

Consumer Finance Monitor (Season 4, Episode 45): A Look at the Legal Issues Raised by Targeted Advertising

Speakers: Alan Kaplinsky and Chris Willis

Alan Kaplinsky:

Welcome to Consumer Finance Monitor podcast. Where we explore important new developments in the world of consumer financial services. I'm Alan Kaplinsky, and I am the senior counsel at Ballard Spahr, formerly the chair of the Consumer Financial Services Group at Ballard Spahr. And I'm very pleased to have join me today, my colleague, Chris Willis. Chris is a partner at Ballard Spahr, and he is now the co-chair of the Consumer Financial Services Group. At least that's one of the many hats that he wears. And he is a frequent moderator and speaker on our podcast show. And also on the many webcasts that we present.

Alan Kaplinsky:

Let me just remind all of you that our podcast show is weekly. Except for two weeks in December, where we take some time off for the holidays. But other than that, we release a new show every Thursday. And we've been doing this now for well over three years. You also ought to consider, if you haven't already, subscribing for our blog, which also goes by the name of Consumer Finance Monitor. We've been doing the blog now for well over 10 years, ever since the Consumer Financial Protection Bureau became operational in July of 2011. So for first of all, I would like to welcome Chris to the show again. And I tell him that I very much look forward to hearing what he has to say about the subject, which I'm going to mention, and he's going to embellish on it. So a hardy welcome to you, Chris.

Chris Willis:

It's great to be back. I'm always happy to talk to our listening public about matters of interest, at least to me and hopefully to them too.

Alan Kaplinsky:

Yeah. And this is really a cutting edge issue that we're going to talk about today that I'm very excited about. And the subject is targeted marketing. And I have a number of questions on my mind, Chris, that I want to raise with you. But before we get to that, can you tell our listeners exactly what targeted marketing is?

Chris Willis:

Sure. And it's primarily a phenomenon of online advertising on social media platforms or on web platforms. And it's pretty common knowledge that the operators of those platforms collect a lot of information about the users. Name, age, gender, race, interests all kinds of stuff. Many, many data points about users of those platforms. And then those platforms of course sell advertising. And the whole secret sauce of the social media platforms and the web platforms, is to use this vast trove of personal information about users, to direct advertisements to people who are most likely to respond to the advertisement.

Chris Willis:

And so, that's the basic nature of targeted advertising. And then in the financial services world, because we have a regulated product in terms of having an anti-discrimination law, the Equal Credit Opportunity Act, or for some types of lending, the Fair Housing Act, some state laws like the New York or California, fair lending laws or the Unruh Civil Rights Act in California, we have a discrimination statute that applies to us. Just like employment, for example, has Title VII. And so the controversy around targeted advertising, is whether either advertisers, that is financial services providers, or the platforms themselves might have directed advertising to certain people or away from certain people based on characteristics that are protected under those non-discrimination statutes, like race, ethnicity, gender, age, familial status, stuff like that. So the topic

we're going to talk about today has to do with the use of that ad targeting technology, that facility that's created by the social media and web platforms, and the intersection with the anti-discrimination laws that we're governed by.

Alan Kaplinsky:

So, Chris, give me rough idea, in terms of number of years targeted advertising has been utilized. Are we talking about a decade or is it even more recent than that?

Chris Willis:

I think it's probably roughly a decade. When it came to the attention of the regulators and became the subject of litigation, it's probably been three or four years. That's when I think that first became a regulatory and litigation issue in the consumer financial services world. There were some public interest groups that filed private lawsuits. There was an attorney general investigation by the Washington state attorney general and a consent order with Facebook. And there was a HUD charge of discrimination also against Facebook related to this issue. All those had happened roughly three to four years ago. That's what got it kicked off.

Alan Kaplinsky:

Was Facebook the pioneer of this area. I mean, were they the ones that really launched targeted marketing?

Chris Willis:

I don't think Facebook was the only pioneer, but definitely was a pioneer. But for whatever reason, Facebook became the focal point, both for the consumer advocacy groups and for the regulators to serve as a target for this issue. So it has been the subject of most of the litigation and regulatory action that has occurred thus far.

Alan Kaplinsky:

So if you could maybe just, I think maybe it would be helpful to some of our listeners, provide an example of what might targeted marketing look like. In other words, you can use a company or make up a company that wants to do certain thing and I assume they contact the social media platform, be it Facebook, and they give them instructions, "This is what we want." Can you give a real world example?

