Consumer Finance Monitor (Season 6, Episode 14): A Primer on "Dark Patterns," with Special Guest Andrew Nigrinis, PhD, Managing Principal, Edgeworth Economics, and Former Consumer Financial Protection Bureau Enforcement Economist

Speakers: Alan Kaplinsky and Andrew Nigrinis

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is our weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr law firm. I'm your host, Alan Kaplinsky. I'm the former practice group leader for more than 25 years, and now senior counsel at the Consumer Financial Services Group at Ballard Spahr, and I'll be moderating today's program. For those of you who want even more information, don't forget about our blog, which also goes by the name of Consumer Finance Monitor.

We've hosted the blog since 2011 when the CFPB was first stood up. So there's a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those in the industry. So to subscribe to our blog or to get on the list for our webinars, please visit us at ballardspahr.com. And if you like our podcast, please let us know about it. Leave us a review on Apple Podcast, Google, or wherever you obtain your podcasts. Also, please let us know if you have any ideas for other topics that we should consider covering or speakers that we should consider as guests on our show.

Today, I am very pleased to be joined by Dr. Andrew Nigrinis, who's a managing principal at Edgeworth Economics. Edgeworth Economics is an economic and quantitative consulting firm that provides economic analysis and expert testimony for clients facing complex litigation, regulatory, and other challenges. Before joining Edgeworth, the Dr. Nigrinis served as a sole enforcement economist at the Consumer Financial Protection Bureau in Consumer Financial Services, and he led the Bureau's economic analysis and evaluation in more than 70 cases. Throughout his career, Dr. Nigrinis has managed investigations relating to allegations of unfair or deceptive practices, fair lending, disputes between financial services providers and lenders, allegations of mortgage and student loan servicing issues, as well as credit card fees, debt collections, and for purposes and very important for our program today, dark patterns. Okay, and we'll get to that in a lot more detail very soon. Dr. Nigrinis has also provided economic analysis of consumer financial regulations and policy and has extensive experience with sampling and big data.

While at the CFPB, Dr. Nigrinis worked alongside State Attorney General as well as the Department of Justice and comptroller of the currency officials on a wide range of consumer finance matters. He began at the CFPB when Richard Cordray was the director, and he left not that long ago under the directorship of Rohit Chopra. So he has actually been involved with several different directors and acting directors at the Bureau. And now most importantly, Dr. Nigrinis is developing a consumer finance practice with Edgeworth Economics. He's a graduate of Stanford University, a university where he obtained his PhD in economics. He completed a master's in economics at Queen's University in Canada, and he was an undergraduate at the University of Alberta in Canada. He won the economics medal at the University of Alberta, and he was a Carmichael Fellow at Queens and a Stanford Institute for Economic Policy Research while at Stanford. So a very warm welcome to you. I'm going to call you Andrew. We're very informal on our program. Really a pleasure to have you on the program today, Andrew.

Andrew Nigrinis:

Well, thanks, Alan. It's a pleasure to be on your program. I've been listening to your program for a while now, and it's a great honor and I hope I can do you justice.

Alan Kaplinsky:

Well, I'm sure you will because we're going to be talking about a subject I know that you've done a lot of thinking about because I've read some of the things that you've written in the area. A subject that mystified me when I first heard it, I think I first heard about it when I was interviewing on our show, Malini Mithal from the Federal Trade Commission. She's very involved in their credit practices area or consumer protection area. And when I hear the term dark patterns, I think of something really nefarious, it's almost a scary term. But actually, once you dig into it and particularly after hearing you explain it, I'm sure all of our listeners will be able to get rid of whatever mystery there might surround it and understand it in very practical terms because it is something that is extremely important. So, first of all, let's start out with a really basic question. What is a dark pattern?

