

Consumer Finance Monitor (Season 5, Episode 16): Understanding the Legislative and Regulatory Priorities of Consumer Advocates: A Conversation with Special Guest Lauren Saunders, Associate Director, National Consumer Law Center

Speakers: Alan Kaplinsky, Lauren Saunders

Alan Kaplinsky:

Welcome to Consumer Finance Monitor Podcast, where we explore important developments in the world of consumer finance and we explain what it means to the industry and what it means to consumers and to the general public. We do our podcast show on a weekly basis. A new show gets released every Thursday during the year, except during two holiday weeks. And as we have done in the past, we're going to be concentrating today on consumer advocacy in the consumer financial services area. And I'm very pleased to have as our guest today, Lauren Saunders.

Alan Kaplinsky:

And let me give you Lauren's, bio, a short bio, because her accomplishments could merit a show in and of itself. But Lauren is the associate director of the National Consumer Law Center, or as it's often referred to the NCLC. The NCLC's a nonprofit organization that works for economic justice for low income and other disadvantaged people through policy analysis, advocacy, publications, litigation, and training. Lauren manages NCLC's Washington DC office and directs its federal legislative and regulatory work. Lauren is a recognized expert in consumer protection areas, including small dollar loans, banking, FinTech, and payment systems. She's the author of NCLC's well known treatise on consumer banking and payments law and contributes to consumer credit regulation among many other publications.

Alan Kaplinsky:

So Lauren, before we get started, I wish you a very warm welcome to our show.

Lauren Saunders:

Thank you, Alan. Thank you so much. I appreciate you having me. It's a pleasure to be here.

Alan Kaplinsky:

Okay. So we have a lot to cover and limited time. And really, the purpose primarily is to find out about NCLC's priorities, both legislatively, on the regulatory side of things, and if there are any judicial, any cases that are pending where the outcome is very important to NCLC, it would be good to know about that. So here we are a few months into 2022. A lot has occurred already and we need to catch up. So Lauren, I wonder if you could tell us what ... Let's start with the legislative priorities first, and then we'll go to regulatory and judicial.

Lauren Saunders:

Right. Well, in this environment, I don't think there's a whole lot moving in Congress right now, but I'd say our top legislative priority is probably a 36% interest rate cap on a national level, which we think would help consumers across the nation, but also industry by, I think, getting rid of some of the predatory lending out there and helping people focus on sustainable lending.

Alan Kaplinsky:

Just to stay with that bill for a second. What is the status of that bill? Is it in the House right now?

Lauren Saunders:

It's been introduced in both chambers. But, yeah.

Alan Kaplinsky:

But it's not moved?

Lauren Saunders:

It has not had a mark up in either chamber.

Alan Kaplinsky:

Yeah. And I take it the chances of any legislation in the consumer or finance area moving is probably not very high between ... at least in this Congress.

Lauren Saunders:

I think that's right. I mean, there were some provisions in the Build Back Better bill, like down payment assistance, small dollar mortgage pilots that we supported and we still hope that those might resurface.

Alan Kaplinsky:

Right. All right. Well, anyways, so 36% rate cap bill. What are the other things that you would consider an NCLC priority legislatively?

Lauren Saunders:

Yeah. We're supporting overdraft fee bills in Houses, credit reporting reform, student loan bills. There's a variety of topics that there's bills on.

Alan Kaplinsky:

Yeah. But they're not going to be moving at least in the near future. So let's turn to what I consider an area where there's likely to be a lot more activity than before Congress. And as before, the government agencies where you've got the Biden Administration that certainly has a much different agenda than what the Trump Administration had in this area. So let's start with the CFPB, and I'd like to get your thoughts, first of all, on how you think Rohit Chopra, the director of the CFPB, his progress so far in tackling the consumer agenda?

Lauren Saunders:

Well, it's still early days, but we are certainly seeing a lot of activity, a lot of focus on issues that are deep problems in the consumer area. I think it was just today that they filed a lawsuit against TransUnion for repeat violations. Certainly credit reporting is going to be a top priority there, rightly so, because it's far and away the number one complaint that they get and it's been a long standing problem. We are seeing a lot of focus on overdraft fees, both on the industry side and the agency side, of course. We're seeing a lot of focus on payment fraud and focus on generally helping people recover from COVID, which is definitely one of our top priorities.

Alan Kaplinsky:

Yeah. Yeah. Well, I'm wondering, I mean, one thing I've heard, Lauren, as a, I guess you could say a mild complaint of some other consumer advocates that I've talked to about the CFPB, and that is some disappointment that on the enforcement side of things there's really not been a lot of activity. I mean, I understand. Today, I just read about a big lawsuit or enforcement initiated against TransUnion for violating a prior order that had been issued, I think, in 2017. But other than that, I think he's been in office about six months, and I don't think there's more than a handful of consent orders or lawsuits that have been initiated. At least, that surprised me. I expected this to be several a week, not a handful in six months. Does that disappoint you?

