Consumer Finance Monitor (Season 7, Episode 44): State Fair Access and Debanking Laws Bring Country's Political and Cultural Divisions to the Fore

Speakers: Alan Kaplinsky, Peter Hardy, Brain Knight, and Peter Conti-Brown

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 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 I'm senior counsel of the Consumer Financial Services Group at Ballard Spahr. And I'm pleased to be moderating today's program. For those of you who want even more information, don't forget our blog, consumerfinancemonitor.com. We've hosted the blog since July of 2011 when the CFPB got stood up. 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 show, please let us know about it. You can leave us a review on Apple Podcasts, YouTube, Spotify, or wherever you obtain your podcasts.

And 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. Well, let me, first of all, describe the topic that we're going to cover today. We've never really covered this precise topic before, but we did, a few years ago, cover a topic very similar to what we're going to be talking about today, and that is, for a very brief period of time, under an acting comptroller of the currency, there was a regulation that got promulgated by the OCC that dealt with what I would describe as either fair access or some people have described it as de-banking, referring to the supposed victims of certain activity on the part of banking institutions. And I had somebody from the Bank Policy Institute who talked about that final regulation. It was very controversial. It happened during the change of administrations from Trump to Biden.

And to make a long story short, it never got published in the Federal Register and I think died on the vine. I'm not sure whether it was ever formally withdrawn by the OCC, but it never became a final regulation. So today, what we're going to be talking about is the fact that an increasing number of states have either enacted or are considering enacting legislation requiring financial institutions to provide customers fair access to financial services. These first fair active requirements appeared in a Florida statute enacted in 2023, which generally prohibits financial institutions from denying or canceling services to a person or otherwise discriminating against a person in making available services on the basis of enumerated factors, commonly including factors such as political opinions, religious beliefs, social credit scores, something we'll hear more about during our podcast, or any other factor that's not quantitative, impartial, and risk-based.

Now, let me introduce our speakers for today's podcast show, and I can't think of a panel that could be better qualified to talk about this panel than the panel that we have assembled today. First of all, I'd want to introduce Peter Conti-Brown or Professor Conti-Brown. He's a class of 1965 associate professor of financial regulation at the Wharton School of the University of Pennsylvania and nonresident fellow in economic studies at the Brookings Institution. A financial historian and a legal scholar, Professor Conti-Brown studies central banking, financial regulation, and public finance with a particular focus on the histories and policies of the US Federal Reserve system. He is the author of the book, the Power and Independence of the Federal Reserve, published by Princeton University Press in 2016, co-author of a leading textbook on financial regulation, The Law of Financial Institutions, and author and editor of several other books and articles on central banking, financial regulation, and bank corporate governance. So, Peter, very warm welcome to our program.

Peter Conti-Brown:

A delight to be with you. Thanks for having me.

Alan Kaplinsky:

Okay. Next, I want to introduce our other very special guest, Brian Knight. Brian is a senior research fellow at the Mercatus Center at George Mason University. His areas of study include the politicization of financial services, which is somewhat the topic that we're going to be focusing on today, and financial service regulation. And he told me I should say this, although I'm not sure how it's connected to the topic, his hobbies include barbecue and recovering from a torn ACL. So, Brian, very special welcome to you as well.

Brian Knight:

Thank you very much. This is my second time on the podcast this summer, so I'm feeling the love. Thank you.

Alan Kaplinsky:

Yes. Well, you're always going to be welcomed back because you have such knowledge in this area. We want to take full advantage of it. And finally, and certainly last but not least at all, is a partner in Ballard Spahr's Philadelphia office, Peter Hardy. He co-leads the firm's anti-money laundering team and he counsels financial institutions on BSA and AML compliance, and he edits the group or the firm's blog that deals with illicit finance called Money Laundering Watch, and I highly commend that publication to you as well. Prior to entering private practice, he served as a federal prosecutor for 11 years. So, Peter, you're always welcome on our show.

Peter Hardy:

Thank you, Alan, and always happy to be here. Looking forward to this.

Alan Kaplinsky:

Okay. Now we're going to begin our... Going to call it our double-click. I don't use the word deep dive anymore because that's not cool. It's become a cliche. But I've been told double-click is a much better word to use. So going to start with you, Brian, and going to ask you a very general question. What are state fair access or de-banking laws? I mean, I gave a one-sentence description, but maybe you could tell us just a little bit more.

Brian Knight:

Well, actually, I think your description was great. Basically, these are laws that have been passed in the wake of a perceived effort... I think probably a real effort by people to try to get access to financial services to be used as a tool of universal regulation. So for example, efforts to cut off access to financial services for carbon-intensive industries or for politically unpopular but legal industries more generally. We saw there was an uptick of this in the past few years, and now what we're seeing are some states responding by passing laws that are trying to prevent banks and other financial institutions from de-banking customers on the basis of politically-sensitive criteria. It's important to note that these laws do not mandate service.

