

Consumer Finance Monitor (Season 3, Episode 25): What's Happening at the FTC (Part II), With Special Guests From the FTC

Speakers: Alan Kaplinsky, Chris Willis, Andrew Smith, and Malini Mithal

Alan Kaplinsky:

...Welcome to the 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. I'm Alan Kaplinsky, the practice group leader of our Consumer Financial Services group of Ballard Spahr. Today, we will do our part two of a podcast series that we began last week, which was in turn based on a webinar we did a few weeks ago, entitled Consumer Protection: What's Happening at The Federal Trade Commission, with special guests, Andrew Smith and Malini Mithal.

Alan Kaplinsky:

Andrew is the leader of the Consumer Protection Division at the FTC, and Malini is the Associate Director of the FTC's division of financial practices at the FTC. On our last podcast, I gave an extended biography of both Andrew and Malini. And if you didn't listen to the first podcast, I encourage you to do so, because we really covered a lot of important issues about what is going on in the Consumer Protection Division of the Federal Trade Commission. We're not going to be discussing anything happening at the FTC in the Competition Division, which includes the Antitrust Laws. So today, we're going to have Andrew and Malini, and my partner, Chris Willis, pick up where we left off last week, and we're going to start with the topic of privacy and data security. So let's get to it. Okay. Thank you, Malini. Andrew, back to you, and the topic this time is, privacy and data security. What can we expect this year from the FTC in that area? And also, can you discuss the announced improvements to orders in data security cases?

Andrew Smith:

Yes, I would be happy to. What's up for 2020 with respect to data security. One of the things that I think is kind of interesting about what we did last year, every year we have a pack of data security enforcement actions, and last year was no exception. I think we had nine maybe, which is a decent year. But we brought a couple of actions against service providers. So typically, our data security cases will be against companies that have direct relationships with consumers that collect data from consumers, that keep that data, that have made promises to the consumers about the security... the safeguards that they'll have in place for that data and have broken those promises. So that's a classic data security case. But last year, we had two cases. Two of the several that we brought were against service providers. One against a company called InfoTrack, which kept customer and employee data for multi-level marketing companies.

Andrew Smith:

And the other against a company called Dealer Belt, and that was a GLBA data safeguards case because Dealer Belt was holding financial information for car dealers, both financial information about customers and loan documents and the like, as well as financial information about car dealer employees.

Andrew Smith:

So this is an area... Service Providers is going to continue to be an area of interest for us. We have been focused, as Malini said earlier, on what I'll call liability for acts of your vendor. But also if you're the vendor, put direct liability of the vendor for when they fall short in terms of the services provided to the principal. And I think then the natural corollary for that will be actions in data security cases against the owners, against the principals. So a principal that employs a vendor who fail to keep the data

safe and has the principal sort of checked all the boxes, has the principal perform the appropriate due diligence, has the principal included in its contract language that says, this is how you shall protect the data, maybe service level standards and the like, has the principal actually monitored the vendor to make sure that they're doing what they're supposed to do? So I think that's something you can look for in 2020.

Andrew Smith:

The other big thing to keep an eye on with respect to data security is our ongoing effort to update our safeguards rule. So I had said earlier that I think if July 13, we have a workshop, it's going to be a virtual workshop on the various proposals that we have made to amend, to upgrade our GLBA Safeguards Rule. We put out our proposal, I think it was last year and collected a bunch of comments. Comments were due in August or September. We reviewed the comments. Based on our review of those comments, we think we'd like to get some more input on some discreet issues, so that is a workshop, but that's a rulemaking that continues, something that particularly financial institutions and particularly non-bank financial institutions might want to keep an eye on.

Andrew Smith:

With respect to privacy... Actually, let me address this issue about the changes to the data security orders before I move on to privacy. So folks who watch the FTC know that when we bring a data security case, we will frequently in the order include language saying that they should obtain third party independent assessments of their data safe guarding programs. And they typically have to do that every other year for a period of 20 years. We, in response to some comments from commissioners and response to workshops that we held on data security in 2018, in response to a decision from the 11th Circuit in the LabMD case, which called into question some of our data security orders and questioned whether or not they could actually be enforced, they weren't specific enough. We have decided to up add, to revamp our data security orders a little bit.

