

Consumer Finance Monitor (Season 6, Episode 47): Consumer Finance Impact of a CFPB Run Amok

Speakers: Alan Kaplinsky, Elliot Stein, and Nathan Dean

Alan S. Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer finance and what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr law firm. I'm your host, Alan Kaplinsky, former practice group leader for 25 years, and now senior counsel of the Consumer Financial Services Group at Ballard Spahr. And I will be a guest, yes, I mean a guest on today's program. I'll explain why in a moment.

For those of you who want even more information, don't forget about our blog, consumerfinancemonitor.com. We've hosted the blogs since 2011, so there's a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those in the industry. So to subscribe to our blog or to get on the list for our webinars, please visit us at ballardspahr.com. And if you like our podcast, please let us know about it. Leave us a review on Apple Podcasts, Google Plays, Spotify, or wherever you obtain your podcasts. Also, please let us know if you have ideas for other topics that we should consider covering or speakers that we should consider as guests for our show.

So very recently, I was a guest on a podcast show called the Votes & Verdict from Bloomberg Intelligence. I was interviewed by Elliot Stein and Nathan Dean, and after asking me a few questions about my background and how I got involved in this arcane world of consumer finance, they then dug very deeply into the doings of the CFPB. Going back to its inception in 2011, up to the present, we talked about a lot of different things, each of the directors and what their style was and what their emphasis was. We particularly focused on the current director, Rohit Chopra, who I explained to them why I felt he was really pushing the envelope and asserting jurisdiction in areas where he probably should not be present.

And finally, we talked about the case pending before the US Supreme Court, which will determine what's going to happen to the CFPB, the case dealing with the constitutionality of the funding of the CFPB. So with that, let me turn it over to Elliot Stein and Nathan Dean.

Elliot Stein:

My name is Elliot Stein. I'm an analyst with Bloomberg Intelligence covering financials litigation.

Nathan Dean:

And my name is Nathan Dean, and I'm an analyst with Bloomberg Intelligence covering financials policy.

Elliot Stein:

So our topic for today is the Consumer Financial Protection Bureau, better known as the CFPB, the primary US regulator for the consumer finance sector. And it's an agency that I would say has received a lot of criticism over the years, largely from the conservative side of the political aisle, almost from the day the agency was created by Congress in 2010. The Bureau is currently fighting a case in the US Supreme Court that alleges its funding structure is unconstitutional, and since that case has important ramifications for the agency and the consumer finance sector overall, we wanted to talk to somebody who has been going against the agency for almost from the day it began operations in July 2011. That person is Alan Kaplinsky, senior counsel at the law firm, Ballard Spahr, and the former longtime practice leader of his firm's Consumer Financial Services Group, which has more than 70 lawyers across 14 different offices.

Alan devotes his practice exclusively to counseling financial institutions in consumer financial services law and defending those institutions against lawsuits by consumers and government enforcement agencies, including the CFPB. In addition, Alan was instrumental in launching the Consumer Finance Monitor blog and podcast, both of which are resources that I have found to

be incredibly invaluable over the years. I truly think there's no better person than Alan Kaplinsky to discuss the CFPB and its impact on consumer finance institutions. And so with all that, Alan Kaplinsky, welcome to the Votes & Verdicts podcast.

Alan S. Kaplinsky:

Well, thank you very much, Elliot. It's indeed a pleasure to be on your podcast show. As you know, I'm usually playing the role of the host on consumerfinancemonitor.com, so it's really refreshing to have the roles reversed today for me.

Elliot Stein:

Yeah, likewise. I'm used to listening to you host, and like I said, I've been a long time fan of both your blog and the podcast for several years, and I feel like this is sort of a long-time fan, first-time caller moment for me. And there's a lot we want to discuss, both about how the CFPB has affected your clients over the years and, of course, the pending Supreme Court case over the agency's funding. But before we jump into those topics, we generally like to start our episodes by asking our guests a little bit about their background, how they got to where they are currently. So maybe we can start with you telling us a little bit more about your legal career, how you wound up in consumer finance law, and then also tell us a little bit more about Ballard Spahr's consumer finance practice.

