

Consumer Finance Monitor (Season 3, Episode 37): The CFPB's Past and Current Leadership: A Report Card

Speakers: Alan Kaplinsky and Prentiss Cox

Alan Kaplinsky:

Welcome to the Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer finance, what they mean for your business, your customers, and the industry. I'm your host today, Alan Kaplinsky and I chair the Consumer Financial Services Group at Ballard Spahr. For those of you who want even more information about consumer financial services developments or wants to explore more information about the subject that we're going to talk about today, I invite you to log onto our blog and to subscribe to our blog, which also goes by the same name as our podcast, it's consumerfinancemonitor.com.

Alan Kaplinsky:

We've been doing that blog ever since the CFPB got stood up in July of 2011 and there's a lot of material on there. Initially, it was a blog devoted to the CFPB, and then when Richard Cordray left to run for governor of Ohio, and Trump got elected, and we had a new administration, we decided to broaden the subject matter content of our blog. Also we regularly host webinars on a wide range of subjects, so if you're not presently listening to our webinars, you should shoot an email to me, or to Chris Willis, or frankly, anyone at Ballard Spahr in the Consumer Financial Services Group, and we will be certain to put you on our invite list.

Alan Kaplinsky:

Let me tell you about the topic we're going to explore today, and I think we have two people that really know a heck of a lot about this topic. The topic is the CFPB, and as I mentioned a moment ago, it was created as part of the Dodd-Frank Act in 2010, took a year to stand it up. We've now seen the CFPB managed by a Democratic administration, and that, of course is Richard Cordray, and we've seen it managed by the Trump administration, and that now is Kathy Kraninger.

Alan Kaplinsky:

We're going to talk about some of the differences, and the trends that we've seen, and we're going to talk about the future, what that might hold in store and the impact on states. We got a lot to explore today, so let me begin by introducing our guests. First, our very special guest and first time presenter on our podcast, and it's Prentiss Cox. Prentiss is a professor of law at the University of Minnesota Law School. He teaches in the area of consumer protection law, public civil law enforcement, civil procedure, and legal practice skills.

Alan Kaplinsky:

Prior to joining the Minnesota faculty, Prentiss prosecuted numerous nationally recognized cases involving subprime mortgage lending, State Attorney General Enforcement Authority and consumer fraud at the Minnesota Attorney General's office. And indeed that's the first time when I got to know Prentiss. I had a client that unfortunately was being investigated by the Minnesota AG. That was a long time ago however.

Alan Kaplinsky:

Prentiss also was a member of the very first Consumer Advisory Board of the US CFPB, and so Prentiss has both through his history of being in state AG enforcement and being an academia, focusing on consumer protection issues, and being on the Consumer Advisory Board of the CFPB has intimate knowledge of that agency.

Alan Kaplinsky:

My other, I hate to use that term guest, he's really my colleague and he often plays the role that I'm playing today, a moderator, and it's Chris Willis. Chris is the chair of our Consumer Financial Services Litigation Group, deputy practice leader of our entire Consumer Financial Services Group. He devotes a very large part of his practice to handling consumer finance enforcement matters, particularly at the CFPB, both during the Cordray administration and all the way through to the Kathy Kraninger leadership.

Alan Kaplinsky:

Probably is handled more CFPB investigations at least than anybody else that I know of. Also focuses a lot on consulting with clients on our wide range of consumer finance matters.

Alan Kaplinsky:

The way we're going to proceed today is I'm going to pose a bunch of questions to Prentiss, hear what Prentiss has to say, and then give Chris the opportunity to respond. And hopefully we'll get a little dialogue going between Prentiss and Chris, who I think may have a different point of view on some of the subjects we're going to cover.

Alan Kaplinsky:

First of all, Prentiss, given the Seila Law case and the decision of the Supreme Court, which will enable the president of the United States, whoever he or she might be to remove the director at will for good cause, bad cause, or no cause at all. Do you see that the CFPB is going to be moving back and forth between various positions in the future as administrations change? And is that desirable or undesirable? And should anything be done to fix that if you think it's a problem?

Prentiss Cox:

I don't, and thanks for inviting me Alan, for starters and Chris. I don't see this as that big a deal. Of course in the short run, it has the ironic effect of meaning that Biden can quickly replace the Trump appointment, so the net effect of the industry lawsuit was to hasten a Democratic appointment. But that's how it goes when you make decisions three years in advance through a lawsuit. I don't think it has a big impact. The idea behind the staggering of the term was to... There was much done, including the financing through the fed to reduce political pressure because of the extraordinary power of the financial institution industries in Congress.

Prentiss Cox:

So the idea was by staggering the term, that you would... It was one of the tactics used to reduce political pressure on the agency. Bottom line though is, there was always going to... the agency was going to turn every five years, now it's going to turn every four years synchronous with the election. The problem you highlight moving from one pole to the other and regulatory approach was going to exist anyway, it was just a matter of timing. The alternative to of course, was the commission, and that has it's... I was fairly agnostic about it, there's pluses and minuses to both.

Prentiss Cox:

The commission, as you see with the FTC, which is the closest analog smoothed things out. It means the agency to... The likely result is the agency stays within a narrower band of enforcement. The downside of that of course, is the agency stays within a narrower band of enforcement. So from the point of view of consumer advocates, it doesn't doesn't serve as that government counterbalance to the control of the market. So I don't see it as a big deal is the bottom line. I really don't. I think the biggest deal is its short-term effect and cutting short Kraninger's term if Biden prevails in the election and takes office.

Alan Kaplinsky:

What do you think, Chris?