Andrew Smith:

First thing that we've done is, we've added more company-specific requirements. And so rather than simply saying, you shall maintain a reasonable data safeguarding program. We actually call out specific items that need to be included in that program that we found were shortcomings in our investigation. So for example, we might require a company to train employees every year to maintain access controls, to monitor systems for data security incidents, to implement patch management systems, to encrypt data, and well, to encrypt data in storage. So this is an effort to make our expectations more clear to companies, but also to improve order enforceability. So we were taking the LabMD decision to heart to some extent, because we don't want our orders to be unenforceable. The next thing that we've done is, we have increased the accountability for these third party assessors. Assessors can no longer just take the company's word for it.

Andrew Smith:

They can't just interview the company and say, Oh, yes. You've complied with all of the requirements of their data safeguarding program. The assessors actually have to do the work. They have to show their work. They have to identify evidence to support their conclusions. They have to independently sample transactions, conduct employee interviews, review documents and the like, and show us what they've done. They have to retain and provide the FTC with access to all of their workspace papers. And these provisions also allow the FTC to withhold approval, which we probably could've done under our old orders as well, but this is just more explicit. And then finally, we are elevating data security considerations to the C-suite and to the board level, requiring that companies present written information security programs to their board or to a similar governing body for approval. And that senior officers provide annual certifications of compliance to the FTC. And I know we have a lot more questions, so maybe I'll just stop there, unless you want me to do the whole privacy thing as well.

Alan Kaplinsky:

Well, why don't we move along, Andrew? And if we have time, we can circle back to the privacy. So, but let me go to Malini. Earlier on Malini, you were to refer to Lead gen, and I know that that's an area of very intense scrutiny by the FTC. So I'm wondering if you could tell us what is the FTC currently doing in that area?

Malini Mithal:

Absolutely. Thanks, Alan. I'm very glad you asked about this topic. As you mentioned, it's an area of intense interest for the FTC. It's a priority area for Andrew and many of our commissioners, and it's a very important space for consumers. So our most recent case on point is our action against Wendy DU so the Wendy DU defendants operated a website, which they promoted as a resource for consumers in search of financial products. The website ranked the best for top companies offering the financial products and there were things like loans. And they described the content as objective, honest, accurate, and unbiased. But in reality, it was paid to play. So for example, in an email, one defendant asked one student loan refiner to pay \$9.50 per click to retake the number one ranking after it fell to number three. In a contract with another company, it said that Wendy DU would rank the company no lower than position three.

Malini Mithal:

And when companies refuse to pay to play, we said that Wendy DU dropped them in the rankings. So the order prohibits misrepresentations, and it also requires the defendant to disclose any material connection between themselves and any entity affiliated with a product or service that they are providing information about. The order also requires a payment of \$350,000. So I think this case is a really good example of Andrew's and our commissioner and staff commitment to go after companies and individuals that use deception to get people to click on advertiser's sites. But another end of the problem here sometimes is the people who buy the Leads. So the FTC is also focused on the Lead buyers themselves. And another action kind of illustrates that point very well, it's our action against a group of companies, including CEC and Colorado Tech. In that case, we said that it was buying Leads from Lead generators that were violating the law.

Malini Mithal:

And so for example, one of its Lead generators was a company called Sunkey, Sunkey used the site army.com and consumers who were actually interested in joining the military would go to that site, thinking they were on a military website. In fact, the real army's website at the time was goarmy.com. So it's just interesting, a lot of consumers visited army.com thinking that they were actually interacting with the actual U.S. Military. But in any event, what happened is Sunkey would use that site to get consumers' personal information, and then it would call them in pitch post-secondary schools. So one of those schools was the CEC group, and we said that CEC was on the hook for the practices of Sunkey and for other deceptive Lead generators. So we said that CEC didn't review its Lead generators marketing materials, including telephone scripts and websites before they started generating Leads on CEC's behalf. And we said that CEC continued not to vet this material, even after it was on notice that its lead generators were engaging in illegal conduct.