Andrew Nigrinis:

Well, I definitely want to take the mystery out of this because mysterious things can be scary, and this is actually not a scary topic, it's something that you can absolutely have to pay attention to and you can deal with. So to start off, the whole concept of a dark pattern, the phrase dark pattern was coined by Harry Brignull, he's a British cognitive scientist. And his definition, and I have to quote a definition here, "Tricks used in websites and apps that make you do things that you didn't mean to, like buying or signing up for something." So first off, this definition is it's a neologism, it's a new phrase, it's only been around since 2010, and it's not very helpful, it's not very operationalizable. So what does it mean to trick someone?

Alan Kaplinsky:

So let me ask you this. The real important thing I suppose is, what did the agencies think of as a dark pattern? And when we talk about the agencies, we're principally talking about your agency, the CFPB, FTC, but I understand State Attorneys General also use that term. So how do agencies actually think about it, Andrew?

Andrew Nigrinis:

Well, the FTC released a report in September 2022 bringing dark patterns to light. And in that report, they define the dark pattern as, "The ways in which interfaces can have the effect intentionally or unintentionally of obscuring, subverting, or impairing consumer autonomy, decision making or choice." So what's interesting in that definition, intentionality is completely out of it. It doesn't matter whether you intended the dark pattern or not. Also, the FTC focuses on four key issues about dark patterns. It's, one, inducing false beliefs. Second, could be hiding or delaying disclosure of material information. Third, leading to unauthorized charges, or fourth, obscuring or subverting privacy choices.

Now, my former agency, the current CFPB director, Rohit Chopra, back when he was an FTC commissioner, stated in 2020 that, "Dark patterns are the online successors to decades of dirty dealing in direct male marketing." Now, that interpretation by Chopra fits really well within the FTC report. They also state, "There are certain dark patterns that the FTC has consistently found to be unlawful, while others would depend on a case by case evaluation of all attendant facts." So what I find interesting there is that now dark patterns are not that mysterious, it's coming within the context of a long tradition of deceptive practice and deceptive practice law.

Alan Kaplinsky:

Yeah. But let me just make this clear. The term is only used in connection with digital presentations, things you find on the internet or on apps. It does not pertain to the deception that might be in a paper advertisement, in a magazine, newspaper, or a brochure, we're talking about online only. Am I right?

Andrew Nigrinis:

Yes, that's my understanding. I've never seen it outside a digital context. And the best way to think about that is to remember that Harry Brignull was or still is a cognitive scientist, and his specialty was user experience design. So essentially creating digital designs for users to interact with. And in our case, those users are consumers and consumers in the consumer finance space.

Alan Kaplinsky:

Well, why are dark patterns so important for companies and the lawyers like myself who are representing companies who might get in trouble with the CFPB or the FTC?

Andrew Nigrinis:

Well, the first major reason is that it could be a source of very avoidable litigation. Since 2019, dark patterns has been a growing area of litigation in both federal and state courts, and has been the subject of a lot of FTC and CFPB enforcement actions. This area affects the entire digital space from both apps, webpages, websites, etc., and it's across all industries. But my particular expertise is in consumer finance. And in many of the settlements that have been going on, dark patterns have been specifically cited or called out by the agencies. This is a recent phenomena, and a lot of these issues are avoidable with good foresight and planning.

Alan Kaplinsky:

Could you give us some concrete examples of dark patterns?

Andrew Nigrinis:

Well, yeah. So I mean, some examples, recently there is the Vonage case. If case here your listeners don't know, Vonage is a voice over internet protocol service, VOIP, essentially allowing for telephone services to be available over the internet. Owned by Ericsson, I believe.

Alan Kaplinsky:

Is it a CFPB case?

Andrew Nigrinis:

That was an FTC case. I'm focusing on non-CFPB because, like you said in the introduction, I was the only enforcement economist for almost six years, and I was involved in over 70 cases. But Vonage case is a good example in the sense that what Vonage was about was negative option marketing. So essentially Vonage case focused on four issues in the complaint. One was the elimination of cancellation options, making the cancellation process difficult, surprising customers with expensive junk fees and continuing to charge customers even after they canceled. And the order specifically prohibits Vonage from using dark patterns to frustrate consumer cancellations. Another case is the Fortnite case, that's also very recent. That was a $520 million settlement by the DOJ. Now that case is tied out with COPA, Children's Online Privacy Protection Act. $275 million was for violations of COPA that had to do with the way their system interacted their online gaming system.

