# Consumer Finance Monitor (Season 5, Episode 18): Recent Small Business and Consumer Finance Developments at the Federal Trade Commission, with special guest Malini Mithal, Associate Director, FTC Division of Financial Practices

Speakers: Alan Kaplinsky and Malini Mithal

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'm Senior Counsel at the law firm of Ballard Spahr. I'm formerly the Chair of the Consumer Financial Services Group at Ballard Spahr. And I will be moderating our podcast today. And I'm extremely excited about the guest that we have for today's podcast show. And in our podcast, we very frequently focus on the Consumer Financial Protection Bureau, the CFPB, and infrequently focus on another extremely important federal agency called the Federal Trade Commission. And I can't think of anybody better suited to give us an update on recent developments at the FTC in the world of consumer financial services than Malini Mithal.

Alan Kaplinsky:

Malini is the Associate Director of the Federal Trade Commission's Division of Financial Practices. And in that capacity, she supervises investigations and enforcement actions, challenging unfair or deceptive practices in the provision of non-bank financial services, including in the areas of fintech, lead generation, short-term loans, debt collections, student loan debt relief, mortgage relief, and automobile advertising and financing. Under her leadership, the division has also engaged in significant policy initiatives, including hosting workshops or issuing reports on so-called dark patterns, marketplace lending, blockchain, artificial intelligence, peer-to-peer payments, crowdfunding, lead generation, mobile payments, and mobile cramming.

Alan Kaplinsky:

Malini has held numerous positions at the FTC before assuming her current position. She was formally Counsel to the Director of the Bureau of Consumer Protection. So Malini, a very warm welcome to you. Thrilled that you're joining us today.

Malini Mithal:

Thanks, Alan. It's great to be here. I really appreciate the invitation and you know that I love talking about consumer financial services.

Alan Kaplinsky:

Yes, I know you do. And we're really going to OD on consumer financial services today, particularly at the FTC. And we've got a lot to cover. And I want to get right into it with you. And the first topic that I want to raise with you is small business financing. The FTC seems very focused on small business financing right now. Can you give us an overview of this market and why is this such an area of focus for you?

Malini Mithal:

Absolutely, Alan. I'm so glad you asked. And before I get into the good stuff, I do have to make a disclaimer. The remarks I'm making today are my own and not those of any individual commissioner or the commission as a whole.

Malini Mithal:

So back to small business financing, that's indeed a priority area for the FTC. Small businesses act as an important engine in the U.S. economy. They provide economic opportunity for entrepreneurs and employment for millions of job seekers. But unfortunately, small businesses have been struggling given the economic uncertainty they have been facing in light of the pandemic.

Malini Mithal:

So you asked about the market. I'm going to focus on online financing because that's where small businesses have increasingly been seeking financing. So financing products in the online market can have a broad range of features. Some offer loans that are like traditional bank loans, so you accrue interest and there's a monthly payment and a set term length. Others have very different features. For example, instead of interest, many products charge flat fees, which means they offer no savings for consumers who repay early.

Malini Mithal:

Now, many online providers are increasingly relying on financial technologies to underwrite loans in new ways. They are looking at alternative data. You know, in addition, there are some large payment processing companies and tech platforms that leverage the information they already collect from small businesses, such as credit card receipts, to offer them loans. So that's a very quick overview of the market.

Alan Kaplinsky:

Yeah. Thanks, Malini. I know one product in particular that's generated a lot of attention is the so-called merchant cash advance product, or sometimes it's referred to as MCAs. Can you tell our listeners what that is and whether that's one of the areas that the FTC is looking at?

Malini Mithal:

That's right, Alan. MCAs have generated quite a bit of attention. So I mentioned that some finance providers are charging flat fees in this space. One such group is MCA Providers. Now, MCA Providers buy a fixed amount of a small business's future receivables, and then businesses have to repay that amount plus a factor that's often between 20 to 50%.

Malini Mithal:

Now, daily payments are often supposed to rise or fall based on the merchant's daily sales, but we've heard some concerns here. So for example, when daily sales drop, some merchant cash providers may not conduct promised true-ups or reconciliations to reduce the merchant's payments. Many MCA providers have direct access to the small business's bank account. And we've seen other situations where they keep debiting the account even after payoff. We've also seen some MCA providers engage in misleading practices to promote their products, and some providers and their agents may use potentially abusive collection practices as well.

Alan Kaplinsky:

Right. So these MCA products I take it are, to a great extent are regulated under state law, that you might have to get a license, I guess, under laws of some states. And I know there is a controversial question of whether they're subject to state usury limitations. I take it that's not something that the FTC focuses on. You're focusing on other practices, more operational issues.