Lauren Saunders:

No. I think it's still early. Investigations take a long time. And one thing Director Chopra has said is he wants to focus on the big offenders and not the small fry. It's easy to churn out a lot of small cases against companies that aren't going to put up much of a fuss. The big ones, the ones that were going to be fought harder or maybe are more ambiguous areas of the law, those take more preparation. And of course, he needed to come in and figure out what his priorities were going to be. And even though he's certainly familiar with the CFPB, I think these things take time. So I do expect enforcement to be a significant tool that he will be using.

Alan Kaplinsky:

Right. It's just going to take a while for him to ramp up in that area, what you're saying. Let's talk about another thing that you mentioned. You talked about overdrafts, and there certainly has been a lot of talking at the CFPB about overdrafts. And it's clear that Director Chopra is not enamored with bank overdraft programs, and he's made that very clear in writing more than once, I might say, has also issued an RFI, request for information, about what he refers to as junk fees, which he says included in the litany of potential junk fees are overdraft fees. And so what I'm seeing, this is more just my observation, I'm not hearing this from other consumer advocates, is that he has shown of a propensity to jawbone or to get on what we pejoratively refer to as the bully pulpit and talk about things that he doesn't like.

Alan Kaplinsky:

But yet, I haven't seen one enforced matter involving overdraft fees or other junk fees. I haven't seen any regulatory initiative dealing with overdrafts. I know the regulatory agenda, the CFTB, hasn't yet come out the one that will reflect his thinking, and maybe it'll be on there. But I am very dubious whether we're going to see anything formal, at least in the regulatory area. I think he feels that that takes too long and his odds of getting something accomplished may not be so good because whatever he does will get challenged either in Congress or in the courts. And it's a lot easier to just speak out against things and hope that the supervised entities listen to what he's saying. Do you have a reaction to that? Am I ...

Lauren Saunders:

I think that means to be seen. I think it is a question of how much rule making will be part of the tools that he uses. He certainly has talked about using the range of the bureau's tools and that includes not just the traditional ones of rule making, supervision, and enforcement, but also obviously his public megaphone and his ability to get information from companies, consumer education, and everything he can do. And if he can accomplish things by just speaking loudly and getting people's attention, more power to him. We do think of overdraft fees as an area where we need a rule making. I mean, we have seen a lot of good changes in the market in the last few months but it's at a handful of banks and some of the reforms have been more partial than others. And we think both competition as well as consumers would really benefit from a level playing field in the overdraft fee area. So I don't think we know yet, but we are definitely hoping that is one area where there will be rule making. But we know there's other important rule makings going on that are taking up capacity there. So we don't know yet.

Alan Kaplinsky:

Yeah. The problem that I have, and I'm sure NCLC focuses on this as well, and that is there has to be some alternatives available for consumers who don't have high credit scores, who have difficulty getting credit, who live paycheck to paycheck. Payday lending, at least the type of payday lending that is conducted domestically within the US, bricks and mortar or online, that's declined. I'm sure a lot of unlawful payday lending programs still exist through Indian tribes, through offshore lending and stuff like that, where the APRs are through the roof. And you certainly don't want consumers to get mixed up in that. But what is going to be ... I mean, if you get rid of overdraft fees, if most of the banks eliminate the formal programs that they have, as some of them already have, and payday lending has been minimalized, there isn't much ... Most of the companies, the legitimate companies, converted their programs to installment lending a while ago because they were anticipating the CFPB was going to issue this regulation. What's left for consumers? Where do the consumers with bad or impaired credit, where do they go to get the small dollar loans?

Lauren Saunders:

Well, first let me say that I think the answer to how overdraft fees ought to be treated is exactly in your question. You focus on overdraft fees as a form of credit, as something that is given to people who maybe have bad credit scores or struggle to get credit cards or to pay them. And that's right. It is a form of credit. And that's what we have called for, is for it to be regulated honestly as a form of credit. We haven't said that consumers should never get overdraft protection. We think overdraft fees need to go back to their roots as an occasional courtesy to cover a check or a preauthorized electronic payment that would otherwise bounce. But if banks want to offer credit, then offer it honestly as credit and not in the form of this exorbitant priced high cost credit feature that is a balloon payment loan as bad or worse than payday loans. It just leads people into a cycle of incurring fee after fee after fee, often all are larger than the small amount of credit they've been given from a debit card overdraft.

