

Consumer Finance Monitor (Season 5, Episode 48): Recent Enforcement Activities of State Attorneys General, with Special Guest Shennan Kavanagh, Division Chief, Consumer Protection Division (CPD), Massachusetts Attorney General's Office

Speakers: Alan Kaplinsky, Adrian King, John Grugan, and Shennan Kavanagh

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at Ballard Spahr law firm. I'm your host, Alan Kaplinsky, former Practice Group Leader for 25 years, and now senior Counsel of this Consumer Financial Services Group at Ballard Spahr. And I will be moderating today's program. For those of you who want even more information about the topic we'll be covering today or basically any topic involving consumer finance, don't forget about our blog, consumerfinancemonitor.com. We've hosted the blog since 2011, so there is 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, let us know about it. Leave us a review on Apple Podcast, Google, or wherever you get your podcasts. Also, please let us know if you have any ideas for other topics that we should consider covering or speakers that we should consider as guests on our show. Now, today's podcast is a repurposing of a webinar that we recently did entitled, Recent Enforcement Activities of State Attorneys General. While the CFPB seems to get most of the media and industry attention, State Attorneys General are extremely active in investigating state laws pertaining to consumer financial services and oftentimes federal laws that are incorporated by reference into state law or when using their Dodd-Frank Authority. We are absolutely delighted to have as our special guest today, Shennan Kavanagh. Shennan is Division Chief of the Consumer Protection Division of the Massachusetts Attorney General's office, and I am absolutely delighted, I first knew Shennan from many appearances she made on the Practising Law Institute, Annual Institute of Consumer Financial Services Law.

And she appeared... Seemed almost like an annual event for Shennan to appear and to give an overview of what is going on in her office as well as in other state attorneys general offices. So prior to her serving as chief, she served as the division's Deputy Chief, and before joining the AG's office, she spent 12 years in private practice litigating consumer finance class actions. She spent her entire career representing in one form or another, either in private practice or now as part of the Massachusetts AG's office, low income consumers. And she's practiced in really a pot parade of sub areas, I guess, of consumer finance ranging from mortgage lending and servicing to auto finance. And we're going to get into a lot of this in more detail in just a couple of minutes. I also want to introduce my colleagues at Ballard Spahr. First of all, John Grugan.

John represents clients in government investigations and complex litigation brought by the SEC, the Department of Justice, the CFPB, and State Attorney's General John's experience, and this is very pertinent to today's webinar, includes several matters working with, or I guess you might say, probably more accurate to say, working in an adverse matter with our very special guest today, Shennan Kavanagh.

John Grugan:

It's never been-

Alan Kaplinsky:

What's that?

John Grugan:

It's never been adverse. It's always been fun.

Alan Kaplinsky:

All right. Okay. And then we have Adrian King. Adrian is the co-leader of our firm State Attorney's General team. He's a former first Deputy Attorney general in the Pennsylvania Office of Attorney General. He served there from 2013 to 2014. He's a former Deputy Chief of Staff in the Pennsylvania Governor's office, serving from 2003 to 2005 under former governor Ed Rendell. And Adrian regularly represents clients before federal state, and local executive branch and administrative agencies, as well as legislative bodies and committees with an emphasis on state attorney general consumer protection enforcement actions.

The very topic that we are going to get into today, so let me describe to you first the format that we are going to use. I have a lot of questions for Shennan, both general questions about how her office works and how it interacts with other state attorney's general and with federal agencies like the CMTB. And then we're going to take a little deeper dive into a number of areas that have been a more recent focus of the Mass AG's office. So first of all, Shennan, before I get into the questions and start cross examining you, a very warm welcome to you. It's really a pleasure to have you on our program today.

Shennan Kavanagh:

Thank you. Thank you, Alan, for having me today. I really appreciate it.

Alan Kaplinsky:

Okay, so I'm going to get a... Throw you a few softballs at the beginning just to get warmed up. And so I'm wondering if you could describe for everybody the types of issues that the Consumer Protection Division focuses on and has prioritized.

Shennan Kavanagh:

Sure. The Massachusetts Attorney General's office has historically been an aggressive enforcer of our state consumer protection statute, which is known as Chapter 93A. It's a broad remedial statute and it applies to many different trade industries and acts and practices. There's no specific definition as to what is unfair, and courts decide what is unfair on a case by case basis. Towards that end, the Consumer Protection Division focuses on areas that impact the most vulnerable consumers in our state. So that includes low income consumers, financially struggling consumers, youth, the elderly, and communities of color.