Malini Mithal:

We also said that, for certain Lead generators, CEC did review scripts after they started generating Leads. One of those included a faint script that we certained an affiliation with the military, and we said that CEC, let it go. Another thing that we noted in our complaint was that consumers would complain once CEC telemarketers called saying, why are you calling me? I thought I was signing up with the military or doing something with the military and things like that, but CEC continued its practices, anyway. And we also said that it continued to slack monitoring of Lead generators, despite our and other actions against the Lead generators it was using to procure Leads.

Malini Mithal:

For the order is... I think another one that I would encourage anyone to look at if they are working with third parties to market products, the order requires that CEC review Lead generator materials, and it cannot pay Lead generators if the materials it's reviewing contain misrepresentations that are prohibited by the order. The company CEC also has to pay 30 million to settle the FTC's claims. So what I like about kind of highlighting the Wendy DU case and the CEC case as well, as it's kind of at both ends of the spectrum. One is the actual company that's making the claims to get the consumers in the door or get you to click on a website. And then CEC, based on our complaint, is the company that was profiting off of the deceptive conduct according to our allegations. So I think that really shows that the FTC is committed to looking at deceptive practices and

rooting out law violations wherever they occur at the Lead generation pipeline, whether it's the first contact, intermediaries or they're final buyer of the Lead.

Alan Kaplinsky:

Okay. Chris, I didn't mean to be ignoring you. And I'm wondering if you have any comments you want to make really on the last few topics that we've covered.

Chris Willis:

Well, just to underscore what Malini said about Lead generators. This is an area where the financial services companies really need to exercise a lot of oversight and have a lot of insight into the practices of generators from whom they buy Leads or how on his website, they might be ranked or featured to make sure that appropriate disclosures are along the lines of what Malini just mentioned are made. And there's no misrepresentation or kind of recommendation made without the disclosure of any relationship between the buyer of the Leads and the Lead generator. That's an area that I think a lot of financial services companies need to pay particular attention to. And that will be my comment on that.

Alan Kaplinsky:

Yeah. Thank you, Chris. So Andrew, next question I have, I actually... I think I skipped a slide. The question I had looks like it may be missing, is with respect to payments. Is the FTC involved in any significant activities, regulatory or enforcement pertaining to payments?

Andrew Smith:

Yes. So Malini mentioned that case, and we've always been active to of EFTA issues, unauthorized debiting on accounts, or companies that require consumers to agree to auto-debiting as a condition of obtaining a loan. So that's always going to be a priority for us. And in any case that we review to particularly any case that involves fintech or online lending, that's going to be a big focus of ours, but we also have another focus and that is payment processors. And that I think is kind of interesting because it's like a recurring theme in our responses to all of your questions we've been talking about. Malini was just talking and doing legion about. Essentially holding companies liable for the conduct of third parties, whether it's an advert... holding an advertiser liable for the conduct of its Lead generator.

Andrew Smith:

And we talked about holding a principal liable for the conduct of its third party, providing data security. And there's the same issue for us in the payment processing world. But here what we're doing is, we have payment processors that are processing payments for essentially scams, and we are holding them responsible for their customers' misconduct. The most recent case that we brought in this area was against RevenueWire, which is a Canadian payment processor, and they agreed to pay almost \$7 million. They were processing payments for a tech support scam. And there, what we alleged was that because the tech support scam was telemarketing, that we could rely on the Telemarketing Sales Rule, and the Telemarketing Sales Rule prohibits assisting and facilitating illegal telemarketing. It also prohibits what's called credit card monitoring, which is essentially processing transactions through a merchant, through a mid-that's not the actual merchant for whom you're processing payments.