Lauren Saunders:

And we think banks can go back to offering affordable overdraft lines of credit, like they used to do until they decided that they could make a lot more money off of overdraft fees. And obviously there's also been a lot of focus around trying to encourage banks to offer small dollar loans. I think banks are a perfect place for small dollar loans because unlike a brick and mortar payday loan lender, they're not trying to put their entire overhead on the backs of a small dollar loan. A small dollar loan really could be more of a service, a feature of a relationship with a consumer of an account and hopefully a broader relationship that leads to credit cards and mortgages and other kinds of products. They don't need to make a lot of money off of it. They can see what's going on the consumer's account, what they can afford.

Lauren Saunders:

And I think the existence of overdraft fees is a lot of what has kept banks out of offering small dollar loans, because it would cannibalize their overdraft fee revenue. They were happy with their high cost form of credit. So let's be honest. It's credit. Let's offer it honestly as credit. Let's price it affordably. Let's offer it in installment payments rather than balloon payments. And whether you drawing it through overdraft protection or just through an affirmative loan or line of credit, I think there's a lot better ways of providing credit than overdraft fees.

Alan Kaplinsky:

OK. Let's turn to some other junk fees in addition to overdraft. Overdraft, I assume, is one of the most important ones from the standpoint of generating revenue and looked at from a consumer standpoint in terms of making sure consumers are protected. But what other kinds ... In the RFI that Rohit issued, he even talked about things that aren't even credit related, like you go to a hotel and they charge you some kind of a fee to get the New York Times in the morning or the Wall Street Journal, or they charge an activity fee that they slap onto your bill. And I must admit some of those things I'm annoyed by. I think I just about everybody is. But what about in the consumer finance area, are there other fees that you would consider to be junk fees that ought to be away with?

Lauren Saunders:

Sure. We're seeing pay to pay fees, fees just for paying your bill. Those were certainly addressed in the Credit Card Act because they were a problem in the credit card space. But we've seen some in the mortgage space, fees as high as \$25 to pay a bill. I mean that is certainly a junk fee.

Alan Kaplinsky:

Not just a regular bill, right? Something that where somebody is on the verge of delinquency or may already be delinquent. I mean, isn't it more nuanced than how you described it? It's not people aren't charging routinely a fee to every month to pay your bill.

Lauren Saunders:

Well, they may be in different situations and may depend on the company or the payment system. But that's one category of fees. I view the growth of tips as a form of junk fee. Companies that are disguising their fees and interest in supposedly voluntary tips. I think that is an invasion and really a form of junk fees.

Alan Kaplinsky:

Even though it's voluntary, right? I mean a tip-

Lauren Saunders:

It's still a cost and a fee and should be treated as such. And there's all sorts of ways that companies can steer people into thinking they need to tip or making it difficult not to tip. We're seeing inflated expedite fees. If you actually want your credit right away, we're pitching credit to people who need credit right away, but, "Oh, you really want it right away?" Well, then we're going to charge you a fee far higher than the cost of the company of actually sending you the money.

Alan Kaplinsky:

Okay. All right. Let's turn to the area of FinTech. That is online credit programs and other kinds of online consumer finance programs. Love to get your thinking about some of the newer kinds of products that are being offered such as earned wage access where somebody, some smart techy a few years ago came up with the idea of, gee, consumers get paid generally every two weeks but they actually get paid in arrears. So why not give them access to their money as soon as they've earned it at the end of each workday. And there has been a proliferation of these earned wage access programs. CFPB hasn't said a lot about them as yet. Some of the state agencies, banking agencies, and attorneys general, some of them have weighed in on it. And there seems to be ... people are of mixed views as to whether this is a good product for consumers or this is just another type of payday lending. Wondering what NCLC thinks about that?

Lauren Saunders:

Well, I do think it is a form of payday lending. It is not as horrible as traditional payday lending. Certainly the fees are a lot lower and in most of the programs the payments are not debited of your bank account so there's not the risk of overdraft and NSF fees. But we do view it as a loan. And your pay cycle, you still have the same amount of money to live every two weeks, and whether you shift your pay cycle earlier or not, you still have that same amount of money. And I think employers do have a role to play in helping people to help with their finances. We certainly don't want to see a situation where people are basically pushed into paying to be paid, which is often what happens with these programs. Because if you can't handle an expense based on your current paycheck and you dip into your next one, well then the next pay cycle comes around and you're going to be short. And so you are going to need to dip in again.

Lauren Saunders:

It's pretty clear that people who use these programs typically do so almost every pay period. And even if the fees are small, those add up, and these are often hourly workers for whom every dollar counts. I mean \$10 is more than an hour's worth of wages. And now, employers may see benefits of offering these programs. I know that the providers tout them as a benefit and something that will help them retain workers or get people to cover shifts. And if it's a benefit for employers, then they should offer it for free as a benefit, and some do. Walmart covers the cost completely or Payroll Providers can cover it as part of their suite of services. So free earned wage advances, I think, maybe have a role to play. I still think they're a form of balloon payment loan and aren't a panacea. Used occasionally, I think they can help people. But whether they make it harder to cover those bigger expenses like your rent and your credit card payment that come once a month, if you're encouraging people to spend money, access it every single day, I'm not convinced it's really good for people at the end of the day in budgeting. But we haven't called for them to be eliminated, but we have said that these are credit, regulate them as credit and employers should really cover the costs and make it a benefit and not push people into paying to be paid.