But $245 million of that was about dark patterns and specifically in game purchases. So essentially it was much easier in Fortnite as alleged by the DOJ to buy things on Fortnite, but then it was very difficult to undo your purchases. So then another example is Google. Google is recently settled with the State Attorney Generals and the District of Columbia for $401 million, and that was over consent on the collection of location data. So in the probe the attorney generals, what they focused on was how Google presented and responded to location history in the web and app activity account settings. And in the judgment, now Google has a pop-up window where consent is quite explicit and there's a website that you can go to track what kind of data Google is keeping. So I use those three cases because they're very different from each other and that's over $1 billion in settlements right there on the table.

Alan Kaplinsky:

Wow. So, Andrew, what types of companies are at risk of a dark patterns investigation?

Andrew Nigrinis:

Well, essentially dark patterns are found at the decision points that a consumer faces when they're on a digital platform. So what I have seen is that the focus, especially if the government agencies on the dark pattern as a support for another legal violation, it seems to be about consent issues and to stop what they see as unfair or junk fees. So in consumer finance, who in particular is vulnerable? Well, I'm just going to make up some examples. FinTech getting consent to share data. Financial firms who charge a fee, like for instance, maybe some sort of overdraft fee or something like that, signing up for services and consenting on whether to quit or not. So there are a lot of cases in consumer finance that you can imagine where your consumer has to interact with your digital platforms, and when those consumers have to make choices on those digital platforms and the environment those choices are being made.

Alan Kaplinsky:

So when there's an enforcement action brought based on the thinking by the agency that it involves dark patterns, what should companies do at that point?

Andrew Nigrinis:

Well, the first thing I have to advise is that I'm an economist, not a lawyer. So the first thing you should do is find the counsel of a consumer finance attorney, and the next thing to do is to speak to a specialist in this area. And the benefit of that is that if I'm able to give advice or someone else, this is all done within privilege. But suppose a CID comes to your firm or to your company, a CID is a civil investigative demand. At this point, you will know what the alleged dark pattern is.

Alan Kaplinsky:

Yeah. So, what type of data will investigators like the CFPB typically ask for?

Andrew Nigrinis:

Well, the CID when it arrives, because it's a civil investigative demand which essentially is an administrative subpoena, allows you to begin having a conversation with the regulator. And now you can start planning out your strategy with the regulator. In terms of the kind of data that they will try to ask for, well, it'll be like a regular type of subpoena process. They will ask you for things like your emails, your internal policy, your strategy documents, but they usually be asking for data. Now, what kind of data? There will be the data that supports the effectiveness of the dark pattern, and there's also the possibility they'll ask for supplemental data.

So like I said, a CID is the beginning of the process. The regulatory agencies will usually have been thinking about this for quite a while before they send the CID out. Comment types of supplemental data that they may ask for and that you may choose to give to them are things like usage statistics, complaint reports, time in of people quitting your service and reason for counseling. This is your opportunity to present a coherent picture to the regulator and it would be a good practice to review these sort of things in advance.

Alan Kaplinsky:

So, Andrew, what should companies expect in a dark patterns enforcement action or investigation?

Andrew Nigrinis:

Well, these cases often go in one to two direction. There's the empirical direction and then there's the theoretical direction. So let's start off with the empirical direction. Data analysis is often the focus of these investigations, because if there's an alleged dark pattern and it doesn't influence consumer behavior, it doesn't give the regulator much to work with. You've manipulated your website that you've done, but it doesn't actually drive traffic in any way. It is not a very compelling argument. So if you are going to data analysis route, usually what will happen is they will want to show the effectiveness of the dark pattern. So what you can do is you can create your own study or your own survey. One common practice, and let's just make this really a much simpler problem by saying it's a binary choice. So you're just trying to get people to click yes on a button.