Alan S. Kaplinsky:

Be happy to do that, Elliot. So I've been practicing law for a very long period of time. I graduated law school in 1970, clerked for one year with a judge on the Third Circuit Court of Appeals, then went to work for a law firm in Philadelphia, called at the time Wolf, Block, Schorr & Solis-Cohen, a firm that unfortunately no longer exists. I started out as a general corporate securities lawyer. I went in-house to work for a company, it was about six years into my career, a company that was engaged in the business of making loans by mail to school teachers, and it was from that moment on that I got hooked on consumer financial services law, an area of law that at the time was rather arcane. It was not something that people just ordinarily would even think about getting involved in, but I did, and that really shifted my career.

I was an in-house lawyer for about three years. Then I went back to Wolf, Block, Schorr & Solis-Cohen to head up a banking and consumer finance practice. Was there until 1995, and then I went over to Ballard Spahr, along with three other people that practiced with me at the time, there were four of us, to start a consumer financial services group for the firm. And I guess, as you could say, as the cliché goes, the rest is history.

Our practice was a very strong practice from the beginning. We were always ranked in the top tier of Chambers, which is the company that evaluates law firm practices. But things really took off for me and my practice when the CFPB was created by the enactment of Dodd-Frank on July 21st, 2010, a date that's very etched in my mind, because one year later, the CFPB became operational, and that was the very day that we launched our blog, which at the time was called CFPBmonitor.com because we were going to be devoted only to all things CFPB.

But then, of course, the politics got in the way, Trump got elected, and we felt that we needed to broaden our focus at that time to cover all things in the consumer finance industry, not limit ourselves to the CFPB, because we recognize that the CFPB would become less of a factor during the Trump era, and that's indeed what happened. But our practice just grew like topsy. We couldn't hire enough people to handle all the work that got generated by the CFPB.

And the CFPB basically generated work in three distinct areas for us. One, it was the regulatory area, because right from the very beginning, they were issuing, all under then the directorship of Richard Cordray, the former Ohio Attorney General, they became extremely active in proposing and then finalizing regulations initially in the mortgage origination servicing area. But then once they were finished with that, they expanded literally into every area under the sun, credit cards, auto finance, deposit accounts at banks, payday lending, you name it, they were involved in it. So that was one area, regulatory.

Second area was enforcement. They became extremely active in the enforcement area, initially going after the big banks for challenging the so-called add-on products that people would sign up for if they had credit cards, club memberships, and various kinds of insurance products and identity theft protection. And literally, every major bank that was issuing credit cards became the focus and a target for the CFPB, and there was a lot of money that got paid out at that time by the big banks. I now understand why they started that way. They knew that that would get a lot of media attention. But eventually they went

after everybody that they could get our hands on, and for a period of time, we were just inundated with defending cases against the CFPB.

The final area that also generated a huge amount of work for us was the supervision that the CFPB was involved in. First of all, any bank that have more than \$10 billion in assets, they became the major supervisor rather than the regular traditional bank regulators, and non-banks, payday lenders, student lenders were automatically subject to supervision. And then they could, little by little, and whenever they saw an area they wanted to supervise, they could issue what was called a larger participant rule, and at this point today, there's hardly any area of the industry that they don't supervise, which means regularly examine, and we have to spend a lot of time educating our clients and preparing them for examinations. And then all too often, the CFPB examiners will find something they don't like, and it will morph into an enforcement procedure.

Ironically, while what I've described to you was a boon to our consumer finance practice, because we grew tremendously and really had then and have today one of the largest consumer finance practices in the country, all of this was good for us and other law firms that practiced in this area, but not so good for our clients, many of whom had to endure, I guess you could say, the wrath of the CFPB in a variety of different ways. And to be perfectly candid with you, my belief is there's been tremendous overreach on the part of the leadership of the CFPB, particularly Cordray, not so much Kathy Kraninger, who was there as the leader under the Trump administration, but finally with Rohit Chopra, who is just in my view run amuck. The agency's, you could say, virtually almost out of control in terms of the different things that it is involved in, and the time and the effort and the cost to the industry is way disproportionate to the benefits that consumers have enjoyed during the last 12 or so years.