Alan Kaplinsky:

Yeah. So I take it ... I've seen a lot of different kinds of earned wage access programs. They aren't all structured the same way. Some are structured in a way where the company takes the position that it's not a form of credit and therefore they don't need to comply with the Truth In Lending Act. And I take it, you would take exception to that point of view.

Lauren Saunders:

Yes. I mean, unless it's free. If it's free, obviously if there's no finance charge, then it's still credit, but it's probably outside of TILA's scope. But if there's a fee, we think they ought to be compliant with TILA. Obviously the CPV under Director Kraninger issued an interpretive opinion and approval order about a couple of very narrow classes of earned wage access providers. We think those were wrong and we've called for them to be reversed. And there was a letter from the CPB expressing some question about whether these programs are in fact credit. So I think it remains to be seen what position the CPB will take there, but even then they were focusing on largely free programs or almost completely free ones.

Lauren Saunders:

California came out with a recent interpretive opinion, which was interesting. On the one hand, it found that one provider, Flex Wage, was not offering loans under California law. Flex Wage has a unique model where the money flows directly from the employer to the employee, which is not the way most of the other programs are set up. But California also made very clear that they are not going to put up with evasions of their laws. And one of the key factors was whether they were charging a lot more than they could if they were offering it as credit and they weren't. And they've also made clear that under California law, and California's not unique in this way, just because it's based on earned wages doesn't mean it's not a loan. A lot of the small dollar loan program laws that were adopted 100 years ago were done as a result of salary lenders who were, in fact, selling access to earned wages. And so a lot of the state laws are very explicit there.

Alan Kaplinsky:

Right. Let's turn now to another product that is even much bigger than earned wage access in terms of the volume of transactions that we're seeing, and that's buy now, pay later. And a lot of people have been very excited about that product and have viewed it as a new product. I myself have looked at it as just a form of a very old product, namely layaway programs. At least it's, I think, a close relative of layaway programs. And wondering what your reaction is to buy now pay later?

Lauren Saunders:

Well, I actually view it as very different from layaway because layaway is save now, buy later.

Alan Kaplinsky:

Right, right.

Lauren Saunders:

Layaway was not a form of credit. This is clearly a form of credit. And I actually think it's more analogous to another old product, which is just an installment loan. It's just an installment loan that has a relatively short repayment schedule. I have mixed feelings about buy now, pay later. I think there is a sweet spot between paying for something in full today with your debit card and putting it on your credit card and paying for it for the next 20 years with a lot of interest. And of course, we've seen other installment loan products spring up to try to meet that middle ground. Certainly we've got real problems right now with buy now, pay later being viewed as outside of the Truth In Lending Act and our credit protections. I actually don't think that's accurate. The more we dug into it in response to these recent inquiry, the more it's clear to me that these are a charge card as defined under TILA. And even though the Credit Card Act and TILA's credit card protections were written a long time ago before buy now, pay later existed, they match up pretty well with what we need here. We need-

Alan Kaplinsky:

So you're saying that ... I mean, they are generally repaid in four or fewer installments and generally a consumer isn't assessed a finance charge. The merchant ends up compensating the FinTech company or the finance company. But you say you would consider them covered the way a credit card or a charge card would be covered by TILA.

Lauren Saunders:

Exactly. You don't need to have four installments or a finance charge for a credit card or charge card to be covered. The old American Express card where there was no finance charge and you paid it at the end of the month, that's still covered by TILA. So it's pretty explicit there. And if you look at the definitions, they really fit quite well with buy now, pay later.

Alan Kaplinsky:

Yeah. Interesting. Are they subject, and you have to part my ignorance here, Lauren, because it's been a long time since I've looked at the charge card provisions, but does that require disclosure of a finance charge? I mean, what is the trigger in general?

Lauren Saunders:

Yeah. I mean, a charge card is just a form of credit card, so it triggers the same protection that you have for credit card. You've got to disclose fees. You've got to consider ability to repay. You've got to provide chargeback rights if there are disputes. You've got to offer statements.

Alan Kaplinsky:

Okay. Well, are you aware of any buy now, pay later companies that are treating what they're doing as a form of credit card or charge card?