It isn't a public utility where you have to be able to provide service to all comers. Rather, what they seek to do is remove certain criteria from the bank's consideration. And in that way, they operate somewhat similar to more traditional anti-discrimination law where you don't have to give a loan to somebody, but the reason you don't give the loan to somebody can't be their race, religion, national origin or the like. But in this case, it would be that they are involved in fossil fuel extraction or that their internal DEI policies are not to your liking or to someone else's liking. So that's what the laws appear to be doing. Now we're in early days with these. There are only a couple that have been passed and more states are considering them, but that appears to be how they're shaping out.

Alan Kaplinsky:

Okay. Well, thank you. I appreciate that, Brian. And so we'll dig a little deeper now and I'm going to go to Peter Conti-Brown. So what states... We may have mentioned Florida and Tennessee as being the only two states that have drafted very broad fair access laws, but I guess there are probably some other states that have done some tweaking here and there, thinking of Texas. But what states have enacted the statutes and what classes of potential customers do these statutes purport to protect and do

they apply to banks or other financial institutions not even having a physical presence in that particular state? And are there exemptions for smaller institutions? I mentioned at the outset in my opening how the OCC tried to promulgate a regulation that was only going to apply to financial institutions that have more than 100 billion in assets. So, Peter?

Peter Conti-Brown:

Yeah, thanks for that. So just echoing Brian's description, you're right that the only two states that have formally passed laws directly aimed at readdressing this perceived problem are Florida and Tennessee. We have a lot of efforts from several attorneys general and governors who are interested in using preexisting laws including anti-discrimination laws for this purpose. Iowa has been leading a charge organized with, I think, 13 states, at last count, who have been quite engaged in speaking out about these practices. And the targets here are coming in roughly two flavors. One I would say are already well covered by the existing federal statute anti-discrimination laws. This is primarily the Equal Credit Opportunity Act, which includes after its amendment all of the so-called federal-protected classes. So race, sex, religion, national origin, welfare status, things like that. And then the other class would be some version of political identity. These are not well-specified. The statutes use different terms to cover it. It's very hard to hit a bullseye with exactly what has had in mind because politics is as politics does as we know, virtually every aspect of one's identity can be expressed as a political affiliation.

And the first category makes these laws redundant in an important sense. Redundant because it is already illegal to discriminate against people on the basis of religion. For example, this is religious discrimination constitutes one of the most important allegations against banks who have de-risked with certain clients because they belong to different religious groups. In that event, there's a path available to both private actors and, on behalf of private of citizens, the regulators, which is to sue under the Equal Credit Opportunity Act and its state law equivalents. The second category is much harder to deal with because, as Brian noted, banks are not public utilities. We don't have a universal access mandate for them. This is contra what some would propose. So some on the left want to reconceive banks in exactly this way, either have banks be public institutions. The public banking momentum has been surging in recent years. Or even if there are private shareholders, that they be regulated as energy utilities essentially, given much bigger monopolistic fiefdoms for banks with a universal service mandate.

These fair access laws sound, to me, very much in a utility mandate register. And the reason is because I cannot think of a meaningful legal or practical distinction one could make to separate political affiliation from other forms of identity related to risk-taking. And the reason, of course, is because we express our values in all kinds of different ways, including in ways that banks might think this would present risks that we cannot or do not want to quantify or balance to our reputation, operations, and even to our balance sheet. And one might say, "That's not fair. These values that I have, the nature of this business are dear to me and I seek to elect those political representatives who will share those values." Well then, all of a sudden, your risk has become a political risk. And for that reason, these become quite unwieldy.

Alan Kaplinsky:

Maybe we'll pause there for a second and I want to give Brian an opportunity to respond.

Brian Knight:

So, unsurprisingly, because I think I was brought on this podcast today to be the heel, I disagree. I don't think these laws sound in public utility. I think they sound in anti-discrimination. And the reason I think that is that I think under the laws... And look, I will fully concede that these laws are not models of clarity in their drafting. And that should be something, when we're going to get to, "What recommendations would you have," I have notes. But these laws do not require a bank to bank anybody. It does require them to be able to articulate why they chose not to bank a specific customer. And so the issue there is not necessarily... And, I mean, we're going to get into this when we talk about BSA. One of the questions is what is meant by quantifiable? Now the OCC, in their regulation that you mentioned earlier, contrasted quantifiable with factors that are quantifiable as related to that particular customer that actually relate to an articulable risk about that customer or relate to some economic factor including profitability versus more general concerns, more undifferentiated concerns, et cetera.

