Consumer Finance Monitor (Season 7, Episode 13): The Consumer Financial Protection Bureau's Use of Unfairness to Regulate Discriminatory Conduct: A Discussion of the Consumer and Industry Perspectives

Speakers: Alan Kaplinsky, Rich Andreano, and Jeff Sovern

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast where we explore important new developments in the world of consumer financial services, what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr law firm. I'm your host, Alan Kaplinsky. I'm the former 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 desire more information, either about the topic that we're going to be covering today or any other topic in the world of consumer finance, don't forget about our blog, consumerfinancemonitor.com. Yes, it goes by the same name is our weekly podcast show. We've hosted the blogs since the very day that the CFPB became operational on July 21, 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. If you like our podcast, please let us know about it. You can leave us a review on whatever platform you utilize to access our podcast today, be it Apple, Google, Spotify, or our website. Please let us know what you think and also if you have any ideas for other topics for our show that we should consider or speakers that we should consider inviting as guests, please let us know about that. I'm very pleased to report that our podcast show was within the last few months ranked by Good2bSocial as the best podcast show among law firm podcast show in the United States devoted exclusively to consumer financial services. And it was ranked by Good2bSocial, which is now part of Best Lawyers.

We're very gratified by this recognition from one of the country's leading social media consultants for law firms. So we have a very interesting topic today and I can't think of two people more better suited to cover this topic than my two guests. So let me first of all introduce my guests to you. So first of all, our very special guest is Professor Jeff Sovern. Jeff is the Michael Milliman Professor of Consumer Protection Law at the University of Maryland, Francis King Carey School of Law. He's written many law review articles on consumer law. He's co-authored a West consumer law casebook. He's written numerous op-eds in places like the New York Times, USA Today, Boston Globe, Politico, cnn.com. You may have seen as many blog posts on the consumer law and policy blog. He is a frequent contributor to that blog.

He also has spoken frequently at events like the PLI Consumer Financial Services Institute, which I chaired for, I was the originator of that particular program and I co-chaired it for 25 years. He's also spoken before the conference on consumer finance law and many, many other events, always on the subject of consumer finance and consumer protection. My other guest today who's also a special guest is Rich Andreano. Rich is the chair of our mortgage banking group that is part of our consumer financial services group. Rich, in that role as being involved in mortgage banking, Rich has had just an enormous amount of experience dealing with fair lending issues. And because the topic we're going to talk about today is a fair lending topic, I thought it would be very interesting to have Rich join us on the program today. And let me tell you what our topic is going to be before I turn it over to Rich who will lay a deeper foundation for the questions that I'm going to raise both with Jeff and with Rich.

What got me interested in doing something is that Jeff recently completed an article that's called Is Discrimination Unfair? It Can be Found on SSRN. It does not yet been determined what law review it will be published in and when it will be published there, but it is available. And it really is a very well written article and I guess I could say almost a tone really covers the waterfront on this. And the issue is is discrimination unfair. And what we're getting at is that a change that was made to the UDAAP Exam manual by the CFPB a couple of years ago, maybe it's not quite two years ago, where they amended it to say

that discrimination can be unfair. If you discriminate, it fits within the unfairness prong of UDAAP. So first of all, before I get to you, Rich, Jeff, a very warm welcome to you. I'm delighted. I think this may be your first appearance on our podcast show.

Jeff Sovern:

Yes. And thank you for inviting me. I'm looking forward to hearing what you and Rich have to say about the article. I always think that it's best to hear the arguments for why what I say in an article is wrong, and I have a feeling that you and Rich are going to tell me that.

Alan Kaplinsky:

Boy, you're very prescient. Well, maybe we won't use the word wrong. We'll be much kinder than that. And Rich, of course, you've been on our podcast show many times and it's good to have you back. So I'm going to first turn it over to you to lay this, where did this whole thing come from, is discrimination unfair? And then we will dive into a lot of questions that I have.

Rich Andreano:

Very good. Thank you Alan. And greetings everyone. Now, just as we've said before when we've addressed the issue, the issue isn't whether under the general concept of unfairness is discrimination, unfair and inappropriate. We all agree with that. The concept here more is in the legal context of UDAAP. Did Congress mean to grant broad powers to the CFPB to reach discrimination in areas not covered by existing federal statutes that are expressly designed to address discrimination but admittedly do not reach all consumer financial products and services? Now where this starts, we have to go back to March of 2022. That's when the CFPB Consumer Financial Protection Bureau revised its examination manual for unfair, deceptive or abusive acts or practices, UDAAP for short to target discriminatory conduct even where fair lending laws may not apply. The CFPB indicated that the unfair prong of UDAAP authority covers discrimination with regard to all consumer financial products and services within its jurisdiction.