Malini Mithal:

You know, that's a great question, Alan. So the FTC Act applies regardless of whether the specific product at issue is considered alone or not. So our cases aren't necessarily going to bring specific charges related to whether something is alone. But that being said, what we've reminded marketers in any space is that it's very important that if your product acts like a loan, then it is a loan. It doesn't matter what your papers say. So for example, if your papers say, oh, there's no obligation to repay us. You know, if you go belly up, then you don't owe anything. But then in fact they come and seize your personal assets even after a business slow down, I don't see why that would be treated any differently from a loan.

Alan Kaplinsky:

Right. Right. So tell us, Malini, about some of the actions that the FTC has already taken in this area.

Malini Mithal:

Thanks, Alan. I would love to do that because we've brought a lot of cases here. Now, our cases have focused on several areas, including deceptive marketing claims. So what type of marketing claims are being made to get small businesses in the door? Are the claims truthful? Even if a claim is not quite accurate, is it okay as long as the real circumstances are revealed later in the transaction before sign up? Spoiler alert, the answer is no.

Malini Mithal:

So I'm going to start again with our cases involving MCAs. So in those cases, we say there were a number of deceptive representations to get consumers in the door. The companies claimed in advertising no personal guarantees, no collateral. But we noted that the contract said otherwise. They also said consumers would receive a specific amount. But then we said that the companies actually charged upfront fees, which means consumers got a lot less than what they were promised. So a takeaway here is even if the customer later figures out what's going on, for example, by seeing in a contract that there's a personal guarantee even when an ad said it wasn't required, that doesn't cure the deception that occurred in the first place. Under well-settled case law, these are called deceptive door openers, and they violate the FTC Act.

Malini Mithal:

Another example of a misleading marketing claim came with our first coronavirus-related lawsuit against a company using the name SBA Loan Program. But it wasn't affiliated with the SBA. And despite what it said, it didn't have the authority to make PPP loans. We got a settlement against the company, and it's no longer using the website sbaloanprogram.com. A big takeaway here is don't misrepresent who you are or your affiliation with the government or others to get consumers in the door, whether those consumers are individuals or small businesses.

Alan Kaplinsky:

Yeah. So you mentioned you've seen several issues in a number of areas involving small business financing. What are some others besides the ones you discussed?

Malini Mithal:

Oh, sure. So besides marketing claims, we've seen issues, for example, with servicing. You know, again, our MCA cases provide good examples here. We had a case against a very large MCA provider, Yellowstone, and we said the company didn't service consumers MCAs as they expected. So the company was supposed to take daily payments until the MCA was paid off. But we said that instead the company continued taking daily debits from the small business' bank accounts even after payoff. We said the company was well aware of this practices and internally acknowledged that it continued to take consumers debits four or five times after payoff. We said there were a lot of consumer complaints on this issue. And recently, we announced a settlement with the company that ordered it to pay $9.8 million.

Malini Mithal:

So the lesson here is that even after a company has made its marketing claims and they're truthful and it's gotten consumers in the door, the next thing a company wants to do is make sure that the product is being serviced as expected and works the way consumers think it will. If it doesn't and consumers complain, pay attention.

Alan Kaplinsky:

Yeah. And I know you focused on collection issues in the space as well. Of course, that would to some extent include servicing of performing loans. But if loans become non-performing, I think of that more as debt collection. Can you give any examples of that?

Malini Mithal:

Sure. We've definitely seen issues here as well. And I'm going to focus on Richmond Capital Group, which is another MCA provider. So we said that the company engaged in a whole host of unfair collections practices that might surprise you, Alan. So first, they required businesses and their owners to sign confessions of judgements as part of their contracts. These are also called COJs. So COJs allow a company to go immediately in court and obtain an uncontested judgment in the case of an alleged default. We said that Richmond unlawfully and unfairly used these COJs to seize personal as well as business assets in circumstances not expected by the consumer. In other words, when they weren't even in default. Alan, the company also made threatening calls to consumers. They told one consumer, for example, that they would break his jaw if he did not make payments.

Malini Mithal:

So a takeaway here is that even if the debt is being collected on and it's not household debt and the FDCPA doesn't apply, unfair debt collection practices can still violate the FTC Act.

Alan Kaplinsky:

Yeah. Let me, one thing I'd like to just clarify for our listeners, does the FTC have broad jurisdiction over all types of business lending? And if not all kinds of business lending, where is that line being drawn? I mean, you referred several times as you were talking about small businesses. You refer to them as consumers even though they're engaged in a business. So I'm wondering where is that jurisdictional line? Where does that get drawn?

Malini Mithal:

Absolutely, Alan. That's a great question. So basically, under the FTC Act, it applies regardless of whether the product that's being offered is for household credit or business needs. It applies whether the person the practice is aimed at is an individual or a small business, or really any type of business.

