

## Consumer Finance Monitor (Season 8, Episode 8): Will the State Attorneys General and Other State Agencies Fill the Void Left by the CFPB?

Speakers: Alan Kaplinsky, Mike Kilgarriff, Jenny Perkins, Adrian King, Jr. and Matthew J. Platkin

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 the Ballard Spahr law firm, and I'm your host, Alan Kaplinsky, the foreign practice group leader for 25 years and now senior counsel of the Consumer Financial Services Group at Ballard Spahr, and I'll be moderating today's program. For those of you who want even more information, don't forget about our blog, [consumerfinancemonitor.com](http://consumerfinancemonitor.com). We've hosted our blog since 2011 when the CFPB became operational, 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](http://ballardspahr.com). And if you like our podcast, please let us know about that. You can leave us a review on Apple Podcasts, YouTube, Spotify, or wherever you obtain 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.

After our high-level post-election webinar on November 12th which we repurposed and released as a podcast show on November 27, our clients expressed great interest in hearing us take a deeper dive into the anticipated changes that will happen at the CFPB and elsewhere once a new acting director or director appointed by President Trump takes over. To that end, we developed and planned a series of three webinars discussing what we will be, the large and widespread impact on the CFPB of the election. On December 16th, we presented the first webinar in our series. It focused on CFPB regulations promulgated and other guidance published by the CFPB under the leadership of director Rohit Chopra, along with outstanding proposed regulations.

Joining us for the first webinar in this series was David Silverman, who held several senior positions at the CFPB for almost 10 years under both Democratic and Republican administrations. David was at the CFPB during the transitions in director from Richard Cordray to acting director Mick Mulvaney and then director Kathy Kraninger. I had almost a 45-minute fireside chat with David. He provided an insider's view of what the transitions were like and what we might expect during the next transition from Director Chopra to whoever President Trump appoints as his acting director and then director during the second Trump presidency. On January 2nd, my fireside chat with David was released as our podcast show. On January 9th, we released as our podcast show the second part of that December 16th webinar which featured several lawyers in our Consumer Financial Services Group who took a deep dive into the area of CFPB regulations and other written guidance.

On January 6th, we presented the second webinar in our series. It focused on CFPB supervision and enforcement under Rohit Chopra and the changes in those areas we expect to see during the term of the next acting or regular director appointed by President Trump. During the first part of that webinar, I did a fireside chat with Kathy Kraninger who described how she became the director of the CFPB, how she managed the bureau during her tenure, and what steps she expects the new acting director and director appointed by President Trump to take during Trump 2.0. In the second part of that episode, I was joined by my colleagues John Culhane and Mike Kilgarriff who took a deep dive into their expectations for CFPB supervision and enforcement during Trump 2.0. Each of those podcast shows were released on January 23rd and 30th respectively. Last week's podcast show was

the repurposing of the first part of the third webinar in our series which was produced on January 17th entitled The Impact of the Election on the CFPB.

Last week the show consisted of my fireside chat with Matthew J. Platkin, the New Jersey attorney general. We discussed how the New Jersey attorney general and other state attorneys general will react to the rapidly shifting CFPB environment. Today's podcast show will consist of an even deeper dive into what we anticipate state AGs will be doing to fill the anticipated void in consumer protection that will be created once President Trump's acting director and then later director get involved in managing the CFPB.

Let me introduce our panelists from Ballard Spahr. It's Mike Kilgarriff. Mike is a high-stakes litigator, has extensive experience in government and administrative agency matters, complex commercial litigation, and regulatory compliance issues. He focuses his practice on state attorneys general investigations and litigation including multi-state enforcement actions, similar to the kinds of things that Attorney General Platkin described during my fireside chat with him. To date, Mike has personally handled investigations and/or litigation in 49 out of the 50 states, the District of Columbia, Puerto Rico, and the US Virgin Islands.

Mike's extensive experience extends to the following state attorney general enforcement actions. He was lead counsel for Navient Solutions in a wide-ranging state attorney general enforcement actions that was brought against California, Illinois, Mississippi, New Jersey, Pennsylvania, Puerto Rico, and Washington in a 39-state attorney general multi-state investigation regarding student loan origination servicing and collection practices. He represented many, many other companies in consumer finance matters where his clients were adverse to enforcement actions brought by state attorneys general.

Let me next introduce Adrian King who you will be hearing from during the second part of our webinar. He is co-leader of Ballard's state attorney general team. He's the former first deputy attorney general in the Pennsylvania Office of Attorney General, and in that role he was responsible for all aspects of the attorney general's operations, including management and oversight of the Public Protection Division and the Consumer Protection Bureau. Earlier in his career, Adrian served in Pennsylvania Governor Edward Rendell's administration as deputy chief of staff for Public Safety and the director of the Pennsylvania Emergency Management Agency. With that extensive government sector experience and very deep knowledge of governmental and regulatory process, Adrian provides his clients with the benefit of an insider's perspective.