So we try to make sure that the most basic needs are met for these communities. That includes housing stability, affordable transportation in particular in the areas of automobile sales and financing to make sure that they are not trapped in a never ending debt cycle, that they have the ability to access credit on fair terms and that they have the ability to repay. So we do a lot of work in mortgage lending and servicing, automobile sales and finance, debt collection, credit reporting, small dollar loans, and payday lending or usurious lending and credit reporting among other areas that impact the day to day financial wellbeing of consumers in Massachusetts.

Alan Kaplinsky:

Shennan, would you say that the priorities of your office are very similar to other AG offices around the country?

Shennan Kavanagh:

I think certainly there is a significant contingent of attorneys general offices across the country that have a similar focus to the Massachusetts Attorney General's office. I can't speak of course with respect to every Attorney General's office in the country,

which also reminds me that I should give a disclaimer as well that the opinions that I am giving today are my own opinion and not those of the Attorney General in Massachusetts, my office or other states attorney's general offices. If you attend some of the seminars that Alan mentioned, like Practicing Law Institute where there's usually representatives from other state attorneys general across the country like California, New York, Pennsylvania, Illinois, just by way of example, I think you'll hear that their areas of focus, namely to address issues that are impacting vulnerable consumers, are their top priority.

John Grugan:

Shennan, how does your division go about determining its priorities? What does it look at? Does it look at statistics? Does it look at numbers of complaints? How does it sort of stay abreast of the most recent issues that consumers may face?

Shennan Kavanagh:

Sure. So we do set our priorities, generally speaking as I've just run through them with you a minute ago. And then in addition to that, we have a separate division called the Consumer Advocacy and Response Division. That's our outward facing intake division for handling constituents' complaints. We look at the information gathered by that division to see if there's a particular business that has a significant number of complaints against it. So the number and volume of complaints can be a driver towards what might result in enforcement activity. Also, whether or not a business is cooperating with our office to try to reasonably resolve the consumer complaints that the office receives might be another factor that we look at.

The egregiousness of the harm that is being suffered by the consumers, whether they're at risk of loss of a significant asset like their home or their car might also be a driver in what would bring something to the enforcement division. And in addition, we have close relationships with various stakeholders, and I know we'll talk a little bit about this, but including other state AG's offices, our federal partners and local legal services offices who, especially with the legal services offices, who will oftentimes see what is happening on the ground with consumers and share information with us to help inform what is most significantly affecting consumers and how we can address it.

Alan Kaplinsky:

Shennan, you mentioned Chapter 93A, which it's notorious, I mean, everybody knows that practices in this area, sort of like when you say UDAAP, everybody knows what that means. But Chapter 93A, I think has a... My experience anyway, it's one of the most consumer protection statutes in the country. Every state has some type of consumer protection statute, but 93A is very daunting, particularly if you're on the industry side. I wonder if you could provide a little more detail about Chapter 93A.

Shennan Kavanagh:

Sure. As I said, so Chapter 93A provides that unfair methods of competition and unfair and deceptive acts and practices in the conduct of any trade or commerce are unlawful. And as I said earlier, Alan, there is no specific definition for unfairness in Massachusetts, which is part of the reason why Chapter 93A is such a powerful tool for enforcement. Courts decide what is unfair on a case by case basis. I think many people in this audience may be familiar just by way of example, with our office's case in Fremont. Fremont was a mortgage lender that lent loans without regard to homeowner's ability to repay during the financial crisis. And the case that the attorney general's office brought then brought a claim under our unfairness prong, under 93A to... And the court held that extending loans with certain terms in combination is an unfair practice because it was certain that those terms in combination would prevent homeowners from being able to ultimately repay those loans.

And some of those terms included teaser rates, by way of example. Fremont had argued at that time that not one of those loan terms in and of itself was illegal, but nevertheless, with those terms combined, the court found that those loans were unfair and deceptive in violation of our consumer protection statute. That's just one example to show that courts make a determination of what is unfair on a case by case basis. And the legislature has not defined unfairness in any specific way under the understanding that there are developments that can happen in the industry or with market trends at any time. And the state doesn't want a cabin itself to a specific moment in time when something may not be considered unfair in case later on there's circumstances that arise that could result in a violation of the statute.

So that's just one example of what you were describing, 93A as being very broad in scope and a very powerful enforcement tool for our office and for private parties. In addition, 93A provides our office with the authority to promulgate regulations, and we have exercised that authority in a significant number of areas, including in automobile sales transaction, mortgage brokers, debt collection, and we'll talk more about that later, and a whole wide variety of other areas. And we've enacted regulations very frequently under our authority under 93A to address real and current issues that are affecting Massachusetts consumers.