Malini Mithal:

So we really do hope that our work here reminds companies not to assume that, especially for the purposes of the FTC Act that a small business is any different from an individual consumer. In fact, a lot of studies and reports, for example, from the SBA show that most small businesses are sole proprietorships and they may not be any different than an individual consumer in terms of sophistication. So it's really important that the FTC Act serves as a protection for consumers, whether that consumer is an individual or small business.

Alan Kaplinsky:

But you say small business. What about a large business? You don't go there. But how do you know where's the... Somewhere, I guess, the line's got to be drawn, right?

Malini Mithal:

So Alan, there's no line. Under the FTC Act, you take the person you're making representations to and they better be truthful, whether that person is really a person or a business, small or large.

Alan Kaplinsky:

Yeah. I think that's something that is not known by a lot of people. When they think of the FTC, they're thinking of, except of course in the antitrust area, which we're not talking about today, but in the so-called consumer protection area, a lot of people don't realize how expansive your jurisdiction is there.

Alan Kaplinsky:

Let's talk about harm to marginalized communities. The Chair Khan has announced an interest in focusing on power asymmetries and harms directed at so-called marginalized communities. What's the FTC up to on that front?

Malini Mithal:

That's right, Alan. Combating harm aimed at specific communities has certainly been a top priority. So just earlier this month, we, along with the state of Illinois, announced an action against an auto dealer group called Napleton. The action included charges related to fair lending and unwanted add-on products like gap insurance, extended warranties, and window etching. And I am going to talk about the fair lending and the marginalized communities, but first I'm going to just start with the add-ons.

Malini Mithal:

So according to our complaints, Napleton charged consumers for add-ons they never agreed to purchase. And in some cases, they specifically declined with the unauthorized charges being buried in mountains of paperwork. We also said that Napleton told other consumers they had to purchase add-ons to finance the vehicle supposedly because of a dealership or financing company policy. But that wasn't true. So for example, one consumer saw a price on Napleton's website for a particular car. He confirmed this was the price before driving more than three hours to the dealership. But when he got there, he was told he would need to pay a higher price because a $2,500 add-on was required.

Malini Mithal:

Now, let me turn to the fair lending. So we said there were problems with add-ons and with interest rate markups. With add-ons, we said that Napleton charged black consumers more often and black consumers paid approximately $99 more on average for similar add-on packages as compared to other consumers. With markups, defendants had a discretionary markup policy that resulted in Napleton charging black consumers on average approximately $190 more on interest than other consumers. And under the settlement, Napleton has to pay $10 million. It also has to cease its illegal practices and adopt a fair lending program.

Alan Kaplinsky:

Yeah. So in finding the discrimination that you've found, was it what we would call direct discrimination, or was it disparate impact discrimination?

Malini Mithal:

You know, that's a great question, Alan, because a lot of kind of legal analysis and cases and amongst parties is sometimes focused between whether something is disparate treatment or intentional discrimination versus disparate impact where there's a facially neutral policy. So in our cases, we're very careful to kind of stick to the law. And in our counts, we actually just allege a violation of ECOA. And so we just say that they engaged in discrimination.

Malini Mithal:

Now, sometimes the complaints themselves will lay out specific practices that lend themselves more to a disparate impact theory, and sometimes it'll be more of a disparate treatment theory. So an example of disparate impact would be where you have the facially neutral policy, like a neutral pricing policy that says you can just mark up interest rates, but then in effect the interest rates are higher for black consumers. In other instances, we might say that there were actually intentional comments made that said, "Hey, charge black consumers more." That's actually something that we said happened in our Bronx Honda case that we also brought recently that you might recall, Alan.

Alan Kaplinsky:

Yes. Yeah, yeah. So are there any other significant auto finance actions that the FTC has brought under Chair Khan?

Malini Mithal:

Yes, there definitely are. So we recently announced a settlement against Tate's Auto. So this matter involved a group of auto dealerships operating in Arizona and New Mexico near the border with the Navajo Nation. We charged defendants here with a range of illegal activities, including falsifying consumers income and down payment information. We noted that Tate's prevented consumers from understanding and reviewing the income and down payment information in their applications. So for example, Tate's would fill out the contracts and then they would present a stack of papers for the consumers that they would sign in a dozen places and they would rush them through the process. One of the financing companies here did audits and found that with one of the dealerships 44% of the applications it reviewed listed inflated income. That company eventually ceased doing business with Tate's.

Malini Mithal:

We also said that Tate's engaged in deceptive advertising. For example, it would have online offers touting discounts of $5,000. But buried behind multiple hyperlinks was the fact that the discount was only available to customers who trade in a vehicle or trade in a lease from another company 30 days before or 90 days after delivery. You know, and I'll just say that an overall lesson from our auto cases, Alan, is that dealers should be consistent with pricing and other terms, in advertising, during lengthy conversations at the dealership, and in the paperwork so that there are no surprises.