Lauren Saunders:

Not explicitly, but I do think from what I see, it seems increasingly clear that the industry views that this is the direction it's going. Certainly in some apps you see that they're displaying a virtual card and people can use, of course, these buy now, pay later apps physically in stores, and they display a little virtual card on your smartphone that you can then tap at the register. It's a point of sale credit product to buy goods and services just like credit cards. So I suspect they're waiting for a little more clarity from the CPB about exactly what applies and how. Most of the protections fit really quite well. Ability to repay. It's not an owner's obligation for of credit cards. And I think they could be doing the same thing. Obviously we're seeing a lot of developments on the credit bureau side of encouraging reporting of these payments and coming up with some sort of credit report, even if it may not be the traditional one. There may be things like the statement requirement that will look a little differently.

Lauren Saunders:

But as people are using these products repeatedly throughout the month, in some ways it's a very backwards product. Instead of consolidating all your purchases into one place, one statement, one payment a month, you got this Helter Skelter of payments coming out of your account every two weeks from the last purchase in crazy ways that the credit cards were reformed back in the '60s of getting rid of. So maybe it doesn't look like a monthly statement the same way that the credit card statement is, but you could have a new statement with every purchase that said, "Okay, here's your total, here's your new payment schedule. We're going to align it every two weeks rather than every single day."

Alan Kaplinsky:

Well, right now the CFPB has done, I guess it's an RFI. They've made inquiries of a number of the major buy now, pay later companies to get information. Where do you think they'll go? Do you think they will actually initiate a rule making pertaining to them? Or do you think they'll let their views be known in some other fashion?

Lauren Saunders:

Yeah. I mean, again, I don't know. It's still early days with Director Chopra. I expect that we'll see a research report based on their findings with some information about what's going on in the market. I don't really think they need to do a rule making here. I think they fit within the definition of credit card and charge card. And I think they could clarify that without doing a whole rule making.

Alan Kaplinsky:

Yeah. Okay. I guess in much the same way as they recently concluded that their UDAP provisions cover discrimination pertained to non-credit products.

Lauren Saunders:

That's right.

Alan Kaplinsky:

Yeah. I mean, I thought that was such a breakthrough announcement that should have called for something more than just changes to their examination manual. But I know other people disagree with me on that.

Lauren Saunders:

I mean, I think it's hard to argue that it's not unfair to discriminate against somebody. It's not taking advantage of them.

Alan Kaplinsky:

Right.

Lauren Saunders:

And I don't think anybody would justify discrimination in any market, whether or not you're covered by a COA or a fair housing act.

Alan Kaplinsky:

Right. Let's talk about another type of newfangled product, and it's been going on now for several years, but it's still, I would consider it a type of FinTech product, and that's an income share agreement. For those of our listeners that aren't familiar with it, maybe if you don't mind, Lauren, you could describe briefly what that product is all about and then I'd like to get your NCLC's thinking about that particular product.

Lauren Saunders:

Sure. An income share agreement is generally understood as ... Often it's in the student loan context, but it doesn't need to be, but providing financing for somebody to pay for education and in exchange, they agree to repay a share of their income after they graduate. So some percentage of their income for some period of time. These are typically styled not as loans, but certainly it is a loan. You're given money today and it's being repaid later. It's sort of like an income based repayment structure like we have for traditional federal student loans, except it's viewed as a sale of ... Well, I'm not sure it's viewed as a sale of wages, but they use various legal terms to claim it's not alone. But you get money now, you repay it based on what your income is. So you make more, you pay more; you make less, you pay less. In theory, if you make so little, you don't have to repay at all or you repay less than they lent you. I think they structure these in ways that doesn't happen very often.

Alan Kaplinsky:

Right. And what are NCLC's thoughts about that product?

Lauren Saunders:

Well, again, we think this is a loan. I think it needs to be offered honestly as a loan with the protections you get from lending. People need to be able to compare it to other forms of borrowing. The APRs can end up being a lot higher than you could get just from a traditional loan. Certainly they base these based on what they think you're going to make and they expect the healthy return. We're very concerned about piling on unaffordable debt. We have a crisis right now of student debt already. And people may be you getting these income share agreements on top of traditional loans. And so it's just piling onto their debt. Affordability is not taking into account their existing student debt. A lot of them effectively have really big prepayment penalties, which we don't actually pay that share of income over the 10 years and you want to pay it off early, it's like front loaded interest, which is a form of prepayment penalty.

Lauren Saunders:

I mean, these are often very young people who have no idea what it costs to live and how you manage a budget and what things are going to look like when they get out of college and salaries that may sound high to them actually, aren't so high in the real world. And they really may not anticipate what a burden this is going to be and how it's not necessarily going to end in 10 years. If things happen and they're not able to make the full payments, they can get extended. I mean, these would go on for 20 years or longer. And you got you young people pledging really indentured servitude for a couple of decades. And we think it's just going to compound the problem of student debt.

Alan Kaplinsky:

So would it be your sense or feeling that it'd be a good idea not to allow this product at all? Or would you be okay with allowing it as long as it's treated like a credit product?