So I hope that gives you a little bit of my background, our group, and leading up to the topic du jour, namely the CFPB and, in particular, this major piece of litigation pending before the Supreme Court today.

Nathan Dean:

No, that's been extremely helpful. Also, I showed up in Washington DC literally a month after Dodd-Frank was signed into law, so I sort of feel like the CFPB and I grew together as Washington certainly. And earlier this year, we had Mick Mulvaney, the former acting director, and one of our questions was, "Why'd you bring donuts to the CFPB?" So CFPB has always been one of those regulators out there that certainly gets a lot of interest amongst those in the financial regulatory space, but maybe not so much interest amongst those, just when compared to the Fed or the SEC or so forth like that.

The one question, I'm going to go back to your three focus areas, because I really liked how you phrased that out. You had the regulatory policy, you had the enforcement, and you had supervision. When you look back on the history of the CFPB and you think about your clients, which one of those areas was the most, I'd say, important for clients to look at or most impactful, and do you anticipate that trend is going to be the same going forward?

Alan S. Kaplinsky:

Sure. Well, to answer your question, you almost have to take a look at the different directors of the CFPB over its 12 or so years that it's been in business. Clearly, when Cordray was the leader of the CFPB, I would say there were two areas, and they both had just an enormous impact. The one area that I guess gave the most agita to my clients was the enforcement area, because they would very often identify practices that were very common that didn't violate specific consumer financial protection laws, like the Truth and Lending Act and the Equal Credit Opportunity Act, Fair Credit Reporting Act, but rather practices they didn't like.

So how did Cordray go after the practices? He hung this hat on a provision contained in the Dodd-Frank Act that created the CFPB, a provision that is referred to as the UDAAP provision, U-D-A-A-P, and that stands for Unfair Deceptive and Abusive Acts and Practices. And if he didn't like something you were doing, thought it was unfair to consumers, he would say it's unfair or it's abusive or deceptive. The abusive prong of UDAAP was in particular a troublesome thing for the industry, because really, it was the first time that term had ever been used, and it wasn't very well-defined in Dodd-Frank, or it was defined, but in a way that you could basically shoehorn anything into that that you didn't like if you were the director.

I mean, it reached the point under Cordray's regime that when clients would call me to find out, they would tell me they're about to launch a new product, and they'd want to get my opinion about the product. And I would so often say to them,

"Well, it technically complies with every specific federal consumer protection law," like the ones I just referred to, "and it also complies with all the state consumer protection laws. But," I'd say to my client, "there is this UDAAP provision," and I'd explain a little bit about that, as I have to you today, and I'd say, "I don't think that the CFPB is going to like your product, either because you're charging too much money for it, or they're going to feel that it isn't a really nice product for consumers."

And so it became almost a little bit like Consumer Reports, getting a bad evaluation of your product in Consumer Reports. As a result of that, that really thwarted and today, continues to this day, to thwart innovation, because companies are fearful of the CFPB. They have all kinds of powers. They literally can put you out of business if they want to, they can fine you millions and millions of dollars, and they have done that to many companies, get restitution for consumers, even when they're not deserving of it, and tarnish your name, because they do get a lot of media attention.

And so under Cordray, there was huge focus on that enforcement. A lot also on the regulatory area, maybe not so much supervision, but you might recall, Elliot, that during that period, that was shortly after the economic meltdown that occurred in the late 2000 and single digits, 2007, 2008, and it was mostly the mortgage area that melted down. And so Congress enacted in Dodd-Frank all kinds of statutes regulating mortgage origination and mortgage servicing. So that area of our mortgage clients, within our Consumer Financial Services Group, we have a very specialized group called a Mortgage Banking Group, and they were very focused on compliance and bringing all of their clients into compliance with all these new regulations.

Then all of a sudden, Trump gets elected. Mulvaney serves there as an acting director. Yes, he did bring donuts the first day that he was on the job. He had two jobs at the time. I think he was head of GAO as well.

Nathan Dean:

OMB.