Now that authority comes from the Consumer Financial Protection Act, which is part of Dodd-Frank, and it defines what is unfair for purposes of this authority and it has three components. One, the act or practice causes or is likely to cause substantial injury to consumers. Two, the injury is not reasonably avoidable by consumers. And three, the injury is not outweighed by countervailing benefits to consumers or competition. Now in the revised exam manual, the CFPB expressly addressed the first two prongs and it said discrimination can cause substantial injury to consumers such as foregone monetary benefits or denial of access to products and services. And that also consumers cannot reasonably avoid discrimination, bureau said that conclusively. It didn't address the third problem, that the injury is not outweighed by countervailing benefits to consumers or competition. That tends to be highly fact specific. So I understand why it did not address that in this context.

Move forward a few months, June of 2022 four trade groups, the American Bankers Association, the Consumer Bankers Association, the Independent Community Bankers of America and the US Chamber of Commerce sent a letter to CFPB director Chopra asking that the bureau rescind the revisions to the manual. They included with their letter a white paper setting forth their legal basis for requesting that rescission. The white paper is entitled Unfairness and Discrimination, examining the CFPBs Conflation of Distinct Statutory Concepts. The title lets you know what one of their points was that they believe under the Consumer Financial Protection Act that UDAAP and discrimination are distinct concepts and that UDAAP does not cover discrimination. As you might expect, the CFPB was unmoved by their efforts and we fast-forward to September of 2022 and seven trade groups filed a lawsuit in federal district court in Texas, and that's important, challenging the revisions to the exam manual.

Now three of the trade groups that were part of the initial request are in fact plaintiffs, the Chamber American bankers and consumer bankers. They're joined however by four additional trade groups, the Independent Bankers Association of Texas, the Longview Chamber of Commerce, which sits within the jurisdiction of the Federal District Court, the Texas Association of Business, and the Texas Bankers Association. Obviously these entities were added to give standing in Texas in particular in that district court. Now the plaintiffs made a constitutional claim and they made standard claims that people challenging federal regulatory action will make under the Administrative Procedures Act. Now the constitutional claim was that the CFPBs funding structure is unconstitutional. Now importantly, this claim was made about a month before the Fifth Circuit ruled in

the case Consumer Financial Services Association versus the CFPB that in fact the Bureau's funding structure violates the appropriation clause of the Constitution.

So what did they base their claim on? The Fifth Circuit had decided previously on banc in May of 2022 in the oil check cashing case, they were addressing certain matters and incurring opinion, Judge Edith Jones concluded that the Bureau's funding structure was unconstitutional. And they based their claim on the theories in her concurring opinion. One of the Administrative Procedure Act claims, very common claim, that these revisions exceeded the bureau's statutory authority. Cases assigned to Judge Barker who was nominated to the court by former President Trump, so of course already the deck appears to be stacked against the Bureau in the case. And importantly that District Court sits within the jurisdiction of the Fifth Circuit and the Fifth Circuit has not been particularly kind to the Bureau. Move forward to September of 2023 and the court granted the plaintiff's motion for summary judgment and it found that the revisions to the exam manual were beyond the bureau's constitutional authority based on the appropriations' clause issue.

Now in there, although the CFPB had several procedural defenses, they actually admitted that should the court reach the merits of the plaintiff's claims, the court was bound by the Fifth Circuit's decision in the CFSA versus CFPB case. And it would have to rule the action was improper because of the unconstitutional issue as determined by the Fifth Circuit. The court also though moved on to the statutory claim and it did say that the Bureau's authority to regulate unfair acts or practices did not reach discrimination. So it had acted beyond its statutory authority. So what the court did now is you go, "Well, why did they decide the Administrative Procedure Act claim when the decision on the constitutional issue gave the plaintiffs the relief they sought?" And that normally is the case and the court acknowledged that.

But the court said, "I know the constitutional issue now is up on review by the Supreme Court." In fact, the court had accepted to the CFPBs request to hear that case. So now that the District Court knew they might rule the bureau structure as constitutional, that would then mean we'd have to turn to the Administrative Procedures Act claim. So in the interest of efficiency, I'm going to look at the statutory claim and ruling in favor of the plaintiffs on the statutory claim did not proceed to see the other claims. Just as a side note, in October of last year, 2023, the Supreme Court heard the oral arguments on the issue of whether the CFPBs funding structure is constitutional.

Now predicting how the Supreme Court's going to rule based on oral arguments, it's a bit like reading tea leaves, but our view, and we think the prevailing view is the court will uphold the funding structure of the Bureau's decision, which will mean that it's the statutory issue that's now the main decision. Now the district court did something very interesting and at first we scratched our heads, but then we realized why, it vacated the exam manual changes, meaning they didn't exist. But then it also granted an injunction to the plaintiff organizations that prohibited the CFPB using this interpretation that UDAAP covers discrimination against any of the members of the trade associations in the supervisory examination or enforcement context. And we said, "Why did it do that?" The reason why is the Bureau had argued that the exam manual changes were not needed for UDAAP to cover discrimination. It already covered discrimination. The exam manual changes were just making that clear.