Andrew Smith:

So you set up a lot of sort of fake dummy accounts and you process payments through those to hide the actual merchant. And that violates the TSR. We also will typically bring those cases under our unfairness authority. And so our authority to prohibit unfair practices, we would bring a case against the payment processor and really what we're looking for are payment processors that are actively facilitating fraud, for example, by setting up multiple dummy accounts in order to sort of suppress the absolute number of chargebacks to any individual merchant, or sometimes what we've seen more recently are processors

that run numerous \$1 transactions in order to essentially to dilute chargebacks, to keep them below these MasterCard tolerances. So that kind of activity by payment processors is something that we will always find interesting.

Andrew Smith:

And in addition, payment processors that essentially bury their head in the sand, that have numerous red flags that they're actually processing for a fraud, they have a variety of different red flags, including high levels of chargebacks, but they nonetheless continue to process for that same company, and as a result, consumers are injured. So this will be an area where we will continue to be very active. RevenueWire was announced within the last two or three weeks, but we have lots of other payment processor cases in the hopper that will be announced over the coming months. And it's an area where currently we are committing a lot of resources.

Alan Kaplinsky:

Okay. I want to come back to you, Malini. And the issues that are under slide facing everybody right now, that is the level of coordination that the FTC engages in with respect to CFPB and State attorneys general. And I wonder if you just comment generally, whether I mean, you've been at the FTC through several administrations, so if you noted any real change since the Trump administration came into office.

Malini Mithal:

That's a great question, Alan. But I will say, I mean, one of the advantages of... many advantages, I guess, of working at an independent bipartisan agency is, a lot of things like that just don't change. So we have worked hard to make sure that we are a good partner with the States and with other federal agencies throughout our various administrations. And I don't see that changing at any point. It's beneficial for our consumers for that to be the case, because different ones of us might be hearing about different issues and different scams. And a lot of times kind of partnering our thoughts or what we're hearing is helpful. And at the same time, we also like to make sure we're coordinating because we want to avoid duplicating efforts or double teaming industry.

Malini Mithal:

So for example, with the CFPB, we have an MOU that we use to kind of notify each other every time we open an investigation or bring a case so that we can kind of see what the other is doing and making sure that we're using our resources wisely. A great example of why it's important for us to coordinate no matter what has been COVID, that's something where we have regular calls, because the CFPB and CTG, with them we talk about various issues that consumers are facing, and we've been able to help each other with targeting that way. And I think that's just kind of one really important example of us working together to make sure that we are all being vigilant in protecting consumers

Alan Kaplinsky:

Right. Now, I want to go back to you, Andrew. And that is the FTC-CFPB Joint Workshop and the accuracy of credit reports. Is there any plan by either or both of the agencies to issue a report on that workshop? And I'm wondering if you could just discuss briefly the highlights of the workshop.

Andrew Smith:

Sure. Whether we're going to issue a report, I don't know what the answer to that is. And I will ask the staff responsible for it. Typically we do report out the results from our workshops, even if we have this sort of hierarchy of different types of reports, which would mean nothing to anybody outside the commission, but we frequently... what we'll do is we'll issue what's called a staff perspective which is a little bit more informal, and rather than an actual report of the commission by the commissioners. So I would hope that what we would be able to do is report out something about the accuracy of credit reports. One of the reasons why I wanted to do this workshop was because I was a little concerned that there were a lot of pressures on the credit reporting system to remove data.

Andrew Smith:

One of those pressures come from the end cap, which is the settlement that the Credit Bureau has made with lots of attorneys general. I don't remember if it was 50, but it was a lot. And as a part of that, what we have seen is that Lead and judgment data has come out of credit reports, as well as some other kinds of data, I think. And then there's pressure on medical trade lines and pressure on collections trade lines and pressure on furnishers generally. So furnisher being the people who provide the data into the system, whether they be banks or somebody else. Pressure on them, both regulatory pressure in terms of CFPB examinations and the like, and CFPB and FTC rules and bank agency rules on data furnishing, but also private lawsuits.