Alan Kaplinsky:

What kinds of remedies do you have under 93A in a, I'm not talking so much about a private lawsuit, but in an attorney general lawsuit against somebody?

Shennan Kavanagh:

We're able to obtain ascertainable losses, so restitution and money refunds to consumers, we can get civil penalties up to \$5,000 per violation. So that is a very significant remedy because it's per violation of the law, so any individual consumer might be subject to multiple legal violations. We also have the authority to obtain preliminary injunctions and to conduct investigations before we even commence an enforcement action.

Alan Kaplinsky:

Yeah, it sounds what you've described, Shennan, that in some respects your authority may be broader than even the CFPB because the CFPB, while they have a UDAAP provision, there's a definition of unfairness which provides some boundaries. I won't say they're that hard and fast, but sounds like in your case, there's no statutory definition, and it sounds like the courts haven't really defined it the way the CFPB has, am I right?

Shennan Kavanagh:

I will say that since the enactment of Dodd-Frank and its UDAAP statute, some states went on to amend their state consumer protection statutes. I think in an effort to broaden the protections afforded there under consistent with the CFPB's definitions. Massachusetts has not amended its statute. It is my opinion that our statute is at least as protective, maybe in some ways more protective than the Dodd-Frank provision.

Alan Kaplinsky:

As an industry lawyer, I agree with you. So let me ask you this, the next thing we were going to talk about or claims under Dodd-Frank or claims under other federal statutes, what can you tell us about that?

Shennan Kavanagh:

Sure. So 93A permits our office to bring claims under any federal consumer protection statute. In addition, with respect to a Dodd-Frank claim, I think generally whether or not to bring a Dodd-Frank claim in addition with a state UDAAP claim is something that would be evaluated on a case by case basis, depending on a number of factors. One is something we just touched upon. I think for some states, Dodd-Frank might assist them to expand the types of actions that they can bring that they may not otherwise be able to bring under their state UDAAP statutes. Another area might be remedies where a state can enhance the remedies that might be available to them by bringing a Dodd-Frank claim. Certainly, I think in most, if not all instances, certainly with Massachusetts, the penalties provision is much more significant under Dodd-Frank, 93A has a \$5,000 cap per violation.

I think also the goals of a case and the target of the enforcement action would play a role in determining whether it makes sense to also bring a Dodd-Frank claim, for example, whether or not a particular service provider or company is engaging in conduct that similarly affects people across the country under a set of rules and regulations or policies that have a national impact. And whether the goal of the litigation is to effectuate change nationally on that particular practice or policy. So I think

that it's really a case by case determination on when it makes the most sense to include a Dodd-Frank claim and an enforcement action for states.

Alan Kaplinsky:

Well, I guess one of the things it would do for your office and a lot of other state AGs, it would give them the right to prosecute claims that are abusive but not unfair or deceptive.

Shennan Kavanagh:

Yes, that's correct. And I think again, too, that's highly contingent on each state's specific consumer protection statute, whether or not the consumer protection statute would already encompass the kind of abusive standard that is provided for under Dodd-Frank, whether there's some kind of common law theory that would be incorporated into a UDAAP statute like unconscionability or something like that. But I do agree, I think for many states, having the additional prong of abusive can be particularly helpful if their state UDAAP statute is constrained.

John Grugan:

Shennan, can I ask a question just to go back a little bit, because before you had talked about in connection with decisions that your division will make to bring enforcement actions the cooperation of the defendant. And so I guess the question is, to what extent do you factor in self remediation, the self-identification of an issue, remediation of it in terms of whether or not you're going to proceed with an enforcement action?

Shennan Kavanagh:

Many, if not most of our actions will begin with an investigation. And during the investigation stage, that is the time when we will typically learn about a company's efforts to self-identify problematic issues and remediate them. And to the extent that that is happening and that we're on the same page with the company about what the problematic practices are and what the appropriate remediation would be for those practices, I think that is a great scenario for trying to get a matter resolved short of bringing it to an enforcement action. So to answer your question more directly, John, yes. Those types of efforts are considered when determining whether or not to bring an enforcement action. I think it's particularly important, however, that the company is listening carefully to what the state is identifying as the problematic practices and concerns of the states and that they are... The remediations associated with it are in line with what the state believes the remediation can look like.