Chris Willis:

I do think that in some respects it would be better to have more stability, and I really don't put most of that in the enforcement or supervision camp, because honestly, there's not that much difference between today's CFPB and the CFPB of Rich Cordray if you look at enforcement and supervision. They're very, very active in both respects right now, even under Kathy Kraninger. But with things like rulemaking-

Alan Kaplinsky:

Chris, that's not the conventional wisdom, at least among the consumer advocates. I bet if I were to-

Prentiss Cox:

Yeah, I would agree with that.

Alan Kaplinsky:

Am I right, Prentiss?

Prentiss Cox:

Yeah. No, we would definitely get a point of disagreement there.

Alan Kaplinsky:

All right. Let's take a little footnote the degression here and explain yourself, Chris. Why do you think not much has changed in the supervision and enforcement area?

Chris Willis:

Let's take supervision... First of all, just because of what I see the agency doing, I have the opportunity to watch the agency work on a day-to-day basis through supervision and enforcement as we represent clients who are involved in those proceedings. So taking supervision as the first example, when the administration change occurred, there was basically zero impact to supervision. They continued doing the same number of exams that they did, they were just as thorough as they were. They were just as eager to call out violations of law, require changes, require restitution as they ever had been in supervision.

Chris Willis:

The only difference was that they handled those matters more in supervision and referred them to enforcement less, so they got resolved on a confidential basis rather than in a public conservatory.

Alan Kaplinsky:

And you had Peggy Twohig, who was the head of supervision policy all the way through the Kraninger era. She remained there into... I'm sorry, the Cordray era, she remained there after Cordray left and she's there, right?

Chris Willis:

That's right, yeah. I just honestly, haven't seen any difference in what they've done in supervision. In enforcement, we had during Mick Mulvaney's acting directorship a significant slowdown in enforcement activity, which by the way, had started prior to Richard Cordray's resignation. It actually started about six months before he resigned that we stopped. There was just enforcement activity just fell off a cliff. And it took a couple of years actually after the administration change, the director change for enforcement to start being active again.

Chris Willis:

But if we look at their behavior in 2020, it doesn't look much different to me from what we saw under Rich Cordray. There's a lot of new investigations being started on a wide variety of topics. There's a lot of consent orders that are in the process of

being negotiated and coming out. The Bureau even has sued a large bank and has a contested litigation matter with a large bank that was filed in January of this year. And then the Bureau more recently engaged in a very aggressive, very expansionist view of red lining in the town stone case, which is building on a fair lending theory in an extremely aggressive and inventive way.

Chris Willis:

So the idea that the current administration has led off on enforcement is not, I think, born out by the record of this year. And I know we have lots of clients who are in the middle of investigations or other matters with the CFPB who wish it were more relaxed, but it just isn't. So it's basically that observation that causes me to say that.

Prentiss Cox:

Okay, I look at it very differently, of course, but, we have some points of similarity. With Richard Cordray and there were the two studies, empirical studies of this bear this out. Rich had a really clear approach. One, he sued when you saw litigation particularly, but when you saw... You look across the enforcement actions, he mostly targeted very large institutions. The largest banks, the big players in industry, and the resolutions of those cases almost very consistent... Excuse me, very consistently involved an injunction, public compensation, restitution, if you will back to consumers, typically in the form of automatic credits, payments and checks without the consumer having to do anything in large amounts and substantial civil penalties.

Prentiss Cox:

So all three of the traditional remedies were invoked against large institutions. That was the pattern of enforcement activity. And then when Mulvaney took over, that's where Chris and I agree, it just stopped basically. Unless Trump tweeted about it, like the Wells Fargo case, it just stopped. Mulvaney basically announced his disdain for the... As he had when he was a congressperson, his disdain for the agency and everything it did, and he was there to stop it. Change the name, mock it, that kind of thing. It was pretty much, from our point of view, it was as bad as it could get.

Prentiss Cox:

Although when you utter those words in the Trump administration, you come to grab them. And then Kraninger came in, and I have a very different view of that. I see Kraninger as neither Mulvaney nor Cordray. She's definitely much more professional, much more consistent in her approach and seems like she is weighing things individually. But at the same time, it's nothing like the enforcement approach under the Cordray CFPB. I describe it as very much the FTC approach.

Prentiss Cox:

And if you look at the enforcement model of the FTC, it was very different than the Cordray CFPB enforcement model, which involved all three remedies all the time. You almost never see that in an FTC action. You get a lot of cases that are injunctions. What typifies the FTC action where you see substantial public compensation restitution is they go after smaller entities and they'll go after a bundle of them like two or three allied corporations and four or five owners of those corporations.

Prentiss Cox:

They'll freeze the assets and they'll get money back to people. And you've seen much more of that. If you chart it out, you'll see that the currency of PB actions tend to go after smaller entities, non-bank entities. When they go after banks, it tends to be an injunction, and then sometimes a fairly not substantial civil penalty. It's enforcement work, and it's investigations and that kind of thing. It's just they very consistently resolve differently than the Cordray's work.

Prentiss Cox:

Again, during the Mulvaney period, I couldn't have been more disappointed that we were truly swinging between the poles there. I think you could have had someone even more aggressive than Rich, but he was definitely way on that end in terms of using the authority on behalf of the public, both in the immediate sense of providing restitution, and making people whole, and in the sense of the sense of providing incentives in the future, both through civil penalties and injunctions, which lay out how it should be done.

Prentiss Cox:

And then Mulvaney to just basically destroy everything, and now in Kraninger, we have something that's more what I would think you would see if you have a commission. I think that's the kind of CFPB you would get with a commission. Does good work, but tends to take on smaller targets and obtains lower levels of relief. And, as Chris mentioned, has a bias from the way they've reconstituted the internal mechanisms for determining when you do supervision and enforcement. That's definitely a result of a policy decision to shift things over to non-public supervisory results instead of public enforcement actions.