Chris Willis:

There's actually three different ways that you can do it. So on one hand, let's say I make a certain type of loans, and I want to advertise on Facebook. Option one is, I can get a list of all of the screening criteria that are available for use on Facebook. And I can pick the ones that I want that I think are most likely to respond to my ad. And then I can instruct Facebook, "Hey, I want you to serve up my ad to people who these criteria. They're in this age range, they're this gender, they have this income, they have expressed interest in these types of products." You know, whatever. Originally, advertisers were free to select from all of the available attributes on Facebook for any advertising.

Chris Willis:

But in 2019, I think Facebook in response to some of the litigation and the regulatory pressure that we mentioned, created a special targeting set of attributes called special ad audiences. That's designed for employment, housing and credit advertisers. And there, the protected class attributes like age and gender and race, stuff like that are not available for selection by the advertisers. But that's method one, where the advertiser chooses its own screening criteria.

Chris Willis:

Option two, is what's referred to as a lookalike campaign. So again, let's say I offer a certain type of loan product, and I want to find more customers that are like my best customers. So what I would then do is I would provide the social media platform

or the web platform with some information about a sample of my best customers. And the social media or web platform would find people who look alike. That's why they call it a lookalike campaign. Who share a lot of attributes in common with my best customers, and then serve up my ads to people who are a lookalike of my best customer audience. There, the variable selection, the screening, the targeting criteria, are up to the social media platform or the web platform. The advertiser doesn't know. It just knows I'm running a lookalike campaign. So that's option number two.

Chris Willis:

And then option number three, is that you can direct advertising on these platforms by targeting people who have already expressed an interest in your particular product. So for example, you can say, I want you social media platform, to show this ad to people who have visited my website as shown by the cookies on their computer. They've gone to chriswillisloans.com. And since they've expressed interest in my product by going to my website, I want you to show them my ad. Those are the three primary ways of targeting someone without their own input. Now, obviously on the search engines, you can target people based on the searches that they do. And you've all seen paid search ads, where if I search for... I want a loan of X type, you might see advertisers who offer a loan of that type. They've paid to be returned as a paid search result in response to keywords that the user may have searched for.

Alan Kaplinsky:

And do the... Let's use Facebook as an example. Do they get paid based on the number of, I guess you could say hits on the ad, on the website where they click on, if someone clicks on it and looks at it? Or does it require that someone actually make a purchase?

Chris Willis:

I believe it's based on clicks on the ad to go to the ad that served on up to them. I don't think it has to do with whether someone originates a loan or not, for example.

Alan Kaplinsky:

Yeah. I always wondered, it seemed miraculous that I could be talking to my wife about a desire to buy a particular thing, and yeah we'd go on a website. And wouldn't you know, the next day, we've got ads from the websites that we've been on.

Chris Willis:

Yep. That's neither miracle nor coincidence, Alan.

Alan Kaplinsky:

Right. Got it. Okay. So now that we've really laid a good groundwork, it seems like there have been a number of targeted advertised in case that were brought by private plaintiffs recently. You mentioned that a few minutes ago. And the courts have been ruling motions to dismiss. Can you describe what those cases alleged, what they're all about and what of the outcomes of the decisions then?

Chris Willis:

Sure, it's really interesting actually. So you have private plaintiffs, sometimes public advocacy groups, and sometimes individual plaintiffs who may be associated with those groups or funded by them, bringing lawsuits against either the social media platforms themselves, like Facebook has been a defendant in some of these cases. And then sometimes they're bringing lawsuits against the advertisers. But the basic theme of the lawsuits is, you didn't serve me up ads for X, housing, loan products, employment, whatever. And that was discriminatory under the Fair Housing Act or Title VII or whatever law happens to be applicable. And so therefore, I want a judgment in my favor saying that you violated the Fair Housing Act or Equal Credit Opportunity Act or Title VII or whatever it may be, and an injunction to prevent you from doing it in the future.

Chris Willis:

That's the root of the case is, I am deprived opportunities to find housing, get a loan or do whatever the subject of the advertising is, because I didn't see the ads. They weren't served up to me. They were walled off from me because of my protected characteristic, because I'm too old or because of my gender or whatever. That's the basic nature of the lawsuits.

Chris Willis:

And the interesting thing that's happened is that you have seen federal courts particularly recently, start to dismiss those cases for lack of Article III standing, basically finding that there's no Article III injury, like a concrete injury. In fact, that's one of the requirements of Article III, standing as the Supreme Court has made super clear in both Spokeo and the TransUnion versus Ramirez cases. And so the courts analyzing these cases have said, "Hey, just because nobody serves an ad up for you doesn't mean you have a concrete injury." And so in particular, there was a case that was decided in July by a court in the District of Maryland, where a private plaintiff sued some rental management companies who were managing apartment complexes under the Fair Housing Act.