And then Jenny Perkins. Jenny is a partner and a litigator in our Consumer Financial Services Group. Prior to entering law school, Jenny had an internship with the New York attorney general office. Since Jenny has been at Ballard Spahr, she has handled numerous state attorney general investigations, has worked on some with Adrian King. Let's turn it over to you, Mike, and for you to carry the ball.

Mike Kilgarriff:

Thank you so much, Alan, and thanks for everybody sticking around. I thought that was an incredibly interesting conversation with Attorney General Platkin, and in many respects, and we did not coordinate in this regard, but a lot of the things that he spoke about in the fireside chat with Alan are very similar to the observations that we see in this space. And so for purposes of the remainder of the presentation we're going to talk about the trends that we see and how the states may fill the regulatory gap that I think a lot of people are anticipating in the second Trump administration. And so briefly, our agenda is to look at both the CFPB and state attorney general enforcement trends, both a look back to the first Trump administration and make some projections and piggyback off what Attorney General Platkin said of what we foresee coming for the next four years.

As Alan asked earlier, the CFPB issued I think a blueprint, a playbook, a roadmap, but either way a guide for the states and how they see consumer finance, consumer protection shifting from the federal government, which has been incredibly aggressive over the last four years in this space, now in some ways back to the states. And then we'll look at, in particular for this audience, consumer finance, certain priorities and initiatives that we see, and again, piggyback on what General Platkin mentioned during the fireside chat. Finally, we'll end with, look, not everybody's

been through this rodeo where they're on the other side of a state attorney general subpoena or 40, and you have three people here who have seen probably every scenario. Adrian's been on both sides of the aisle so to speak. And so we're going to offer our perspectives and tips because we do anticipate that the states will be much more active in the wake of a new CFPB director and under the new administration's directive.

So without further ado, we'll dive in. I'll say this is going to be much a conversation between Jenny, Adrian, and I. I will do my best to MC and make sure that everybody gets their CLE credit. So first and foremost, I think where to start is a look back. Alan mentioned this during the presentation earlier, you sort of have this expectation that the first Trump administration and the bureau acted substantially differently. At least that was my perspective until you really look at the data, and this is one thing that on the CFPB website I check frequently because they updated around this time and they just did for 2024. So you see that in many respects the enforcement actions that the chart, at least on my left, you don't see that much of a variance between Democratic-appointed CFPB directors and then the Trump administration between 2017 and 2020.

And obviously with respect to this data, there's a lot of content. We have COVID in here, you have dual directors during Trump's first administration and all the questions about removal, but where you really see a difference, and I think if you were in our last webinar with former CFPB Director Kraninger, there was a different approach to penalties and restitution, and you really see that displayed in the chart, at least on my right, where you're looking at consumer relief. I think one commentator that I'm going to steal, at least with respect to this last, or I guess I should say the current administration, they were swinging for the fences every single time, whereas under the first Trump administration you had a lot of singles. You had smaller single digit type of penalties and relief for true violations and maybe not the same stretch of everything as a UDAP. And so in many respects, we see that the pendulum is going to fully swing back to the states and very much mirror the first Trump administration in terms of consumer relief as the second.

One thing before we really get into the programming, I did go back and see... I guess I did go back and see what were commentators talking about in the first Trump administration, and in many respects, it's mirroring the same thing that we're talking today, that there was this presumption that consumer and investor protections would be no longer enforced or rolled back. And so I found this quote from the former New York Attorney General Schneiderman, again, very similar right after the election, talking about the concern that the Trump administration and the approach that they were going to take with respect to consumer finance laws. In many respects, you saw this trend play out.

I mean, Attorney General Platkin talked about working with his federal partners, and thankfully there's lots of data out there. I went and pulled during the Trump administration how many of these multi-state coalitions worked with the federal government. Here you really only see four, and in many respects three are related to for-profit schools and then one was the Equifax settlement. And so I think as we think about trends, we have to look back at history and think about what are businesses going to be facing at this time. And so the last sort of to hit home on this point is, again, right after the election, you had Attorney General Bonta saying, "We've been preparing this for months coordinating and working together," and in many respects that's been the trend for state attorneys general. You now have all of these consumer protection divisions that know each other, that have worked together, that have collaborated, and they see the value in resource sharing and dividing and conquering, and that's not going to slow down.

So it's going to be really fascinating to see whether Attorney General Platkin is right in his hope and goal that a lot of the CFPB initiatives will not be abandoned. That being said, history tells us that the states are going to fill that regulatory guide. So in particular this section, and I think this is where Adrian and Jenny have such great perspective, but if you look at the map of the current state attorney general parties, very much like the election in November, you're seeing a divide, but the reality is as Attorney General Platkin, there's certain issues that are just nonpartisan in general. So let me ask Adrian, from your perspective, both in private practice or working in the attorney general's office, what was that relationship with other offices, the coordination, and were there particular

issues that were more nonpartisan? Obviously in terms of social issues and suing the federal government, those are going to be along party lines. But in this space, consumer protection, consumer finance, what's your experience like?