Maybe it's yes to consenting the sharing data or yes, to agreeing to have a fee or being willing to pay a fee if you failed to meet some condition or something like that. Well, one thing you can do is you can create mockups. You can create a mockup of what is the idealized version of the digital space that the government regulator thinks you should be having, and then there's what you actually do have. And then like any type of statistical study and survey, at this point, you would need to consider things like the demographics of your customers and all the other technical things that go into a study.

But essentially, you'll be creating an analysis that will show that, and let's just put some numbers to make it easier to think of, the number of people who click yes button, let's say 10%. Well, it's radically different if the number of people who click yes in an idealized webpage as according to the government is 9% versus 1%. One, 9% shows that the dark pattern really didn't move the needle that much, though obviously it might be a very big business, which is very different from the 1%. And it also going to matter a lot when you start talking about your liability in your exposure.

Alan Kaplinsky:

So, what can companies do proactively in response to this new dark pattern regulatory environment?

Andrew Nigrinis:

Well, the first thing that I recommend firms do is that you review your digital presence. So review your apps, your webpages and things like that in order to determine where the decision points that consumers face. You want to get an idea of the terms of service agreements, signing up for anything, all this before there's an investigation. Now, one thing I've seen a lot in my personal experience is a common tool companies use is A/B testing. Now, in case your listeners are not as knowledgeable about A/B testing, but A/B testing is a common tool used in engineering data science to improve user design. So it's basically using micro experiments. You present to a random group of your customers, say a webpage, version A, version B, and you see which one gets more people to click the yes button.

Well, A/B testing is a potential liability because all that data is usually being stored for an analysis. And in case you're thinking this is just an academic exercise or I'm just being fussy about this, there was the Credit Karma case back in September 2022. Now in that case, the FTC was claiming that Credit Karma had gave the impression that consumers had already gotten approval for their credit products when they actually had not. And in that complaint, the FTC says, and I quote, "The complaint further alleges that Credit Karma knew that its prominent preapproval claims conveyed false certainty to consumers based on the results of experiments known as A/B testing and employ them deliberately to influence consumer's behavior."

So here, the FTC is basically saying that the existence of this A/B testing is a sign that there was intentionality in order to drive people to click a button. Now, A/B testing is possibly being used at the companies of your listeners, and it's of great importance to general counsel to know how they're being used and when they're being deployed. They need to know that if the engineers and the user designers are getting yeses, why they're designing the webpages, and there should be more of a rationale to a webpage design other than your specialist found that they could drive more traffic that way. And just to kind of complete the loop here, remember Harry Brignull, the original coiner of the term was a user experience design specialist. So this is very tied into the whole concept of dark pattern.

Alan Kaplinsky:

So to get back to these two methods of investigation that you mentioned, the empirical direction and the theoretical direction, what kind of theory is motivating these metrics?

Andrew Nigrinis:

Deceptive patterns have been all around for a long time and this is not new. So what we're seeing here is an increased prominence on cognitive scientists and behavioral economists. So, in my experience, often they will bring in a behavioral scientist such as a cognitive scientist or a behavioral economist in order to provide the rationale for what is being seen in the data, but they need not do that in and of itself. So the best way to think about this is, I don't know if you remember, Alan, there was this book Nudge by Thaler and Sunstein. The idea was that they were going to nudge people into doing things like saving more for retirement or something like that. And the premise of the book is that there's these natural cognitive biases that nudge people to make certain decisions that they wouldn't do on their own.

So most of these cases I've been mentioning are of that vein, the exception being negative option marketing, which is more about being able to get out of something. So, of the biases that I've seen, this is not an exclusive list, but let's take the example of suppose you had a magazine and you sold subscriptions and people were there. Well, one kind of behavioral bias is the default bias. Are people just resubscribing because this is something they've always done? Are they really benefiting from this? And this get ties into the whole concept of junk fees where things are just going along purely out of inertia and not because of any sort of consumer desire. Another one is scarcity bias. I'm sure most of us have had the experience of going on a webpage and being told, "There's only one minute left to make your decision, or there's only one left in stock," or something like that.