So the plaintiffs wanted an injunction that would go to protect their members, that the bureau couldn't assert that theory outside of the exam manual. Now, as might expect, the bureau did appeal up to the Fifth Circuit, that was in November of last year, 2023. And then also in November the fifth Circuit granted the bureau's unopposed motion to stay the proceedings say, "Why don't we stay the proceedings here? Let's see what the Supreme Court does on the issue of the CFPBs constitutionality. And then once that's decided, we'll move on." Again, we think the Supreme Court will uphold the funding as being constitutional, meaning the one issue before the Fifth Circuit will be the claim or the decision of Judge Barker, that the exam manual changes were beyond the bureau's statutory authority. With that, I now turn the podcast back to Alan.

Alan Kaplinsky:

Well, Rich, thank you very much. That was a very comprehensive and I think a complete review of what has happened with respect to the issue. There's one other issue that I think the judge decided, I don't know if it's on appeal or not. But didn't the judge decide that the amendment to the exam manual was tantamount to a regulation as met the definition of a regulation under the APA and therefore should have been published for notice and comment?

Rich Andreano:

I believe there was. He didn't rule directly on the other APA issues, but it was clear, I think, the ruling that he did think that this was a substantive agency action. And that was more dealing with the procedural claims made by the bureau because they basically were saying initially that they had sovereign immunity and the court said, "No, this is a final agency action. It can be challenged." So it was dealt with in the procedural context, not on the merits.

Alan Kaplinsky:

All right, Jeff, my first question to you is why do you think Judge Barker got it wrong? What's wrong with that opinion?

Jeff Sovern:

Well, speaking very broadly, I harken back to the famous quote from Judge Harold Leventhal of the DC circuit who criticized the use of legislative history as looking over a crowd at a cocktail party and picking out your friends. Judge Barker was not using the legislative history in this case, but for better or worse, the statutory interpretation tools that we have available to us, even outside of the legislative history context, resemble the same general approach. That is to say there are so many tools that in many cases if you want to decide it one way, you can go with the tools that enable you to do that.

If you want to decide it a different way, well you can use other tools that will let you come out that way in many cases, not every case, but many cases. So I think Judge Barker went with the statutory interpretation tools that allowed him to reach the result he wanted to reach. And I of course use somewhat different tools. I reach a different result and that means that my paper is subject to the same criticism that I've picked out the friends that helped me. But I think the response to that is the tools I use are more faithful to how the Supreme Court interprets statutes these days. I think they're more based on the text of the statute and the meaning of the statute, but I have to acknowledge that people could disagree with me.

Alan Kaplinsky:

Yeah, okay. Well isn't there, let's get back to what I think is the key issue here, and I think the difference between Judge Parker and Rich Andreano and you is that you look at the dictionary definition of the term discrimination. And under the dictionary definition, I think it's pretty clear or maybe under the definition of unfair, and as Rich said at the beginning, everybody concedes that if you look at dictionaries, it's unfair generally to discriminate. I wouldn't say in all circumstances because I think we could give you, and we will later on I think give you some examples of types of distinctions that are made by consumer finance companies for customers that I think you would agree with us, they're fine, they're not unfair, and you would probably somehow shoehorn it into the definition of unfairness under the Dodd-Frank Act.

But where the rubber meets the road here is when it comes to the legal definition and does discrimination fit with the legal definition? And there you've got to deal with the other statutes that are very expressly prohibit discrimination, protecting certain types of classes. They're very, very specific. And of course I'm referring to the Equal Credit Opportunity Act and the Fair Housing Act. So my question is, isn't there a difference between the way words are normally understood and the way Congress uses them? In other words, you can't always just pick up a dictionary and maybe you can in certain circumstances, but where you have this overlay, this legislative history of legislating on the specific area of discrimination unequal and the Fair Housing Act, doesn't that alter things somewhat Jeff?

Jeff Sovern:

Sometimes. And when that's true, Congress often uses definitions. We don't quite have a definition of unfairness here. The statute limits the use of unfairness to the circumstances that Rich described earlier, substantial injury and so forth. But that's not exactly a definition. It just says you can't use the statute unless, it can't be considered unfair unless those conditions are met. The statute does not say unfairness means and then have a definition. The Supreme Court often rejects the view that statutory text is not used in the ordinary way. In fact, there's something called the ordinary meaning canon that Justice Scalia wrote about in the book he co-authored with, I think it's Bryan Garner, on how to interpret statutes. And you're right that I do use dictionaries, the Supreme Court does too. And in fact it has in the consumer financial context in the Henson against Santander case where it used dictionaries to figure out what words in statutes meant.