Adrian King:

Thank you, Mike, and I'm happy to be here. I think you have to assume that there is widespread coordination on what I'll call some major themes. In my experience, some of them have been involved with the redlining in the mortgage lending space and also with respect to rent-to-own have handled some pretty major cases. You're always going to see coordination obviously in a multi-state. You're going to see it when there are simultaneous actions often coordinated between states and the federal government where the CFPB is bringing a simultaneous action that one or more states are bringing with respect to the same business. And quite frankly, you have copycat cases where perhaps the state does a settlement in a matter, other states see it, it's not handled in a multi-state but they say, "Huh, this is something we should look into what's going on with the same company in my jurisdiction." In our experience, a lot of times the states that maybe are a little bit ahead of others are more than willing to share knowledge or information. I will say from a practical perspective what the target needs to do along with their counsel. Just make sure here you're very familiar with the laws in the various jurisdictions that apply to the privacy of data and information that is provided in the context of an investigation. So you've got to, if you can, and we've seen this in some of the matters that we've handled, throw a brushback pitch if you get a sense that they're bending the rules or quite frankly not following the rules on what they can share. In Pennsylvania, there are some pretty clear prohibitions and we've taken advantage of those when we can. I want to give Jenny an opportunity to also speak on this, and she and I have worked very closely on this type of issue.

Jenny Perkins:

Thanks, Adrian. I mean, just to echo on the copycat states, I mean you and I have seen almost verbatim CIDs issued by different states against the same target company. Although it's not a multi-state, it's clear that they're talking as we're seeing identical CIDs.

Adrian King:

If I could, let me give one example, and this is the law in Pennsylvania but I think it's important and instructive in all jurisdictions. In Pennsylvania, they don't necessarily use the word or the terminology a CID, civil investigative demand, but they typically will start an investigation with what's called an access letter. They try to paint it typically as this is not a big deal, we're looking into these issues. It's a very big deal. It's signaling that you're in their sights, so to speak. A bad analogy perhaps. But here's the thing. We typically advise our clients in that circumstance not to respond to that letter, but to voluntarily ask for a subpoena. Some clients, especially those that are publicly traded, get a little freaked out by that because they feel that that may be a reportable event, why do you want to go to a subpoena.

The reason is in Pennsylvania, and by the way, the subpoena is something they can always issue if you were to ignore the access letter, but the reason why you ask for a subpoena in Pennsylvania is because the law is much clearer that when a subpoena is issued it is cloaked with various protections on disclosure to third parties, and we would argue those third parties include other governmental investigatory agencies out of state or even the federal government that they can't share your information if you're responding to a subpoena. But again, that doesn't necessarily cover an access letter or what Pennsylvania calls a civil investigative demand. So that's a real-world example of what you need to take into account when you're turning information over and trying to protect where it goes.

Jenny Perkins:

And, Adrian, the law that you're referring to in Pennsylvania does not even permit the Pennsylvania AG to use the information and documents or to use the documents they obtained pursuant to that subpoena if litigation actually does occur ultimately. So you should definitely take a look at what the laws are with respect to confidentiality in the respective states. In terms of and going back to Mike's point, we are seeing CIDs or access letters from states across the aisle when it comes to certain consumer finance issues, certain types of companies, and I don't think any of us on this call were surprised to see the guide post that the CFPB put out regarding certain issues that we think that we're going to see both from red and blue states.

Mike Kilgariff:

Yeah, thanks, Jenny. Thanks, Adrian. Let me just go to the next slide. I mean this idea of sort of cross-aisle big multi-state coordination, we just pulled some of the big ones where you had 49, 50, 34 state attorney general working together on both red and blue states, and you see different leads, and I think this trend is going to continue. I obviously lived the first one for a really long time, but at least in this space I think it's fair to say that consumer finance is a nonpartisan issue as much as maybe folks want it to be, that these states are going to go after and protect their constituents and think about ways that they can ensure that their respective citizens are taken care of. Especially one to Jenny and Adrian's point, it's really easy just to copycat or join at the end and take advantage of the relief, and we envision that I think happening again.

Jenny mentioned this, the playbook, the roadmap that the CFPB issued, and I think, I mean, look, they're saying on those, "These are the recommendations for states to follow," and in many respects they want these states to be little mini CFPBs. So we put together really the highlights from this, and in many respects, they're not hiding the ball. They haven't done, right? They blog, they issue these highlights, they sort of tell you exactly what they're thinking, and this is no different. I mean, they anticipate deregulation. They're looking for the states to take more robust consumer financial protection laws, and this is really for both state attorneys general and legislators. I mean, I don't know, Jenny and Adrian, when you see this, I guess the question is do we really think that this is going to change anything. I mean, in many respects the states now use Dodd-Frank and the federal action to bring those powerful protections. I mean, you heard Attorney General Platkin mention the fact that New Jersey has very robust laws, but obviously other states that maybe don't are still able to take advantage of the federal framework where appropriate.