Naturally, these are techniques to motivate the consumer to hurry up and make a decision and get them to agree faster than perhaps if they deliberated more than they would. Loss aversion, this comes straight from Kahneman and Tversky, the Nobel Prize winning economist. It's the idea that we value losses three to five times more than we value gains. This is actually a very common view in the academic literature. And we see that a lot loss aversion when things are presented as you already have it, but are you going to claim it? So it's already yours, don't lose it. So in Credit Karma, the FTC specifically points out the apply now button was not as effective as to take offer version and to take offer is the offer is already yours, you just have to take it. The endowment effect, often we value things more once we own them than before we own them. And that's very similar to loss aversion, the example I just gave.

Now, I want to emphasize that it's really hard to make absolute statements. This is a very context specific and context-driven field in terms of the theories. And my personal view is that there is no general theory of behavioral economics and hence it matters the context that a particular theory is presented in. But from the perspective of a general counsel, what I think should matter is if the regulator is presenting an empirical argument with data and at the same time showing up with a cognitive scientist to rationalize that data.

Alan Kaplinsky:

So, what are some important questions given the methods of investigation?

Andrew Nigrinis:

Well, the first question is, which method will be used to investigate a dark pattern? And if it's an empirical question such as agreeing to click onto something or something like that, you need to ask yourself is, what does the government or the regulator have in mind as a dark pattern free interface? And then from there, you can start asking empirical questions. So one is to do a survey, a study to see how effective your dark patterns are. Go back to the subscription example, you may want to present supplemental data. So if you're a magazine and you're claiming that 10% of the people who subscribe are the result of a dark pattern, well, we're in a data rich environment now. So you can get that data and you can show that they were reading the articles, they were playing the daily crossword, they were doing things like that.

So perhaps you would want to present usage statistics to the regulator. This would actually be a very effective tool. If they quit their subscription, I mean, I've had subscription, so for instance, I used to subscribe to The Economist, I don't subscribe anymore. When I was asked why I don't subscribe anymore, I said, "I just don't have time to read it." Well, I mean, if they said my subscription is the result of a dark pattern, as the owners of the magazine, you can say it's like, "Well, no, we have these people who are saying that they were perfectly aware they had the subscription, they understood it, and they were not tricked. They voluntarily chose to give up the magazine. It's not that they were tricked, they were fully aware."

You want to start talking about the demographics. So what are the demographics of your customers in order to start designing your rebuttal? And then of course, they may bring a theoretical expert, but you could also bring your own theoretical expert because, again, there is no general theory of behavioral economics. A lot of this is going to determine or going to depend upon how things are structured and how the consumer interacted. Now, I'm not saying things like loss aversion and stuff like that don't exist, but it's not 100% true or it's not something that's true within every context, it's going to depend upon how things are designed and how things are framed. And again, before you present any of these kind of arguments, it would be good to be able to talk to a consumer finance specialist and through a consumer finance counsel in order to be able to have these conversations with privilege.

Alan Kaplinsky:

Tell me, Andrew, because we're just starting to draw to the end of our chauffeur today, what could happen in the dark patterns regulatory environment in the future, and how can companies prepare? For example, is one takeaway right away that companies ought to go back right now and look at all of their online content in which they're trying to sell goods or services and take a fresh look at it, and should they be doing that, should they be hiring someone like yourself, a behavioral economist to look at it and to critique it?

Andrew Nigrinis:

As much as I want to say yes to that, we have to remember that these agencies are resource constrained. So the CFPB, the FTC, they're not going to go after everyone. It's always a good idea to review your systems, but in terms of how much you should spend in terms of your bandwidth and your time and resources, that's a different issue altogether. Now, I think it's always difficult to make predictions about the future. I can't remember the quote of that, but I do believe that one of the areas of interest is going to be negative option marketing. The rationale is that they've already set down the Vonage case, they have clear rules on this, and the CFPB just last month issued a press release about what they considered acceptable in negative option marketing to be on the right side of their regulation.