Andrew Smith:

So how have these affected not just the accuracy of credit reports, but also the quantity and the quality of data and the credit reporting system. And I think that what we found was actually, I think pretty good. There seemed to be a lot of agreement that the end cap, which was, again, the State AG Settlement has, was generally viewed as positive. And the Credit Bureaus noted that this at the end cap and the collaboration that ensued following that, allow changes that would have been very hard for them to undertake individually.

Andrew Smith:

So one of those biggest changes has been to require furnisher to use the Metro 2 Format, which has caused many furnisher just to quit the system because they weren't able to integrate Metro 2 with their systems. But because of that... because now it's all the data's coming in using that same format, which is much more robust, there's much better accuracy. Differing views on tax liens and civil judgments, industry thought that this wasn't really an issue with the accuracy of the underlying records, but rather with the lack of identifiers, but the consumer advocates said, well, yeah, that Lead and judgment, data it's frequently not updated, and so it's unreliable.

Andrew Smith:

From our perspective at the FTC, our focus is now on sort of the non-credit world. So not necessarily the big three nationwide consumer reporting agencies got much more on background screeners and tenant screeners. And we've been very active in that space, for example, with our case against RealPage, which was a tenant screener, and for accuracy violations, and we're going to continue to be active in that space. I anticipate that there will be more enforcement actions of that same type. And in that case, we had a special panel on accuracy considerations for background screeners, and everybody thought that there could be real issues with public record, a big issue for accuracy and background screening, particularly the lack of identifiers, incompleteness, not frequently updated. So that's something that we're going to be spending some time thinking about.

Andrew Smith:

But I think it was a good... it was a one-day workshop. I think it was positive generally. And like I said, my hope is that we will report something out, but I'm not confident that we're going to be able to make that happen.

Alan Kaplinsky:

Right. Chris, do you have any comments on what Andrew had to say about credit reporting?

Chris Willis:

Well, certainly we do hear a lot from clients about the necessity of doing large-scale deletions of trade lines under certain circumstances. One of those recent circumstances has been the COVID crisis, where the Fair Credit Reporting Act requires responses to disputes within 30 days, but because of staffing difficulties of people not being available to work and be in the office where they need to be to resolve those disputes, there may be very large numbers of accurate trade lines being deleted because of the very high volume of meritless disputes that furnisher receive. And it causes me to worry about the accuracy of credit reporting and the completeness of data therein. And so we'll just have to see how that plays out.

Alan Kaplinsky:

Right? Okay. Malini, the FTC versus Credit Bureau Center, a very important case dealing with the question of whether the FTC can obtain restitution under 13B of the act. Could you give everybody a brief status report on that?

Malini Mithal:

So that was a case to come out of the Seventh Circuit. So before I dive into the details there, one thing I hope that is kind of apparent after our discussion today, is that the FTC is continuing to engage in a robust law enforcement and seeking money. So whether it's coming from the staff level, Andrew, the commissioners, this is something that we've all been focused on, is making sure that we're engaged in vigorous law enforcement and seeking strong remedies. So for example, I started by talking about the progressive order, which is for \$175 million. I also mentioned our CEC case for 30 million. CEC is actually in the Seventh Circuit where CBC came down. I know that's confusing because one case is CEC and the Seventh Circuit decision is CBC. But one thing I want to say about CBC is, it does talk about limiting or it does limit one type of relief we can get in one circuit, it doesn't affect our ability to get civil penalties or relief under another section of the FTC Act, which is in section 19.

Malini Mithal:

And as I just said, it's in one circuit. So defendants have raised these arguments and cases in other jurisdictions saying, Oh, the FTC is limited in what monetary relief it can seek, and defendants and all these other jurisdictions have been struck down. So, so far we've won all these other arguments. Now, I'm asked for the CBC decision itself. We are seeking appeal of that. The [inaudible 00:30:38] petition is pending before the Supreme Court. So we'll all have to stay tuned on how that is handled.

Alan Kaplinsky:

Okay. Thank you. Well, Andrew, although we have run over, it's such an important area that I think we would be remiss if we didn't circle back to the privacy agenda at the FTC. So I'm wondering if you could cover that and then we'll bring the webinar to a conclusion.