Alan Kaplinsky:

No. Leasing, I guess, is another area, auto leasing that you have jurisdiction over. And one of the things that just occurred to me because I was out recently with my son who had leased a car almost three years ago and his lease was coming up for renewal. And we went back to the dealership where he got the original lease thinking that because the prices of used cars has gone up quite a bit that the residual value that's on the paperwork from three years ago would be well below the fair market value of the car. And I'm wondering if some dealers are trying to avoid giving people who are trying to renew credit for that differential and trading in the car and entering into a new lease. It just seems rife with the possibility for fraud.

Malini Mithal:

Yeah. And we've got a lot of auto actions involving leasing. But even in other contexts, we've had concerns with how leasing terms are portrayed because it can be really confusing for consumers. So we had a case where a company was saying, "Oh,"... You know, people would ask is there interest? And the answer was, "No, no, there's no interest. There's a lease multiple of two." And consumers were like, "Okay." They had no idea what that meant. So this is something that we're focused on as well.

Alan Kaplinsky:

Yeah. Yeah. I mean, there's so many ways for the dealer to skin the cat with the residual value, the capitalized cost, the interest rate factor. I mean, it's endless how they can... It's almost impossible even for a sophisticated consumer to be on a level playing field with the auto dealer.

Malini Mithal:

Yeah. I'm really glad you brought that up.

Alan Kaplinsky:

Yeah. Let me mention COVID. I mean, we would be remiss if we didn't talk about COVID. I assume that there must be just a ton of COVID-related scams that you've had to deal with. Am I right?

Malini Mithal:

That's right, Alan. And I'm so glad you gave me an opportunity to mention this. Because earlier, when I was talking about small businesses and I mentioned our PPP case, I was kind of making a mental note that I wanted to talk about some other COVID scams as well.

Malini Mithal:

So we've been closely monitoring how businesses reference COVID-19 in their advertising. And we took action against an ad agency that sent mailers to consumers supposedly directing them how to obtain COVID-19 stimulus benefits. The ad said, "Come to our relief headquarters to claim your benefits." But when consumers arrived, they found themselves at a lot hosting a used car sale.

Malini Mithal:

So I know, it's really kind of problematic, and I could use a lot of other adjectives how companies are kind of capitalizing on people's fears and financial distress related to COVID. And that's been a real priority area for the FTC. And in fact, since the time we brought that case, Congress enacted the COVID-19 Consumer Protection Act, which prohibits misrepresenting government benefits related to COVID-19. That act comes with civil penalties, so that's something people should keep in mind.

Malini Mithal:

The other reason I like to talk about this case is because it is an example of where we went after an ad agency, not just the seller. You know, a whole host of companies are subject to the FTC Act. It's not necessarily just the company that's actually selling the product to the consumer.

Alan Kaplinsky:

Right. So let me turn now to another area, there seems to be no end to the areas in which the commission is involved, and that's the area of education. And the FTC's been very active in that area of bringing cases against for-profit schools and taking other action. Can you discuss the agency's work there?

Malini Mithal:

Absolutely. Thanks, Alan, this gives me an opportunity to talk about a settlement that we just announced this month. It's with a for-profit medical school based in the Caribbean called Saint James. Now, we said that the school deceptively marketed its medical license exam pass rate and its residency match rate to lure prospective students. So it claimed that the exam pass rate was 96%, but we said that it actually inflated this rate by requiring students to take and pass an unexpected prerequisite test before they allowed them to sit for the actual exam. And when you actually measured the rate against all students that were eligible to take the real exam, we said that only 35% of students actually passed, a far cry from the 96% that was touted. So we also said that they said their residency match rates were more than 90%. And they said it was the same as U.S. schools. But in reality, we said it was much lower than it claimed and much lower than those reported by other U.S. medical schools.

Malini Mithal:

St. James also marketed financing for tuition and living expenses. But we said that they used illegal credit contracts that violated the Holder Rule. Now, Alan, I know that you know the Holder Rule protects consumers who enter into credit contracts by preserving their rights to assert claims and defenses against any holder of the contract, even when they're assigned to third parties. And essentially, the Holder Rule requires that sellers include in their contracts a specific notice about these rights. But we said that the defendants didn't include the notice in their contracts. They included it in the application instead, and they used language that was different from what's required in the rule.

Malini Mithal:

So there are a few key lessons here. Don't inflate your claims. If you're saying a specific percent of consumers are going to get something, that specific percentage has to be true for the typical consumer. And also, pay attention to the Holder Rule in your credit contracts.