Because I think that oftentimes there could be a disconnect between what the company views as policy or practice corrections or as what the particular issue is. And there can be a disconnect between that view and the state's view. So certainly we want to hear that information, we want to have conversations with that information. Many times we resolve investigations short of an enforcement action because we are able to get the information we need to do our evaluation and have appropriate discussions with the company to reach a resolution. If a company gets a subpoena, so in Massachusetts it's called the civil investigative demand. In other states, it may be called different things like a subpoena. But if we send a civil investigative demand, our expectation is that the company is going to comply with it and they're going to produce the documents and records that we seek. We are always openminded to burdensomeness concerns to the extent they're substantiated and making sure that we're getting documents consistent with what might be appropriate timelines for various companies.

But we want to see the documents. When we start getting the runaround or refusal to produce documents or to allow us to take testimony, that's when we really start running into trouble. And oftentimes we have been in a position where we've had to enforce our civil investigative demands in court, and we have been successful every single time that we have... At least in recent history that I'm aware of, that we've had to go in and enforce our CIDs. So both the efforts and efforts and thought put into remediation, but also cooperation with our office in terms of providing us what we need to be able to do our due diligence on the issues we have concerns about are things that are taken into consideration when we're evaluating whether an enforcement action is ultimately necessary.

John Grugan:

I think that you and I have had some conversations about this efficiency of the company's response before, so I'm well familiar with that. How do you assess... Or how much credit do you give when the company comes to you to identify its problem and also present its solution, as opposed to you all having to initiate a proceeding through a CID or otherwise?

Shennan Kavanagh:

So that happens on occasion, in my experience anyway, where a company will affirmatively come forward before any investigation has commenced by our office. I think it happens because it's required to happen under statute in our data breach laws, but that that's a requirement under our statutes. I am not sure based on my own experience, how often a company comes forward to our office to say, we've identified this problem, we are undertaking efforts to remediate it, and we want to work with you to make sure that the outcome is consistent with state law. I don't know why that doesn't happen very often. I can only guess, and my guess on that would be that the company feels they can do their own internal compliance and resolve issues, and there isn't a need to bring those issue to the state attorneys general. But that being said, I think it is certainly helpful both in our efforts to protect consumers and the public welfare and the company's efforts to avoid an enforcement action to have those conversations when appropriate.

Alan Kaplinsky:

Adrian, you have some question about when the Mass AG coordinates and communicates with other state AG's offices, you want to-

Adrian King:

Yeah, Alan, it's just... Yep, I know we're sort of focused on some general questions and before we move into maybe some industry specific issues. Shennan, two questions. First, we talked about consumer complaints that go into your mediation unit and that can kind of be a sentinel for you, and that makes sense. And as you would expect, we counsel clients to take those very seriously. But I wanted to just touch on two other things. To what extent, to the extent that you can share, does your office take into account that are business bureau complaints or even things you might see on social media, which from a company's perspective I would submit to, or potentially at times can be subject to maybe influenced by competitors or things of that nature? But I think people would be interested in hearing if those are taken into account because obviously what companies are trying to do up front is if they're seeing things where people are not happy with their services, they want to get on top of it as quickly as they can.

Shennan Kavanagh:

Sure. So without speaking to the integrity of any of these evaluation services like the BBB or other social media services, I think it's fair to say that if something is publicly available, if there's publicly available information about a company, it's something that we would certainly look at. We would certainly want to know online, what's happening, what people are saying about a particular company, whether or not that is the evidence that we take and put into a complaint without verifying or looking deeper if that is necessary, depending on the source of the information might be another question, but certainly anything that's available online about a company is something that I think we would take a look at as part of an overall investigation of the company.

Adrian King:

That makes sense. And to Alan's point, the term multi-state and for a lot of companies can raise a nightmare or two. And I know you want to be limited in how that works behind the scenes, but you did mention overall when you're looking at matters that you may want to pursue, you talk to other state's AG's offices or at least trade notes, I suspect, but how-

Shennan Kavanagh:

I'm not sure if I said that exactly, but in any event, I can tell you this is what I can say about multi-states, we're all-

Adrian King:

Let me be clear, when I say trade notes, I want to be clear, I'm not talking about any specific company or business. I'm talking about just areas of business, things that are consistent with what you've already stated. I'm sure our topics of discussion, but I don't want to put words in your mouth.

