those as transactions or course of conduct to challenge, shows that they are paying attention to these newer developments that traditionally would not have been viewed as antitrust.

Alan Kaplinsky:

Right, right, right. So I got another question for you, Ed. Consumer financial services lawyers have also focused on legal issues raised by certain fees such as late fees, overdraft fees that are a fairly large source of revenue. The focus these days is maybe a

little bit less on overdraft fees, because of a lot of litigation in that area and a lot of pressure by the CFPB, overdraft fees that are no longer as large a source of revenue as they used to be. Today, the focus is on late fees and at the CFPB, they want to slash late fees that credit card issuers have been charging now for several years, down to a flat amount of $8 a delinquency. So is there any particular antitrust angle in this area, other than the general pro-consumer focus that consumer finance regulators have?

Ed Rogers:

There is Alan, and let me just start by saying that the consumer finance industry, if we'd sort of thought about it from a distance, is sort of a natural area to apply the antitrust laws because of the direct to consumer sales focus and the antitrust laws do tend to focus on unequal bargaining power, consumer choice issues that we've seen in the consumer finance litigation area for years under different headings. Yes, the way the fee issue is looked at by antitrust regulators is a little bit different. Number one, they regard fees as an area where there is an opportunity for collusion. That's what we saw in the foreign currency case, where the issuers all allegedly charge the same percentage. So that's sort of a traditional price fixing case, but this becomes a vehicle for coordinated conduct, number one.

Number two, in particular, these newer regulators are focused on the fact that the consumer, to the extent the fees aren't disclosed, clearly, the consumers can't comparison shop and therefore, their choice is limited and that is regarded independently as an antitrust problem because it's sort of a matter of economic theory, if you don't have a lot of choices, you're going to end up paying more and it's really just an extension of the concept of a monopoly.

Alan Kaplinsky:

Another area that I know is top of mind, certainly among lawyers that work for or counsel FinTech companies is the use of customer data. That raises all kinds of privacy concerns, but it can also be a helpful source of information for companies. Have the antitrust regulators weighed in on this area of customer privacy and the use of their data?

Erin Fischer:

Yeah, so going back to the conference, there was a million CLEs on the overlap between privacy and antitrust. I think Lina Khan has indicated in the past year that she sees data aggregation and data use as potentially anti-competitive conduct. She's been very clear that she doesn't think firms should be able to amass customer data and they shouldn't be able to use the data that they've amassed to help themselves competitively. She's been very clear about that. There's some focus on access to customer data at the CFPB, there's been some private class actions, but what I'm going to focus on here is the essential facility doctrine, which is an idea in antitrust that says if you have control over an input that everybody needs, you can't anti-competitively keep other people from getting access to that input.

So a long time ago, that might have been grain. Now, there's some who say that we should look at the aggregation of customer data through that same lens. The other side, I think very understandably says there's all sorts of privacy and personal data rights issues with treating customer data as an essential facility that needs to be shared with your competitors, and there hasn't really been a clear answer to whether the antitrust laws are appropriate in that space at all. Lina Khan has indicated that she believes that there's a robust role for the antitrust laws to enforce and police the use of customer data.

Alan Kaplinsky:

So Ed, let's get very practical now. I mean we've talked about you and Erin, have done a great job, telling us about the antitrust laws and the concerns that banks and companies ought to have, explain what companies are now doing to ensure that their existing practices or practices that they contemplate don't run afoul of the federal or state antitrust laws.

Ed Rogers:

Sure. Now that's obviously critically important to everyday business life in these firms. And as I said at the beginning, unlike a lot of consumer finance laws and regulations, antitrust is largely judge-made, and so you've got a lot of doctrines that are flexibly applied and they depend on the facts of the case. That makes it a little more difficult to establish rules of the road

within a company. That said, the best approach that we've seen and that we've been involved with directly is helping companies develop compliance policies. Those compliance policies really involve educating the business people about what I would call areas of danger. So these are things like discussing price with competitors and going to trade associations and talking about price.