Alan Kaplinsky:

Yeah. We're going to get to the Holder Rule in a second. Now, I have another question for you. The FTC also announced another education-related initiative, the Notice of Penalty Offenses. Can you tell our audience what that's all about?

Malini Mithal:

Sure. You know, it's interesting, Notice of Penalty Offenses refers to a notice document describing certain types of conduct that the commission has determined in a litigated administrative case to be unfair or deceptive in violation of the FTC Act. Now, it's important to know that the commission can bring an action for civil penalties against any company that gets a notice if it then engages in the same conduct that the notice says is unfair or deceptive. So recently, we put 70 for-profit schools on notice that if they make certain deceptive claims about earning power or job outcomes, they could be subject to civil penalties.

Alan Kaplinsky:

Interesting. And is there any limitation on the ability the FTC to send out this notice? Such as, if you were going to be subpoenaing documents, you got to have reasonable cause to believe that there has been a violation of law. But in sending the notice, can that be essentially sent to anyone?

Malini Mithal:

It can be sent to anyone. Once we send the notice to anyone and then they engage in that conduct, then we can seek civil penalties for those violations.

Alan Kaplinsky:

Wow. It has to be a notice directed to a specific individual. You wouldn't be able to just post something on your webpage saying here's a notice to those of you engaged in the following business.

Malini Mithal:

We do have to show that the target in question got the notice.

Alan Kaplinsky:

Right. Right. Do you, when you do that, does that get publicized more generally? Do you put something on your website just saying the world ought to know that we've sent out a notice to 100 companies?

Malini Mithal:

Absolutely. So we have publicized those notices on our website.

Alan Kaplinsky:

Okay. Yeah.

Malini Mithal:

Because we also recognize that companies when they're put on notice, whether they get a letter or they see something on our website, that can be a deterrent as well.

Alan Kaplinsky:

Yeah.

Malini Mithal:

So we hope that these letters not only affect the specific companies they go to but they create some general deterrents as well.

Alan Kaplinsky:

Yeah. I take it you don't mention on the website the names of the companies that got the notices. Am I right?

Malini Mithal:

We have not.

Alan Kaplinsky:

Yeah.

Malini Mithal:

We have not. So with these education notices, we did not state the names of the companies.

Alan Kaplinsky:

Right, right. Okay. Let's now go back to the Holder Rule. And I've got more questions about the notices of penalty offenses. But before we get onto that, you mentioned the Holder Rule. Is there anything specific businesses should keep in mind there?

Malini Mithal:

Absolutely. You know, the Holder Rule has been called by many consumer groups and others one of the most important initiatives the FTC has ever done. Best thing since sliced bread I heard someone say recently in a meeting. So it's certainly something we want businesses to keep in mind. And recently, we issued an advisory opinion reiterating that the rule does not prevent a consumer from obtaining costs or attorney's fees against holders.

Malini Mithal:

So some courts and finance companies incorrectly were concluding that the rule preempts state laws and authorizes attorneys, oh, sorry, preempts state laws that authorize attorney fee awards against holders. But in fact, the Holder Rule does not preempt state law. And it does not eliminate any rights the consumer may have under state law. So finance companies should keep that in mind.

Alan Kaplinsky:

Right. Right. And I guess this is maybe a good point just to ask a question about the banking industry. We've been talking all about non-banks, and I think it'd also be educational for our listeners to know to what extent, if any, does the FTC have any jurisdiction over the banking industry? And I'm thinking, for example, the Holder Notice. A lot of banks will buy retail installment sales contracts where the dealers put that Holder Notice on it. And if the bank, as the holder of that instrument, tries to go after the consumer, is the consumer able to interject defenses that he or she had against the dealer? And is the FTC able to pursue the bank?

Malini Mithal:

Yeah. So that's a great question. So starting with FTC jurisdiction, we do have broad jurisdiction, but there is a carve-out for banks. So we can go after non-bank financing companies. And in the specific example you raised, if an auto dealer has a Holder Notice in the contract, then of course that applies to the holder whether it's a financing institution that's a bank or not.

Alan Kaplinsky:

Yeah.

Malini Mithal:

So the Holder Rule applies regardless of who the holder is.

Alan Kaplinsky:

As a matter of contract.

Malini Mithal:

Yeah. That's exactly right, Alan. That's exactly right. It doesn't matter what that status is. If you're a holder of the contract, it applies as a matter of contract.

Alan Kaplinsky:

Right. Right.

Malini Mithal:

Now, where a holder rule violation comes in is if the dealer or the initial seller doesn't include the notice. And that's what we say happened in the case of Saint James. Then we can bring an action against the seller for civil penalties under the Holder Rule.