Prentiss Cox:

I think this is what you would have gotten. The Kraninger is what you'd have gotten under a Republican-led commission approach. Mulvaney is that wild swing Alan was talking about. That's my view of it.

Alan Kaplinsky:

Okay. Chris, any rejoinder or on that point?

Chris Willis:

I just wanted to pick back up with the main question we were answering, which is like, is it undesirable to have the bureau's leadership swing back and forth between the political parties? The original point that I was going to make was from a supervision and enforcement standpoint, that swinging has some effect, but not a giant effect in practical matter, in my experience.

Chris Willis:

But where it can really have a very significant effect is on the rulemaking side where you have a very politically charged rulemaking, like for example, the short-term small dollar lending rulemaking, where you've seen a rule proposed under Rich Cordray that would have essentially exterminated the payday lending industry. Then they get a Republican leader of the bureau, and now that piece of the rule is gone, so the industry gets to live again. Then if there's a new director because of an administration change in 2021, we may be right back to where we were with the original rule that was proposed by Cordray.

Chris Willis:

So the idea of having the sort of industry destroying or preserving rules flip back and forth like this, I think is highly undesirable, and it's that kind of instability that I think is bad for the industry and bad for consumers, honestly, and a commission would bring more stability, I think, to the rulemaking efforts, most of all.

Alan Kaplinsky:

Okay. Let me just add something to an observation Prentiss made. I have found there's a lot of confusion over this point, and that is, the very limited remedial authority that the FTC has. And I never really focused on it a great deal until recently when the Supreme Court granted cert in a case to decide in a fact whether the FTC has got the right to award restitution. Does it fit within the ambit of... They do have the right to award injunctive relief, but it's unclear whether that covers restitution.

Alan Kaplinsky:

The other thing that I think is already played pretty clear, they can get civil money penalties as a result of an initial investigation and an initial lawsuit. The only time they can get that is if there was a contempt or a violation of a consent order entered into with the company, then they can go back to court and they can seek penalties. It's not nearly, they don't have nearly the arsenal weapons that the CFPB has. CFPB can essentially do just about anything.

Prentiss Cox:

I don't know that that... This is a fascinating area to me. They're really two different issues here. You've raised the issue of what I'll call public compensation is often referred to as restitution, and the issue of civil penalties, and they are different. Initially, the authority in the CFPB was a grab bag, it's just a list of every term that has been used by courts in order to award a form of public compensation. They say, "You can get the disgorgement, you can get restitution, you can get damages," and it goes on, "you can get rescission," and it's just this list of about eight phrases.

Prentiss Cox:

So it's a statutory incorporation of these terms. But if you look back, the FTC authority until the Seventh Circuit decision, which is now before the Supreme Court. Supreme Court took two cases up, one from the Seventh Circuit, one from the Ninth Circuit. The Seventh Circuit case says, "The FTC doesn't have authority to get a disgorgement under the statutory injunctive authority of the FTC." Until that decision was issued, there was really no question that the FTC had essentially the same authority as the CFPB.

Prentiss Cox:

And this actually has a much broader question, it also goes out to the authority of state AGs to get public compensation, and it all ultimately goes back to a 1940s decision by the US Supreme Court called [PODA 00:23:41], in which the US Supreme Court determined that based upon the statutory injunctive authority of The War Powers Act that the rent limits that were exceeded under that act during World War II, that people could get money back based upon the statutory injunctive authority of the agency.

Prentiss Cox:

And then that principle that when the agencies have the statutory injunctive authority, it includes the equitable power of the court to order some form of disgorgement or restitution has continued then for decades. So the FTC had... It also has a separate authority in Section 19 to get restitution. So you had these two authorities, the FTC, they preferred to use the more flexible Porter Bay statutory injunctive authority. Nobody really challenged that until this very recent Seventh Circuit decision.

Prentiss Cox:

And I think you're seeing this across the board, because there were two Supreme Court decisions recently about the SEC's authority. Same thing there, the authority under their statutory injunctive powers to order restitution back to disgorgement in the case of SEC back to investors. So you're seeing this flurry of activity, this is what you get when... We talk about Mitch McConnell's very proud of reshaping the courts, appointing all these Federalist judges, very business friendly. This is the reality of the result, you'd have decades of law getting called into court. Very settled law getting called into question here in terms of the authority of these public agencies.

Prentiss Cox:

And I think it would be all federal agencies, and it goes down to the state AGa because they rely on essentially the same authority. So I disagree that the FTC has a different... Until that Seventh Circuit decision, the SEC has a fundamentally different authority to get money back to people. Now, on the civil penalty side, you're right, that's the one P, the traditional Troika of public enforcement authority that the CFPB, the SEC, the CFTC, and all these state AGs have is in statutory injunctive authority. They retribute various forms of public compensation authority and civil penalties.

Prentiss Cox:

And the one the FTC lacks, which makes no sense is the authority to get civil penalties, unless it's a violation of an order. And the FTC has tried to get around that by entering into a whole bunch of agreements, just the consent orders, particularly in the privacy cases, particularly with the tech industries in order to set injunctions so that if they're violated, they'll have this civil penalty authority. But that is one where the FTC has less.

Prentiss Cox:

But they traditionally have had really all the authority, they need to do the public compensation. They just haven't tended to do it when they go after big targets. They save that for scam operations, affront corporations and that kind of thing. They don't tend to go after big companies and get big awards. They have a little more recently, but over time, that's not something they use a lot. Whereas when Cordray ran CFPB, every case. They were going to get money, large amounts of money back to people pretty much in every case, unless the company had no money at all.