And so to the extent what quantifiable requires is that the bank can articulate, like, "We didn't bank so-and-so because we felt X, Y or Z. It wasn't profitable. We worried about this particular risk related to this particular customer," that would probably clear. And then Peter mentioned the Equal Credit Opportunity Act, as he should, I mean, it was one of the major anti-

discrimination laws, but one of the interesting historical quirks is that, in the original set of amendments, political affiliation was going to be a protected class. And what led to political affiliation not being a protected class was that almost everyone, including all of the banks who testified, said in effect, "Yeah, it would be terrible if banks discriminated on the basis of political affiliation. Yeah, this would have some potentially distortionary effect toward our politics." But nobody does that. That would be crazy to do. And yet, here we are and, arguably, that no longer holds.

And I would say one other thing that I think is motivating this, and we can get into this in more detail later if we want, is that there is a concern that people are trying to use the financial system as a tool to, in effect, deprive people of various important rights, including the ability to effectively participate in the political process, which requires organization, and organization requires access to financial services, or certain other activities that are grounded in some constitutional right and that the view is that people who can't achieve their end through the democratic process, either because they can't win the votes or because the constitution gets in the way, are instead trying to use the financial system as a... And I know this term is overused, but it's just so gosh darn good, a choke point to de facto control things. And so that is one of the motivations. It's not the only motivation, but as one of the motivations that is driving these laws is to try to protect citizens from that.

And so in that regard, I think this is, in some ways, perhaps not as eloquent as ECOA, but sounds in the same motives and in the same manners as our anti-discrimination law. It's just adding new protected classes. And we should note that the states have added new protected classes beyond what ECOA has for years. I mean, Massachusetts added sexual orientation as a protected class in the '90s, and the OCC took the position that, yeah, national banks would be bound by that. So you may not like the protected classes that are being added, and, well, that's politics, but this is not something that I think is new or different, nor do I think this is a public utility move because there is still the obligation and the ability of the bank to make the type of economic and compliance assessments that they're supposed to make. We want banks to be allocating capital to its highest and best use.

Alan Kaplinsky:

Yeah. So I just want to follow up with one question of you, Brian, and then I'll go back to you, Peter, to respond to what Brian had to say and maybe deal with some of these other questions I raised. And so is it absolutely clear that if a bank or a financial institution doesn't have the in-house expertise to bank a particular customer, let's just say it's somebody in the fossil fuel industry, and they don't have an expert in that area, can they deny that person on that basis or do they have to actually go out and acquire the expertise?

Brian Knight:

So I can't say it's absolutely clear, nor could I say it's absolutely clear ex ante about any customer under ECOA, but at least by my read of the statutes, I think that would be accepted as a legitimate justification, because the bank could say, in effect, "Look, to properly bank this customer, we would need to be able to assess the value of this collateral, et cetera, et cetera. We just don't have that capacity and it's not our thing to do and it's not economically [inaudible 00:20:14] enough for us to do this," I don't think there's a compulsion there...

And we should note that the Tennessee statute, like the OCC statute, only applies to large institutions, 100 billion in assets above. And, actually, it doesn't apply to loans. So it's a much narrower law. But I don't think that this law is properly read with the caveat that they are not models of clarity, would force a bank to get into a business it isn't otherwise in. It's more a case of, "Well, you have the capacity to do this, you do this for similarly situated customers who don't trip one of the protected classes, but you don't do it here because the customer's protected status."

Alan Kaplinsky:

Okay. Well, let me go back to you now, Peter, because I'd like to get your reaction to what Brian had to say. And then I want to focus on out-of-state banks and whether they're covered and exemptions that might apply.

Peter Conti-Brown:

I think the text of the statute's pretty clear and in its clarity is extraordinarily broad. And this is why I don't think Brian is correct in thinking of this as an anti-discrimination statute rather than a public utility one. Anti-discrimination requires some boundaries around the identity claim, some sense that what we're talking about is targeted. You can see what belongs to the protected class and what doesn't. And we can have arguments about whether different extensions of protected classes fit this model or don't, but politics don't. And I'm going to quote here now from the statute itself to show you why and how almost impossible it would be to separate a protected class here from another. So first of all, it prohibits any factor if it is not a quantitative, impartial, and risk-based standard, including any such factor related to a person's business sector. It prohibits denying or canceling financial services to political opinion, speech or affiliations.

It also prohibits the use of any rating, scoring, analysis, tabulation or action that considers a social credit score based on factors including but not limited to a person's political opinions, religious beliefs, lawful ownership of a firearm, engagement in the lawful manufacturer distribution sale or use of firearms, engagement in the exploration, production, utilization, transportation sale or manufacture of fossil fuel-based energy, timber, mining or agriculture, support of a state or federal government combating illegal immigration, drug trafficking or human trafficking. I think the language of the text itself shows why Brian is wrong to conclude that banks can choose their industries to service. I think that's wrong under this law that what the law does is force these banks to engage in risk-taking that they may not be equipped to do because they don't have the talents or abilities or history or interest in banking specific kinds of business activities.

