Consumer Finance Monitor (Season 6, Episode 35): Should Section 5 of the FTC Act be Amended to Add a Private Right of Action?

Speakers: Alan Kaplinsky and Myriam Gilles

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 a weekly show that is brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm. I'm your host, Alan Kaplinsky, the former practice group leader for 25 years, and now senior counsel of the Consumer Financial Services Group at Ballard Spahr. And I'll be moderating today's program.

For those of you who want more information, don't forget about our blog, consumerfinancemonitor.com. We launched our blog program on July 21, 2011. That's the day that the CFPB got stood up, and we actually launched our blog on the very same day that that occurred. 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. You can leave us a review on Apple Podcast, Google, or whatever platform you may use to access your podcasts. Also, please let us know if you have ideas for other topics that we should consider covering or speakers that we should consider as guests on our show.

So let me first of all introduce the topic that we're going to talk about today, and then I am going to introduce our very special guest. So the topic that we're going to talk about is whether or not there should be a private cause of action under Section 5 of the Federal Trade Commission Act. Section 5 of the Federal Trade Commission Act has been on the books for decades, and it prescribes unfair and deceptive acts and practices. It's enforced exclusively by the Federal Trade Commission. There is no private right of action.

Many of the states have what are called mini FTC laws that are patterned after Section 5 of the Federal Trade Commission Act in that they also prescribe unfair and deceptive acts and practices. Even a few of them go a little bit beyond that and prescribe abusive acts and practices, similar to the authority in the Consumer Financial Protection Act that's given to the CFPB.

The person, our guest who I'm about to introduce, has written a very, very interesting and provocative law review article advocating for a private right of action. It's called The Private Attorney General in a Time of Hyperpolarized Politics. And it's in volume 65 of the Arizona Law Review, beginning at page 337.

So now let me introduce our special guest today. Our guest is Myriam Gilles. She is a graduate of Harvard Radcliffe College, Yale Law School. She was a litigation associate at Kirkland and Ellis before joining the faculty at the Benjamin N. Cardozo School of Law in 2000, where she holds the Paul R. Verkuil research chair. I probably, she'll tell me I got that wrong in a minute. She specializes in class actions in aggregate litigation, has written extensively on forced arbitration clauses, a subject which all of our listeners know is near and dear to my heart.

She's testified before the Senate Judiciary Committee on multiple occasions, the House Judiciary Committee also on multiple occasions, to discuss the impact of forced arbitration and class action bans. And she's testified also before numerous state legislatures regarding the same subject. Her articles have appeared in practically all the nation's top law reviews, including Berkeley, Chicago, Columbia, Michigan, Penn, Texas, and Yale. And her work has been cited numerous times in judicial decisions. She's actually the fifth most cited civil procedure scholar in the country, and the editor of a very influential case book in the field dealing with civil procedure.

I could go on and on and on. Myriam, you've got so many very impressive credentials, but I think I'll stop there because I want to make sure we have plenty of time to talk about your interesting article. So first of all, a very warm welcome to our show.

Myriam Gilles:

Thank you so much, Alan. Thank you for that wonderful introduction. I'm impressed just listening to it. I can't believe that's really my life. And thank you for having me on the podcast. Longtime listener, first time guest.

Alan Kaplinsky:

Yeah. Yeah. Although I think we've actually, I think of one of the hearings that was held on arbitration, I think you may have been on the same panel with me, at least a vague recollection I have. In any event, and I think it was before, I think the panel was a little more receptive to what you were arguing than what I was arguing.

But let's turn to the subject du jour, and that is your law review article and the extensive research you've done on the subject. Your research shows that the origins of federal consumer protection law are inextricably linked to the rise of antitrust enforcement. Why was that?

Myriam Gilles:

So this was an interesting bit of research for me because I hadn't really understood how interconnected these two concepts were, because obviously for us sitting here today in 2023, we think about, and in your law firm, for example, you've got an antitrust group or a competition group, and you've got a consumer group. And those things are separate, and we really do think of them as separate entities.