If you go back to the dictionaries at the time Congress... that were in use at the time Congress wrote the original FTC ACT provision, banning unfair practices. This is back in 1938 and it's the statute from the CFPB drew... from which Congress drew the UDAAP language, some of the UDAAP language in the Consumer Financial Protection Act. If you go back to those dictionaries, you see that they do in fact see discrimination as unfair. So the 1943 Funk & Wagnalls Dictionary, which I confess I had not heard of since I was a boy watching Rowan & Martin's Laugh-In, but it defines unfairness as showing prejudice. And many dictionaries back at that time talked about fair or unfair, focused on things like just dealing, equitable, not in a just or equitable manner, even-handed. So I think the language focused on the use of fairness or unfairness as discrimination. But beyond that, if you want to stick to the way Congress uses the word unfair, well, when Congress wanted to pass a statute banning discrimination in housing back in 1968, it called it the Fair Housing Act.

So Congress has equated fairness with discrimination in that statute and many others. In fact, in the Consumer Financial Protection Act itself, the statute that the CFPB relies on for its unfairness power, the statute talks about fairness, fair lending, it says means, this is a quote, "Fair, equitable and non-discriminatory access to credit for consumers." And the statute established the Office of Fair Lending and equal opportunity within the CFPB and spoke about how that office's goal was to ensure non-discriminatory access to credit. So in the very statute that we're talking about, Congress used the word fair to relate to non-discriminatory access to credit. For Judge Barker's position to be correct, you have to say that in the very same statute, the word fair or unfair, they mean completely opposite things. And I can't think of many statutes that use the same words to mean opposite things. It just strikes me as a very unlikely thing for Congress to do.

Alan Kaplinsky:

So. Rich, what about that? I mean that sounds like a good argument that Jeff has made.

Rich Andreano:

Yeah. At first, I do commend the paper to people interested in this issue. Because I think Jeff, if you are supporting the position that UDAAP covers discrimination, he's made the arguments to support that. And I think he does it in a very effective matter. But as you know, I think it's an issue where reasonable minds can differ. My answer to this, whether normal wording or different, it really relates to Jeff's approach to the first question, is courts kind of go down the path that gets them to the result that they want to rule on.

And so if the normal meeting of a word supports the way the courts will want to go to rule, it'll cite the dictionary and say, "Well, that's what Congress meant, and I'm adopting that." If the normal meeting doesn't, then what the court will do is, "Well, this is a term of art." Or, "This word needs to be construed in the context of other language in the statute, not its normal way." So it's one where I see courts just they're going to use the statutory analysis tool they want to get to the result they want. And I think this may happen here. I think that's what Judge Barker did, and I have a feeling that's what the Fifth Circuit's probably going to do as well.

Alan Kaplinsky:

Yeah. Well also Rich, isn't there language in Dodd-Frank, I don't remember the exact language that where Congress seems to make a distinction between unfairness and UDAAP and I don't remember the exact language, but there's something, do you know what I'm talking about?

Rich Andreano:

There are a couple provisions. There's Section 1021 B2 which sets forth the objectives of the Bureau, and one of them is that consumers are protected from unfair, deceptive or abusive acts and practices and from discrimination. The white paper in particular pointed to that saying, "Look, that they're two separate concepts." They said protected from UDAAP and protected from discrimination. Section 102, subsection 13 actually defines fair lending and it says, "It means fair, equitable and non-discriminatory access to credit for consumers." Again, the white paper and Judge Barker said they use the word fair and they used the word non-discrimination. They were treating them differently. That was his reading. And then in section 1013, which does create the Office of Fair Lending and Equal Opportunity again in the white paper and Judge Barker referred to the fair, equitable and Non-discriminatory access to credit. The two examples of the statutes that do that were provided for the

ECOA, Equal Credit Opportunity Act and Home Mortgage Disclosure Act. Judge Barker in the white paper said they didn't refer to UDAAP there, but I agree, different people who are very reasonable can get different meanings out of that wording.

Alan Kaplinsky:

Right, right. And I guess one of the things that troubles me about this thing is it came out of the blue that here we've had... the law was enacted 2010, the CFPB became operational in July of 2011. They have employed UDAAP on numerous occasions. It's typically invoked whenever they're investigating somebody or they bring a lawsuit, an enforcement action against somebody. Why all of a sudden, I guess I'm asking you this question, Jeff, all of a sudden they discovered that unfairness encompass discrimination. Why didn't it happen long ago? Certainly, they've been very, very focused on discrimination issues. They have done many investigations under ECOA. I never recall when they resettlements with people under ECOA that they also cited UDAAP as their authority. That's what really troubles me. What's your answer to that?