Chris Willis:

And the court said, "Well, look, how are you injured? Just because you didn't see an ad on your Facebook feed? If you want to find housing, there's lots of places to find it." The apartment complexes have websites. There are apartment finder websites that are popularly known. You can run a Google Search for apartments in my area. That seems like a better and more efficient way to find housing than just to randomly scroll your Facebook feed and look for an ad that may or may not ever land." And that's really what the court said. And so the court said, "I don't buy that you have an injury from failing to receive ads, no matter how they were screened from you, because you have another way of finding housing. And I don't see how you're injured. So case dismissed for lack of Article III standing."

Chris Willis:

So we noted that in July when it happened, it was on our blog, of course. And then in August it happened again, there was a federal district court in the Northern District of California, in a case brought against Facebook. Same type of case. Which wasn't quite so strongly worded in the court's opinion that there is no consumer injury, but nevertheless, the court allowed the plaintiff in that case to amend twice, I think, to allege a particularized concrete injury as required by Article III. And then found at the end, that the plaintiff had failed to allege a sufficient injury to confer Article III standing. And so that case got dismissed too. And so it really seems like there's a trend following on the Supreme Court's decisions in Spokeo and TransUnion, to say that there isn't a concrete injury for consumers for standing purposes in these targeted advertising cases. And so that was interesting in and of itself.

Alan Kaplinsky:

Yeah. Let me change the facts on you a little bit, Chris, and get a reaction. What if the targeted ad offered some kind of discount, let's say the first month rent free, if you respond to this particular ad and you rent the apartment for a year or more. And that discount was not generally available, but available only to people who got that particular ad? Is that a different kettle of fish?

Chris Willis:

I think so very much because there it's easy to see what the injury is, right? "Oh, I had to pay my first rent's rent and somebody else didn't." And "Oh, it just so happens that the reason I didn't get it is because I'm too old." And so that's age discrimination under whatever applicable statute it is. So I think once you leave just pure advertising and you have different terms available to consumers based on whether they got the ad or not, I think you have a lot better chance of somebody having a real injury there.

Alan Kaplinsky:

Yeah. We haven't seen any cases like that yet I take it?

Chris Willis:

I don't recall any.

Alan Kaplinsky:

Yeah. Okay. So what are the decisions have come down? What do they tell us about the viability of future private litigation on this particular issue?

Chris Willis:

Yeah, and I think, I think what it tells us is that there's a lot of question to whether that is a viable strategy for the consumer advocates and others who believe this is a bad practice to try to address it. I mean there were some initial litigation matters brought by for example, the National Fair Housing Alliance and some others, there's some labor unions who brought some who succeeded and had their cases settled, but didn't really get to a litigated outcome of them. But then more recently, you've had decisions like this Maryland and this California case that we just mentioned just this summer. And I think it really casts a lot of doubt on whether private litigation is a viable path forward for the opponents of this practice to actually get anything done. And they seem to be now just making bad law for themselves rather than accomplishing anything.

Alan Kaplinsky:

Yeah. So, as so typically happens when plaintiffs or consumers are unable to achieve their objectives through the courts, they look to the regulators to provide relief. And like you to comment on that. What's been happening at the regulatory level.

Chris Willis:

Interestingly, not a lot. So as I mentioned, and a couple of years ago, there was a Washington state attorney general consent order with Facebook, and there was a HUD charge of discrimination filed against Facebook. I think that happened in 2019. The Washington AG thing was in 2018, and the HUD thing was in 2019. As I recall, it's still out there. I don't think there's been a resolution of it. And there was a public statement issued by the New York State Department of Financial Services, that they were going to look at advertisers who were screening based on protected characteristics under New York's Executive Law 296-a, which is their fair lending statute and fair housing statute. But beyond that, there hasn't been a lot of regulatory activity or even statements about this issue.

Chris Willis:

The CFPB, as far as I know, has never said anything about it publicly. And likewise, not many other regulators have either. And so, the regulators have presumably been watching, but they haven't been doing a lot. And one of the big questions in my mind, and I think in the mind of a lot of people in the consumer finance industry is, with the change of administration that we had earlier this year, will we see the federal regulators, like the CFPB start to Wade into this issue? We haven't seen it yet, but could it happen? But so far, not much action on the regulatory front.

Alan Kaplinsky:

Yeah. I'm wondering in light of all the attention being devoted now to fintechs, particularly by Rohit Chopra, the new director of the CFPB, is now looking very carefully at a number of fintech companies and particularly what they're doing in the payments area. Whether their investing or whatever it is that they're doing could morph into this area, what do you think?