But back at the turn of the last century, they were quite intertwined. And I think there are a few reasons for this. First of all, the very basic hydraulic pressure of anticompetitive conduct having the tendency to raise consumer prices. So the idea is if you can regulate the anticompetitive conduct, you can protect both consumers and competitors. So that's sort of the easy answer. But I think there are a couple of more interesting ones, or I certainly found them interesting.

My research showed that the very idea of consumers, which we take for granted today, hadn't really actually been developed at the turn of the last century. Historians have shown that it's the period right after World War II that marks the beginning of a kind of immense eruption of consumption, and consumption and consumerism, of course, are pretty linked. So by the time the great Justice Traynor of the California Supreme Court writes his concurring opinion in Escola versus Coca-Cola, all your listeners know that case, and he explains to us that handycrafts have been replaced by mass production, that consumers no longer understand even where their products are coming from. In 1944, that's striking a nerve, but I don't think it would've struck a nerve even 10 or 20 years earlier.

And finally, and I think this is an important bit for the paper, for the argument I make in the paper, before 1900 I think citizens did not really see themselves as being protected by the federal government. State and local government is what protected our health, our welfare. And to the extent there was anything even resembling consumer protection, it was protected by the states. But of course, this is the era, the era of US steel, US sugar, all these big conglomerates, these industries that are becoming nationwide, some of them actually even bigger than that. And it's impossible for states to really regulate these industries in a way or to protect consumers from misconduct by these massive industries. And so anticompetitive justifications start to get braided together with consumer protection.

Alan Kaplinsky:

Yeah, I don't know whether you'd agree with this or not, but I think in a sense things have come full circle, Myriam, in that today, and really, I would say ever since Lina Kahn has been in charge, the chairwoman of the FTC, and Rohit Chopra, who was a member of the FTC and now director of the CFPB, it's just about everything I read coming out of those agencies focuses on competition or anticompetitive behavior, or makes the point that if a competitor violates a consumer protection law, as opposed to an antitrust law, that's anticompetitive behavior because it's hurting the rest of the industry.

And so actually, I did a podcast a little bit earlier this year with a couple of colleagues at my firm who are antitrust lawyers. One of them is a very prominent antitrust lawyer by the name of Ed Rogers. And he came to me because he said he is seeing just an increase in antitrust litigation against banks and consumer financial services providers. And he thought it would be an interesting topic. And then coming up, I'm going to be doing actually a webinar very soon talking about the so-called dark

patterns that have been talked about a lot by the FTC and the CFPB. And part of that discussion also has a connection to anticompetitive behavior and antitrust. So I think in a funny kind of way, it comes full circle. Do you agree with that?

Myriam Gilles:

I do, actually. And it's interesting, and I wish I'd talked to you before I finalized this paper because that would've been a great conclusion, to sort of talk about how we're back to a moment of really seeing antitrust and consumer protection as being one and the same, after a number of years of the trust busting and Teddy Roosevelt and stuff that didn't feel like it was exactly oriented towards consumer protection, which is part of my story, right? Because part of the story here is that the FTC, once it becomes a thing, once it's authorized by the FTCA, the FTC really focuses so much of its attention and resources on competitors, on true antitrust suits, not on consumer protection. It doesn't really see that as part of its bailiwick for a long, long time, if ever.

And I think one of the interesting bits of history that maybe your listeners don't know, and I didn't know, is that the FTC was really critical in getting states to enact these mini FTC Acts that you're talking about. They floated a model act that was the gold standard for a lot of states because they really didn't want to be in the business of consumer protection. They thought that states and localities would do a better job because they were just closer to the action.

And I think now we're sort of seeing the FTC say, no, no, no, that's part of our portfolio. Lina Kahn seems what she's doing is not just being a trust buster, but having the positive effects of that trust busting trickle down to consumers. And you and I could debate whether that's good or bad, but certainly I think as a descriptive matter, I agree.