Adrian King:

Yeah, I don't think you're going to see anything necessarily new, especially I would say with the most sophisticated and well-resourced states, so New York, New Jersey, Maryland, Illinois, Michigan, California, State of Washington. Now, not surprisingly, most of the states I've just mentioned, if not all, those are all states with democratic attorney generals. They're already very well aware of the tools that federal law provides to them, and they're going to continue to deploy that. I think that what we're effectively saying is I think consumer protection in sort of 15 years ago for the CFPB there was always sort of the old yarn that Republican AGs were just more concerned with their criminal enforcement powers with respect to drugs and what you think of as crime, and democratic AGs were more interested in broadening their approach. I think all AGs across the state want to bring to bear all the tools they have available to them under their particular state laws. So I don't think that we're going to see less consumer protection enforcement in Republican states. I think it may be a matter of emphasis.

I think that the Republican AGs are going to kind of get on the Trump administration bandwagon on certain key issues that they see as key, on immigration, on drugs, things like that, fentanyl obviously, but that doesn't mean they're going to just abandon anything on the consumer protection side. They will. I think the one thing, and I'm willing for others on the panel or even in the comments from the attendees to disagree with me on, I would like to think that in some of the Republican offices, I think the approach will be more even-handed at times where they will look at perspectives on consumer protection issues from both the consumer and the business side, whereas I

think some of the more aggressive, or dare I say even activist democratic states, they just paint a very negative brush on businesses and don't really ever give them the benefit of the doubt. And that is where I do think there could be some difference in the approach with respect to the two sides of the aisle.

Jenny Perkins:

I know the three of us were talking about this, but I think the makeup or the composition of the deputy attorneys and the attorneys in the AG offices in the consumer protection divisions are likely to change. Adrian, I don't know if you want to talk about what you think Pennsylvania will look like now that we have... now that we've changed across the aisle with our AG.

Adrian King:

Yeah, I mean, just briefly on Pennsylvania, starting with Josh Shapiro who's now our governor but was our attorney general before he ran for governor, he wanted to take full advantage of the consumer protection powers of the office. He went out of his way, part of his strategy, I mean he recruited attorneys from the CFPB to come and join him and to create their own version, mini-version, they would say it themselves that's what they were doing, of the CFPB. I just, I don't know how that changes. I can't think it'll be held in the same light under the new Republican administration just because by and large the Republican approach to the CFPB has not at all times been very positive. So that's something we're really keeping our eye on. It's going to be interesting to see whether the emphasis remains the same. Again, do I think they're going to abandon those powers? Absolutely not, but I think there's going to be, like in anything, there's resource allocation and I think you're going to see more resources going back into some of the criminal division, opioids, again fentanyl, I think things of that nature.

Jenny Perkins:

And we have a question from the audience about multi-state actions. I know for one I'm predicting that there's going to be more multi-state actions. There is one consumer finance multi-state action that's active right now in the Eastern District of Pennsylvania. It started with a few states and then there was rulings on motion to dismiss, whether they could all be filed together, and the answer was yes, and after that ruling we saw a number of other states join. So I do think that there's going to be more multi-states. The question is is do either you, Adrian or Mike, think that there's going to be any incentive changing for companies now litigating these actions or these multi-state actions rather than settling them.

Mike Kilgarriff:

Yeah, I'm happy to go first because I think this is really interesting, and, Jenny, what you mentioned. I mean, my experience really going back to Trump 1 Inauguration Day is the states would file themselves, right? The CFPB filed by themselves. I mean, I'm not giving away trade secrets here, but I had a group of enforcement lawyers from AGs tell me that they won't do that again, that they learned from their mistakes, and now they are going to file collectively. I think it's really interesting from thinking about the question from a settlement standpoint. The one difficulty is when you have a multi-state and it breaks apart, now you're negotiating not with one group but you really are now negotiating with seven or eight, and they all have different interests, especially when they break the seal and file suit because at that point the press releases are out the door, the AGs have made their statements, they have grandized this action.