Lauren Saunders:

I mean, we haven't called for it to be eliminated, but we definitely have called for it to be treated as a credit product and have the basic protections for credit, including responsible lending, interest rate limits, ability to repay. It may have the most appropriate use at schools that are not eligible for federal student loans. Now, you got to make sure that this is just not a vehicle to get funding for the for-profit schools that have often scammed students. We've got a lot of problems out there with programs that make big promises and really don't deliver anything useful. But there may be coding boot camps and other places that aren't eligible federal student loans. Structured right with reasonable terms and without gotchas, maybe they have a place. But it's the form of credit. And let's be honest about that.

Alan Kaplinsky:

Yeah. Okay. I mean, we've talked about earned wage access, income share agreements, buy now, pay later. Are there other kinds of FinTech products, either credit or non credit that are of concern to you?

Lauren Saunders:

We're really concerned about fraud in P2P services, payment services, both apps as well as bank to bank services like Zelle. We're just seeing exploding levels of fraud and really inadequate consumer protections. And so the fed, of course, is developing the new Fed Now service that will operate like Zelle, bank to bank. We've urged them not to copy the problems of Zelle with really leaving people unprotected if they're defrauded into sending money or mistakes like putting in the wrong cell phone number. Sorry, your money's gone. We think they can make Fed Now a really model payment system that hopefully then others will copy. And we think the CFPB ought to amend regulation E and make clear that consumers are protected with fraud in the inducement. We don't even think they need to make an amendment to clarify that consumer errors are covered.

Lauren Saunders:

And I think this is in the interest of industry and not just consumers. I mean, if you look in the UK, which has had faster payments longer than we have, no surprise, they saw fraud level skyrocket once the faster payments come on board. And the payment industry has come together and said, "Hey, I think we need to protect consumers here if they're going to have confidence in the system and adopt it and use it." So they've adopted this voluntary contingent reimbursement model that gives some reimbursement to consumers. But unfortunately the implementation is uneven because it's voluntary. And the payments regulator has now called for mandatory reimbursement. And we think that we need that here in the US as well.

Alan Kaplinsky:

And I take it you are getting pushback from that industry. They haven't embraced ... They're not on the same page with you yet.

Lauren Saunders:

Not yet, but I think we're going to get a growing realization there.

Alan Kaplinsky:

What is the extent of the fraud? Do you know what the numbers are?

Lauren Saunders:

I don't have the numbers memorized, but they're in the tens of billions of dollars, I think. And I mean, these are sad cases. There's all sorts of fraud. I mean, there's fraud in the P2P apps. There's also fraud in somewhat in conventional payment systems. I mean, I just got an email yesterday about a woman who lost \$30,000, her entire savings, when it was transferred out of her account through a wire transfer that she did not do, so clearly unauthorized. But maybe outside of the EFTA and the bank is saying, "Sorry." We see a lot of problems, even just with compliance with the EFTA. I mean, the CPB, the FDAC, the Fed have all recently said banks and others are not complying with their obligations to investigate consumer disputes. It's a common problem. So we need more work there.

Alan Kaplinsky:

Yeah. Okay. What about ... I'd like to get your thinking about artificial intelligence, as more and more companies are utilizing it in the credit underwriting area. But even more than that, it's being used for marketing, targeted marketing. It's being used in the collection area. And I know the industry has clearly embraced AI. They see it as a really effective way, a better way to make credit decisions and collection decisions. But the CFPB seems to be concerned about it, worried about whether there could be some credit discrimination that's occurring, maybe not intentional discrimination, but the use of it having a disparate impact on certain protected classes. So I'm wondering what you're thinking is about AI in general?

Lauren Saunders:

Yeah. The potential for discrimination is what most concerns us because just because a machine is doing it doesn't mean that it doesn't result in discrimination. There's all sorts of data points that go into AI that correlate with race, things combined in

different ways can correlate with race. And we don't want to have discrimination no matter how it comes about. So it's really essential that we pay close attention to how these AI models work. I mean, we think regulators need to do some really in depth reviews of how they work and look out for potential disparate impacts. Companies need to do regular testing of their AI models to make sure the outputs are fair, are empirically derived, statistically sound and comply with fair lending laws. And this needs to be really intentional. I mean, they need to program the computers to look for and try to address disparate impacts. If there are better ways of achieving the goal, whether it's underwriting for credit or something else without the disparate impacts, they should program them to find that. So it's got to be very, very intentional. In the credit area, certainly we don't want to see either higher price credit or credit denials that are based on race, but in other areas we also don't want to see targeting for products that aren't suitable for people based on discriminatory models.

Alan Kaplinsky:

Right. Right. And as you alluded to a little bit earlier, it seems that you're of the view that discrimination shouldn't be limited just to credit and that the UDAP authority of the CFPB unfair and deceptive and abusive acts or practices, that that should be used for non-credit products like deposit accounts, remittances, other kinds of payment products, really anything, I take it, that is offered by a consumer finance provider.