Chris Willis:

I don't know that that the publicly announced orders from a week or so ago are likely to morph into this, but a pursuit of this issue would certainly fit the theme that was articulated and director Chopra's public statement associated with those orders about suspicion of large tech companies and their use of data. Here, it would be for advertising purposes. There, it was really for payments type transactions. So there may be a motivation on the CFPB or some other regulators part to pursue it for that reason. But in addition, there's a lot of consumer advocacy group to think that this is a bad practice that exacerbates patterns of discrimination and access to financial services or housing or whatever in society. And they really want the regulators to do something about it. So there's motivation there for the regulators to do something about it. It hasn't eventuated into action yet, but we have to assume that there's some on the regulators to address this issue.

Alan Kaplinsky:

I mean, how much different is it, Chris, than plain vanilla redline where we know the regulators are very focused on that. At least the CFPB, DOJ, they brought a lot of actions raise on geographical redlining. Well, isn't this a something akin to that? What's really the difference?

Chris Willis:

Superficially, it sounds very similar. And there's a lot of very loose usage of the term redlining now to encompass things like what we're talking about today. But if you really pay attention to redlining, as it has existed with the federal regulators over the past 10 or 20 years, it has a lot of elements in it that don't lend themselves easily to this type of claim. So take a look at any redlining complaint that was filed by the CFPB or the Department of Justice in the past 10 years. And you're going to see a combination of factors. You're going to see at the center of it, a peer analysis based on HMDA analysis that says, "You are making loans in this metro area, and I've compared you to a group of peer lenders. And I can see that they have say, 15% of their applications and 15% of their loans are made in minority areas of whatever the city is. And you only have 3%." And so the peer analysis is one key aspect of every redlining case, which cannot be done in this instance because we've don't have HMDA.

Chris Willis:

Then the other elements that you see in the redlining cases are, you're directing advertising preferentially to particular areas and excluding areas because they are majority minority areas. You have the location of physical branches, like a bank's branches or a lender's to exclude any branches in majority minority areas because mortgage loans are frequently originated with in-person contact. You sometimes see allegations about the lack of diversity among the mortgage loan officers of a particular lender of like, "Oh, you only have white men and you don't have any Hispanic or African American loan officers.

Chris Willis:

And some times you'll have some additional evidence thrown in like the BancorpSouth case, as an example of this, where there's some direct evidence of targeting. And then since most of the defendants in these cases, all except one, have been banks, they've also looked at their defined Community Reinvestment Act service area. And they've said, "Well, when your CRA service area is gerrymandered to avoid high minority neighborhoods," that's another element. And the end result of combining all these factors is a conclusion that you intentionally engage in redlining by intentionally avoiding making loans to high minority areas and their residents. But as you hear those elements, almost none of them is easily applicable to online advertising for a non-mortgage loan product. So when you say, "Oh, it's just like redlining," it really isn't. You'd have to invent a whole new analysis to call this redlining, and you'd have to significantly alter the definition of how we've understood redlining for probably 20 years.

Alan Kaplinsky:

Yeah. So let me ask you question, let's say, I'm sure that this has happened to you already, but you get a call from a client that wants to do targeted marketing and is negotiating or talking to Facebook, Twitter, any social media site about it. What do you

tell them in terms of the advice? Do you tell them, "Oh, if I were, you I'd stay away from that area it's fraught with peril. While the regulators haven't done anything yet, they very well could jump into the area"? I mean, how do you craft your advice?

Chris Willis:

Well, it stems from a number of factors. So first of all, there's a pretty significant business necessity with advertising on Facebook and other social media platforms. That is a very major channel for people to advertise their products. And the business typically feels that they are incredibly hobbled without access to those advertising channels. So saying, "Oh, you just shouldn't do it." Isn't a real world option, I think for most people.

Chris Willis:

Second, as you just noted, there is no empirical track record of financial services companies getting into trouble for advertising on Facebook. It could happen, but it hasn't happened yet. And so for us to say, "Don't do something that the business really needs to do because of a hypothetical threat of what a regulator might do in the future," isn't a very balanced approach, I don't think.

Chris Willis:

And so, I think it's important for financial services companies to know that this is an area under scrutiny. And that they may be called upon to defend their use of these kinds of advertising methods. But in general, I think the way forward at the moment weighing all the factors that are out there, is to try conduct the advertising in a way that most assures us of protection from a claim of discrimination by a regulator, but doesn't cut off the channel altogether. And I would hasten to add the other factor is from a legal standpoint, assuming you're dealing with a non-mortgage product. And so you're just dealing with the Equal Credit Opportunity Act, the Equal Credit Opportunity Act really it doesn't say much about advertising. In fact, there's only one provision of ECOA that says anything about advertising. And what it says is, "You're not allowed to discourage someone from submitting an application because of their protected characteristic." So you couldn't put up a sign that says, "This loan product is only for white men," for example, or "Only for women between ages of 25 and 35." That would be a straight up violation of ECOA.