So that's the first point. The second point is that, as I see here today, I cannot imagine how I could credibly say under the statute what kinds of opinions, business practices, ideas do not constitute political or at least I don't know how to make that claim if whoever is managing the Florida Office of Financial Regulation investigation against me here, I would be a banker, is motivated to see it otherwise. There's just no claim. Because as Brian said earlier, that's politics. Right? What politics is is just what we argue about in the public sphere and get others who earn our vote to fight about in the halls of power. And because of that breadth, that means that this has turned banks to whom these laws will apply into a utility.

Brian Knight:

If I may, I want to contest one thing about... Two things. But one, I will counter Peter's point about politics with the fact that religion is also difficult to define and yet the courts define it. And we've had debates and legal decisions about religion to the point where atheistic beliefs are considered on par with religious beliefs for these protections because it's about some statement of the status of the universe. And so I disagree that political opinion, speech or affiliation is going to be some impossible or infinitely malleable standard. And honestly, courts have experience in the First Amendment context in distinguishing between pure political speech, commercial speech, et cetera. So I don't agree that that is a problem.

As to the list of the parade of horribles that Peter listed, I... And look, we will need to see how Florida or Tennessee or whomever interprets this, how the OCC interprets this, and ultimately how courts interpret this, which put this law on par with any other state law that impacts national banks. But I think these things can be read coherently together to, in effect, say that these are the protected classes. And so if your determination is that we do not want to do carbon because we want to push the world to a zero carbon environment, that might run afoul. If you say, "I'm not going to bank Shell oil because I have no idea how to value their collateral. And here's my math on that," that would strike me as consistent with this statute.

And Peter and I will agree to disagree on this, but I don't think that turning this into a public utility is the only or necessarily best way to read the statute. And I will say, if that's what's being intended here, then I will agree, that's a bad idea because we do want banks to be able to allocate capital to their highest and best use, and we do want specialization. What we don't want, or at least what I don't want and what the drafters and supporters of these bills don't want are banks to be using their privileged position or being pressured to use their privileged position to distort the economy and society for what is ultimately political purposes.

Alan Kaplinsky:

Okay. Well, Peter, I don't know if you want anything further to comment on that. If not, I'd like to get your answers to the question of does this only... Let's take the Florida statute, might it apply to a bank in New York, let's say, or Pennsylvania, that's doing business with some business or individual based in Florida?

Peter Conti-Brown:

An early version of the bill was quite comprehensive. Its final version is more limited. It's subject to the Florida state banking codes as the limit. I'm not an expert on Florida state law, but reading banking statutes generally that would make me think that if you're doing business with a Florida-based institution, you're doing the provision of financial services, then you would be subject to those laws because banking laws protect a variety of stakeholders, not only the bank itself. And so any laws that are aimed at regulating interactions between banks and clients, in this case, potential clients, would be subject to this law. And so that means Florida's a big state, a big economy, there are going to be a lot of different ways to understand that. But I would think of this as not an attempt that would be unconstitutional by the Florida legislature to mandate national policy even without interactions with Florida.

Alan Kaplinsky:

I take it you don't see a Commerce Clause issue lurking there.

Peter Conti-Brown:

Not in the sense that the state of Florida, unless otherwise preempted, which again, I don't think that these laws would apply to national banks and I expect litigation to prove that point. But for banks that want to do business in Florida, they're going to have to abide by Florida's laws. I don't think it's controversial that Florida has asserted that it's the limits of its law in that way.

Alan Kaplinsky:

And I guess the final question, what are the remedies if somebody violates one of these statutes? Are there public remedies, I assume? Are there private remedies that could apply?

Peter Conti-Brown:

I know the Florida law best, I don't know if Tennessee is different, but Florida, again, this went through various iterations. Originally, there was a private right of action so anybody could sue a bank that they felt was not adhering to what I would regard as their universal mandate. Although I'm saying that mostly to tweak Brian. That was retired in the final version that Governor DeSantis signed. Today, it's a complaint-driven system that triggers an automatic investigation by the regulators. The termination of that investigation will lead to an opportunity for the bank to respond, and then an enforcement action. It's pretty highly orchestrated, where the burden of proof lies in that investigation is pretty astonishing to me. You have to prove that adherence as opposed to the burden of proof being in the opposite direction. So a bank accused by the Office of Financial Regulation has to prove that it is doing everything according to the law as opposed to the OFR, the government's responsibility to prove its violation. That's an incredibly important factor. That's also what makes me think that this is something closer to a universal service mandate.

Alan Kaplinsky:

You may have answered this question, I think you have to a great extent, Brian, but what is it about these statutes that have made them so controversial and polarizing?

Brian Knight:

Well, I mean, these laws are controversial I think for probably obvious reasons if you've listened to the podcast up to this point, right? You're talking about a law's passed in response to the intrusion of the culture and political wars into financial services. What you're seeing is an intrusion upon the freedom of action of private entities by conservative leaning governments, which is not something anyone's really used to, at least in such overt ways. And even among people who support the concept, the means of redress and how to handle it are controversial.