Prentiss Cox:

Which actually I will want to highlight one thing in that troika of authority that I think all the States should adopt. We should have for the FTC, which I think is fairly uncontroversial and Kraninger has used well, and just did I think last week, which is the Civil Penalty Fund. Now, that's a unique thing to the CFPB that does not exist in any state Attorney General that I'm aware of, or the FTC where you can take the civil penalties, put it in a fund.

Prentiss Cox:

And then when you Sue these scam operations and they have no money to pay people back, you have a pot of money that you can use to provide compensation to the public. It's just a wonderful idea, Kraninger's use of it gives me a lot of heart that it's not going to be politicized, and I think it should be adopted at state levels because it's a huge problem in public civil fraud enforcement. If you're the AG, it gives you a little incentive to go after scam operations sometimes because... The injunction's worthless, they go out of business. The civil penalty's worthless, you can't collect it and you can't get money back to people who are scammed. But if you have a civil penalty fund, you can. That's little footnote too.

Alan Kaplinsky:

Okay. Moving away from the issue of remedies and what's available, the CFPB and the FTC, and how that may have varied under Cordray versus Kraninger. Let's talk about the history of the CFPB a little bit. What do you see as the Cordray era successes and what do you see as the failures of the bureau during the Cordray era? Was he perfect? Did he get it all right from the standpoint of consumer protection?

Prentiss Cox:

God doesn't make perfect people. I happened to be a huge fan of Rich Cordray. I always have been because he combines a real instinct for people on the ground and focusing on human cost and harm, with being super bright and capable of delving into the details. So I love Rich Cordray. But like all people, he's imperfect it's. In terms of enforcement, I think he got it just right. He really did the kind of enforcement that made a huge impact and change company's views of what a banking regulator could look like. And therefore, I assume had to have a tremendous impact on their actual operations if you have to be worried about actually an assertive enforcer.

Prentiss Cox:

On supervision, for standing up from nothing, again I'm less familiar with that. Chris can say there. I think Peggy Twohig, who I know going back to our days at the FTC did a fantastic job of doing that. They worked very well in placing cases between supervision and enforcement. A real problem from my point of view as a former AG at the state level. You'd talk to the OCC and the OCC would hide everything, wouldn't tell you anything, would actively intervene to one of my cases, against us.

Prentiss Cox:

We found that out by the defendant's attorney saying, "We're talking to the OCC." So I tried to call OCC, they wouldn't talk to me. This was pre crash, but... So from our point of view, the supervision was used in order to hide things, but that did not happen with Rich. And I think they did a good job of that. I had a real problem with the regulatory side under Rich. I think it was a real failure. And I was involved at the... First, I was the chair of the committee on the advisory board that looked at that, they helped with that payday rule.

Prentiss Cox:

And whereas you thought it killed the industry. I thought it took way too long to develop all the rules, took way too long to develop. They were just maximally complex. They're extremely... They were defensive. The rules often and payday was a great example of that. They often read like, "Okay, how can these be attacked? And let's design the rule so we're bulletproof from every possible attack," rather than starting with the question of what's the problem and what's the most clear, elegant solution to that problem? And what are our options for easily enforceable, clear, elegant solution that we can adopt relatively quickly?

Prentiss Cox:

And that was true of everything, including the arbitration rule, which I know is close to Alan's heart and is a disaster from our point of view. It just robs people of their rights. We couldn't disagree more on this in an American way. And we had this authority and it sat, and it sat, and it sat, and there was all this complex thing, and it came up with this complex rule about class actions. It was really an easy call to me. It's just, we're done when you survey people and nobody knows they've given away all their rights and you have the statutory authority.

Prentiss Cox:

It's like, "You like arbitration? Great. Everyone agrees to it after the dispute arises." Rather than forcing every day people through boilerplate contracts they don't know about or understand to sign away their rights in this fiction about what a contract means. It was an elegant, simple solution, which was just get rid of that. And instead, we went for this highly complex thing that took years and years to develop, and then as a result of unforeseen political changes resulted in nothing for consumers.

Prentiss Cox:

So I think the regulatory side was to a large extent, a failure A-plus on enforcement and supervision, and education.

Alan Kaplinsky:

What about the mortgage regulation, which was the very first thing that the bureau had to tackle. They were required to deal with that, because if they didn't get that done by a certain deadline, the statute itself would have been affected and that would have been a disaster.

Prentiss Cox:

I agree with you on that and I'm sorry, I was painting with a broad brush there. I'll say two things about the mortgage regulation. First of all, it was good that there was a statutory requirement for timing. One of the problems with the regulatory side is they just overanalyze, made it overly complex, and they were forced to do that. And second, they had Pat McCoy do that. So they had someone who didn't do the rest of their regulations do that and she did a marvelous job in my opinion.

Prentiss Cox:

I think trig is great and it was consumer-testing, and it did what I was talking about. It was simplified. It took disclosures and it made them more elegant and simpler, and was an early success. But then after that, the regulations ran through one person and I just think it was not good.

Alan Kaplinsky:

Chris, what's your reaction to what Prentiss has said, and also your own view of Rich Cordray's successes and failures?

Chris Willis:

Sure. I'm actually going to start off by agreeing with Prentiss about the overall impact of the CFPB. The impact of the very aggressive enforcement and supervision activity that occurred during those first many years, six years or so of the CFPB was to make a lot of industry players put a lot more time and focus on compliance and consumer treatment issues. And really brought about a wholesale revision in the way that those things were looked at, especially on the non-bank side.

Chris Willis:

Banks had some attention to that already, but I would say my observation, it was intensified by the bureau, but on the non-bank side, without a regular supervisory regulator, the advent of supervision for them and enforcement as well, but honestly it was supervision that did, most of it was to really cause them to devote a lot of resources and attention to compliance and consumer treatment.