Jeff Sovern:

I want to address that, but first I just want to go back to something Rich said. Rich quoted Judge Barker quoting the statute about how it lists the objectives as ensuring that consumers are protected from, and then it listed several things, unfair, deceptive, abusive acts or practices and from discrimination. Judge Barker used that to suggest that each of those categories is separate. In other words, the discrimination doesn't fit in within any of those categories, and therefore it's not unfair. The problem I have with that is that those categories are not airtight. The FTC said in the International Harvester case, that deception is a subset of unfairness. And in fact, Judge Barker quoted an article by Jade Howard Biles that repeated that point, though he did not mention that specific language. There's a lot of overlap among those categories, if unfairness includes deception, then I don't see why it can't also include discrimination.

And similarly abusiveness in the cases in which the courts, or rather the CFPB has found conduct to be abusive, it's also frequently founded to be unfair or deceptive or both. So those categories are not airtight. I think what Congress was doing in writing the statute that way was not to distinguish among those categories, but to emphasize their importance. And it would be ironic to take the position that a section emphasizing the importance of preventing discrimination actually means that the CFPB has less power to prevent discrimination. But now getting back to the point you raised Alan about the history. Yes, as far as I know, this is the first time or 2022 was the first time the CFPB took the position that discrimination is unfair. Of course the CFPB is a young agency and for part of its life, it was helmed by Kathy Kraninger and Mick Mulvaney who probably would not have been that receptive to that position.

But this is not a new position for administrative agencies to take with respect to the meaning of UDAAP statutes generally. In fact, you can find examples of this back in the 1970s. So if you go back to the 1970s, the Civil Aeronautics Board, CAB, an agency which no longer exists in that form, it's been sort of absorbed by the Department of Transportation, brought a case against Delta for treating, would be ticket buyers who lived in Harlem and other places that at that time tended to have more African American residents, differently than people who lived elsewhere. And the CAB specifically said that it was proceeding under its UDAAP statute, which in turn was patterned on the FTC Act just as the CFPBs UDAAP statute was. The FTC took the position back in 1970, that a case that it had decided prohibiting discrimination was in fact an unfairness case.

In 2004 during the administration of the second President Bush, the FDIC and the Fed issued a letter saying that unfair receptive practices that target or have a disparate impact on consumers may violate the FTC Act, which they also enforce. So you have a series of administrative agencies taking the position that discrimination violates UDAAP statutes. And the reason we care about this especially is that a lot of this occurred before Congress codified the limits to the use of unfairness for the FTC Act, which it did in 1994 and enacted the Dodd-Frank Act, which was in 2010. And under the prior construction canon, when Congress uses terms of art in a statutory text, it's presumed to adopt as well existing interpretations of the terms unless it says otherwise, which it did not in these cases. In Justice Frankfurter's words, "Words of art, bring their art with them." So at the time Congress enacted the CFPA, it should have known about these interpretations and didn't say anything about how it saw things differently. And that means that the CFPB does have the power to treat discrimination as unfair.

Alan Kaplinsky:

Yeah. Well, Rich, what's your reaction to that?

Rich Andreano:

Yeah, I agree. This is a concept that I think what was viewed as unfair probably varied over the years. At the time that the bureau was... rather the FTC was given the power to go after unfair acts. I don't think Congress then considered it as applying to discriminatory conduct because the federal government was racist back then. In fact, the federal government are the people that brought us redlining as Jeff points out in this paper, that they're the ones that created the concept. And in modern redlining settlements, the Justice Department doesn't shy away from that. It said, "We acknowledge the federal government started this, but it was wrong then and it's wrong now." Then you move to the '60s and '70s with sort of the heyday where federal regulation was really kicking in and you had very broad views of federal power. And in particular, given the Civil Rights Act, fair housing, broad views that agencies were broadly interpreting statutes in ways to reach conduct that they found disfavored.

The problem I have is when you fast-forward to Dodd-Frank, and now we're in a regulatory environment that did not exist in the '30s, were now in a... The consumer financial protection products and services industry is one of the most highly regulated industries in this country. And to me it would just be peculiar that Congress would adopt all these specific laws and laws addressing admittedly only one side of the financial products and services sector, the credit side and not the deposit or related services side, that some may say, "Well then they meant for UDAAP to fill in that gap." And I said, "I'm not so sure that's the case, that they would've developed these very specific statutes that define what the prohibited basis are that define how you can bring a claim of discrimination, do that in certain areas, and just say, use this generalized power with no guideposts to impose discrimination elsewhere." That seems peculiar to me.

Jeff Sovern:

So there I want to talk about the Bostock case, and of course, we generally think of Bostock as the case that says that the Civil Rights Acts prohibiting discrimination on the basis of sex extends to discrimination on the basis of sexual orientation or being transgender. But in reaching that conclusion, the court also made some statements that are useful in statutory interpretation. It pointed out that those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. But it went on to say that when the express terms of a statute give us one answer, and I think they do here, I recognize that you disagree, Rich, an extra textual consideration suggests another. It's no contest, only the written word is the law. So the fact that at the time the FTC ACT wrote, Congress might not have been thinking about discrimination, doesn't matter when you measure that against the statutory text.