Alan Kaplinsky:

Let's turn now to the topic that initially piqued my interest in wanting to talk to you. But there were so many other things that it's only now one of many topics. And that is the area of fake reviews. And I assume were talking about fake online reviews that could appear on Yelp, or it could be on Google or any number of places. And going back to notices of civil penalty offenses, you've also, have you not, sent notices regarding fake reviews? And I'm wondering if you could talk about that.

Malini Mithal:

That's right, Alan. We have done a lot of work in the consumer review space, including sending notices regarding fake reviews. So I want to back up a sec and note that the rise of social media has really blurred the line between what's authentic and neutral content versus what's advertising. And that has led to an explosion in deceptive endorsements across the marketplace. So the FTC is using its penalty offense authority to remind advertisers of the law and deter them from breaking it. We sent notices to more than 700 companies to put them on notice that they could incur civil penalties if they use endorsements in a way that runs counter to prior FTC administrative actions.

Malini Mithal:

So companies receiving the notice represent a large array of companies, top advertisers, leading retailers, top consumer product companies, and major advertising agencies. The notices outline a number of practices that the FTC determined to be unfair or deceptive, including falsely claiming an endorsement by a third party, misrepresenting whether an endorser is an actual consumer, and failing to disclose an unexpected material connection with an endorser. So taking action against deceptive endorsements is definitely a top FTC priority.

Alan Kaplinsky:

Yeah. Yeah. And I take it if you get a celebrity to endorse a product but the celebrities never actually use the product, that's got to be disclosed, right?

Malini Mithal:

So yeah, that's got to be... If the celebrity hasn't used the product, that's a problem because I think consumers would've expected the celebrity to use it.

Alan Kaplinsky:

Yeah.

Malini Mithal:

You know, the other thing is even ordinary consumers. Like you said, Alan, go on Yelp and things like that.

Alan Kaplinsky:

Yeah. Yeah.

Malini Mithal:

And it's very important that those reflect actual consumer experience. And that's not because the reviewer is being paid to make the endorsement. So even with ordinary consumers, we're worried about endorsements.

Alan Kaplinsky:

And does your work in this area also get you involved in social media influencers, these people that have thousands of followers who become almost cult-like?

Malini Mithal:

Absolutely. You know, a few years back, we sent a lot of warning letters involving social media influencers saying things like, "Look, you've got to disclose that you've got a material connection to the seller, and things like SP, that's not going to cut it." A consumer's not going to know SP means that the ad is being paid for by the seller.

Alan Kaplinsky:

Right, right, right. Yeah. I mean, I'll tell you, often it's very, very confusing when you go on social media and sometimes it's very hard to distinguish what's an ad from news. That's the other thing that's really where the lines are being blurred. But there's so much where it appears to be a news story. But then if you look at the small type, it'll say sponsored.

Malini Mithal:

Yep.

Alan Kaplinsky:

That's a problem too, right?

Malini Mithal:

Alan, we've seen a lot of that. And I'm glad you brought up yourself as a consumer. I always think, okay, I'm a consumer too. I go online. I read reviews. That helps me decide what to buy.

Malini Mithal:

So another kind of issue in this space we've seen is when companies pretend to be neutral ranking sites, but they're actually being paid to rank certain companies at the top or best company. That's a place where we've taken action because consumers should be able to go to actually neutral sites if that's what they are being portrayed as.

Alan Kaplinsky:

Right. Right. Since this topic, Malini, cuts across so many industries, including financial services sectors, I have a few more questions here. You've had a long history of stamping out fake consumer reviews. You recently issued a bulletin on consumer reviews. Why has this topic generated so much interest among law enforcement?

Malini Mithal:

Sure. And actually, that's right, Alan, we've brought a lot of cases. The CFPB's recently done a bulletin on consumer reviews that cited to our cases. I've got to say, to me it makes complete sense that law enforcers are concerned about this. You know, as we said, ordinary consumers rely on reviews from other ordinary consumers. And when companies instead put out fake reviews, they're not only harming those consumers, but the businesses that use real reviews are being harmed as well.

Alan Kaplinsky:

Yeah.

Malini Mithal:

So this is definitely an area of concern.

Alan Kaplinsky:

I bet you get a lot of tips from competitors, I would think. Is that right? Yeah.

Malini Mithal:

Yeah. That's one way we certainly see actions. And a lot of times we rely on complaints from consumers as well, but certainly.

Alan Kaplinsky:

Yeah. Right. So have you seen deceptive review practices come up in the financial services area, or is it limited to more things like restaurants and hotels? What have you seen in the financial services area?