Chris Willis:

So the good side of that if you're looking at it from a consumer protection standpoint is, you a lot more attention being paid to those issues by the industry today, where the clients we work with very frequently do their absolute best to try to make things right for consumers and make sure they don't have unintended consequences or unclear disclosures or things like that. The downside to that success is that during that period of very aggressive enforcement and supervision, you had a sense of the industry or at least I did that they were afraid to move or even breathe for fear of being held liable for UDA violation.

Chris Willis:

That had the negative impact of deterring entry into the market, deterring investment into the market, deterring the development and offering of new products, et cetera, and so it did tend to freeze up the industry from the standpoint of competition and innovation. That's I think it's a natural corollary to such an aggressive regulatory posture by the agency, but it was there and I definitely perceived it. I won't say that it was a mistake by the bureau because I think the bureau did exactly what it wanted to do and achieved what it wanted to in terms of getting the industry to pay attention to these issues.

Chris Willis:

My view of the biggest error of the agency in its first six years was the very controversial stance it took with respect to dealer finance charge and disparate impact under the Equal Credit Opportunity Act. You had the combination of a very shaky legal theory, a very politically powerful target in auto dealers, and extremely strong market forces that worked against the objective that the bureau had set out for itself to basically eliminate that practice out of the market. And so you had the effort come to a complete failure. It didn't change the market at all.

Chris Willis:

It also made the political attention on the bureau so much more intense and made the bureau more of a political football than I think it would have been otherwise. So I think the bureau risked a lot and lost a lot by pursuing those cases and gained nothing, and was never going to gain what it wanted to gain because the market forces involved were so strong. So I would view that as the biggest error or miscalculation in the bureau's first six years.

Alan Kaplinsky:

Okay. I can't resist myself in commenting on or responding to Prentiss' comment on the work that the CFPB did in the area of arbitration. It depends upon of course what your viewpoint is. I've always been a very strong advocate of the use of arbitration and have felt that it's not in usage. And I will agree with Prentiss and I'm sure he will make this point, is that so few

people, consumers actually use arbitration. How could that be good? And therefore all arbitration does is has a a chilling effect on the ability of consumers to vindicate their rights.

Alan Kaplinsky:

I've always felt that the problem has been a lack of education that the consumer arbitration actually works, it's a good thing. It's a very convenient for consumers, they don't have to go to court to prosecute their claims. Very often the claims can be resolved on online. Most of the consumer complaints are not class action-worthy to begin with. They're one-off kinds of complaints about their bill that doesn't reflect any kind of a systemic problem.

Alan Kaplinsky:

And the problem as I see it is that the CFPB, the state Attorneys General, and I will say the industry did a very poor job collectively in educating consumers on how to take advantage of arbitration, how to use it effectively. The study that the CFPB did, Prentiss suggested that instead of working around the edges of arbitration and banning the use of class action waivers, but in general, not regulating arbitration in general, that that was a big mistake.

Alan Kaplinsky:

But you've got to bear in mind that the CFPB couldn't just do or Cordray couldn't do what he would like to have done. I'm sure he would have liked to ban arbitration, but his agency was data-driven and they conducted a study that went on for several years, there were three hearings that were conducted, I testified at all three hearings. And what happened is, the data didn't support a ban, number one, and it didn't even support what they did, and it became easy prey for Congress to override it under The Correctional Act.

Alan Kaplinsky:

And I believe that even if that had not happened, there would have been litigation and it would have ultimately been thrown out.

Prentiss Cox:

Obviously, we're going to disagree about this, Alan. Just real briefly to respond to you on that, we're not talking about whether arbitration is good or bad, that was the problem. The problem was they fell down the trap of saying, "Is arbitration better than judicial resolution?" There's nothing to do with it. The only thing we're talking about is mandatory pre-dispute arbitration set up on the terms of the business that writes the boiler plate contract.

Prentiss Cox:

If arbitration is better than judicial resolution for consumers, everyone can make that decision after the dispute arises. We're only talking about forcing people into doing arbitration on the terms of the company writing the contract, that's all we're talking about. And once you establish that consumers by and large have no clue about all the rights that they're waving, which is just the common sense, nobody. We all know nobody enters contracts and says, "What does clause 19 say? And what will be the impact of this?" That's not how humans operate. Everyone knows that.

Prentiss Cox:

So we're not talking about... They fell into the trap of answering your question and spending three years collecting data about whether arbitration is better. I think they just said, "That has nothing to do." The only question is, do we force consumers to accept the business' clause written by their attorneys on their interests, mandatory pre-dispute arbitration? Not whether arbitration is better. And when you do that, and by the way, you think of the most consumer friendly arbitration clauses that are there to provide a foil to justify the class action waiver. But there's arbitration clauses everywhere.

Prentiss Cox:

I just had a case with the local realtors, for instance, have an arbitration clause where they insert themselves between the buyer and the seller with an arbitration contract, they insert along with the purchase agreement and they choose, of course, the arbitrator approved by the Realtor Trade Association. And if the consumer has a claim against the realtor for breach of fiduciary duty, fraud, whatever, the realtor has to pay nothing, and the consumer has to front like \$2,000 for the arbitration.

Prentiss Cox:

There's all kinds of these arbitration clauses and the only question to me is... You would never see that as a post dispute because no one would ever choose it. You only do that when people are just signing documents as part of their real estate purchase and not reading anything, and that's the only issue. So to me, two different worlds. They fell down the rabbit hole of trying to prove to you that arbitration is worse than judicial resolution, and they was doomed when they made that decision.