Shennan Kavanagh:

Sure. So everybody's familiar with multi-states, and I know that it's a typical question that comes up in the various conferences that I attend or participate in, which is, what's the method behind the madness? When can we expect to see a multi-state? And I don't have a straightforward formula or answer to give on that because again, it's really on a case by case basis. It depends on the company, obviously. Is it a company that just does business in a region of the country? Is it a national company? There's a number of factors that might go into whether it makes sense to do multi-state coordination depending on the issues, the various state laws at play. Some state laws might have outright prohibitions on particular practices, others might not. We certainly collaborate with both our federal and state partners as one would expect we would.

And with respect to companies and multi states, I mean, I would just pitch this back to you guys a little bit, but I do think sometimes there's kind of inconsistencies in what you would hear from the industry, which is on the one hand, this desire to buy universal peace and not wanting to be subject to one off state by state investigations. But on the other hand, not wanting to face down a multi-state. And I think that multi-states can achieve purposes for both sides, for states to be able to have national practice changes and national relief by people who are affected by the same company or the same problem. And for industry to be able to buy peace on a particular issue and to be able to address it holistically instead of on a state by state basis. So I think that again, it's really case by case basis that a lot of different factors would come into play too, for the states, determine whether a particular investigation or lawsuit makes sense on a national level in a multi-state proceeding.

Adrian King:

And I'll just comment or respond, I think you're absolutely correct that for a lot of businesses, a multi-state can be very, very helpful in terms of putting issues to rest broadly or nationally if that's the scope of their business. And as we know, I mean, not that it's maybe technically a multi-state, sometimes that can include federal partners as well. I think when I describe it as possibly being nightmarish, obviously the issue then, though is, it's just the scope or the magnitude of a resolution can become that much greater. But look, it's a trade off and for a lot of businesses, trying to put a matter completely to bed is very beneficial.

Alan Kaplinsky:

Okay. Well, I think we better move along and we do want to take a dive into some of the specific substantive areas that you already mentioned, Shennan. And first, let's talk about mortgage servicing. You mentioned that housing stability has long been a priority of your office, so what issues are you seeing? And also is there an increase in foreclosures after pandemic related moratoriums ended up expiring?

Shennan Kavanagh:

During the financial crisis, the office was very active, as I mentioned before, in enforcement against mortgage lenders for predatory and discriminatory lending. And in the aftermath of that crisis and during that crisis, not only was our office active in an enforcement capacity, but we also created a special program called Home Core Program, which served as a very similar program to our constituent services program, which was to help individuals resolve delinquencies and obtain loan modifications with their loan servicers. And that was an extremely successful program. They were able to save thousands of homes from foreclosure and obtain a significant number of long term affordable loan modifications for individual borrowers. So that was very, very important component to our offices' efforts to address the housing crisis. Born out of the housing crisis came a statute that we call 35B, which is unique in Massachusetts.

Maybe some other states have similar statutes, but it requires mortgage servicers for certain mortgage loans to make a good faith effort to avoid foreclosure. And it has notice requirements and require loss mitigation requirements to order to make sure

that people can have the long term chance of staying in their homes. Our office over the past several years has been an aggressive enforcer of 35B, which is a carry on to the subprime lending crisis. People were saddled with these unaffordable predatory loans. And this is kind of addressing those loans in the aftermath to continue to prevent foreclosures and to help people have long term stability in their housing. And towards that end, I can just give a couple of examples of our enforcement in this area. Much of our enforcement has been resolutions by way of assurances of discontinuance after an investigation. And generally speaking, those resolutions include a monetary payment as well as what we call a principal reduction loan modification program, where the servicers agree to, as a primary component to a loan modification for borrowers to reduce the principal balance of the loan.

And so we most recently, last month, resolved such an investigation against fay servicing and they agreed to do a 2.7 million principal reduction loan modification program meaning that they would hit that target at the very least for homeowners participating in the program and they'd make a \$500,000 payment. We've had similar resolutions with Shellpoint Servicing and Nationstar, Seterus and others. And cumulatively, this has resulted in many millions of dollars in principle balance reductions for Massachusetts homeowners. The programs have been hugely successful. Our paralegal teams have been incredible assisting individual homeowners in getting through these programs. To answer your second question about increase in foreclosures, there's another federal program, the Homeowner's Assistance Fund that was created to help homeowners who entered into default because of a COVID related hardship to get funds to help them maintain their home, to stay in their homes, and different states have used the funds different ways, but I'll try to be quick.