And so I don't think, this is me personally as someone on the defense side, that I would necessarily advise that you want to take a different position. I think at the end of the day keeping those actions out of courts is advantageous and the same settlement incentives remain. That being said, I think, look, just like anything else, these offices are learning. They're changing their strategies based on what worked, what didn't. I can't imagine that's going to be any

different, especially in the wake of this case you mentioned in the Eastern District of Pennsylvania where they are able to collaborate. I mean, you sort of see the evolution of their thinking with the way they're filing now. I think the one thing, and we've been on this slide for a long time, but the one thing I did want to say that I thought Attorney General Platkin mentioned and I think it's going to ring true is that you have this framework for consumer protection laws and they're applying it to a wide variety of industries, entities. I mean, you heard about financial lenders, the fintech space, the Bureau's been really active with AI is going to be a particular interest. I sit here in Denver, Colorado has passed probably the most comprehensive AI bill to date from a state perspective in thinking about enforcement. And so these states are really thinking about how they can take the tools that they already have which is their consumer protection statute and apply it to emerging technologies. I think Adrian's point, you may see a divergence where you've got the blue states or purple states really focused on consumer protection, whereas the traditional model is red states thinking about job and pro-business, and that might be one place where there is a little bit of attention that I think will be interesting to see how they employ their tools to emerging technologies. Okay, So we have reached I think for our part of the section the first aspect of the CLE. I'm going to go ahead and click. I'm sure everybody's still listening. So this is just a continuation of where the Bureau would like to see changes in the states for their protective, their respective consumer protection laws. I mean, I think the one that jumped out to me was the strengthened private right of action. This is where there's a big difference between class action in this space for consumer protection and then the attorney general enforcement actions. Typically, and I say typically, I'm not aware of what state needs to show monetary harm or reliance, whereas individual consumers in order to bring claims really need to show that they were harmed by the practice, that they relied on it, and so you have this divergent requirement to really bring the same type of action. So I mean, I know in my practice that's always something to key in on between where you often see the plaintiff lawyers following the attorney general and trying to bring the same copycat claims and where you can from a strategy standpoint really take them down a different path. So I don't know. Jenny, Adrian, anything here on sort of the legislative changes or practices that jumped out to you all?

Jenny Perkins:

The one thing that I would say, and I know we're getting into this in a moment, is that one of the issues that's in the CFPB's playbook is looking at junk fees and hidden fees, and certainly that's always been something that the CFPB and the states have looked at, but I've seen it as a renewed theme both in civil private litigation and in attorney general and CFPB investigations and litigation. In terms of legislation, California recently entered into, or I'm sorry, enacted a junk fee law which is supported by the California AG. I encourage everybody to take a look at the law. There's a lot of literature out there about it, and I wouldn't be surprised to see more states enacting similar laws.

Adrian King:

The one thing that sticks out to me on the CFPB, quote, unquote, "recommendations" is I don't know if it's naïveté but it's much easier said than done to say, "We're going to pass legislation to improve this or improve that." I mean, obviously they had their priorities in the Biden administration and junk fees was certainly one of them, and it was certainly something that President Biden himself would mention. But the reality is in terms of these recommendations you really have to look at each state, each jurisdiction on a case by case basis. In those states and where Democrats have full control of the legislative process, meaning they control both chambers of the legislature and the governor's office, yeah, you're probably going to see legislation like you see all the time sort of parroting what the CFPB is recommending.

In a state like Pennsylvania, no, I don't see that. We have a Democratic governor, we have a Democratic house, although barely. For those of you in Pennsylvania, there is actually right now no majority. It's a tie, and there is one additional Democratic member who is in the hospital with a serious medical condition. There's been a courtesy

arrangement that there's a Democratic speaker of the house, but there's a tie and the Republicans control the Senate. So I don't see any heavily pro-consumer legislation making it easily through Pennsylvania legislature. So I droned on a little bit on that, but my point is you really need to look at each state very individually what is the political situation on the ground so that you can really see where you may have vulnerabilities in terms of new legislation getting passed to afford more powers to a state attorney general's office.

Mike Kilgariff:

Yeah, and I'll just say, I mean sort of piggybacking off that, again, kind of going back to Alan's conversation with Attorney General Platkin, I think what you're going to see is just state attorney generals and the federal government operating as I think he used the term co-regulators, especially in this emerging technology space, probably more so than broad sweeping changes to state consumer protection laws would be my suspicion. But absolutely agree with Adrian, it's going to be state specific. I mean certainly there's a lot of new bills, regulation, guidance on data privacy, on AI that is a focus of many of the states right now which will touch on consumer protection. But some of the recommendations, again, I just go to they can bring the federal action. I think, the next part of this section here is really focused on consumer finance and areas in which we see states focusing on.

But I've got... there's a few questions, so one, will state AGs be bringing more actions in state court based upon violations of federal laws. I don't think so. I mean my experience is that the states often want to be in state court, and so they'll bring it under their state consumer protection action because they want to get hometown cooking, whereas I mean as sort of national council we are always looking to remove it into federal court where I think folks want to get a fair shot. I assume, Jenny and Adrian, that's sort of your experience and would agree with that.