Arrangements to prevent companies from taking employees from one company to another, what's so-called no poach agreements, which is a big, big area now. It's particularly big in these technology companies including in the financial area, boycotting competitors. In other words, getting together and say, if a bunch of banks decided we're not going to take payment in cryptocurrency, for example, it might be a very good idea, but it would be potentially considered an economic group boycott. Coercive conduct, and we see this both implicit and explicit, and we see this a lot I think in the FinTech area where if you have an account or you have a credit card or you end up getting channeled into the various payment processing alternatives ... and that was the issue in Visa-Plaid, that Visa wanted to be able to control each phase of the transaction.

They were concerned they could lose significant revenues, but by controlling each phase of the transaction, at least from the antitrust lawyer's perspective, you are limiting consumer choice and creating the potential to raise prices. The other area, and we saw this again in the Visa-Plaid case and we saw it in the foreign currency case, and you see it in many business contexts, but especially in antitrust, are internal documents, business plans, emails in the company that talk about things like market share and these competitors are killing us. So the best policies identify categories, problematic categories of conduct, and then you try to create some sort of a reporting and internal policing process where you get the in-house lawyers involved early, and you consult them and you try to minimize the creation of records that are going to give rise to more serious exposures.

Alan Kaplinsky:

Yeah. So do you think it's a wise idea that whenever a FinTech company is developing a new product, let's say in the payment space, that not only should they be consulting with experts on the consumer finance laws, but they really ought to be talking to people like you and Erin about the possible application of antitrust laws?

Ed Rogers:

I do think so, in particular, because it may be less obvious. If these competition issues are new, they are a focal point of these regulators we keep talking about and as I say, they involve more judgment calls than simply saying, "All right, let's make sure you're in the safe harbor. Let's make sure that you've complied here with Reg Z. It's got a lot of different sections and we can go through mechanically and apply those rules because they're very clear and very explicit." And that is not the case in this area, but an experienced antitrust lawyer or an in-house lawyer who's got a list of issues to look at, will be able to spot these. There's no reason to think that this has to become some kind of a bottleneck in terms of developing new products and services, but it is a very useful thing to do.

Most antitrust cases involve conduct that could have been avoided. I mean the old-fashioned price fixing discussion in the O'Hare airport with American Airlines, I mean that's one thing, but so much of what we see now are business plans and consultants and people being careless with the way they express themselves and who they speak to about these things. And good advice, it's not just about a policy, it's about having a process and having some oversight.

Alan Kaplinsky:

And I take it, there should be ... every company ought to have a written policy dealing with compliance with the antitrust laws, but they have policies dealing with compliance with a whole range of other statutes.

Ed Rogers:

That's right, and the field has evolved to the point where those can be relatively short and written in plain English, so that they can actually be used by the business people and not just sit on a shelf and have the lawyers think about them.

Alan Kaplinsky:

Right. So Erin, let me turn to a different subject, and that's Section Five of the Federal Trade Commission Act. It's usually Section Five, when I think about it, I think about it as a UDAP statute, one that prohibits unfair and deceptive acts and practices. I don't really think of it as an antitrust law. Why is the FTC's decision to dust off Section Five and in fact, they issued a policy statement on that at the end of last year, why is that particularly noteworthy for consumer finance firms?

Erin Fischer:

So the FTC is the sole enforcer of the FTC Act and therefore of Section Five. You're right that half of Section Five is unfair and deceptive practices. Then, there's another half that is unfair methods of competition. Generally, the FTC uses Section Five as a tag along, follow on in other lawsuits that are filed under Sherman Act, et cetera, like the Facebook case, there's a section five claim in there. Standalone Section Five enforcement is not often used, but it is intriguing. I was actually talking about this with Professor Hovenkamp the other day and he said, "It has always been shocking to me how rarely they use Section Five as a standalone claim." And the reason why is because the evidentiary burden is way lower. You don't have to show the existence of agreement, for example.