Alan Kaplinsky:

Okay, let's turn to another issue that Judge Barker, another thing he relied upon, and that is the Major Questions doctrine, which is a construct of the US Supreme Court when it comes to deciding how much deference do you give to, judicial deference, to a regulation issued by an agency that's got general authority to issue regulations. And in a very important decision of about two or three years ago, the Supreme Court came down with an opinion involving the Environmental Protection Agency in the state of West Virginia dealt with environmental law, totally different subject than what we're focused on today. But there was a very specific regulation that the state of West Virginia was objecting to.

And the Supreme Court agreed with the state of West Virginia that Congress in enacting the Environmental Protection Laws could not have possibly contemplated that this kind of a regulation would be appropriate for the EPA to enact. And he basically said same thing with UDAAP, Congress intended to prescribe unfair, deceptive and abusive acts and practices. There's nothing in the legislative history that talks about discrimination in the context of that language. And so this thing runs a foul of major questions, and you may disagree with that opinion. I suspect you probably oo the Supreme Court suspect, you probably do. But how do you end up distinguishing that case from the situation here?

Jeff Sovern:

I think there are two problems with fitting this into the major question doctrine, assuming that it's even a valid method of interpreting statutes. The first is that the Supreme Court has described it as applicable when an administrative agency claims to discover in a long extent statute an unheralded power. And this is not an unheralded power. It's been around, as I said, since

the '70s. Now it's new to the CFPB, but again, this is a fairly new agency. The second problem is that it's limited to questions, decisions that have vast economic and political significance.

So for example, in the student loan case, Biden against Nebraska, the court described the impact of the ruling that it would affect amounts owed by 43 million people, nearly one third of the government's $1.7 trillion in annual discretionary spending. And in the Alabama Association of Realtors case, that was the eviction moratorium during the pandemic. The court said we could be talking about a $50 billion impact. Well, here we're talking about a much smaller impact. Judge Barker spoke of millions of dollars. There are a lot of administrative interpretations that will affect millions of dollars or have that kind of impact. As for the political significance, yes, it extends prohibitions on discrimination, but prohibitions of discrimination are nothing new.

We have them in many federal laws, as you've noted, and so this is more of a gap filling exercise than a major change. Justice Scalia has that famous quote, "Congress does not hide elephants in mouse holes." First of all, I think this hole, Congress constructed a hole that's the size of an elephant. It adopted the statutes or modified the FTC act against the background in which UDAAP statutes have been used to prohibit discrimination. And it's quite clear and has been said by many actors in this area that the unfairness is intended to be flexible. So I think this is a pretty big hole. Second, I don't think this is an elephant. If it is an elephant, it fits in the elephant sized hole, but I think this is more like a mouse, maybe a cat, but definitely not an elephant in light of all the other prohibitions on discrimination we have in our law.

Alan Kaplinsky:

Let me ask you this question, Jeff. Why is it that Congress, if you're right, that UDAAP already covers discrimination and is much broader, it's not limited to just credit discrimination, it's all kinds of discrimination. Why did Congress feel a need to enact the equal Credit Opportunity Act? It's already covered more broadly, isn't it, under the unfairness prompt?

Jeff Sovern:

I think the answer to that is that ECOA does a lot that UDAAP statutes don't. I mean if let's say tomorrow Congress passed a law saying the unfairness authority we have given to various administrative agencies includes discriminatory conduct, the right to police discriminatory conduct, I think we would still need ECOA because ECOA does things that UDAAP statutes don't. At least the federal UDAAP statutes, ECOA authorizes injured consumers to sue. There is no private claim to enforce the FTC ACT or CFPA. ECOA establishes incentives for self-testing provides for small business loan data collection. We would still need ECOA. And so I think they overlap to some extent, but there's a lot of area where they don't overlap.

Alan Kaplinsky:

Okay. So let's talk about disparate effect or disparate impact. Okay, very controversial subject that's been dealt with on many occasions in the context of ECOA. And what's your view on whether or not the new UDAAP authority or the UDAAP authority that you're relying upon, does that also cover discrimination through a disparate impact or does it only cover intentional discrimination?

Jeff Sovern:

Well, first of all, unfairness does extend to unintentional acts. So if conduct is discriminatory and meets the statutory test for unfairness, it doesn't matter, I think, if the conduct was unintentional. Now, that being said, there are some distinctions between the CFPBs unfairness power and disparate effects or disparate impact. And some CFPB officials like Eric Halperin have said, although I think speaking as private citizens, not as officials of the CFPB, they have said they're different specifically, for example... And how are they different? Well, for example, one requirement as Rich mentioned for a violation of the unfairness power is that you have to show that consumers could not reasonably avoid the injury.