Adrian King:

Yeah, I would agree with that wholeheartedly. While we've seen some puzzling places where cases have been filed in some of the matters we've handled, typically the state AGs and their teams, they look at venue just as much as we do, and they certainly want the home field advantage when they can get it.

Mike Kilgariff:

Absolutely. I think there's a couple questions and we're definitely going to get to number one. But just while we're looking at data privacy and consumer rights, there's a comment about the Texas attorney general. I mean, I think this goes back to nonpartisan issues, and whether it's opioids, social media, and data privacy, that is certainly one where red states are taking the lead. There's a reference to Texas. I personally like the Texas attorney general's investigation into GM and how quickly that went. I would say unlikely bedfellows, Texas attorney general and New York Times who basically had this investigation going on at the same time concurrently. So I mean, I think in this space, data privacy, I think it's just every state is going to be active and going to be looking for violations, especially with the emergence of nontraditional fintech financial corporations. I mean, I think Attorney General Platkin said these third parties that are getting access, what are their safeguards, thinking about that, confidential payment, financial information. I mean, in some respects, it's really easy for the states to make that case.

Adrian King:

Yeah, just one point, just through my real-world experience. Privacy is a really interesting issue because it seems to have a strong attraction on both sides of the political aisle, and when I say both sides of political aisle, the extremes of both sides of the political aisle.

One thing that amazed me when I was in the AG's office and we were really in the midst of the beginning of the opioid epidemic was I could not get a bill passed for the longest time on a prescription monitoring program. While this is not consumer finance, I think it's instructive about privacy, and it was as much a problem with the Republicans who I thought would sign on because it was all about law enforcement. All you're doing there is you're



taking data and you're looking for trends and you're trying to understand, for example, why a certain big box store in the Lehigh Valley near Allentown is dispensing more opioids than any other big box store in the United States, and you're like, "What's going on?" But they did not want to give us more power to look at prescribing patterns because privacy was just sacrosanct, was just we're not going to do that. I didn't get it because we all saw the havoc that was being brought by opioids.

And just to answer the question that some of you may have, I mean, what was going on is there were rings of people being brought into that area by bus from New York City to get false or fraudulent prescriptions filled, and it was all just an opioid ring. But for whatever reason, privacy is just something that you're going to get a lot of attention on both sides of the aisle. So if that's something that your business is concerned about, continue to be concerned about it.

Alan Kaplinsky:

Mike, before you jump to the next area, I did want to mention something that people may not be aware of. In that roadmap document or blueprint that Rohit Chopra issued a couple of days ago, he did something that I certainly found a little bit extreme. I've never seen anything like this from a CFPB director before. He offered advice to plaintiffs attorneys, plaintiffs class action attorneys, and there are several pages of his blueprint where he talks about arbitration being a very bad thing for consumers, and he suggested various ways around arbitration. He's urging states to follow what California has had for many years, 17-200 of the civil code which allows for a private attorney general action that is for virtual effect act as a private attorney general, and by doing that he's saying you can avoid or do an end run around arbitration provisions.

Well, I think anybody who reads that... we're going to be blogging about what he wrote there because it's just replete with errors and mistakes about how the Federal Arbitration Act is interpreted. For example, he says you can't get injunctive relief in arbitration. That's absolutely false, that arbitrators can grant injunctive relief. So it may be a pipe dream of his to think that he's going to be able to get many other states to enact private attorney general provisions. This 17-200 of the California Civil Code has existed for a long, long period of time, and I haven't found another state yet that is trying to do the same thing. It's just I thought really a little bit beyond the pale that he ought to be playing footsie with plaintiffs class action attorneys. That bothered me. I know it's something you wouldn't do, Adrian, when you were in the attorney general's office. I'm sure you collaborated with other attorney generals, but you didn't tell plaintiffs attorneys what to do.

Adrian King:

Well, it's interesting you raised that point, Alan. I mean, I never liked those types of associations, and certainly there've been a lot of plaintiffs class action lawyers who've, as you said, played footsie with AGs. They routinely came into the office and pitch cases. Interestingly enough, we inherited one from a prior administration which was Republican involving nursing homes staffing. But I think AGs offices need to be real careful about those arrangements. They just don't look good. A lot of times these people are contributing money to campaign finance coffers, and you can't honestly say that interests are totally aligned between a governmental enforcement agency and a private plaintiff's attorney because the plaintiff's attorney has one goal and one goal in mind, and that's putting as much money into their pocket than anything else. So I agree with you. That kind of stuff really turns me off as well.