Alan Kaplinsky:

I would like to take credit for pushing them down that rabbit hole, but actually here's a little anecdote, Prentiss. When I had my first meet... When Mark Levin and I, partner of mine that gets involved in consumer arbitration to a great extent, we had a meeting at the CFPB and we said, "We urge them to..." They had a compare arbitration to litigation in court and we gave them on the ideas on how they could do that. They said to us, "Oh, of course, we know we have to do that." It wasn't like I was

Prentiss Cox:

I know. I was blaming the CFPB, not you. And even if it was you that suggested it, they should have said, "No, that's not the issue. The issue is simple, it's just pre dispute mandatory resolution, that's it. We're not going to look at whether one's better than the other."

Alan Kaplinsky:

And the problem with... Of course, and then we'll move on to another topic, so we could talk about this for several more hours that we're never going to agree. The problem is if companies did that, it would be a very rare case that would end up in arbitration because, not because arbitration wouldn't be better for the consumer than going to court, but because in general, lawyers who represent plaintiffs are very oriented around using the courts and not... they don't like arbitration and never liked it.

Alan Kaplinsky:

And particularly, class action lawyers, they want to be in court and they want to prosecute their class actions. So it was a non-starter right from the beginning. The industry never would have set up the infrastructure to have arbitration programs if consumers were allowed to make the choice after the fact. And frankly, I don't see-

Prentiss Cox:

Because they would have been fair. Because the infrastructures were set up in order to benefit the industry, shockingly, who could have figured? But anyway, we should probably move on.

Alan Kaplinsky:

Yeah. I don't see much of a... I see a major difference between arbitration, which by and large, you're right, consumers don't care so much because they're not thinking of a deal breaking down and they're having a claim. But what consumers worry about are the fundamental terms, if it's a loan, what's the interest rate? How much do I owe per month?

Prentiss Cox:

What's the monthly pay?

Alan Kaplinsky:

How long am I going to have to pay it back? Once in a blue moon, they may think about a late fee. Now, are they going to care that much about the process to be used to resolve a dispute? The answer is no.

Prentiss Cox:

Until they have a dispute.

Alan Kaplinsky:

Yeah, until they have a dispute.

Prentiss Cox:

Until they have a dispute.

Alan Kaplinsky:

Right.

Prentiss Cox:

Right. Exactly. We don't care about the accident until it occurs, so if in any way, the safety features of the car until it occurs. Go ahead.

Alan Kaplinsky:

Okay. Let's move on. Now, I think, you did a a good job of chronicling the successes under Cordray and where he may have fallen short, and Chris added his two cents. Let's turn now to... Let's skip Mulvaney. I think we will all probably agree that he didn't do a heck of lot. He was a caretaker until Trump could get somebody in there permanently. But focusing on Kraninger, what were her successes, if any? And I think you alluded to a few earlier, and what were her major failures? I'm going to ask Chris, same question.

Prentiss Cox:

I would say her success was bringing the bureau back to a professional basis for decision-making and into something that looks more like the kind of government agency that the public expects. And also not trashing the mission of the agency in the process. Then her failures are just, I think, more how we look at... We look at it differently as a consumer advocate and an industry advocate. Obviously, I like someone who's there and trying to provide a counterbalance, the public sector counterbalance to the power of the market to benefit the industry.

Prentiss Cox:

She obviously has the more industry favorable perspective, but I wouldn't... I think it's well within the bounds of what we would hope would be, from my perspective, the kinds of polar swings that you would get between Democratic and Republican administration. So don't have a lot of really bad things to say. You said we couldn't talk about Mulvaney, so I don't have really a lot of bad things to say.

Alan Kaplinsky:

He did supply popcorn, I think on his first day of office. I think he brought a lot of goodies too, and then I'm sure helped morale to be [crosstalk 00:51:02]-

Prentiss Cox:

Huge. I'm sure it changed everyone's perspective. The problem with Mulvaney, I will add. One of the problems with Mulvaney is the problem... He's a Trump guy, right? Obviously. And one of the problems with Mulvaney is this trashing of basic norms of public decency and respect. And in addition to the actions taken and the policies and that sort of thing, it's just deeply troubling to me. I think it's an attack on our democracy when you have that sort of mocking approach to an agency.

Prentiss Cox:

If you don't like the agency, go back to Congress and get it eliminated, don't go to the head of it and mock the people that work in it and the purpose it exists. I found that deeply troubling, but just one of the many deeply troubling things about this attack on democracy in the Trump administration. So I've made my political point, let's go.

Alan Kaplinsky:

Let me ask you one other thing, and then Chris, I'm going to get your response. After Trump got elected and the initially Mulvaney was in there as acting director, there was a hue and cry from a lot of state Attorneys General, mostly in the larger, more aggressive states, New York Attorney General... In Pennsylvania actually was a little bit of a surprise because that had been at least to my way of thinking, even during Republican and Democratic administrations.

Prentiss Cox:

It was a sleepy place until Josh Shapiro came in.

Alan Kaplinsky:

Yes. yeah, that's true. Yeah. Not much went on there, but all of a sudden-

Prentiss Cox:

They have some good people, but, yeah.

Alan Kaplinsky:

Yeah, yeah, that's right. All of a sudden the state AGs were very outspoken, some of them created the little mini CFPBs, they tried to emulate the CFPB, and they were going to fill the void created at the federal level. And I want your opinion whether you think the state AGS were successful in filling that void.

Prentiss Cox:

No.

Alan Kaplinsky:

No? And why?

Prentiss Cox:

Because they don't have the resources to do it. Pretty simple. Just don't have the resources to do it. And the places where they have the most resources, there's one place that just stands out that could actually have the resources to do it, which is California, and weren't a particularly effective office and you'd have enforcement.