I mean, Peter alluded to the fact that in an earlier version of the bill, there was a private right of action in Florida, and that's since been reduced to just the attorney general. The Florida banking regular can bring enforcement actions under the Florida code, which may not apply to national banks, because if you look at the Florida banking code, it doesn't seem to apply to

national banks, at least as I read it. And then you have the AG being able to bring enforcement actions under the unfair and deceptive trade practices law in Florida. So, yeah, they're very controversial all the way around. I mean, one of the ironies of all of this is, for years, it had been a progressive project to reduce the amount of preemption that national banks enjoy vis-a-vis the states. And now, that dynamic has, in some ways, been flipped on its head.

Alan Kaplinsky:

So let me go to Peter Hardy. And I'm glad we're finally able to get to your area, Peter. My question for you is why is it that the Treasury and the acting comptroller of the currency have expressed AML concerns about these kinds of statutes? And I didn't hear anything in the description of who's covered, who's protected by the statute. It didn't say that terrorists are covered or other people who are engaged in scams, and fraud, and all that. So what's the connection, Peter?

Peter Hardy:

Sure. So just as context, in early July, there were a collection of congresspersons from both parties who wrote a letter to the Department of Treasury inviting them to weigh in on these laws. And that occurred in mid-July, the then undersecretary for Terrorism Financial Intelligence wrote a letter, and then later, in July, the OCC wrote a letter, and I can hit on the concerns laid out, and if folks are interested, we did blog on this and all the links to all these letters are in that blog post. But-

Alan Kaplinsky:

Yeah, that's your money laundering blog.

Peter Hardy:

As well as the CFS blog. Yes, both blogs. So to reword things, the concern is that, and I'm going to echo some of the comments that have already been made on this podcast, that the laws are much too broad in how they've been worded. I'm going to focus here initially on the Florida law. I'll make a few comments about the Tennessee law as I wrap up. But as folks have indicated, the Florida law talks about prohibiting decisions made on any factor, if not quantitative, impartial, and on a risk-based standard. So this is beyond simply saying, obviously, don't discriminate against people on the basis of their religion. Furthermore, in the Florida law, and I think this has been alluded to, there is a prohibition against consideration of the customer's, quote, business sector. So on its face, three out of these four factors are, I would say, really antithetical to the realities of how any anti-money laundering compliance program works.

And any financial institution is going to have a fairly elaborate program. Obviously, it's going to depend upon the size of the institution, but you have software running transaction monitoring, you have a team of people trying to catch suspicious activity, do investigations internally, and then file, of course, suspicious activity reports if appropriate with FinCEN. Now, the risk-based standard, that is ironically the touchstone of AML compliance and we can debate how helpful that is, that's a separate podcast in itself, the utility of a, quote, risk-based standard as opposed to a prescriptive rules-based standard. So that itself is not problematic, but it's the quantitative impartial and business factors. Because making decisions in terms of risk and whether or not a customer presents too high a risk for the purposes of possible illicit finance or money laundering or what have you, it's inherently subjective. It is not really a quantitative process. It can't be... It's largely quantitative.

So all of this just runs afoul in terms of how you actually operate one of these programs. And of course, you always have your regulators looking over your shoulder. And in terms of the business sector, you always look at the business sector or the business itself when determining risks as to whether or not you're going to potentially bank a customer or de-risk them. De-bank them is the phrase we've been using on this podcast once they're in. So let's go through some of the industries. So there have been references to firearms. Personally, I think there's probably a difference between a gun manufacturer versus a gun distributor. And please don't get me wrong, I own guns myself. I'm not anti-gun. But there are gun distributors, sellers who have risky businesses, and back in the day, when I had my old hat on as a federal prosecutor, had to prosecute some of them. For example, straw purchases, selling weapons to people who should not be buying them.

It's entirely rational for a bank to decide that they don't want to bank a gun seller because the compliance risks, which means the costs is going to be not worth it or prohibitive. What about porn? Nothing inherently illegal about porn. Obviously, we're

talking about just not getting into child porn or things like that. Isn't it entirely rational and within the rights of a financial institution to decide from a reputational standpoint that they do not want to bank such businesses? Maybe, maybe not, but that is a business sector. Money services businesses, crypto. That's very risky, potentially. Certain trade organizations, you can get into possible violations of sanctions, et cetera, et cetera. So my concern is that these statutes are written so broadly that they open themselves up for potential abuse. And it's very unclear to me that what the statute is addressing is a real-world problem to any extent.