Malini Mithal:

We've definitely seen it in the financial services space. So I was talking about comparison websites, right? A lot of people go and say, "Okay, I want to take out a loan. Who's going to get me the best rate, or what's the best lender?" So we took an action against LendeEDU that we said was ranking lenders, but it was actually not based on what the best rates were or some kind of other objective criteria. Instead, they were taking compensation from the companies they were recommending. So it was pay to play.

Alan Kaplinsky:

Yeah.

Malini Mithal:

And they actually, when they solicited companies, they said, "Hey, you'll get more clicks depending on where you're ranked, so if you pay me more, we'll rank you higher." And when companies refused to pay to play, they dropped in the rankings. And there are a lot of lessons from these cases, Alan. So certainly companies shouldn't give the impression that a ranking, review, or other endorsement is objective or unbiased if it's actually based on compensation.

Malini Mithal:

But also, Alan, you were saying that when you go online, sometimes it's difficult to tell the difference between what's an ad versus what's news these days. You know, we're really concerned about that too. And we've actually, just to kind of mention briefly another topic, something that we refer to as dark patterns is when marketers use design practices that trick consumers into clicking on links or taking other actions they wouldn't take. So an example would be a fake news site. An example would be a neutral comparison site that is supposed to be neutral, but it's actually taking payments, it's actually pay to play. Those are examples of dark patterns and the FTC is monitoring this space closely.

Alan Kaplinsky:

Yeah. So then talking about dark patterns, can you give us some additional examples of dark patterns? And can you explain the term a little bit? I mean, it's sort of a mysterious name, a dark pattern?

Malini Mithal:

It is a mysterious name, but I think that's apt because it's for a mysterious practice. You know, dark patterns are design practices that trick or manipulate users into making choices they would not have otherwise made. And dark patterns often take advantage of consumers cognitive biases to steer their conduct or delay access to information they would need to make fully informed decisions.

Malini Mithal:

So we've talked about news sites. We've talked about the supposedly neutral ranking sites. But another type of dark pattern is let's say a lead generator that conveys a false connection or affiliation to someone a consumer might trust. You know, an example was our Sunkey case. I don't know if you remember that one, Alan.

Alan Kaplinsky:

Yeah.

Malini Mithal:

But they used the site army.com and they pretended they were the Army and that they were an official recruitment site. But instead, they took consumers information and they sold it to for-profit schools. So I think that anytime a company is through its design elements creating an impression that it is something it's not, that's a type of dark pattern.

Alan Kaplinsky:

Right. Right, right, right. Lead generation, which you mentioned. When I think of a government agency most associated with lead generation, it's the FTC. And what has the FTC been doing recently in the area of lead generation?

Malini Mithal:

Lead generation absolutely continues to be an important area, Alan. So earlier this year, we announced an action against IT Media. IT Media operated websites that encouraged consumers to apply for payday loans. They got consumers to give them their sensitive financial information, including Social Security numbers, by promising that the info would be shared only with the network of trusted lenders.

Malini Mithal:

But then we say that IT Media distributed the information to others, regardless of whether they were lenders. They didn't require these buyers to safeguard the data or even indicate what the data would be used for. And also, IT Media didn't mask or otherwise restrict access to the sensitive information that others were considering for purchasing purposes. So we basically said that it distributed sensitive information without regard for how it would be used.

Malini Mithal:

And there's some important lessons here. It's really, really important to vet and monitor your buyers. Are they who they say they are? Are they using information in a way that's consistent with what consumers would expect? Have the buyers been subject to complaints or other law enforcement action? That's something we saw in IT Media, that they were selling leads to people we had sued that were not lenders. You know, also, it's important to monitor your lead buyers to make sure they're using information in a way that's consistent with consumer expectations, including through auditing.

Alan Kaplinsky:

Right. Right, right. So let me turn to, we only have a few more areas that we have the time to cover, although I could go on with you all day, Malini, there's so much that the FTC is involved in, and that is the impact if any that the Supreme Court case in the AMG case has had. And I'm wondering, first of all, just to make sure our listeners know what that case is all about, maybe if you could briefly describe the holding and then tell us what impact has it had.

Malini Mithal:

Alan, absolutely. I'm sure it doesn't surprise you to hear that this has been a big topic of conversation at the FTC.

Alan Kaplinsky:

Yeah.

Malini Mithal:

So we're obviously talking about the Supreme Court's decision last year that money is no longer available under one part of the FTC Act that we had previously used regularly to get money back to consumers. Now, since then, you won't be surprised to hear that we have pressed Congress to amend our statute so that we can get money back under that portion of the FTC Act. But meanwhile, we've been working hard to get money back under other parts of the FTC Act. So for example, we can and have pursued monetary relief through other statutes and rules we enforce. These include ECOA. You know, I talked about the Napleton action earlier.

Alan Kaplinsky:

Right. Yeah.