Alan Kaplinsky:

And even the CFPB, who you have to look very, very carefully to find any mention of anticompetitive behavior in the Consumer Financial Protection Act, but certainly Rohit Chopra views it as part of his authority to look into that and to be concerned about it. He mentions it literally all the time.

Myriam Gilles:

He does, and his basis, at least the cases that I'm thinking about or the areas I'm thinking about, when he talks about payday lending, I think there's good reason to think that there are some anticompetitive effects that are enabling this industry to charge usurious rates, to engage in misconduct without real repercussions. There's been a lot of consolidation. There's just a handful of companies that own all of the payday lenders, and they basically operate very similarly across the country.

So I do think that it's not just that these regulators, who I know you're not big fans of, but it's not just that these regulators are taking on antitrust as a kind of a mantra. It's the fact that there hasn't been greater consolidation in lots of areas that have real impact on consumers, the products they buy, the prices they pay, their experiences as consumers in the marketplace. So there's just been a lot of consolidation.

Alan Kaplinsky:

Yep, yep. So you write in your article, Myriam, that policymakers in the early 20th century generally understood that placing all consumer protection authority in the hands of government actors, whether they be state or federal, was unwise. Why has that thinking changed so radically over the past century?

Myriam Gilles:

Wow. So one could write a book about this, and probably somebody has, right? I mean, you and I have lived through just this sliver of time in which the plaintiff's bar has become, the plaintiff's class action bar has become such a potent force. But let me try to put this in some historical context because the paper does try to take a historical look at this.

So just as the idea of a consumer didn't really develop until post World War II, the same with private antitrust litigation, doesn't really get going until right after World War II. Private enforcement of antitrust suits, we see those increase. There are

lots of great charts out there that can show you the rise of these cases, especially follow-on suits that piggybacked off government investigations or government enforcement actions. We see a huge increase.

And the lawyers that are bringing these cases, most notably that major price fixing case in the electrical manufacturing space that led to the passage of the MDL statute, the lawyers bringing those cases start to really develop an identity, a network. They're doing some of the work that we see lawyers on the plaintiff's side do today, having these collaborative networks to bring complex litigation. So that coupled with the adoption of the class action rule, the modern class action rule in 1966, really gives lawyers an incredible amount of power to bring antitrust suits along with those troubled damages that are the pot at the end of the rainbow. There's a great financial incentive to do this.

I think that if the government, if Congress, could have seen what the private bar would become when it enacted the FTC Act, I wonder whether they might not have added a private right of action. I think at the time the idea was that public enforcement would do, even the threat of public enforcement would deter anticompetitive conduct, much less full on enforcement actions. But I think hindsight's 20/20. I think the private bar has in many ways been a very successful font of enforcement authority over the past century. And so the changes, it's an impossible question to answer because the changes are so immense and there's so many of them. But I do think the times have truly changed.

Alan Kaplinsky:

Although I don't want to, we could get into a debate talking about the efficacy of class action litigation and how effective that has been, because even, I know it's in the arbitration context, but even the study that the CFPB did showed how little the actual payout is to consumers that are part of class actions that end up settling, something like $32 and change.

Myriam Gilles:

I think you know this about me because I think we've talked about it. I don't think that the best way to determine the success of the class action device is to look at how much money gets to consumers. I think the class action device is a very expensive way of getting dollars into the hands, especially in small value cases, of getting money into the hands of consumers.

The better question, and the one that perhaps is impossible to answer because it would require counterfactual understanding, is how has the threat of class action liability deterred companies from engaging in conduct that they would've otherwise engaged in? And I don't know the answer to that, but I think I trust that there are probably lots of things that companies would do if they didn't think that there were plaintiff's lawyers who might catch them out doing it.

And I don't think they're as worried about government regulators because I think there's a sense in which, well, for lots of reasons, reasons we probably don't have time to go into, but I don't think government regulation has, it's powerful, and I don't want to take that away from the government, but I think that it's the one, two punch that has had the greatest deterrent effect.