Massachusetts got \$178,000, they're administering still a plan that essentially is a cure plan to cure folks' defaults to get them out of foreclosure. And so that plan coupled with the work that we're doing on the loan modification front has really bridged together nicely in a lot of ways to actually reduce the number of foreclosures in Massachusetts. So we're seeing a trend downwards now in foreclosures in Massachusetts as a result, certainly of half and the funds available there. But my office's longstanding work in this area, I believe has made a significant contribution as well. So I think to answer your question, as of today, we're seeing a reduction in foreclosures.

Alan Kaplinsky:

Let move along to auto sales and financing because you referred to that as a priority as well. And what are the types of issues you're seeing there, Shennan?

Shennan Kavanagh:

Yeah, and I'll try to talk about this since this is a consumer finance webinar in the context of financing, I mean. As you all know, my office has had some significant settlements in the area of automobile finance, including the Santander settlement that had to do in part with charging of gap insurance, add-on products that were effectively finance charges that raised the APRs of the loan above 21%, which is the cap in Massachusetts, and also more recently the lawsuit and resolution of Credit Acceptance Corporation. I want to talk a little bit about the intersection between automobile sales practices and fraud on the part of dealerships and finance companies because the number one complaint or the top volume of complaints we receive from consumers are about defective and inoperable cars. And so that's an issue that we, in real time, try to address as best as possible because if somebody can't drive their car, then they certainly can't afford to repay the loan on the car.

They can't afford to get to work, they can't get to work and make the money they need to repay their car and they're putting a ton of money into repairs and they can't keep up with their loan. So towards that end, we've done some enforcement against automobile finance companies who we allege had facilitated the sale of defective and inoperable vehicles. And we've reached some resolutions over the years, including with UACC, a smaller finance company called Source One, another sensible auto lending. But I think this is important for finance companies to be thinking about when they're thinking about their dealer relationships. And this is also, in particular, in the context of the new proposed FTC rule on automobile sales, which has a plethora of proposed requirements to make automobile sales more fair and transparent in addition to specific provisions that go directly to financing.

And I think that finance companies should familiarize themselves with the components of this rule to make sure that their dealerships are complying with it because they are at risk of being held accountable, in my view, for the dealerships' failure to comply. Some of the financing disclosures, the dealerships who originate these loans are required to provide consumers,

include disclosure of the total payments when quoting monthly payment amounts, and informing consumers that when a lower monthly payment will actually increase the total price of the car. So oftentimes in automobile sales, the seller is pointing the consumer to what their weekly or monthly payment will be and is telling the consumer that that payment's affordable, when in reality, because of the lower monthly payment, the loan term is longer or fees and charges are more significant and the total financing cost is much more expensive as a result of that lower monthly payment. And of course with used cars, you run the risk of them becoming inoperable sooner.

So the longer the loan term is, the less chance the car has to make it to the end of the loan term. So there's going to be a significant amount of clarity and specific rules that come out of the FTC as a result of this, that automobile finance companies should really have their eyes on to make sure that they are making sure their dealers are complying with these.

Alan Kaplinsky:

Yeah. I just want to mention that shortly after the proposed rule came out, on our podcast show, I had two of the key people from the Federal Trade Commission who were involved in that rule making. And for people who are interested in that rule and the impact it's going to have both on auto sales, which it deals with directly, but there are indirect effects that it can have on financing companies, banks or non-banks that are involved in financing. And as you said, a state AG could take the position that a financier is facilitating a wrongdoing, aiding and abetting, I guess is one way of looking at it. We also, on our blog Consumer Finance Monitor, we cover that proposed rule in detail. And out of fairness to the auto dealers, the National Association of Dealers Associations, we blogged about their response. To put it mildly, they are not at all happy with what the FTC is doing there. Let's move on if we can.

Shennan Kavanagh:

Yeah. If I could, Alan, I just want to point out one case we recently brought, because it's particularly important in the auto sales world, and I just want to mention it real quickly, is we recently... So add-on products are a really strong focal point in this proposed rule. And my office has done a lot of work in enforcement with respect to the sale of add-on products for company's purposes. Like I said before, some of the gap insurance settlements in which the gap insurance was a non-disclosed finance charge and caused loans to exceed the usury cap, that's one area where finance companies need to be particularly careful.

We recently sued an auto dealership for its discretionary pricing policy resulting in a disparate impact on prices for Black and Hispanic customers. Under Chapter 93A in our Public Accommodations Act, the name of the dealership is Jaffarian. And our investigation found that Jaffarian charged Black and Hispanic customers on average, hundreds of dollars more than white customers for add-on products such as paint protection, gap insurance, and remote starters. And it's based on their discretion, they afforded their sales people to mark up the cost of the add-on products during the sale and incentives that they gave to their sales force. So I just want to point that out because discrimination in pricing is going to also, I think, be something that folks are looking at very carefully going forward with-

Alan Kaplinsky:

Well, that triggered a thought on my mind that I'd like to... What? Something I wanted to ask you. In bringing that lawsuit, did you rely on 93A or did you rely on the Equal Credit Opportunity Act? Because as you know, there's a lot of controversy swirling right now over the CFPB's decision to define unfairness as including discrimination, both credit discrimination and non-credit discrimination.