Lauren Saunders:

That's right. I mean, I don't think any of us would want us see bank accounts denied to people on account of race. We wouldn't want to see people charged higher cost for remittances based on who they are. Discrimination has no place anywhere in the financial industry. I don't know anybody who would disagree with that. And again, I think it's hard to argue that it's not unfair to discriminate.

Alan Kaplinsky:

Yeah. Although what about discrimination based on location, where a person resides? What's your ... I mean, in other words, ECOA has got certain protected classes. I'm not going to list them all, but race is certainly an important one, sex, and there are several others. But there are other bases upon which financial institutions have been discriminating for years, and one is where you reside, where you're located. Do you look at that any differently? I mean, should there be protection for people based on that type of discrimination?

Lauren Saunders:

Well, I mean, location is highly correlated with race. I mean, unfortunately we still have a very segregated country. And if you have the same credit worthiness as somebody else, a black person who lives in a black neighborhood or a white person who lives in a white neighborhood and they have the same income and the same credit worthiness, why should the black person have higher priced credit or be denied credit based on where they live? I mean, that's exactly what we need to look out for in AI models, that they're not using other proxies like location in ways that result in discrimination.

Alan Kaplinsky:

Well, except that a bank, some banks would say we've got the right to define our lending area or the area in which we want to offer products to consumers. We don't feel that we have to offer them throughout the state that we're located in or the United States in general. I mean, you can't go into a community bank and maybe even a regional bank if you live in a particular state where that bank does not have bricks and mortar. It can be very hard to get loan own because the bank will say, "Our policy is we don't lend in that area." I mean, we-

Lauren Saunders:

Well, I mean, but that's not the kind of location based discrimination we're talking about. I mean, first of all, more and more banks and others are just lending online and they're offering it everywhere. And if they're offering it everywhere, that really means to mean everywhere and not have digital red lined areas. Obviously we can't have redlining and walling off areas where

people won't lend. Now, I'm not saying if there's a San Francisco bank that only lends in San Francisco that they have to lend in Los Angeles. But that's not necessarily discriminatory. But within San Francisco they're only going to lend in the white areas and not in the black areas, that's a problem.

Alan Kaplinsky:

Yeah. Okay. I hear what you're saying. I think sometimes there are gray areas where a bank can under the Community Reinvestment Act defines its lending area. And I take it, you would have a problem and a lot of people would have a problem if they defined it in such a way that it excluded a predominantly African American neighborhood. But on the other hand, at some point, a bank, it seems to me, has got the right to figure out what's its local community to which it lends money and takes in deposits. And one would think it doesn't have to define it more broadly than it wants to.

Lauren Saunders:

Well, I think you're mixing up a couple of different concepts. I mean, when you bring in Community Reinvestment Act, I mean, the problem with the Community Reinvestment Act is that a bank may lend all over the country. They may lend everywhere, but they define their zone of community reinvestment is some tiny corner of Utah that gets all the benefits of their CRA activities, even though they're lending all over the place. So certainly there's been a lot of effort gone into modernizing our Community Reinvestment Act regulations. That's not an area of my expertise, so I can't go into details about it. But we certainly that there's a need for modernization and that banks that are making money off of people ought to be giving back as well. Exactly how you accomplish that is a complicated question.

Alan Kaplinsky:

Right, right. Let me turn to one final subject because we're running toward the end of the hour and we're going to have to wrap things up, Lauren, and a subject that is very near and dear to my heart, because I've been very involved from the beginning of the use of arbitration and consumer contracts. Although you didn't mention it as a legislative priority, I assume you wouldn't be disappointed if Congress were to enact a ban on the use of arbitration in all types of consumer contracts and employment contracts.

Lauren Saunders:

Certainly. And I probably should have mentioned that as our top priority. If I could do one legislative change, that would probably be it.

Alan Kaplinsky:

Yeah, no. I'll allow you to amend your remarks. But what about at the agency level? I haven't heard anything coming from Rohit Chopra about arbitration. I mean, he's mentioned a lot of topics since he's been in office, but haven't heard any reference to that. Do you think that ought to be a top priority of the CFPB and does it disappoint you that you haven't heard anything from Director Chopra about it?

Lauren Saunders:

Yeah. I would say yes. Certainly it's a top priority. It's something within their jurisdiction. And we would love to see attention to it. Obviously he's constrained by the Congressional Review Act resolution that disapproved the prior rule, but that doesn't take away all authority and we'd like to see more public attention to it, more studies, potentially another rule. So, yes. I think that is a big absent point in his agenda so far.