And we don't have that with disparate effects. Disparate effects has all these rules on burden shifting. We don't have that with the unfairness power. As a practical matter, to be completely honest, I'm not sure it matters partly because we just don't know enough about what it would look like to prohibit discrimination using the unfairness power. That is to say it may be, although I'm far from certain of this, it may be that in every case in which discriminatory conduct was unfair, you'd also be able to

demonstrate a disparate effect. But it may be that isn't the case and that there are some that would flunk one test but pass the other. It's just too soon to know.

Alan Kaplinsky:

So let's assume that the CFPB acted correctly when it made this change to the exam manual. Would you agree with me that that was a funny sort of device to use or a document to make this kind of a change? I think agree that the industry was certainly not operating under the assumption all along that discrimination was encompassed by the unfairness prong of UDAAP. And the industry was wrong, the CFP apparently for several years, granted some of it was under the Trump administration, but part of it was under Richard Cordray and Rohit Chopra for a while. Shouldn't this have been done through the... or normal APA process, publishing it for comment. And shouldn't it have been fleshed out in some fashion, at least with ECOA, you know who the protected classes are, right? I mean, they're defined. They're listed by Congress. Here, the industry didn't know how the hell to deal with this thing, Jeff. So my questions relating to the vehicle that they used to announce to the industry was a major change and something without any guardrails, something that wasn't cabined at all.

Jeff Sovern:

Yeah. Now you're getting a little bit ahead of my expertise. I've agreed to teach administrative law next year, but I've never taught it. So I need to read those cases and the Administrative Procedure Act provisions before I can answer that. So ask me again next spring if you will. But I do agree that I could see that the industry was taken by surprise by this. And I think the Bureau has an issue in general or concern in general. You'll recall that during the Cordray administration, they would bring cases and the industry would criticize the bureau for what it called regulation by enforcement.

So I think Rohit Chopra's answer to that is to find other ways to announce how he understands the laws that the CFPB enforces weighs short of bringing a case. So that the industry rather knows ahead of time what the relevant rules of the road will be. So he's doing it in the form of things like changing the enforcement manual, blog posts, press releases, and so forth. Of course, he's getting criticized for that too. I understand the industry wants the bureau to go through notice and comment rulemaking before these rules take effect.

Alan Kaplinsky:

For something like this, would you agree, you don't have to be an in administrative law, I think to answer the question. I'm just saying from the standpoint of operating in a reasonable manner, you don't want to surprise any of your constituents. You want to give them advanced notice of what the expectations are. And given the fact that they didn't flesh out this concept anywhere else, the first time it was announced was in an amendment to an exam manual, they didn't seek any input. They didn't know what could be the unintentional results of something like this. Let me give you an example, Jeff, I give this example frequently, and I may have mentioned it to you before. But a lot of banks basically won't do business with somebody that doesn't live in their local area. I'm talking about probably most of the banks in the country.

We have many, many banks, and I'm not talking about the big boys, the JP Morgans and Bank of Americas and Citibank. But if you, let's say you're on vacation with your wife and you're out in Idaho and you decide you want to open a bank account out there at a community bank, they were offering a really high rate of interest on a one-year CD. If you went in there, I would bet you they would say to you, "We won't open that account. We don't want your money. You don't live locally. You live in Maryland. Go deposit your money with a Maryland bank." Now that's discrimination, right? You're discriminating on the basis of geography. Is that something that would be prescribed under the CFPBs newfound expansion of the unfairness prong?

Jeff Sovern:

I would say not, the CFPBA and the FTC Act both permit the FTC and the CFPB to take into account public policy considerations in determining what's unfair. They can't make it their primary basis for their ruling, but they can take it into account. So if I were running the show here, and I'm not, and I don't know how the CFPB feels about this, but if I were making the rules here, I would say that in determining what's discriminatory and hence unfair within the meaning of the relevant statutes, I would focus on the items that Congress and perhaps states, although I don't know, I have to give that more thought. But definitely Congress have identified as barred by statutes, things like race, color, national origin, marital status, and

so forth, rather than geography, which as far as I know, is not prohibited under any federal law. So I would limit it that way. Now, I don't know that the CFPB sees it that way, but that's how I think it should be.

Alan Kaplinsky:

Well, that's my very point. Nobody knows how they see it, and that's another reason for publishing it for comment, getting all the views of all the stakeholders. And then if they still want to move ahead with it, promulgate a regulation, something similar to regulation B under ECOA where banks know what to do. I mean, just my experience and Rich, I'd be interested in your thoughts on this as well. As soon as this came out from the CFPB, I got calls from many clients saying, "Wow, what does this mean, Alan?" Yeah, we make a lot of distinctions. We don't call it discrimination. And the one thing that many of them would mention is geography, but there are other things. Am I right, Rich? I mean there's a whole litany of things that where banks make distinctions among customers or prospective customers.