Mike Kilgarriff:

Thanks, Alan. Thanks, Adrian. Definitely an interesting section on arbitration in the playbook. So the second, or I guess the third of our four sections is highlighting certain areas of consumer finance where we anticipate state attorney generals either focusing or filling that regulatory gap, and I know we've got a pending question on digital... sort of this fintech space where the Bureau was, I mean at least in Q4 of '24, Q4 of '24 really focused on, I mean, press releases related to Google. You saw Goldman and Apple with the consent order, and so this sort of non-

traditional, non-banking entities that are in this space. I mean, I think all of us anticipate that the CFPB will scale back and that the states are going to be a focus here. I think, I don't know, Jenny, anything to add, maybe add on that? I know at least on this slide, this is your practice area with respect to some of these items. Anything you want to add to I guess either of these, debt collection servicing or the fintech space?

Jenny Perkins:

I think we're also going to see some of the AGs potentially go after entities that are calling themselves credit repair organizations, and I know most of our clients have to deal with them as they get many letters from these credit repair organizations. So I think that that's going to come in and we might see some actions or some legislation with respect to those entities that impact not just the consumer but impact the financial companies as well.

Adrian King:

Yeah. I know we want to move along quickly, but one quick point. On crypto and digital currency, I do see the potential for some serious headbutting between the federal government under the Trump administration and state AGs who may decide that that's scenario they want to get into. Again, I'm just reading the political tea leaves, but it appears that the crypto space has certainly intrigued the president-elect and his team. And so I think you have to assume that if there were aggressive enforcement at the state level, would they try to do something at the federal level on behalf of the industry. So we'll see how that plays out, but it's just an observation that I have on that particular issue.

Mike Kilgarriff:

Yeah, it's really interesting. Just to piggyback off that, and then we can kind of skip that section later on, but in the wake, I'm thinking 2023, you had this wave of large cryptocurrency companies filing for bankruptcy, seeing the fraud come to light, whether it was the SEC or the DOJ, whether it's Celsius or FTX, and certainly the states were involved there, right? You had DFPI, other states' DFI hand in hand with their federal regulators. What will that look like moving forward, will it just be the states, will there be some sort of protectionist action at the federal level I think is something that we're watching in the crypto space. I mean, I'll just say quickly, debt collection servicing practices, this is sort of the bread and butter of AGs. It's not going away. It never went away. We've touched on AI and decision making. We've touched on data privacy and cybersecurity I think at length here. Jenny touched on overdraft fees, junk fees.

We didn't really touch on ESG which was kind of a holdover of the first Trump administration where you saw Republican attorneys general being really active in this space, especially with banking clients, and then we talked about crypto, digital assets. I mean access to banking, I did see I think it was yesterday or two days ago potential regulation about non-discriminatory banking practices, mainly focused on I think like gun manufacturers and making sure they have access to banking. I think this is maybe the opposite from the state side and something that they'll be looking at as well, and then again, sort of like debt collection and servicing. The bread and butter of state consumer protection is certainly looking at mortgage servicing and foreclosures.

So our last little section here... Oh, sorry. If you can confirm you're still listening, but our last little section here is focused on what do you do, right? I mean, I think the three of us have been involved in countless numbers of these. It's almost second nature. But to add a practical element to this, what should you be thinking about, both in the wake of this regulatory shift but also if the state comes knocking at your door? So let me turn it over to Jenny for a little bit and I'm sure Adrian and I will want to chime in.

Jenny Perkins:

Thanks, Mike. So I mean, in our experience we've been involved as soon as the client receives the access letter or the CID. I think it is helpful to get attorneys involved so that you can work with the AG on realistic timeframes.

Sometimes you'll receive a letter that wants countless number of documents within 30 days which is, it's just not realistic. So kind of showing the AGs that the company has already engaged outside counsel shows that they're taking it seriously, they want to comply, they're just getting their ducks in an order.

With respect to preserving relevant documents, oftentimes as the AG begins their search they may expand some of their document requests that we always think it's good practice to send out a litigation hold letter and make sure that you're doing that in your company and preserving all the documents that the AG may want to see, and just also having outside counsel speaking to the AGs that are working on the case and being able to get a little bit more background than just what the letter says. They are very open, and when you talk to the senior deputy AG or the junior deputy AG that's been tasked with the case, in our experience they'll be really upfront about the issues that they are looking at, and that can also help us help the companies navigate the response.

Mike Kilgarriff:

Just to piggyback what Jenny said, I mean two things. One, mainly because this is front of mind for recency bias, I think having that buffer between you and the AG, you being the business and the AG is really, really valuable. It's one thing for outside counsel to say, "No, go pound sand. Impossible." It's really difficult if you're the general counsel or chief compliance officer or deputy of litigation in-house. It's just so much easier to have outside counsel manage that situation.

But I think for me personally, and this is just my practice, the open communication with the AG's offices, I have just found that to be really, really successful. Having worked with offices all around the country, being able to sort of reach across the divide and work together has been really, really successful, and so that's one thing that I always do which is to try to maintain of course a professional but a friend relationship with the state attorney general's office, because at the end of the day they are regulators. They do hold a lot of power. But in terms of things like extensions and just frankly working together, I think it goes a long way, a really, really long way, and it's just something that's really important when you're thinking about... you know what? It's stressful. You're under this investigation. It's really difficult. But I don't know, sugar goes a long way I have found with these particular investigations.