Alan Kaplinsky:

Well, the only thing I can tell you, Myriam, that's not at least the sense that I get from talking to my clients. They don't talk very much about plaintiff's class action lawyers and class actions that are being filed. Yeah, they're aware of it and it's a concern. But the big enchilada here, or the big fear that they have is the CFPB, particularly those that are supervised by the CFPB.

Now because of political changes, obviously during the Trump era, that became less of a worry or a concern, but even then there was, supervision was still going on. And Peggy Twohig, who I think is a very responsible and very neutral kind of government regulator, who was the head of supervision policy at the CFPB, both under Richard Cordray and under Kathy Kraninger, they conducted business as usual. I've had long discussions with Peggy about that. Nothing really changed in her world.

And in the enforcement area, there was a lot of enforcement activity even. I mean, the data shows, it surprised me, that there was more enforcement going on then than there is under Rohit Chopra. But I agree with you. I'll concede to you, there wasn't that great fear that existed when Cordray was at the helm. And today, with Rohit Chopra at the helm, our clients are scared to death about the CFPB. Whenever I give them advice on how to comply, you know, they have a new product in mind and the

hoops they need to jump through and how they have to comply with the Truth in Lending Act and Equal Credit Opportunity Act, when I'm done, they say to me, "What do you think the CFPB is going to think about it?"

And my answer is, "That's exactly what you should be concerned about." Because if something doesn't look right, or if it's a little controversial, a little bit edgy, and maybe there are consumer protection issues, or maybe there are dark patterns hovering over that could affect that product, that's exactly what to be worried about. Believe me, if Rohit Chopra doesn't like it, he will somehow shoehorn it into UDAAP, unfair, deceptive, or abusive. I know we got off on this tangent.

Myriam Gilles:

Well, maybe what you just said is a great way of getting back because you just implied that Chopra might, because if he doesn't like something, he might just decide to put it into a box where he can have regulatory power. So to go back to answering your actual question, this was exactly the concern that at least some people had about how to engage in fair, legitimate regulation of business at the turn of the last century.

If you give power to a politico, how are you going to justify it when they intervene in ways that could be viewed as political in economic markets? You have to find a way to not put all your regulatory eggs in the government's basket because it doesn't look good. The optics are bad there.

Alan Kaplinsky:

Okay, let's move on, because we still have a lot to cover in a short period of time, to the debates that took place in 2012 and '14 over the enactment of the FTC Act have any parallels to the current era?

Myriam Gilles:

Yeah, but it wasn't 2000. It was 19. It was 1912 to 1914. That was another thing that was just fascinating in doing this research. So first, Congress at the turn of the last century was divided over the right model for regulatory authority. And we can see this because they just enact like three or four major regulatory statutes that empower commissions to engage in quote unquote enforcement.

So the first one is the Interstate Commerce Act in 1887, which is the nation's first independent regulatory agency, charged with controlling railroad rates, and very successful at doing so. That was a very successful commission. And then we get the Industrial Commission in 1898. Finally with Teddy Roosevelt, we get the Bureau of Corporations. These are multi-member commissions, so they should look a whole lot like what your listeners are used to. The FTC, for example, is a multi-member commission. We have lots of commission models in our current regulatory landscape. So we know that that becomes a preferred approach.

But here's the thing. I think the commission model really obfuscates exactly what authority you want to grant said commission. So for example, the Bureau of Corporations was only given the authority to study the problems facing the US economy, study and report, right? And I think we still have a little bit of that concern. You and I were talking earlier before the podcast about the CFPB and the legislative history there. There's also lot of debate over the CFPB and what powers to grant it, to grant this newborn agency, and how it should look, which is something of course the Supreme Court's going to decide next term. How's it going to look? How much power should it have? What form should that power take? To whom is it accountable? We've seen in the CFPB a real effort to make that agency completely immune to political pressure. But of course, no agency can be perfectly immune from political pressure.