Shennan Kavanagh:

Yes. 93A and our Public Accommodations Act.

Alan Kaplinsky:

Yeah. Okay. So let's move on because I've got a couple more subjects I want to raise with you before we wrap it up. And we actually got a question from the audience about this and that is, "What are the differences between the Massachusetts debt

collection law and the Federal Fair Debt Collection Practices Act? My understanding is they in some respects, they conflict with one another." And the questioner wants to know what your position when there's something in your statute that conflicts with the federal law.

Shennan Kavanagh:

I don't believe that anything... I'm not sure I would call it that it conflicts with the FDCPA. I think simply that Massachusetts provides greater protection in our debt collection regulations that may not exist in the FDCPA. And in particular, by way of example, the state regulations apply to original creditors as well. So we have brought debt collection enforcement actions against a whole host of feyers ranging not only from big debt buyers and debt collection law firms, but to a security alarm company, mortgage servicers, online lenders, a whole list. Automobile finance companies are subject to our debt collection regulations. They also explicitly apply to mortgage servicers where I believe the last time I looked, the FDCPA had a carve out for mortgage servicers. So I think the Massachusetts law just has a broader reach with respect to the companies that are subject to it, and we aggressively enforce our debt collection regulations here. I'm happy to run through some examples unless you have questions. Sure.

Alan Kaplinsky:

And debt relief companies, that's another area of concern of yours, am I right?

Shennan Kavanagh:

Yes, that's correct. And let me run through a couple of quick examples if I can on some recent-

Alan Kaplinsky:

Yeah, go ahead.

Shennan Kavanagh:

So we recently entered into an assurance of discontinuance with Encore Capital Court. The subsidiary is Midland Funding, that's one of the largest national debt buyers in the country, and they're obligated under the assurance to pay \$4.5 million and to provide \$7.5 million in debt relief for certain debtors. We had a similar resolution of portfolio recovery services several years ago that I think resulted in a \$4 million payment. But just to kind of pick off some of the issues that arose in the Encore matter, which are typically issues that we've seen in other debt collection matters, we allege that they bought debts and attempted to collect on them without having sufficient account level documentation to substantiate the debt. They failed to provide consumers or debtors with debt validation notices outlying their rights to dispute the debt and obtain verification of the debt. That's something we have routinely seen companies failed to do.

It's extremely important, especially where a company might not have the underlying documentation to substantiate the debt. They filed huge volumes of lawsuits in Massachusetts. These big debt buyers take up a huge percentage of the number of filings in Massachusetts courts. We allege they made excessive, and harassing telephone calls to debtors in attempts to collect the debt. And then specifically with respect to Midland, they engaged the services of a third party debt collection law firm that was called the Daniels Law Firm. Daniels is now disbarred, and the law firm is out of business. Daniels purported to file suit and take those suits to judgements against debtors and then collect on those purported judgements when they never reduced those suits or brought them to begin with. So they engaged in fraud.

And then when Midland learned about that, we allege they transferred those same accounts over to another debt collector for collection. Other concerns we generally have are when debt collectors induce debtors who only have exempt sources of income to make payments on that exempt income or when they attempt to collect on time bar debt. So that is sort of like a laundry list of issues with which we took concern in our Midland investigation, but they certainly arise with a variety of other companies that engage in debt collection.

Alan Kaplinsky:

So Shennan, no discussion with either your office or CFPB would be complete if we didn't talk about, what are you doing in the area of emerging technologies? FinTech, digital payment platforms, artificial intelligence, data gather, big data, et cetera. And I assume you have taken a plunge into that area. Am I right?

Shennan Kavanagh:

Well, let me say this and I know we're short on time, Alan, is we have a... And I keep using the word strong for Massachusetts' law, but our state usury cap for small dollar loans is 12% and we will take enforcement action if we see lenders trying to skirt our user caps. That might happen in a variety of contexts. I think that there's always a lot of discussion about FinTech companies. In other contexts, just by way of example, we recently resolved a case against a automobile title lender that was based in New Hampshire and claimed that it wasn't a Massachusetts company, even though it was doing business in Massachusetts and purporting to consumers here, that it was a Massachusetts company, but you all may be familiar with automobile title lending, but they were charging interest rates on their loans using the title of consumers' vehicles as collateral for up to 300%. So they were permanently banned. That's just outright illegal in Massachusetts. They're permanently banned from doing any lending or debt collection in Massachusetts.