Chris Willis:

But as long as you're... It's a real question as to whether an applicant is discouraged because they never see an ad. That's a stretch. And so the legal basis for a regulator or even a private plaintiff to bring a lawsuit under the Equal Credit Opportunity Act based on targeted advertising, is I think, quite thin. And so, you have to decide whether you want to litigate that issue with somebody or not. But if you decide to, there's a substantial merit behind your argument that the Equal Credit Opportunity Act just doesn't touch this issue.

Alan Kaplinsky:

Mm-hmm (affirmative). Okay. So I guess if I could try to boil it down and put words in your mouth, if your client mentions one of the prohibited basis, or I should say, if the client is going to deal with a class in its targeted marketing, that is avoid marketing to a specific protected class, be it women, be it based on age or nationality or any of the prohibited basis, then I guess you'd have a major problem with it.

Chris Willis:

I think in most instances, yes, I would say that that should be avoided. The only exception to that is there are certain financial products that I think have a natural audience that may fall along a protected class line. So let's say I'm a student lender. Okay. And I make loans to people who are attending college. Well, the truth of the matter is, there's a certain age range of people who are overwhelmingly the ones who need those loans. And so I act to think it's probably defensible to market student loans to people who are in the age range of people who go to college.

Chris Willis:

Think about another example, let's say I'm a credit card issuer. And I have a co-brand credit issued by a store like a women's clothing store, for example, that caters to some particular demographic group. Well, is it wrongful under the Equal Credit Opportunity Act if I direct my advertising for my women's clothing store co-brand card, primarily to women? I mean, am I required to advertise to men who probably will never shop at the store? That seems a little silly to me. So there are some very narrow instances where I think it's probably defensible to utilize some protected characteristics in directing advertising for certain types of products. But in the main, I agree with the statement that it should be avoided in almost all instances.

Alan Kaplinsky:

Right. Right. Okay. Well, Chris, we have drawn to the end of our show today, but before we close it out, want to give you a final opportunity to add anything you'd like to, to tell our listeners anything related to targeted marketing which we haven't already covered.

Chris Willis:

Well, one of the things that I really wanted to stress to the audience is these recent decisions that you and I talked about a couple of minutes ago, where the courts are finding no consumer injury and no standing from alleged targeted advertising. And will that have an impact on whether the regulators weigh into this issue or not? On the one hand you could say, "Well, it's not looking great." You've got some federal courts who are saying, consumers are not really harmed here. So is this really where I want to spend my resources and risk litigating an issue and losing it because the federal courts have already signaled their hostility to these claims. And so if I'm a regulator, I'm going to stay on the sidelines for a while longer on this issue. That could happen.

Chris Willis:

On the other hand, we have seen instances where regulators decide they feel strongly enough about an issue that they don't really pay attention to what the federal courts have been doing. A prime example of that is, you had a number of CFPB enforcement actions in the auto finance area, dealing with the exercise of discretion in setting retail interest rates for car purchasers on retail installment contracts. And in some of the documents that were released by the House Financial Services Committee several years ago, there were CFPB memoranda that talked about the potential tension between the Supreme Court's decision in *Walmart v. Dukes*, which said, "Discretion is not a policy or practice that's subject to disparate impact analysis at all." And the fact that the CFPB brought numerous enforcement actions based on exactly that theory.

Chris Willis:

So, the fact that some federal courts have signaled disagreement with the theory doesn't bind the regulators or control them. And it's a real question about whether they would give credence to those decisions or not. Watching this case law continue to evolve and then seeing how the regulators react to it, I think is one of the big open questions. And something that I know I'll be paying a lot of attention to.

Alan Kaplinsky:

Okay. Well Chris, thank you very much for coming on the program today and bringing us all up to date on what's happening in this, what I would say, is a hot area where there is a lot of interest. Namely, targeted marketing. So, that does it today. In addition to thanking Chris, also in particular, want to thank all of our listeners who downloaded the show today. We really do appreciate your listening to our podcast shows. And also once again, tell you to subscribe to our blog, consumerfinancemonitor.com. And get on the Ballard Spahr Consumer Financial Service's mailing lists, so that you receive invites to the many webinars and webcasts that we conduct. Well, thank you to everyone.