And so some of the same debates that we can see in the 73rd and 74th Congress, we see again in our current Congresses and before the current court. I also see a pretty direct line between the 75th Congress, which enacted the FTC Act, with their debates over the scope of the FTC's authority and the case the Supreme Court decided a few years ago, the AMG versus FTC case, where the court limited the FTC's ability to seek monetary relief under Section 13. This was an issue that was actually debated in the enactment of the statute. So we sort of see unresolved questions in the legislative history getting resolved, but like a century plus later, and still we're struggling with some of those same issues.

Alan Kaplinsky:

Your research also indicates that there were some members of Congress who may actually have believed that they were voting for a Federal Trade Commission Act that included a private right of action. What is your evidence of that?

Myriam Gilles:

So this is the actual reason I wrote this piece, because an early bit of research convinced me, and so let me tell you what I saw. First, there's a lot of evidence that President Wilson, Woodrow Wilson, who along with Brandeis, who was his consigliere, they stumped for this statute. They went to the Capitol and they talked to legislators and said, "We must enact something like this." Wilson was incredibly worried that commissioners might easily succumb to the interest of big business. He thought they could be bought off. So he believed from the start that the FTC Act should include a private right of action. He made that clear. You can read his diaries now. Wilson made that clear in every conversation he could, that there should be a private right of action.

Some members of Congress surely agreed with the president. We can see this because there are debates over exactly this question, whether there should be a private right of action, what form it should take. Some members of Congress, so some of my other evidence is more of the implicit sort, so for example, Senator Moses Clapp of Missouri, he was a big proponent of the FTC Act, a big supporter of the bill. He sponsored an amendment that would have authorized a treble damage cause of action for anyone injured by reason of unfair competition. He was joined by a bunch of other senators.

And look, I don't think you propose a treble damages provision if you don't think there's already a damages provision, if you don't think there's already a basis upon which to seek damages. I'm not saying that the evidence is clear cut. I think the best argument against me is, okay, Gilles, then why didn't they do it? Why weren't they explicit about it?

I think that lots of people in Congress may have believed that just by making unfair competition illegal and not granting the FTC exclusive jurisdiction, not granting the FTC exclusive jurisdiction to police these violations, they were automatically creating a private cause of action for damages. So it's not the great, I wish I had a smoking gun and I could just say, Alan, I found it, and they could make a movie about this. That would be very exciting. But I think it's all the evidence if you just connect the dots and look at it logically.

Alan Kaplinsky:

So let me just clarify something with you, or ask a question for you to clarify something. And that is in the original act, did Section 5 only deal with unfair methods of competition, or did it also deal with unfair and deceptive acts and practices?

Myriam Gilles:

The former, only the former. It was narrower. Yeah.

Alan Kaplinsky:

When did they add to the statute unfair and deceptive acts and practices?

Myriam Gilles:

The Wheeler-Lea Amendments in 1938.

Alan Kaplinsky:

Okay. And at that time, was your research so that they once again considered whether to add a private right of action?

Myriam Gilles:

No. And again, that's great evidence against me, though I will say, I've read the legislative record on the Wheeler-Lea Amendments. There's about two years of debate over this amendment to the FTC, and Congress at this point is trying to fix a

lot of little problems in the statute that have come up in court decisions, and they're not very focused on this private right of action.

I submit this, if we had seen by 1938, so 20 years later, if we had seen lots of consumers seeking to use Section 5 and being rebuffed by the courts, I think the issue might've been ripe for that Congress, but we weren't seeing that. What we saw were businesses, competitors trying to use the FTC ACT and arguing that they had a private right of action under Section 5. And courts saying, that's what the antitrust laws are for. Go over there and get your private right of action. There's no private right of action here.

And this has a lot to do with the fact that consumers weren't litigating cases in the 1930s. I mean, it really wasn't, that body of law wasn't developed. People, again, were just starting to think of themselves as consumers.

Alan Kaplinsky:

When did the class action rules, Rule 23, when did that get created? Do you recall?