Is it true that large petroleum businesses can't get bank accounts? I'm not aware of that actually being the case. I could be wrong, but it just seems to be a solution looking for an actual problem. These concerns in my mind are exacerbated when you link it to the complaint process that's been alluded to. So customers in Texas, and I'll say a little bit about Tennessee as well... I'm sorry, in Florida. I'll say a little bit about Tennessee as well. You have a disgruntled customer who's been de-banked, they can file a complaint, and then the state's going to do an investigation. And I'm not going to make any assumptions about the sophistication level of the state investigators. So they'll go to the bank to compel this process. And if you kick somebody out of your financial institution because you have money laundering or illicit finance concerns, you don't really want to share your decision-making process.

And indeed, it can implicate the SAR filing process. And even before you get to the ultimate decision as to whether to file or not file a SAR, there's all sorts of things that lead up to that that are still confidential. And I spend some of my time in litigation discovery disputes, fending off discovery requests by would-be plaintiffs to try to get into the bank's decision-making process. There could be grand jury subpoenas at issue. And one, it's illegal to share a decision as to whether or not to file a SAR under federal law. It is illegal for a bank to alert the subject of a grand jury subpoena that there is a grand jury subpoena. So you have this perverse scenario in which the instances in which it is most justified to de-bank a customer will be the areas in which you really don't want anyone, including the state, looking into that decision-making process.

Now, there may be a counter-argument, "Oh, well, the state will keep it confidential." Florida Sunshine Laws are aggressively enforced by the state folks, and I have direct experience in this. In litigation, we're trying to keep certain things confidential. You can't. Their position is under the Florida Sunshine Laws. Everyone's got a right to go in and figure out whatever it is that the state has received. And so I definitely foresee instances in which true bad actors will manipulate this process and make complaints so as to try to discern what has or has not gone on. I really don't see Exxon coming in and complaining to the state, but a guy is running a Ponzi scheme, yes, and that may seem counterintuitive, but a lot of folks who engage in criminal behavior, their attitude is good offense, is a good defense. So, again, I just find this untethered to the practicalities and realities of an AML compliance program.

And then just wrapping up with Tennessee, in regards to the Tennessee statute, it is less broad than the Florida statute. So in that sense, it's better. It doesn't refer to quantitative or impartial or business sector factors, but it still suffers from many of the same issues. And I'll also note that it does provide actually for a civil cause of action to the disgruntled customer. And it also actually indicates that if a bank violates the statute, the bank itself could be subject to a criminal misdemeanor offense. So in one sense, it's more narrow and carefully tailored than the Florida law, but in another sense, in terms of enforcement, it's actually much broader.

Alan Kaplinsky:

So, Brian, I'm wondering if you could respond to what Peter had to say, but one thing in particular, I don't know if you were going to deal with this or not, but Peter made a comment that I've been thinking about and that is where's the injury here? I mean, haven't heard of a lot of people who are claiming that they're being kicked out of banks or they're not being offered bank services and it's because they own a gun shop or they're involved in the fossil fuel industry, or... I could go on and on and on. I mean, I haven't heard the harm that is typically a predicate for any legislation, let alone something as massive as what Florida has done. So wondering if you could include in your answer a response to an issue that Peter raised, but that's an issue I have as well.

Brian Knight:

Sure. So to start off with the Bank Secrecy Act and that risk element, I mean, I think it does depend on what the states mean by quantifiable and if they adopt that OCC definition, I think, Peter, in some of his comments, articulated what that would be

like. Let's take the bank that's like, "Hey, we do not think that the risk-to-profit value for banking a gun distributor because we're concerned that they may not be as tight as they should be on preventing straw purchases." Well, presumably, unless that's just a whim, if they've actually sat there and done the math, that's a quantifiable, impartial risk-based reason. It's quantifiable, they've done the math, it's risk-based. And unless it's like, "Well, I don't like Jim because Jim's my neighbor, but otherwise, I would tolerate this, but I don't like that particular person," it's an impartial criteria.

And as for the industry concern, again, I think that this doesn't stop banks from saying... I mean, the Treasury in their letter didn't have any specific examples. They had like... Well, imagine a fentanyl producer, imagine someone who produces things that might aid the Russian war effort. Well, okay. Fine, let's imagine that. Right? And presumably, unless the bank is going to say, "We are going to full stop not bank any company that produces fentanyl, which would mean a lot of different companies, well, its abuse is terrible, can also have legitimate uses, that would be a problem. But if they say, "This firm here, we're not comfortable that their supply chain controls are sufficient, we're worried that this is leaking into whatever, and here's some good-faith analysis of that," that would likely count. Likewise, another provision in this is family affiliation, right?

Well, okay, what if it's Putin's sister? Well, presumably you should be able to articulate like, "We don't want to bank this person because their Putin's sister, and therefore we think that there is a risk of sanctions evasion, and here's our math," not, "Well, we just are not going to bank anyone who might be distant related to Putin." And honestly, when you look at what the Treasury said about de-risking and how they also warn against excessive de-risking, de-risking entire countries and de-risking entire industries, I don't see how there's a big tension there. And then the question is how likely are banks to be allowed to cut off services without performing some individualized analysis? Or how consistent is that with existing Treasury guidance? The other part that he mentioned is the tipping off the presence of a SAR. And I think that concern is dubious in part because both laws include provisions that in their reporting sections that say, if such a report is prevented by or inconsistent with federal law, the report doesn't need to be provided.