Alan S. Kaplinsky:

OMB, yeah, right. And he brought donuts, because I think he knew what a pariah he was going to be. I mean, most of the staff were holdovers from the Cordray era, very progressive people, and they did not like at all this major shift that occurred politically. And then you get to Rohit Chopra, and with Rohit Chopra, not so much the enforcement anymore. In fact, people will be surprised to learn that he has brought fewer enforcement actions and launched fewer investigations than any other CFPB director, including Kathy Kraninger and including, of course, Cordray.

But he's more than made up for that in spades by regulations, or what I would call quasi-regulations. And what that means, if he wants to change the law on something, he prefers not to go the formal regulatory route, because that takes a lot of time, and you have to solicit, you have to publish it in the Federal Register, you have to have a comment period, and he doesn't like hearing so many opinions that disagree with him when he publishes something for comment. So instead, he will issue advice in more informal ways that, to his way of thinking, accomplish the same objective, but it enables him to do it a lot quicker, and he can do it unilaterally without having to go through the formal process under the Administrative Procedures Act.

So he issues guidance, he issues circulars, he makes speeches where he announces policy, he puts things on his blog where he announces policy, he amends the examination manual, as he did about a year or so ago, in a very expansive way, which we could get into in a little more detail, because I think it demonstrates the terrible overreach of Director Chopra, where he took the UDAAP exam manual, and he decided that an unfair practice encompassed any kind of discrimination, not just the discrimination that had been prohibited for years by the Equal Credit Opportunity Act and the Fair Housing Act. He went well beyond that. And of course, he's been challenged in court about that.

Nathan Dean:

And he lost that.

Alan S. Kaplinsky:

And he lost. Yeah, so far. It's not yet a done deal because, a lot of these cases aren't done. There will likely be appeals, but I think ultimately, he is going to lose that particular matter. And the interesting, one of the things that not too many people have focused on in that case is that the court, one of the defenses of the CFPB was this isn't a formal regulation, so they moved to

dismiss the lawsuit. "Well, all we did was amend the exam manual. That's not the same thing that's a full-blown regulation." Well, the court made mince meat out of that argument and said in so many words, "You've got to be kidding." And he looked at speeches that Chopra had given in the press release that they issued, and they said, "Well, if that's the case, why is the industry so concerned about how to comply with this requirement?"

In fact, when you think of discrimination, you typically think of things where people discriminate on the basis of race or sex or sexual orientation or national origin, but in Rohit's case, he was talking about all kinds of protected classes. If this exam manual change had held up, it would've meant that a bank would have to open up accounts for people that don't live anywhere in their local geographic area. If you would want to open up or borrow money, you couldn't be discriminated against based on geography, which Congress never said that that was prohibited, and banks have been doing that for decades, and yet, he concluded that that was illegal. So he's trying to do too much too quickly, and he is pushing the envelope further than any other director. People used to complain about Cordray pushing the envelope, but boy, Chopra has made Cordray really look pretty reasonable in the eyes of the industry.

And he is getting back into an area near and dear to my heart, which I'm pretty upset about. He's trying to, even though one of the last regulations issued by Cordray in his regime was a regulation banning the use of class action waivers in arbitration provisions. I was the one, myself and my colleague, Mark Levin, pioneered that area a couple of decades ago. We came up with the idea of using arbitration agreements and deposit accounts and consumer loans, and the Dodd-Frank Act contained this provision that required the CFPB to investigate the area, do a study. He spent about two or three years, maybe a little bit longer, doing a voluminous study, held field hearings in three locations. I testified on behalf of the industry in all the locations, but I knew eventually Cordray was going to do something that would make arbitration not worthwhile anymore.

And sure enough, he didn't ban arbitration altogether, but he said you couldn't put a class action waiver in an arbitration agreement. That is language that says if you have a dispute with a consumer, you have to individually arbitrate it. You can't be a named plaintiff for part of a class. And as all of you know that followed the history of that rule, shortly after that you had the change in presidency, Obama being succeeded by Trump. And that change in fact had already occurred by the time that regulation became final. But then under the Congressional Review Act, that regulation was overthrown, and that was the end of that. But it's back now. A group of consumer groups have filed a petition with Chopra to, in effect, resurrect some anti-arbitration regulation that basically would say, "You can enter into arbitration with the consumer, but only after a dispute arises. You can't have pre-dispute arbitration."