Myriam Gilles:

1966. 1966. Yeah.

Alan Kaplinsky:

There was no such thing as class action litigation.

Myriam Gilles:

I mean, there was an earlier version in the thirties, but it was not useful to the average consumer. And look, arguably, even in the 1960s, it took a long time, for the development of a plaintiff's bar with enough sort of self-funding to be able to absorb the cost of a class action.

Alan Kaplinsky:

Yeah. Now, what about the so-called implied private right of action? That had not been litigated at that point. I mean, I know eventually there were cases, I don't know if they involved the FTC Act, but I think in the securities law, I sort of remember a case. I can't remember the name of it, but I'm sure you-

Myriam Gilles:

Yeah, I see a ton of litigation brought, again, by competitors, not by consumers, in the forties and fifties, arguing that there's an implied private right of action under the FTC Act and all getting rebuffed. So if you look at the test, and it's too complicated to go into now, but courts use a test to determine whether there's an implied private right of action. And here, there was no case that met the test. And furthermore, and once again, competitors had another place to go. And that's the Sherman Act.

Alan Kaplinsky:

Yeah, yeah, yeah, yeah, yeah. So let's talk about the problems that you think would be solved by amending the FTC Act to add a private right of action. Or, maybe even before we get to that, in your article you actually say it would be actually a very simple amendment to the statute. It wouldn't take a lot of words to add to create that. Tell us, if you would, what would actually have to be done?

Myriam Gilles:

I do think it'll be fairly straightforward, and I think we could pattern it after private rights of action that are granted in lots of other federal statutes, from Title VII to [inaudible], pick your poison. There's a lot of different ways to add that language. I

don't think it requires much language, but that ignores the fact that it would take tremendous amounts of political will and probably a greater shared sense that it would be a positive thing to do at this point, and I'm not sure that we're there.

Alan Kaplinsky:

Does your proposal authorize actual damages as well as statutory penalties or punitive damages? What would it do?

Myriam Gilles:

Yeah, so I don't go that far in this paper. I think a lot of those details, which to call them details is not to diminish how significant those questions are. I mean, remedies are everything in this sort of business. But I think that that's something that is up for discussion and debate. I could imagine, look, I think an actual damages provision would be great. I'm not sure we need more.

But again, there's a lot more to tease out here about how we would foresee this private right of action being used, what limitations we want to place on it. Right now, for example, the FTC before it brings an enforcement action has to show that the action is in the public interest. Would we require the same of a consumer? So there's a lot of questions. I can add some language to the statute, anybody can, but the repercussions of that throughout the entire statutory framework-

Alan Kaplinsky:

Actually, I think you were wise not to go down that rabbit hole because that I think would've made it, it makes it more controversial. When they enacted the Truth in Lending Act, and then they did it in several other federal consumer protection laws, they put a cap on class action liability because there was a concern about companies being saddled with draconian penalties.

And of course, there are statutory penalties also in the Truth in Lending Act and in some other federal consumer protection laws. And I think that scares a lot of people. So I think you were wise leaving that issue off the table, Myriam.

But you were going to get to the problems that it would solve. Some of these you've alluded to already, but why don't you summarize what this would truly accomplish?

Myriam Gilles:

Well, I mean, maybe the way to answer that best is to tell you what I worry about. What I worry about is, as you observed earlier, nearly every state has a mini FTC Act, or a state UDAAP statute that fills the enforcement gap that we think might have been left in the wake of the enactment of the FTC Act. And again, the FTC was very much a proponent of that movement. And those statutes, love them or hate them, Alan, they've been used a lot. Consumers use them, and they've made some changes in the way that products of all sorts are marketed and sold.

But I worry that we're starting to see some rollback on some of these statutes because when you can't get Congress to act, I think that what business interests have learned with the Chamber of Commerce and the business lobby has learned is you take the fight to the states, and they've been pretty successful at taking the fight to the states.