Alan Kaplinsky:

Did they have an office in Massachusetts or were they doing it all by having customers drive to New Hampshire to transact a business?

Shennan Kavanagh:

I don't believe they had a brick and mortar office in Massachusetts, but don't hold me to that. They were transacting business in Massachusetts and telling consumers they were a Massachusetts company, so there were transactions taking place in Massachusetts, but they attempted to skirt our laws by claiming... And this was resolved, but by claiming they were a New Hampshire company, so-

Alan Kaplinsky:

And the Commerce Clause would give them... We won a case many, many years ago for an auto title lender in the Seventh Circuit. I'm sure I can't remember the name of the case right now. It's that long ago. We were litigating with the Indiana Department of Financial Services and we had an out-of-state auto title lender located in, not in Indiana, located in Illinois. People would drive to Illinois, transact business and the Seventh Circuit said that's protected under the Commerce Clause. So whoever you litigated with, I don't know if they made a Commerce Clause argument, but apparently it didn't work.

Shennan Kavanagh:

Well, we resolved this short of litigation, but suffice is to say, we don't take kindly to company's attempts, however creative, to skirt Massachusetts' strict usury caps. And in any context, we would scrutinize very carefully that company's practices and business models to make sure that they're not violating law and taking advantage of consumers here. Yeah. Generally-

Alan Kaplinsky:

What about other than auto title, like buy now, pay later, earned wage access? Are you doing things in that area?

Shennan Kavanagh:

There's a lot of discussion generally, I think that we're all aware of these products and what these products mean for enforcement or regulation. I think generally speaking, again, it's a case by case basis based on the particular company. On the one hand, I think that innovation and finding ways for people, Unbanked for example, to be able to have access to certain... To credit or cash is a problem that needs to be addressed. But at the same time, with the types of products that are coming on the market, there's just a huge concern about consumer protections. I mean, some of these products, the technology involved,

the ease of using apps on your phone to be able to obtain cash or obtain small dollar loans, I think creates problems for allowing consumers to be able to understand the terms of the product that they're buying or the service that they're getting to get the proper disclosures, there is... I think some of these products are targeted towards youth who tend to use their phones to do everything, but also obviously these products are targeted towards the most vulnerable consumers who are living paycheck to paycheck.

And that automatically just puts them in a category of people that we're going to be very careful about protecting. And I think disclosures are a big issue. I think the failure to evaluate whether a consumer has a real ability to pay, the ease with which people can stack these products and stack these loans to get them continuing trapped into a debt cycle. I think data privacy is another huge concern. What these companies are doing with these consumers' data and whether they're selling it to other companies to be further targeting. I think that whether or not some of the fees and charges that these services require, whether the cost benefit analysis make sense based on how much they're charging in fees and whether they're even disclosing those fees, the extent to which those fees are finance charges and the amount of interest people are ultimately paying for small dollar cash loans or cash advances, whether or not consumers are putting their assets at risk.

We talked about the title lending, but whether they're putting their home equity at risk for these types of products, I think that this is just an area, as you all know, that there's a lot of discussion about and that federal and state regulators are understandably and appropriately looking at very carefully.

Alan Kaplinsky:

Well, the CFPB has just issued a report on buy now, pay later. Being an industry advocate, I put it into the category of no good deed goes unpunished because here you have a product that is in most cases is interest free. If the customer pays on time and doesn't incur late fees, it's not costing the customer anything. The merchant ends up paying whoever is the provider of the buy now, pay later product. And I recognize concerns over disclosures, but I don't think people should lose sight of the fact that it's a pretty good deal that you can defer paying for a product over a period of time without paying any interest, right?

Shennan Kavanagh:

The devil's in the details, Alan, and also what's the end game? I think we're going to see the aftermath at this and this will tell us... And again, it's a case by case basis, but I think we'll see at the end whether or not these products are actually successful in giving consumers what they purport to give consumers.

Alan Kaplinsky:

Well, on that note, we've come to the end of our program and I really thank you tremendously, Shennan, for being our guest today. Also want to thank my colleagues, John Grugan and Adrian King for their participation. And I, of course, want to thank all of our listeners.

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