Elliot Stein:

That's fascinating.

Alan S. Kaplinsky:

That's tantamount to killing arbitration.

Elliot Stein:

We could probably devote a whole episode just to that topic, and maybe we will. So let's put that issue on hold for now, because I do want to get to the Supreme Court case, which obviously is a monumental case for this agency and potentially for other agencies too. It was argued in early October, and I should say we're recording this episode on October 27th. The case is not the first constitutional challenge to the CFPB to reach the Supreme Court. A few years ago, of course, we had the sale, a law case, in which the Supreme Court ultimately held unconstitutional a provision in Dodd-Frank, that said the CFPB director could only be fired for cause. Ultimately, the Supreme Court severed that provision from the statute. The CFPB essentially continued to operate as it did before, except, of course, the President can now fire the CFPB director anytime the president wants.

This latest challenge comes from a payday lending group that argues that the CFPB's funding structure is unconstitutional, because the Bureau doesn't go through the normal congressional appropriations process, but rather gets its funding from the Federal Reserve's budget. Like I said, oral arguments were held earlier in October, October 3rd, I think was the date. And I

think coming out of that argument, the general view of most observers was that the court's questions were much more skeptical of the challenger's arguments than many of us had anticipated.

So I'd love to get your thoughts, Alan, on this case, in part because just before the case was argued, you wrote an op-ed in the American Banker, in which you argued that the court should find the CFPB'S funding structure unconstitutional, but should leave the remedy to Congress. So I'd love to get your thoughts, maybe tell us more about the case, how you think it should be decided versus how you think it will be decided.

Alan S. Kaplinsky:

Yeah, sure, Elliot. I'll be happy to cover that. So the case emanated out of a challenge to another Cordray, I guess you would say, a legacy regulation that dealt with the payday lending in this industry, a regulation that if it ever had become final in its original form, it would've put a huge percentage of the payday lending industry out of business, mostly because it required companies in that industry to do an ability to repay determination before they can make a loan to a customer. The industry was built on the concept of not doing credit bureau reports, not doing traditional underwriting, but rather the fact that if you had a job and you were getting a paycheck, you would qualify. So it was a big deal for the industry. And over the years, I have done a lot of work in that industry, and I can tell you from firsthand what a Draconian regulation that was.

Well, anyway, an organization called CFSA, which is a trade association of payday lenders and a trade association in Texas of payday lenders, brought the lawsuit against the CFPB, challenging the legality of that regulation on a lot of different grounds. Initially, none of them had to do with this constitutional ground dealing with whether or not the funding mechanism was comported with the constitution, but focused on challenges under the Administrative Procedures Act and whether or not the CFPB complied with the law that gave them the authority to issue regulations, but not constitutional issues.

Then again, you had the election occur, and you had Kathy Kraninger take over, and she went through a process, a regulatory process again, to eliminate the ability to repay provisions and leaving in place only, what I would say, pretty benign provisions dealing with how many times you could submit an item, a payment that was made to repay a payday loan, how many times you could, if you got a check, you could submit it to the bank, even though it was continuing to bounce.

In any event, litigation continued. The litigation already had developed a life of its own, and it was in federal court in Texas, the home of the Fifth Circuit Court of Appeals. Eventually, the constitutional issue got brought into the case, and the case, they lost in the district court, that CFSA lost, went up to the Fifth Circuit Court of Appeals, the Fifth Circuit, in a unanimous opinion issued by three Republican conservative judges appointed by President Trump, they ended up invalidating the payday lending rule on the theory that the funding was unconstitutional, and they went beyond that, and then they said the remedy for that was to invalidate the payday lending reg, but also they suggested that all other actions that have been taken by the CFPB would be invalid.

So petition gets filed in the Supreme Court, with no surprise that they granted it. And I must say, at the time, I said CFPB is in big, big trouble, because here you have an agency that is really the poster child for the administrative state that the Supreme Court abhors. They've never liked the administrative agencies, and the CFPB is the poster child coming before them. The Supreme Court already, as you pointed out, Elliot, had founded another provision in Dodd-Frank, dealing with the ability of the President to remove the CFPB director only for cause in the seal of law case. They already had the occasion to say that that was unconstitutional, and they didn't like the fact that the CFPB was being managed by a single director and had such extraordinary power actually in some areas, more power than the President of the United States.