So Sherman Acts Section One, you have to show agreements. FTC Section Five, you don't have to show. You can show invitations to collude. That's sufficient in a lot of cases, and there is a weak history of enforcing Section Five as a standalone claim because there's been so much uncertainty about what behaviors can be condemned. And there was policy statement issued a few years ago that Lina Khan rescinded about a year ago, that she said was too limiting for the powers of the FTC and they've just reissued a new policy that is about as broad as you can be. It says everything that's condemnable under the antitrust laws is condemnable under FTC Act Section Five, which the courts agree with. Then, it says, "And everything else that you do that might be anti-competitive," and I think their intention is to use Section Five as a way to get at the behaviors of big tech and there's no treble damages.

So it is slightly less scary than the traditional antitrust laws, but the lower evidentiary burden should make everybody concerned. It's not clear how it's going to be used, but it is clear that tech is the focus, and it is also notable in light of the fact that recently the Supreme Court stripped the FTC of its ability to use 13-B to disgorge from wrongdoers, those who have violated various laws including the antitrust laws. So it's one of many ways that the FTC is signaling, we're still here, we're still going to enforce. I think there's going to be a lot of development in that space in the future, and in the coming months.

Alan Kaplinsky:

Am I right just on Section Five that there's no private right of action. So we're only talking about FTC enforcement, and the other thing I think is worth mentioning, is that the FTC doesn't have jurisdiction over banks. So we're talking about non-banks when it comes to the FTC. We're sort of drawing to the end of our show for today, but there's one area that we haven't really talked about at all. We talked about federal antitrust laws, but we haven't said anything about state antitrust laws, which I think exist in maybe all states or practically all states. They're generally enforced by state attorneys general. Is anything going on there, Ed?

Ed Rogers:

Yes. Antitrust has been, we'll call it a growth industry for state attorneys general over the last five to ten years. It's considered, I think, by progressive attorneys general to be good politics. It's splashy, and there are two things the attorney generals can do. They can either bring cases on behalf of the state as a purchaser of services because the state is a big employer and it's a big purchaser. So they can bring cases in their propriety capacity, but of greater concern is when they bring cases on behalf of the citizens, the so-called parens patriae cases. There are certain state UDAP laws and state antitrust laws that limit standing to the state attorney general. So only the state attorney general can bring these cases.

And I can tell you that we have a client that obviously, I can't identify, but that is engaged in a big fight with a state attorney general involving electronic payment system in the mortgage area, and they have proven to be, the state attorney general, has proven to be a very dogged adversary, and there is a very recent piece of legislation that's been passed that has broadened the venue law so that a state attorney general can now bring a case in his or her home district rather than being limited to where

the case should be venued for the traditional venue reasons. That will provide a tactical advantage to state attorneys general, and it's an antitrust specific venue provision. It's not for all laws.

So that will embolden them further, and we do see them now and they are often plaintiffs, individual plaintiffs, bringing cases alongside parallel class actions and then, they have certain enforcement powers quite apart from bringing civil litigation.

Alan Kaplinsky:

Do you ever see them joining forces with DOJ in a lawsuit or the FTC?

Ed Rogers:

Not only do they join forces with DOJ, they joined forces with one another and probably the most, not a CFS example, but the opiate litigation and the tobacco litigation, those were really driven in many respects by the state attorneys general and they resulted in gigantic settlements and there's no reason that couldn't be done and won't be done in the consumer finance area as well.

Alan Kaplinsky:

Well, to our listeners, you thought you already had plenty to worry about with compliance with the many, many federal consumer financial services laws and the laws in all 50 states in that area and now, you got another thing to worry about, federal and state antitrust laws. I really want to thank my colleagues, Ed Rogers and Erin Fischer for helping us understand why this is an important area. I know that the two of you are working on an article that will be published sometime in the near future, dealing with this subject. So that should be of interest, and I also know the two of you are going to be speaking on a program, I believe in Chicago being sponsored by the Consumer ... what organization Ed?

Ed Rogers:

Conference of Consumer Finance Lawyers.

Alan Kaplinsky:

Do you have a date on that?

Ed Rogers:

It's May 18th.

Alan Kaplinsky:

May 18th in Chicago. Okay. So thank you again. My thanks to both of you.

Ed Rogers:

Thank you, Alan. This has been a great opportunity to really dive into these issues with you and address the questions that you've posed.

Alan Kaplinsky:

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