Alan Kaplinsky:

And we're going to get to California in a minute. Okay. Chris, wonder if you could tackle this two part question.

Chris Willis:

Sure, I'll take it in reverse order. First, I'm going to agree with Prentiss on the state's filling the void. The thing that made the CFPB so effective or so dangerous, depending on which perspective you take is that it had an unlimited budget and unlimited resources plus unlimited power. And so it wasn't just the fact that the bureau had all these remedies, it's that they had a huge arsenal of people so that they could find the problems. And it's the detection of the issues, mainly through supervision, somewhat through looking at complaints via enforcement, but honestly, supervision is the biggest tool that the bureau has to basically find everything that's going on and then decide to take action.

Chris Willis:

And then unlike state Attorneys General's offices who don't have supervisory authority at all, the bureau also didn't have a resource limitation. So, whereas a state regulator frequently has to make choices about which places to spend their limited time and resources in terms of which cases to pursue, the bureau during its first six years, basically pursued everything all the time. So that's why there's such a big difference between what the bureau did and what the state's ability was to fill the void as you asked in the last question. That's my perspective on that, and I think it's basically the exact same thing that Prentiss was saying.

Chris Willis:

Going back to the original question about Kathy Kraninger, I would say, I think her biggest success is being, what I regard as being very even handed and considerate of both sides in connection with the work of the agency. She is definitely not a lap dog for the industry, there's no evidence that I can see of that. And when we see the bureau taking actions, it looks like a fairly careful deliberative effort in many instances to try to balance the needs and protection of consumers with the need for the industry to go on and be able to function.

Chris Willis:

The debt collection rulemaking, I think is a perfect example of that, a very measured rulemaking where both sides got something and both sides lost something. So I really respected the fact that the bureau seemed to be actively listening to and giving credence to both sides, and she doesn't represent a swing all the way to one pole the way per perhaps Mulvaney did, which I think I perceive that to be the case.

Chris Willis:

The biggest failure, I think for Kathy Kraninger, at least in the eyes of the Democrats and the consumer advocates was she was appointed by Trump. Honestly, I don't think it matters what she does, it doesn't matter how fair she is. She will be labeled as someone who's abandoned the role of the agency, and who's turned her back on consumers, and is a lapdog for the industry, even though it's not true. It's a completely unfair criticism, but nevertheless, she seems to be saddled with that and seems to get accused of that very regularly by Democratic members of Congress, and the Senate, and by consumer advocates.

Chris Willis:

I wish that weren't the case, but that's what I perceive.

Prentiss Cox:

It's not what I said, Chris.

Chris Willis:

Oh, I know it's not what you said, and Prentiss-

Prentiss Cox:

We're actually agreeing on that. We're agreeing. And I think you're right. I think you're right. I think her original sin was being appointed by Trump. Having said that, I don't think... She doesn't represent a consumer advocate point of view. And one way

to think about this, having been around it a lot is that I think that people that come from the industry perspective as you two do, tend to think of fair being that the agency acts more like calling balls and strikes.

Prentiss Cox:

And you'll see that in the business wing of the Democratic Party and the... Well, there's not much left to the reasonable Republicans anymore, but you'll see that in the business wing of Democratic Party. They see these agencies as someone who calls balls and strikes. And from my point of view, good, that's a positive. That's better than no regulation, it's a fair way to look. Consumer advocates, they see it differently. I see it as the market is not a fair or even hand, it's a wildly disproportionate power dynamic and a role of the agency isn't to call balls and strikes, is to actually be a presence to eliminate that disparity in power between unorganized, lesser informed consumers and focused businesses that hold all the cards.

Prentiss Cox:

So, from our point of view, it's not calling balls and strikes, it's actually someone in the game on behalf of consumers. Now, having said that, I always was super aware that when you've got a power like a civil investigative demand, it brings with it certain responsibilities and you don't issue those lightly. And you then have to constrain yourself. It has to be that with power, with authority comes responsibility. From my point of view, that's where the constraint comes in if you're a reasonable regulator. But we have different perspectives about what constitutes fair, right?

Alan Kaplinsky:

I've got two more topics to cover quickly before we wrap things up. We have an election coming up soon. The polls show that Joe Biden is going to win, and if he wins, I think we'll all agree that one of his initial things that he's going to do is replace Kraninger in one of two ways. He'll either get somebody, Joe Biden will get somebody at the CFPB as an acting... Appoint someone as acting deputy director, will do something, and eventually will get somebody confirmed by the Senate.

Alan Kaplinsky:

And of course, if the Senate is controlled by Democrats, it will be very easy to get somebody confirmed.

Prentiss Cox:

This time-

Alan Kaplinsky:

I'm going to ask you, Prentiss, the-

Prentiss Cox:

You made me remember that that wasn't so easy with Cordray, but go ahead.

Alan Kaplinsky:

I know. I know it wasn't. Who do you think is going to be the next director of the CFPB? I know I have my opinion. I've heard Chris express that, and I'll let him tell you in a minute, but I'm wondering who you think Biden might appoint. Bearing in mind, I think that Biden very much, or I should say Elizabeth Warren very much has the ear of Joe Biden when it comes to the CFPB.

Prentiss Cox:

That's what I was going to say, so I agree with you. I'm sure if you're Joe Biden, when it comes to the CFPB, the first thing you do is pick up the phone and say, "Who should I appoint?" To Elizabeth Warren. That's what I would think would happen is she would have a tremendous impact on who the nominated be. I of course, want to see somebody who has a bias wildly in

favor of understanding what happens with average people use consumer financial products. That doesn't say data-driven means, we don't try to connect what the data is telling us to what's happening in individual people's lives, that the wisdom lies in that connection.