And so that seems to be a fairly easy... I don't want to call it a workaround, because it's within the statute, but to the extent that the bank's like, "Hey, look, Florida bank regulator, we can't provide you this because in doing so, we would be highlighting that a SAR has been filed... Maybe not saying that last part, but just saying, "Hey, we can't do this. It's a violation of the BSA," unless Florida refuses to accept that as an answer, that's consistent with Florida law. And even federal regulation, while it does prohibit the disclosure of the fact that a SAR was filed, does not prohibit the underlying facts and circumstances that gave rise to a SAR being disclosed... Provided it's not disclosed to the people on whom the SAR was filed. And so in this hypothetical, saying to the Florida regulator like, "Look, we have real concerns about sanctions and that's why we dropped it." Unless the Florida bank regulator insists and says, "That's not good enough," that may well answer the mail on these claims.

And so I don't think that the risk to the BSA system is as acute as the Treasury made it out to be. And I worry frankly, because the BSA is so opaque, that the risk is that it becomes invoked just as like, "Well, we don't want to deal with this, so BSA," versus really trying to wrestle with where the exact contours of the BSA obligations are. And as to your question about like, "Well, where's the harm," these laws were passed, one, in response to some very high profile statements by national banks, by other people who have a certain amount of sway over national banks, particularly members of Congress that, "Look, we are going to use our power to cut off access to certain industries, either full stop, or unless they change their behavior to conform not to the law, but to what we think the law should be." And examples include firearms. They include the private prisons that the federal government uses as part of its immigration policy. It involves carbon-intensive industries.

And we can debate how much of that was rhetoric versus how much of that was reality, but people respond to what they see. And you do see firms and industries complain and lament about it being harder to access financial services. And one thing to keep in mind is the standard is not... And look, you can disagree with these laws. That's fine. And you can disagree with what is protected by these laws, but these were policy choices that the voters of these states made. And one of the policy choices they made and that's consistent with the policy choices we see in things like anti-discrimination law is the customer being able to get an alternative is not necessarily sufficient that there's the... Perhaps it's a normative argument or what.

That customers should not be disadvantaged on the basis of certain criteria. And even if they can find an alternative, that is not in and of itself a justification for the conduct. And if they can find an alternative, it's often an inferior alternative, and therefore the concern is that it will, at the margin, chill the conduct or the activities that the voters of Tennessee or Florida want to protect.

Alan Kaplinsky:

Peter? Any response?

Peter Hardy:

Well, there's one thing on which Brian and I agree, and that is that the BSA is very opaque. I will certainly agree with that. I am still concerned about the complaint process. And I feel that it can be used by folks who the law ostensibly does not seek to protect that is the bad actors, but it is there for them anyway. And it will also simply make a very difficult job that is AML compliance person, that job even harder, because I anticipate that many people will be very worried about these laws.

I mean, the argument may be, "Don't worry, the law is actually not as broad as you think it is, and it will be enforced intelligently." Perhaps I have more confidence in the first part of that sentence than the second part. But I think, regardless, the folks on the AML compliance end are going to be feeling hamstrung and will be, therefore, making decisions that will, in the aggregate, increase the overall risks to the financial system. So I hear Brian, but I still feel that this is perhaps more of an expression of political will than it is a real-world solution to a problem in the financial sector.

Alan Kaplinsky:

Well, I'd like to know, Peter Conti, whether you have any response to the remarks of Brian Knight or Peter Hardy, with respect to the AML concerns expressed by the acting comptroller, the currency, and the treasury.

Peter Conti-Brown:

Thanks, Alan. These debates obviously are incredibly important in ways that I think the defenders of Fair Access Laws might be misstating now, not necessarily Brian Knight among them. Brian, I think his nuance appreciating the fact that there are risk factors associated, as he discussed, with these fair banking laws that are specific to money laundering is correct.

I think that thinking about legislative intent and the efforts by legislators to be sensitive to those risks is incredibly important too. Some of the critiques of these laws that make them seem like so much money laundering buffoonery are wide the mark, to be sure. But I'm completely persuaded by Peter Hardy and his analysis of this.

The question here is not simply are these laws exploitable by money launderers? Of course they are. The question is how well are they exploitable? And do the regulatory responses, especially the shifting of the burden of proof that fair banking laws require toward the banks, to produce more information about their risk assessments, including their AML risk assessments. Does that make money laundering so easy by those who would play the shell game of complicated money laundering?

There was a new study that was just released this week that looked at the value of a college degree to the mafia. It's kind of one of those playful articles that economists like to write from time to time about intergalactic free trade and the like. And here the answer was yes. In fact, the value of sophistication and what you might learn in college to the mafia is non-zero, and it has everything to do with money laundering.