Alan Kaplinsky:

Yeah. Okay. I mean, I don't think he's going to go there. I mean, that's just my opinion in that it would be very time consuming and he would have to conduct new studies because the old studies that they did that led up to the promulgation of what's called the Cordray Antiarbitration Rule, they're dated now. And it took the CFPB, I don't know how many years to get

from when they initiated a rule making pertaining to arbitration until they finally issued a rule. It took many, many years. And I think that's probably not an area that the CFPB wants to spend or use up a lot of their bandwidth on.

Lauren Saunders:

Yeah. I mean, rule making is time consuming, and I think you may be right in terms of the decision making there. It doesn't mean we couldn't use the bully pulpit, just like with overdrafts, right? There are banks that don't use arbitration. Capital One doesn't. I don't think Bank of America does in their consumer agreements. So if they can get by without these clauses, we think a lot of others can as well. And we think they could be doing some research as well even if they're not ready to tackle rule making right now.

Alan Kaplinsky:

Yeah, yeah. So before we wrap it up, Lauren, let me ask you one very open ended question, and that is, is there anything else that is on NCLC's agenda that we haven't spent any time on this morning?

Lauren Saunders:

Yeah. Ironically, you haven't touched on the number one area of my focus, which is rent-a-bank lending, preventing evasions of state interest rate limits and high cost lending, 150 to 200% APR range. I wish we had a national interest rate cap, but until we do, the state ones are what protects consumers against predatory lending. And we did have Congress overturn the True Lender Rule, which was an important victory. And we think both probably at the litigation level as well as potentially the agency level we can make some progress on rent-a-bank lending.

Alan Kaplinsky:

Yeah. Well, there is ... Yeah. And I'm sorry, that was an oversight on my part. There is an important lawsuit where I think it's called Opportunity Loans has sued the California-

Alan Kaplinsky:

Yeah. Department of Financial Services. And the outcome of that lawsuit, I think could be extremely important.

Lauren Saunders:

Yeah, yeah. A strange move by them. I mean, maybe they felt they backed into a corner because California was going to sue them if they didn't sue California. But we're optimistic about the outcome of that lawsuit, I think. Yeah. I think response actually may have been due any day now from the state.

Alan Kaplinsky:

Yeah. Okay. Yeah. Well, thank you for reminding me of that. It's not an area, I guess, that we've been very focused on, the CFPB in particular. This involves the bank, Prudential Agencies, more the comptroller, the FDIC and the Federal Reserve.

Lauren Saunders:

Yeah, yeah. Let me just mention one other issue in one minute, which is crypto. I'm not spending a lot of time on crypto. I think it's largely an investment issue, which we don't cover, but it is really distressing to see all these banking apps pushing crypto on people who are just going to lose their shirts. If you've got money to play with and you think you're going to make your fortune, fine. But people who can't afford to do that, I mean, it's just really distressing to see all these companies pushing people to invest in crypto.

Alan Kaplinsky:

Yeah. Do you think that's something that the CFPB could poke its head into? You think it would have jurisdiction?

Lauren Saunders:

Well, they certainly have jurisdiction over crypto as a deposit and as a payment. Investment side, not so much.

Alan Kaplinsky:

Yeah, yeah, yeah. Yeah. Because I mean, at least so far, I haven't seen anything coming out of the CFPB regarding it and it surprised me. It seems to-

Lauren Saunders:

Well, I know they're seeing a lot more complaints about crypto scams.

Alan Kaplinsky:

Yeah. No. It seems to be a regulatory vacuum, and in a way I get the feeling that none of the agencies really want to take the lead in the area. I'm not sure why that's been the case, but they all seem to be treading very gingerly in that area.

Lauren Saunders:

Yeah. If anything it's more of the opposite problem. I think some want to take the lead, but then there's a little bit of jockeying of who gets preeminency and who's stepping on each other's toes.

Alan Kaplinsky:

Yeah, yeah. There may some turf, I guess, concerns about who's really got the jurisdiction and who ought take the lead. But, yeah. Well, I agree with you. That's an extremely important area and one that not only consumers ought to be focused on, but also banks and others in the consumer financing industry that are dealing with crypto. Okay. Well, we have covered, I think, quite a bit and we're right up to about the hour. I really want to thank you very much, Lauren, for sharing your thoughts with us today, we've really covered the waterfront. Any final words or should we just wish our listeners a good day?

Lauren Saunders:

Well, thank you for having me. And I think we need to have more conversations between the financial industry and consumer advocates, because when we do that, we may find more that we agree on than we think.

Alan Kaplinsky:

Yeah. And I totally, totally agree with you about that and that's why I'm so happy that you've been on the program today. So thank you again. I particularly want to thank all of our listeners who have downloaded the program. And I guess the final thing I'm going to say is that we're very proud of the fact that a lawyer marketing firm called Good To Be Social has ranked our podcast program last year as the second best law related podcast program in the country. So we appreciate that honor. And with that, bid farewell.