Adrian King:

I represent companies in a lot of regulated industries, and the best thing you can do to effectively get your position across is to maintain that good, solid, professional relationship, and that starts with showing them you're taking this seriously. You're responding in good faith to their inquiries. You're getting them what they want to see. That's going to give you your best opportunity to get your position across. And so I agree with what Mike said.

Mike Kilgarriff:

All right, Jenny, we'll let you drive.

Adrian King:

I think we may have lost Jenny.

Mike Kilgarriff:

Nope, we might have. All right, Jenny, I think you're on mute.

Jenny Perkins:

I think we should jump to the next slide. I think we covered everything in the first two slides.

Mike Kilgarriff:  
Great. All right.

Jenny Perkins:

So distinguishing factors of AG investigations. Of course, you're not in discovery yet. You don't have a mediator, you don't have a discovery judge to tell you what they can and cannot ask for. So it is a little bit different, but in contrast to maybe working with plaintiffs counsel or class action counsel, I have found that AGs are really willing to work with you on narrowing the scope or at least initially narrowing the scope and then reserving their rights to go back and ask for more information. So certainly don't be afraid to ask for that in the beginning, especially given their teams and their resources it's highly unlikely that they're going to be able to look at everything within the 30 days that they've asked for. So you don't have a mediator or a judge that can make these decisions, so those are things to think about.

I think the next slide goes into proactive measures, and I know we also want to touch on the first question about consumer relief. So in terms of proactive measures, I mean certainly seeing high numbers of AG complaints that are coming into your company either from one particular AG or on similar claims, that is something that's enough that should raise a red flag. We've certainly been told that some of our clients, the investigation started simply because they received five or six common complaints from somebody submitting it. So making sure that you are on top of those AG complaints that are coming in, you're monitoring them, and then also you're responding to them timely. Sometimes these AG complaints just get lost, and you certainly don't want that to be your first impression with the AG that you're not responding to these initial complaints. And then I think we could go into settlement, but I'll see if Mike or Adrian has anything to add here.

Adrian King:

Just two seconds on this. Where they are getting case ideas is through consumer compliance, Better Business Bureau, newspaper reports, investigative reporters. I mean, don't kid yourself. This is where a lot of cases start, and so you got to take all of that stuff seriously. The other thing that I would recommend to businesses, because I think both Jenny and I have seen this trend, is sometimes companies, especially when they're starting up and maybe a new emerging business, I would say they sometimes cut corners on compliance at the beginning because there is a rush to acquire market share, and that can really come and bite you in the tail later on.

And so I think that if you're in a business, especially in some of the newer fintech businesses, that you may have done a self-assessment and known that maybe that was the case, it's always better to start getting ahead of that even before you might hear from an AG. I mean, just be honest about what's been going on. But there's always been... I've seen a tension between market share acquisition and compliance, and you just got to understand that's a big risk that you're going to have to manage one way or the other, either before the AG shows up or afterwards. So just an observation.

Jenny Perkins:

In terms of settlements, it's been our experience that most AGs, even if there's no open court case, they're going to want to create an assurance of voluntary compliance or discontinuation of certain measures. They want to have that so that they have a direct channel if there is a violation of the AVC. In terms of remedies, it's been my experience and Adrian's experience, and I'd be interested to hear Mike as well, it seems like primarily the AGs are interested in restitution back to the consumer, and they may have a little bit more wiggle room when it comes to civil penalties. But certainly in terms of thinking about what press releases will say with settlements, I think that restitution has always been the number one thing that they're looking for, and we've also been able to mirror that with some sort of debt relief out there. But Mike, I'd be curious to see your experience.

Mike Kilgarriff:

Yeah, that mirrors my experience as well, really a focus on consumer relief.

Jenny Perkins:

So, Mike, we should probably wrap things up and I'll let you do that.

Mike Kilgarriff:

One, thank you so much for everybody who stuck around, listened to the program. Obviously the three of us enjoyed talking about this space given our experience with these respective offices which is a little bit of a segue. I mean, maybe two updates, recently Ballard Spahr merged with, acquired, I'm actually not sure of the correct term, with Lane Powell out of Washington, Oregon, and Anchorage, and it's just brought, frankly, more firepower to our state attorney general practice with folks in those respective offices that have either worked at the AG or worked with. And so this map is... I think it's highlighted because Ballard Spahr has handled investigations, litigations in each and every single one of these jurisdictions to date. So it is a full nationwide practice with 50 states plus Puerto Rico. I don't know. I've done Virgin Islands. So anyways, just want to say thank you. Thank you to Jenny, thank you to Adrian, and Alan, we'll turn it back to you.

Alan Kaplinsky:

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