So I'm thinking even though the Fifth Circuit opinion left a lot to be desired, its reasoning, it wasn't really all that clear, and I don't think it held together very well. My view was the Supreme Court is controlled by six Republican conservative justices that don't like this agency. They're going to find a way to affirm the Fifth Circuit, but perhaps do it on different grounds. Okay?

And then comes the oral argument. Turned out I was not in Washington, hearing the oral argument. I was very lucky. I was on vacation with my wife on a riverboat cruise in the southern part of France. So I didn't have very good wifi reception, but I could listen to the argument, and I caught parts of it. And then I got the transcript and read through it actually a few times. Then two weeks after the oral argument on October 17th, I had a webinar round table that I hosted where I invited six lawyers who wrote amicus briefs in that case for all sides who wrote them for CFPB, who wrote them for CFSA, and one brief

that was filed by the Mortgage Bankers Association where they took no position on the constitutional issue, but said, "If you find that the funding is unconstitutional, by God, don't throw out the baby with the bath water." The mortgage industry wants all these regulations. They spent a fortune complying with all these regulations, and there'd be utter chaos if you throw out all the regulations.

Well, the interesting thing and the bottom line of the webinar round table, and my bottom line right now, is I think the CFPB is going to win. Elliot, always hazardous to predict how the Supreme Court is going to come out based on an oral argument, but I've got to tell you that, to my great surprise, the questions that were posed by Justice Barrett, for one, and also by Justice Kavanaugh, another conservative justice, those two justices in particular, combined with the three liberal justices, who absolutely are going to vote for CFPB, I think that gives the CFPB at least a five to four majority, might even be six to three. One member of our webinar round table came out and said he thought it'd be seven to two, and he said he wouldn't even be surprised if it was unanimous.

So we'll have to wait and see.

Elliot Stein:

Exactly.

Alan S. Kaplinsky:

It's very unclear, that the Supreme Court showed no interest at all in talking about the remedy. That, to me, is a very ... If you're rooting for the CFPB to lose, that's a very bad sign, because that is an extremely complicated area that I would've thought they would've spent a lot of, especially the conservative justices, would've spent a lot of time in that area. The only person who even raised that was Sotomayor, a liberal justice, who, in a perfunctory way, asked the council to CFSA for his opinion on that. And I think he wisely said that that's really an issue, most of that can be given to Congress to figure out if the court finds that the funding mechanism was unconstitutional.

Elliot Stein:

Yeah, and I thought it was interesting when Justice Sotomayor even raised the remedy question. She prefaced it by saying, "I don't know if it's a good thing or a bad thing, but we haven't even talked about remedies yet." So I thought that was interesting.

Alan S. Kaplinsky:

I think that speaks volumes, I really do.

Elliot Stein:

Yeah. Although I wonder, so I'm one of the few people, maybe the only person left, who tends to think that the CFSA is still likely to win, and I get why people-

Alan S. Kaplinsky:

You mean CFPB.

Elliot Stein:

No, no. I think the CFPB will still lose. I think there's a good chance the court finds the funding structure unconstitutional. And you spoke about Kavanaugh and Barrett, and I think with Kavanaugh, in particular, a lot of people are focused on his comments about how Congress could just go back and change the funding mechanism whenever it wants, but I haven't seen a lot of people talk about what sort of followed that, where Noel Francisco, who argued for the challengers, said that Dodd-Frank essentially flipped the baseline, and that's the phrase he used, flipped the baseline in terms of how the funding works, basically moving from Congress, who normally has that task, and flipping it over to the agency to determine how much

funding it should get every year. And Kavanaugh said, he said, "I agree with that. I agree with that view basically." So I think maybe that comment gives me some hesitation and makes me think that maybe the challengers will do better than a lot of people thought coming out of argument.