Rich Andreano:

Right. And that's the problem. What it reminds me of is when you go back to before the Texas Department of Housing versus Inclusive Communities decision, which ruled for the first time that you can bring a disparate impact claim under the Fair Housing Act. But Justice Kennedy was concerned, he put various guardrails around that because prior to that, it had always been the federal government's position that yes, you can bring disparate impact claims under the Fair Housing Act and Equal Credit Opportunity Act. The problem was the way the agencies approached it, it was very difficult to counsel clients because they would say, "Well, you are of this conduct, this conduct could have a discriminatory impact. We found a discriminatory impact. Therefore, you're liable."

Never connecting the dots between the challenge practice in the discriminatory result. And that was something that Justice Kennedy was very worried about when he ruled, "Yes, you can bring disparate impact claims into the Fair Housing Act, but the plaintiff has to connect the challenge practice to the discriminatory result." There has to be, he referred to it as a robust causality. So that helped because now we have... now I can better give you guidance client as to how to avoid a disparate impact claim under the Fair Housing Act or perhaps under a code. The Supreme Court's never addressed the issue under ECOA. So here is, I had clients ask me, "What do we do?"

I said, "Frankly, I have no idea at this point because what are the prohibited basis? What are the theories of discrimination? I just don't know." And it's basically, well, we know in general if the Bureau thinks there's consumer harm, what it does, it looks for consumer harm, then it looks for whatever theory it has to come after you. If it has a specific statute, it uses the specific statute. If it doesn't have the specific statute, it uses UDAAP. And that would be the concern here, is it would find something that it thought wasn't appropriate and in the end claim it was discriminatory under UDAAP without any guidance to the industry on what you can do to protect yourself from such a claim. That's my main concern with this.

Jeff Sovern:

I do think that the geographical discrimination issue may also not fit within the statutory limits to the unfairness power. Namely, I suspect that there are offsetting benefits to competition or consumers when a financial institution says we're limiting our customers to our local community. Although I don't know that for certain. I agree with you as a general matter that notice is desirable and there are due process implications to that. One problem with relying on notice and comment rulemaking is, as you know, it takes a very long time. And during the time that it's being considered, before the rule can be issued, there may be bad practices. And if the CPB limits itself to that particular device, we're going to have a lot of, or at least potentially a lot of misconduct that goes unaddressed during the pendency of the proceedings.

Alan Kaplinsky:

Okay. So Rich, I don't know if you have anything more that you want to add, but we've come very close to the end of our program today. And before we sign off, I guess, let me just add one thing. We don't have time to delve into this, but there are two other cases pending before the US Supreme Court. One is called the Raimondo case and the other is called the Relentless case. And the Supreme Court is being given the opportunity to decide whether to overrule the 1984 Chevron opinion or the

so-called Chevron judicial deference framework, under which the Supreme Court in '84 said if a statute is ambiguous as to whether it covers a particular issue or it's silent as to whether it covers a particular issue.

If the agency adopts a reasonable regulation, the courts are bound to follow that even if the court might reach an opposite conclusion. Supreme Court is on the cusp of overruling a Chevron opinion. And I guess, let me give you just a very quick answer from you, Jeff. Would that change anything in your mind in terms of the legality of what the CFPB has done here? If the Supreme Court rejects Chevron and says, "No, we'll consider the views of an agency just the way we would consider anybody's views on what they've accomplished."

Jeff Sovern:

It's hard to answer that without seeing the opinion, but my first reaction is no, there's still the statutory text, there's still the history against which the CFPBA was written.

Alan Kaplinsky:

Right. Okay. Well, we've come to the end of our program. I'm going to give you a standing invitation now, Jeff, when we get an opinion from the Fifth Circuit, whenever that might be, maybe next year, it could be this year, I suppose. The CFPB Constitutionality case will know the answer by the end of June. And then at that point, it seems to me the Fifth Circuit will probably commence briefing on this alternative issue, assuming that our predictions are correct, that the constitutionality of the CFPBs funding will be upheld. So this is just the beginning. We will certainly want to have you back. And so my very deep thanks to you today for taking the time to share your views.

And please, when you end up deciding where your article is going to be published, let us know. We will put something on our blog about it so that everybody is aware that it's no longer just an SSRN piece. My thanks to you as well, Rich. Really appreciate your input today. And I want to thank all of our listeners for joining us today. And to make sure you don't miss any of our future episodes, please subscribe to our show on your favorite podcast platform. Don't forget to check out our blog, consumerfinancemonitor.com. And if you have any questions or suggestions for our show, you can email them to us at podcast@ballardspahr.com. Stay tuned each Thursday for a new episode of our show. Thank you again for listening and everyone have a good day.