Another one is consent to share information, the rationales, the Google case, it was a multi-state attorney general action, and it kind of harkens to the idea that the terms of service agreements, the ones that were multi-pages long and most people just agree to, that regime seems to be gone. And that regime put the onus on the customer to be fully cognizant of what they're agreeing to.

Now it seems, and the Google case emphasizes this, that the new regime is to be able to make sure that consent is quite explicit, so like a pop-up window, something like that. And then one area that I've been watching with a lot of interest is the whole buy now, pay later space. Buy now, pay later is just growing exponentially and it's becoming a really important or a really common way to buy things on digital platforms. What's interesting about buy now, pay later, and you're the attorney, so you may be able to tell me more about this than I can, but as I understand being installment loans with four or fewer payments, this means that they don't have to give the APR notice by the Truth in Lending Act.

Alan Kaplinsky:

That's correct. If it's four or fewer installments, Truth in Lending Act does not apply.

Andrew Nigrinis:

Right. But the Truth in Lending Act has nothing to do with dark patterns. So for instance, the information environment that a buy now, pay later, the way they present their information online, I guess not the correct way to do it by the CFPB's logic, it could be exposed to a regulatory action through dark patterns, because at some point, that information has to be given and presented to the consumer. Another one is the way information is being presented on the social media. Are we going to start seeing liability for influencers or people pushing credit products on various social media platforms? I'm a bit older, I always get my credit products through the bank, but that world seems to be changing with the FinTechs, and that could be something where based on how that information is presented could create an opening that the CFPB or another regulator may find tempting to take to put some regulatory structure on this space.

Alan Kaplinsky:

Yeah. So wondering if you could, just very briefly, tell our listeners or to provide them with some general principles of good online design?

Andrew Nigrinis:

The rules in this space are still fluid, there hasn't been any big circular saying the dos and the don'ts. Well first off, this is not legal advice. Second, this is just based on my observations. I would like to say that, one, when there is an issue of consent to paying a fee, it would be good to have things like pop-up windows. A pop-up window is just good because by the name of it, it pops up and that means that you have to explicitly pay attention to it in order to agree to whatever you're agreeing to.

Another one is symmetry in the structure. So, how you present information in one scenario should be similar to how you present it in the other one. So if you give multiple options, creating them in the same way is good. Lack of symmetry in the extreme is the problem with the Vonage case where it was easy to buy a product, but it was hard to get out of a product. Another one is be very careful with pre-selected boxes for two reasons. One is it breaks the whole concept of symmetry, and two, especially in the consumer finance space, it could be misconstrued as a recommendation. It's all right to pick option two out of three options presented, or that's the preferred one. So this is not an exhaustive list.

Alan Kaplinsky:

Let me just push back on that just a little. What's wrong with a company making a recommendation for some product? Isn't that implicitly what every advertisement does? You're not going to be advertising some other competing product.

Andrew Nigrinis:

But I meant more like suppose it was subscription like do you sign up for one year, 18 months, two years, and you pre-select in one of the buttons. So more along those lines as opposed to a competitor's product.

Alan Kaplinsky:

Well, Andrew, thank you very much for shedding a lot of light on, for me, at least at one time was a rather murky subject that I didn't completely understand. And I wish you very best of luck as you have left the regulatory environment and you've come over, I guess, we could say to the dark side to use a bad pun.

Andrew Nigrinis:

I mean, I'll be honest with you, I'm not a big fan of those kind of jokes because we have to remember is that, especially in consumer finance, a lot of the things that we don't consider acceptable, it increases the supply of credit and that is also very pro-consumer. So, for instance, different types of fees and stuff like that, no one likes paying a fee, but companies have to be profitable in order for there to be a supply of credit.

Alan Kaplinsky:

Okay. Well, I would like to hear Rohit Chopra say that a few times. It's good hearing it from you though. All right. Well, again, I'm really delighted that you found the time today to be on our program. I know if people want to contact you, it's Edgeworth Economics, your email address is anigrinis, N-I-G-R-I-N-I-S@edgewortheconomics.com. So thank you very much for joining us.

Andrew Nigrinis:

All right. Well, thank you for your time.

Alan Kaplinsky:

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