And then with Barrett, a lot of people had the same view about her questioning in the student loan case, the student loan debt forgiveness case that was argued earlier this year, I believe, and she had a lot of questions in that case, too, for the challengers, but ultimately, she wound up ruling against the debt forgiveness that the administration wanted to enact. And so my view of Barrett is that she's always looking for that limiting principle, and that's what she's getting at. And eventually, she'll find it or she'll come up with it if she doesn't get the right answer. So I'm not convinced that the CFPB is going to win, but like you said, you can't always read too much into the questions. So we'll see how it turns out.

Alan S. Kaplinsky:

And a lot of times, you're right, the justices will use the oral argument. Sometimes, just they like to play the devil's advocate. It's sort of fun to do that. They can do that. There are Supreme Court Justices, they can ask any questions that they want. And you're right, you don't know for sure what's in the back of their minds. But I think the thing that to me was the most demonstrative was really what didn't happen, and that is that there was not a lot of probing on the remedy issue. The thing that may be behind, if I'm right, that the CFPB is going to win, they're concerned, as they should be, because it is an issue that needs to be dealt with in the opinion if they find against CFPB, what does that mean for other agencies who also don't have to go hat in hand to Congress every year to get an annual appropriation, agencies like the Federal Reserve Board, the Comptroller of the Currency, the FDIC, the post office. There are lots of agencies like that.

In my op-ed, I found what I thought was a fairly easy way to distinguish the CFPB from all those other agencies, and that is all those other agencies are self-funded. They're not funded by any money from the government, from the Treasury, or any other government source. They get their money from, in the case of the FDIC insurance premiums, the Comptroller of the Currency, fees that they charge to the national banks that they regulate and supervise. The Federal Reserve Board gets its money principally from the Federal Reserve banks that are under the umbrella of the Federal Reserve that's engaged in all kinds of open market transactions involving Treasury securities, and that's how they get funded. They don't get their money from the federal government either.

But there seemed, surprisingly, that was not really honed in on. It was mentioned very much by the Solicitor General, because she made a big deal out of that and kept, of course, focusing on the Customs Service. That was the paradigm that she was hooked into. And even the Customs Service, they got their money from customs, they were self-funded. So I saw a way of distinguishing it. I put it into my op-ed article on the American Banker, but frankly, I wonder whether any of the justices will even read that article and whether that will turn them around.

Elliot Stein:

Oh, I'm sure they've all read it. But on that point, I think the Fifth Circuit actually addressed those differences between the CFPB and the other agencies in sort of trying to limit its own opinion, which I think most people thought it had gone pretty far in any event. But the Fifth Circuit distinguished the CFPB from the FHFA, from the Federal Reserve, so it did cabin its opinion, and if the Supreme Court rules against the CFPB, I would expect them to do that too.

I wonder a couple of things. On the remedy issue. I wonder if it's the kind of thing where if the Supreme Court finds the funding structure unconstitutional, they sort of remand it back to the Fifth Circuit to sort of do more on remedy as to just how extensive the impact is on everything the CFPB has done in terms of enforcement and regulations. And then also, that buys Congress time to fix the statute as well. But we'll see.

Alan S. Kaplinsky:

Well, they could do that, Elliot, or they might not send it back to the Fifth Circuit, but just stay the mandate of the court. In other words, hold the opinion to give Congress some period of time to fix the constitutional issue and, at the same time, ratify the actions of the CFPB that this current Congress should be ratified and not ratify or invalidate other actions that it doesn't like. But it's quite a Congress that we have, right? It's hard to say that doing that is going to result in the Congress paying any

attention, particularly during an election year to this issue. It's probably the last thing that they want to deal with. So that is a messy, a real messy issue, because I mean, looking at my clients, some clients, they don't care about the payday lending regulation. If you're not in payday lending, you wouldn't care at all about that. They care about other regulations. Some of our clients would love to see regulations invalidated, our mortgage clients just the opposite. So even within the industry, there's not unanimity of opinion.

Elliot Stein:

Yeah. So let's say you're right and the CFPB wins, how worried are you that that really emboldens the agency to be even more aggressive than it's been? And I'm thinking just recently of the announcement that they're ramping up their enforcement team by 50%.