And I talk about this quite a bit in my paper, about a concerted, organized effort by the business lobby to amend and weaken state UDAAPs. And they've really achieved some pretty significant success. I talk about examples like Arkansas and Mississippi, and who knows where else these battles will be fought in the future. But as state legislatures lurch to the right, I think we have to be concerned about them taking the law with them and emptying out this reserve of pretty good consumer law in the hopes of attracting business interests to the state. So I'm worried about that. I'm worried, as anybody should be, that if what we thought was going to fill the enforcement gap has now left the building, what happens to consumers?

If there's really no, if you're in Mississippi and you're a consumer, you don't really have a very, an operable UDAAP statute, and the FTC doesn't have your back, where do you go? So that's another origin story for the paper.

Alan Kaplinsky:

Let me ask you a very practical question. And I know a lot of what's in your article, you're not necessarily saying that today you'd be able to get Congress to get this thing through. This Congress can hardly agree on what time of day it is. And can you imagine introducing a bill like this? I mean, it'd just never get through.

What is your, I mean, I take it your hope is eventually to get this thing passed, but it would have to be a Democratic controlled Senate by a significant amount. You'd probably need to get the minimum of 60 votes to avoid the filibuster, and you'd need control of the House and you'd need a Democratic president. And that doesn't look like it's in the cards right now.

Myriam Gilles:

No, it certainly doesn't. We'd have to go back to early Obama, which if I could roll back to that, I would in a heartbeat. Although it would mean that I'd have to then relive the last number of years, so maybe I wouldn't after all. No, I think it'll be hard. So Senator Whitehouse, Democrat from Rhode Island, he and his staff were working during COVID on kind of an omnibus bill that would deal with all sorts ... It was the Democrats, a progressive proceduralist's wishlist, passing the Fair Act, working on qualified immunity legislation. And this was on his list.

So I think what I want is to try to get this idea on as many lists as possible. I sent it to a staffer, she read it, and we had long talks. And I want to get this, look, everybody's got a wishlist when it comes to legislation. I just want to be in the conversation on this issue. I've already, as you described, I've made it clear how I feel about the Fair Act, right? I really want us to pass the Fair Act. I have all sorts of other things I'd like us to do, but if we're really worried about state laws kind of going bye-bye, I think we need to do something at the federal level.

Alan Kaplinsky:

Well, you mentioned the AMG case, Supreme Court opinion, that basically made it clear the FTC couldn't obtain monetary relief for consumers. And I know the FTC wanted to get the law amended to overturn that Supreme Court opinion. That didn't go anywhere for sure. But if there was sort of a vehicle that you could use, this is a standalone bill, I don't think it would ever get through.

But if it was part of another bill that took care of other things dealing with the Federal Trade Commission Act, or maybe, who knows, Myriam, after the Supreme Court concludes that the CFPB was unconstitutionally funded, anything could be up for grabs at that point. There will be a lot of horse trading going on at that point because neither the Republicans or Democrats will have enough to get everything that they want. So maybe you get yourself a seat at the table, right?

Myriam Gilles:

Yeah, I mean, look, I think one of the things that scholars can do is do the heavy lift of the research to bring the idea to the forefront. And that's what I hope to do with this piece. But you're right, the politics of the moment are so sclerotic and paralyzed. I'm not staying up at night hoping that this idea goes through. But I do think that there are some people who are interested in this, and who knows? I don't think I could have predicted the last 10 years. So who knows about the next?

Alan Kaplinsky:

I've got one more question to ask you. And we've been talking most of the time on our show about the Federal Trade Commission Act and amending that to create a private right of action. But your paper doesn't address at all whether you considered amending the Consumer Financial Protection Act. That is the act that became law as part of the Dodd-Frank Act, and that created the Consumer Financial Protection Bureau.

And that statute, as we all are painfully aware, has an analog to Section 5 of the Federal Trade Commission Act, except it's more draconian from the standpoint of industry. It prescribes unfair, deceptive, and abusive acts and practices. Why is it that you didn't consider putting it into that statute?