Malini Mithal:

It includes the FCRA. When I was talking about IT Media, it also violated the FCRA and we got civil penalties there. And we've brought a whole host of other actions where we can seek civil penalties.

Alan Kaplinsky:

Statutes other than Section 5 of the FTC Act dealing with unfair or deceptive acts or practices.

Malini Mithal:

That's right. That's right. And also, Alan, by the way, the FTC can promulgate rules. And many of these rules allow us to get civil penalties and money back to consumers. So for example, the Telemarketing Sales Rule lists a whole host of deceptive and unfair practices and those we can get civil penalties for violations. That's actually what happened in Saint James, the for-profit schools case I was talking about. So we can also file actions administratively, and then we can file what's called a Section 19 action in district court to get money back to consumers.

Alan Kaplinsky:

That's after the administrative processes run its course?

Malini Mithal:

That's exactly right, Alan. That's exactly right. And then also, we can do things like notices of civil penalty offenses that you and I talked about extensively. So if we put a company on notice and that it engages in the same conduct, then we can seek civil penalties.

Alan Kaplinsky:

Right. Right. So I guess you've maybe had to jump through some hoops that you didn't formally have to jump through, but then that result has pretty much been the same. And I guess, although you didn't mention it, maybe this is a good time to mention it, you often partner, don't you, with the CFPB or state attorneys general and they clearly have restitution rights and you can piggyback on that, right?

Malini Mithal:

So we certainly leverage partnerships to do what we can to get money back for consumers. And we are getting great results for consumers. But we are still urging Congress to make changes here also because it is a huge tool that was in our arsenal that we used to protect consumers that we would like back.

Alan Kaplinsky:

Yeah. Sure. Let me ask you one other question, what I've referred several times, as have you, to the new chair of the FTC, Lina Khan. And I'm wondering, you've been at the FTC a long period of time through many different chairs, different leadership, and wondering has there been any material changes that you've noticed and can comment on?

Malini Mithal:

So sure. You know, you can expect Chair Khan to taking somewhat of a different approach when looking at problems and identifying harm. So something she has said is that she wants to take a holistic approach when she's looking at harms and not only to individual consumers, but to independent businesses and workers. So we talked about small business financing. You know, another area that Chair Khan has been focused on is the gig economy, that I know we don't have time for today, but maybe that'll be the topic of a future podcast.

Alan Kaplinsky:

Yeah. Yeah.

Malini Mithal:

You know, another thing, Alan, that you specifically referenced as she's been focused on power asymmetries and harm directed at marginalized communities. So that's why much of our discussion today was focused on topics like fair lending. She also wants to make sure that we're taking swift action, which means being especially attentive to next generation technologies and practices. And I think our work on dark patterns is a good illustration on this point. You know, we had a workshop on dark patterns last year and you can definitely expect to see more from us on that front. And so these are just some of the things that you can expect under Chair Khan.

Alan Kaplinsky:

What about the area of crypto? Has there been activity there too?

Malini Mithal:

You know, we recently put out a crypto data spotlight that showed that complaints about crypto have skyrocketed. And this is because of a lot of the trends that we've been discussing today, Alan. You know, for example, the use of social media to promote different crypto-related schemes. So that is something that we're certainly monitoring.

Alan Kaplinsky:

Yeah. And another area I know that the FTC is very big on is privacy and data security, right? There's a lot going on there for sure.

Malini Mithal:

Absolutely. Alan, we could probably have another 50 podcasts related to privacy and data security alone.

Alan Kaplinsky:

Yeah. I get it. But we have drawn to the end of the hour. And so we are going to have to bring this one to a close. And I first want to thank you, Malini, for taking the time and preparing for our interview today. I think this was extremely illuminating and should be very, very helpful to our listeners who often aren't as familiar. Even though the FTC has been around a lot longer than the CFPB, the CFPB's, at least in the last 11 or 12 years maybe has made more noise or has gotten more media attention. And so we learned a lot today about the Federal Trade Commission. So again, Malini, thank you very much for being our guest.

Malini Mithal:

Thank you so much, Alan. It was a pleasure to be here today.

Alan Kaplinsky:

Yeah. Great. And I want to thank all of our listeners who downloaded the program today and remind you that our podcasts get released on a weekly basis, on Thursday of each week. They're available on our website where you can get not only the audio podcast, but if you want, you can get a transcript of the podcast. That is available. And a lot of people prefer that means of communication rather than listening to a podcast.

Alan Kaplinsky:

And then finally, can't resist tooting our own horn. A social media site for lawyers and law firms called Good2BSocial last year ranked our podcast show as the second best law firm podcast show in the country. So we're very proud of that achievement. And so with that, I hope all of you wherever you may be enjoy the rest of your day.