Prentiss Cox:

So, I would love to see somebody who understands that at a real... Who understands that in a deep way in their heart, and not somebody who is more in their head about these theories of how markets work. I would love people like Chris Peterson who has experienced at the agency. Somebody's not on the top of everyone's list of political figures.

Alan Kaplinsky:

He may be governor of Utah.

Prentiss Cox:

I gave him money, but a Democratic governor of Utah, sure. But if he doesn't become governor of Utah, someone like that is who I would love-

Alan Kaplinsky:

Or how about Rohit Chopra?

Prentiss Cox:

Yeah, I love Rohit. Yeah. Again, Rohit understands that. He's looking at people's lives and experience, and connecting that in a sophisticated way to... And also able to understand market regulation, the issues and that sort of thing. Two, how could you go wrong with either of those choices? Just [crosstalk 01:02:59]-

Alan Kaplinsky:

And Chris has got a different opinion, unless it's changed.

Chris Willis:

No, I'm still ready to bet on Patrice Ficklin as being the next director of the CFPB. She's at the agency already, she is still very visible publicly with the agency, has survived the transition into a Republican administration. Fills the box of being someone who is very much on the consumer side. And the other thing is, one of the greatest fronts that the consumer advocates and the Democrats believe the Republicans did to the agency was the evisceration of the fair lending office, and I'm channeling the consumer advocates there.

Chris Willis:

And she was, of course the head of it and still is. And so, what better justice would there be to make her the head of the CFPB to right that wrong? So for all those reasons, that's why my money is on Patrice.

Prentiss Cox:

That's a sophisticated call. She's got to be on the shortlist too, and a wonderful [crosstalk 01:03:56]-

Alan Kaplinsky:

Yeah, I would think. Final question. Very recently, the California legislature passed with some significant amendments, a mini CFPB law, and it's a waiting signature by the governor. Could happen any day now. By the time our podcast gets released, it may have already happened. But I'm wondering what your view, if you've had an opportunity, Prentiss, if you've been

following that, the evolution of that bill up to the point where it's now about to become the law in California. I'd like to know what you think about it and what kind of an impact that might have.

Prentiss Cox:

No, that one is a game changer because of the size of the market and the size of the state. I followed it a little, I'm not super intimate with the details. But I've always thought that California's been... It's fairly quiet, frankly. It has not really wielded its authority as much as you would hope. And I, of course, I'm a big believer in whoever runs the agency is a huge choice.

Alan Kaplinsky:

Chris, what's your [crosstalk 01:05:24] thought on-

Prentiss Cox:

... if Trump gets reelected.

Alan Kaplinsky:

Right. What's your thought on the California law?

Chris Willis:

I think it's going to be very interesting to see what happens there, but it certainly creates an opportunity for a regulator that would rival the CFPB if Trump gets reelected or really augment the power of the CFPB if you have it change hands to the Democrats. And so I agree with Prentiss, it stands a real chance at breaking the pattern that he and I both talked about earlier of the state agencies having the will and the desire to fill that gap, but not having the resources to do so. I think there's a good chance that this could reverse that situation as it respects California.

Alan Kaplinsky:

Yeah. And I guess-

Prentiss Cox:

And one thing that... Go ahead.

Alan Kaplinsky:

Yeah, go ahead, Prentiss.

Prentiss Cox:

One thing that we didn't mention that Cordray did right and I think has continued under Kraninger is setting a tone of very cooperative relationships between the CFPB and state enforcers. Even if Biden wins, that would be a great augmentation of the, to use Chris's words, of the CFPB's authority, partly because of that tradition within the CFPB that Rich started being a good partner with the state.

Alan Kaplinsky:

Do you think that's deteriorated under Mulvaney and Kraninger-

Prentiss Cox:

Under Mulvaney, yes.

Alan Kaplinsky:
... that relationship?

Prentiss Cox:

Under Kraninger, I think it's come back a little bit, but I guess I'm not quite as familiar. My understanding is, it's not, yeah. I think it's still there. I think the culture is to cooperate with the states, and that has still gone on. It would be a huge plus for the CFPB under Biden, it would be essential from a consumer advocates point of view, consumer protection point of view if Trump is reelected.

Alan Kaplinsky:

Right. Okay. I would be remiss before I wrap this up if I didn't throw one other hat in the ring for the next director or the CFPB, namely you, Prentiss. I would see you up there with people like Chris Peterson, Rohit Chopra and Patrice Ficklin.

Prentiss Cox:

... to be modest, I... Believe me, if they call me, I'd say, "Ask Rohit, ask Chris, ask Patrice. They're much better than me." I'm likely to say something wildly inappropriate to a Republican Senator.

Alan Kaplinsky:

Okay. Thank you, Prentiss very much for taking the time to be our guests today. I think it was very enlightening, and I hope you'll have an occasion to revisit us sometime in the future, talking about, of course, something related to consumer finance, so my thanks to you.

Prentiss Cox:

Oh, thanks for having me on, I appreciate that you want my perspectives on these issues, and I appreciate hearing from Chris. I thought we agreed on a lot more than we disagreed on.

Alan Kaplinsky:

Yeah. And my thanks to Chris too. Make sure you visit our website, www.ballardspahr.com, where you can subscribe to our show. You can also subscribe in Apple Podcast, Google Play, Spotify, or whatever your favorite podcast platform may be. And of course, don't forget to consult with our blog regularly, consumerfinancemonitor.com for daily insights of the consumer finance industry.

Alan Kaplinsky:

Our podcast is generally, with the exception of a couple of holidays, is released weekly on Thursday. And that's it for today. Thank you again.