Andrew Smith:

Okay. Yeah, I'd be happy to. So privacy, we enforce a couple of specific statutes, and then we also enforce our sort of our general our organic statute, section five of the FTC Act, the prohibition on unfair and deceptive practices. So with a specific statute, Fair Credit Reporting Act, Children's Online Privacy Protection Act, and the Telemarketing Sales Rule. We actually have civil penalty authority. And so we've been active in that area with the Fair Credit Reporting Act, I've already mentioned our case against RealPage. We also brought a case against the mortgage broker, who we alleged was illegally disclosing on the internet, our contents of credit reports. CAPA, Children's Online Privacy Protection has historically been a big priority of ours. And it continues to be in the coming year. Last year, last fall, we announced an enforcement action against Google and YouTube, and a fine of \$170 million for illegally engaging in online behavioral advertising with respect to the users of child-directed content, which violated the CAPA rule.

Andrew Smith:

We are currently engaged in a review of the CAPA rule. We requested comments on a variety of topics. We have not yet gone out with any kind of proposal. We just issued a request for information, including some of the issues that we dealt with in the YouTube enforcement action. We put out a request for comment, and we got, I think 175,000 comments. So these are really deeply held positions that many people have about children's online privacy. And that's going to be a significant amount of work for us to read and understand all those comments and figure out what the next steps might be with a newer proposal. That's going to be a big priority coming up over the next year, though. With respect to TSR, Telemarketing Sales Rule. Malini mentioned that our case against the CEC, the for-profit college.

Andrew Smith:

Another thing that we do is, enforce our orders that we already have against companies. So we have orders already... administrative orders against some big tech platforms, including Facebook and Google and Twitter. And in the last year we enforced our order against Facebook, the Facebook order, I believe that prohibits Facebook for misrepresenting anything about... misrepresenting how it collects, uses, or shares consumer data. And we alleged that it misrepresented the use of the data. And that resulted in a \$5 billion penalty. That's telling you to be against Facebook, as well as important injunctive relief, including privacy impact assessments and the like. And the court just entered that order within the last week or two against Facebook. And then finally, our General Organic Authority against deceptive and unfair trade practices. And there, I think you're going to continue to see cases against companies that make specific privacy promises to consumers and break those promises.

Andrew Smith:

You're also going to see cases under the US-Europe Privacy Shield, which is an agreement between the U.S. and Europe to allow transatlantic data flows. And we have enforcement responsibility against companies that say that they adhere to those privacy shield principles, but they do not. Every year we bring several privacy shield cases. And in fact, this year, we actually are litigating one against a company called RagingWire. So you're going to continue to see a lot of work, a lot of activity in the privacy shield area. And with that, I will turn it back to you, Alan.

Alan Kaplinsky:

Yeah. Thank you very much, Andrew. I think after listening to you and Malini, you have certainly destroyed any myth that there might be, that the FTC has taken its foot off the accelerator during the last three years under the Trump administration. Even though the Republican commissioners constitute a majority of the commission. So I just wonder we'll wrap things up, and I just want to give you a last final opportunity either, or both you and Malini to make any concluding comments.

Andrew Smith:

Well, no, that's very nice of you. I would just say that I just thank you and the audience for having us on, and for being interested in the work of the Federal Trade Commission.

Alan Kaplinsky:

Yeah. Okay. How about you, Malini?

Malini Mithal:

Not, absolutely. I think you've [inaudible 00:36:33].

Alan Kaplinsky:

Okay. Chris, did you want to add anything?

Chris Willis:

No. Just to thank Malini and Andrew for being on our webinar today and puts you guys against you I and in person.

Alan Kaplinsky:

Okay. So that concludes our podcast for today. I want to thank Andrew Smith, Malini Mithal, my partner, Chris Willis, and all of our listeners who downloaded and listened to our podcast this week. I hope you enjoyed it. If you have any questions or suggestions for the show, please email them to podcast@ballardspahr.com, and stay tuned each Thursday for a new episode of our show. Thank you again for listening.