Myriam Gilles:

It's a great question. And given the pending, the looming Supreme Court decision, maybe I should have because the CFPB may be no more, and maybe if there was a private right of action that would remain even if the agency were struck down because of its funding stream. I look, just so your listeners know, Alan actually posed this question to me earlier, and I did some research and looked into, now that I've mastered legislative history research, I did some legislative history research on the Dodd-Frank Act.

Much shorter legislative history there. As you remember, the Dodd-Frank Act was enacted at a time when we were in the midst of economic collapse, and there was a lot of concern about making sure that there was somebody, an adult in the room, that this sort of thing would not happen again. So it's a much more truncated legislative history, but I could find nothing, no debate over private right of action. So that's fascinating.

Maybe I'd have to drill a couple of levels deeper, and there are always levels deeper to drill in legislative history research, but I didn't find anything. And I wonder whether by the time we get to 2008, when the Dodd-Frank Act is starting to be debated, there's already enough consciousness about plaintiff's lawyers in class actions that even progressives thought that might be a third rail, that that might defeat the bill. That certainly was not true in the early part of the last century when we didn't yet have a robust plaintiff's bar or certainly a class action rule upon which it would be built.

So I think maybe there's an answer there. I'm really not entirely certain why there wasn't a private right of action in the CFPB Act. Alan's question has made me wonder whether there's a second paper. Academics are always thinking, is there another paper here somewhere, about the CFPB? But I think we all have to wait and see what happens next term.

Alan Kaplinsky:

Yeah, I would've thought, I mean, at that point when Dodd-Frank was enacted, the industry was very vulnerable. We had just gotten out of the recession. There was a lot of antipathy against the industry, a lot of antipathy with respect to the government regulators who people thought had dropped the ball.

I'm thinking of the banking regulators like the comptroller of the currency, and I, if that had been included in the bill, my guess is it would've flown through because Elizabeth Warren got just about everything she wanted, a single director and funding insulation from congressional appropriations and UDAAP with the abusive prong. So this just would've been one other thing. And people were feeling in a very punitive kind of mood, or maybe were seeking retribution at that time against the banking industry.

Myriam Gilles:

In any event, it wouldn't have mattered, because soon after we get AT&T versus Concepcion, we get class action waivers, and the consumers that we're talking about could never be able to bring these consumer class actions anyway. So I'm not saying Congress was prescient, they never are, but…

Alan Kaplinsky:

I'm glad you mentioned that because actually that made me recall one of the things that you did talk about in your article, because otherwise you would have a problem, you specifically put in language saying that you can't waive the right to go to court, that consumers, you can't be forced to go to arbitration. So you have dealt with that issue.

Myriam Gilles:

Yeah, I think obviously any legislator has to think about that very carefully in granting any positive rights to sue at any point, because waivability is such a huge issue.

Alan Kaplinsky:

Yep, yep. Got it. Okay. Well, Myriam, is there anything that we've overlooked that you think our listeners ought to be aware of, that's relevant to the topic we're talking about today? Or we pretty much covered the waterfront?

Myriam Gilles:

I think we've covered the waterfront. I think this was a pretty thorough discussion. But of course I'm happy to send anyone the article if they'd like to read it, or you can find it on the Arizona Law Review's website.

Alan Kaplinsky:

And I guess you can get it on the social, what is it called?

Myriam Gilles:

SSRN.

Alan Kaplinsky:

SSRN, that's where I got it. And I became aware of it, I should give credit where credit is due, I think I found it on the Consumer Law and Policy blog. I think Jeff Sovern, Professor Sovern from St. John's, had done a blurb about it. And that gave me the idea to contact you to do a program.

So again, thank you very much for taking the time today to enlighten all of us about this very important article. A little scary for those of us who are in the industry, but nevertheless, a very important article. So thank you for being on our program today.

Myriam Gilles:

Thank you so much for having me. This was a lot of fun.

Alan Kaplinsky:

Yeah, I agree. We'll have to do it again.

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