Alan S. Kaplinsky:

Well, they are already emboldened, Elliot. I thought when the Fifth Circuit came down with this opinion, they'd maintained a low profile until the Supreme Court had decided the case. My thinking, not that it was going to have that much of an impact on the Supreme Court, but my feeling was if the CFPB is held to be unconstitutional, at that point, Chopra might have to go hat in hand to Congress and to beg for his agency to continue into existence and beg that they not invalidate everything that the agency has done over 12 or 13 years. So that's what I thought was going to happen.

That's not what happened. It was water off a duck's back as far as Rohit Chopra was concerned. You wouldn't know that he had this big cloud hanging over the agency or an albatross, you could say, not at all. Now, will it embolden him even more? Yeah, it definitely will. They haven't used up the budget that the Congress specified. They put a cap on how much they could request each year from the Fed. They've never come that close to reaching the maximum amount. They're going to do this hiring. It's going to cost a lot of money. So I am expecting enforcement will ramp up. Remember, I told you that was one area that Chopra wasn't quite as focused on. I think that will change.

I do think that there'll be even more in the regulatory area. I think that more you want to supervise more companies than he's ever done before. It might include data brokers and aggregators of accounts. They don't yet regulate installment lenders. I think that will greatly expand. I think he'll expand in all three areas that I identified. And he'll continue to do things without regulations. If he wants something done quickly, he'll find some other way of accomplishing that objective.

Now, that's the good news for him, or at least that's going to make him feel re-energized, I guess, but he will continue to be attacked by the industry. I think the industry will have used up the constitutional theories for attacking the agency, but there are a lot of other theories for attacking what it's done.

As you pointed out, you mentioned the lawsuit that was brought challenging is the change in the UDAAP exam manual to encompass discrimination, and the court held that that regulation was invalid, not only because of the constitutional issue, but also because of a statutory issue, that Congress never would've thought when they enacted UDAAP out, which was originally part of the Federal Trade Commission Act decades ago, that that was going to encompass discrimination. And the Supreme Court has this doctrine called the Major Questions Doctrine, and I think based on that doctrine, the district court was right. Undoubtedly, there will be an appeal of that case. You can only go to the Fifth Circuit. They don't have any choice. The nice thing that the industry can do, they can decide where to sue the CFPB, and they seem to like Texas.

Elliot Stein:

I wonder why, I wonder why. All right, we're running out of time. So Nathan, why don't you ask our grab-bag question?

Nathan Dean:

Yeah. So I get the tough one. So this is something we ask all of our guests. So if you are stuck on a desert island, and you're only allowed to bring a CD player with three albums, or let's just call it your MP3 player, what albums would you bring?

Alan S. Kaplinsky:

Yeah. Now, this is probably going to surprise all of you. I am a jazz aficionado, and I have been since, actually, since I was a little kid. I don't play an instrument, but I would probably bring a Sonny Rollins album, a John Coltrane album, and Miles Davis, not later in his career when he went into Jazz Fusion and it became more like rock, but I like traditional hard bop, bebop jazz. That's what I would play on my desert island.

Elliot Stein:

Can never go wrong with jazz, and I'm sure the ships that pass by your island would enjoy listening to that music too. Well, Alan, unfortunately, we're out of time, so unfortunately we have to wrap up this episode of Votes & Verdicts. But we are so grateful to you, Alan Kaplinsky, for appearing on this episode. This was really a fascinating and informative discussion about a very important moment in time for a very important government agency and the companies that it regulates and its impact on the American economy.

Alan S. Kaplinsky:

Well, I first want to thank the hosts of the program today, Elliot Stein and Nathan Dean of Bloomberg Intelligence. And as usual, I want to thank all of our listeners for downloading the program today and listening to it. To make sure you don't miss any of our future episodes, please subscribe to our show on whatever your favorite podcast platform may be, Apple Podcast, Google Plays, Spotify, or wherever you listen. Don't forget to check out our blog, which also goes by the name of Consumer Finance Monitor. We will provide daily insights on the consumer finance industry, and we've been doing the blog now for over 12 years. If you have any questions or suggestions for the show, please send them by email to podcast, that's singular, podcast@ballardspahr.com. And please stay tuned each Thursday for a new episode of our show. Thank you for listening and have a great day.