The idea is that the most sophisticated of the money launderers will have... These laws present a gift to those sophisticated money launderers. And the reason is because the way that the risk assessments, that include qualitative ideas, that include including and perfectly legal substrata of sectors, can find themselves subject to money laundering. In ways that banks are not always going to be able to produce in the way that the fair banking laws require.

I think that the defenders of fair banking laws need to take this on board. They're making the lives of money launderers easier. The lives of police efforts to stamp out money laundering harder. And the question then becomes whether that balance is what they want to seek?

And many people would say absolutely because the money laundering and anti-money laundering laws are way too onerous as it is. But if that's the claim, I would like to hear it made in exactly those terms because I see this as inviting opportunities to engage in substantially greater money laundering by the most sophisticated of the players in this space.

Alan Kaplinsky:

So, Brian, I got to give you an opportunity to respond to Peter.

Brian Knight:

Thank you. And I know we're short of time, so I'll make this quick. I take all those comments. I would say, however, given how little we know about the effectiveness of our money laundering laws, given the fact that Congress has asked the relevant agencies and so far gotten no meaningful information, I do think that before we just say, "Well, it might make money laundering easier and therefore this isn't worth it." We also need to get an appreciation for exactly what the real concrete risk we're talking about is.

Because if we're honest with ourselves, any number of laws we cherish, make the life of law enforcement harder at the margin. And so that trade-off is endemic in all of our public policymaking. And so if the government can come forward and say, "No, look, here is concrete evidence that if you pass this law, it will create massive problems or serious problems or moderate problems." Who knows?

Well then that's something that the policymakers and the public can evaluate. But if it's just an appeal to a parade of a possible risk or a possible threat, on those grounds, you could outlaw curtains because they make law enforcement's life more difficult.

And so I very much take Peter's point and I think it's a serious one, but I also don't think that we should just default to, oh, it might complicate money laundering and therefore it isn't worth it. We do have to look at how realistic that threat is, which would require concrete information and what other values are at play.

Alan Kaplinsky:

Okay, well, let's move to another issue. And this time I'm going to start with Peter Conti-Brown. And that is, Peter, are these state fair access laws preempted for national banks, federal savings banks, or federal credit unions? Or put differently, do these state laws prevent or significantly interfere with the exercise of a national bank powers under the recently decided Supreme Court opinion in Cantero v. Bank of America and other Supreme Court cases including Barnett Bank?

And if so, in what ways is there a conflict or significant interference? And I guess I would add to it, what is the power, which power are we talking about that's being interfered with? If you believe that.

Peter Conti-Brown:

If we had been recording this podcast prior to the Cantero decision, I would have I think a different answer. Something that's funny about the Cantero decision is the fact that it commanded unanimity of the court. It was a 9-0 opinion. I have absolutely no idea what it means, to be perfectly frank with you

Alan Kaplinsky:

And, Peter, that makes two of us. I don't know if you saw the blog that I wrote about the opinion, but I basically said the Supreme Court punted. In order to get that unanimous opinion, they provided I think no guidance. They didn't add anything.

Peter Conti-Brown:

So I'm not a constitutional law scholar by any stretch, but as a banking historian, I'm deeply steeped in traditions of the dual banking system and preemption with respect to banking. And the problem, you put your finger exactly on the problem.

The standard enunciated by the Cantero court that such laws are as state consumer laws are only preempted if they prevent or significantly interfere with the exercise of a national bankers powers. When I went to law school, I learned that words like significantly are weasel words. And we don't use adverbs like that because they invite too much negotiation about the contours of exactly standards like this.

So this is absolutely not a rule. The Cantero court in the Second Circuit pronounced a rule to say that state consumer finance is categorically preempted because consumer financial law is a category of national bank powers. And this is a rule that where fair banking laws, fair access to banking laws in 2024 have much more partisan content in them.

Republicans are lining up on one side more or less. Democrats more or less lining up on another, although that might be overstating it a bit. Preemption is no such thing. This is partisan scramble. So I want to be clear about this.

The legal analysis that I find more persuasive is much more one based in rules rather than standards. So the Second Circuit standard or Second Circuit rule made more sense to me as an application of Barnett Bank to say that consumer financial protection, as opposed to police powers or employment law or many others, would be preempted.

But the Supreme Court, 9-0, did not agree with that. And so now the analysis must come from the courts following litigation, whether in fact these fair banking laws are of the kind or type that prevent or significantly interfere with the exercise of national banking power. I think that they do.

I don't think it's a close call. I look forward to the litigation. I assume I would even write an amicus brief on behalf of national banks or otherwise be engaged because I feel pretty clear about this historically. But the ability to choose customers is the beating heart of the banking enterprise. Banks are not public utilities, contra arguments that have been made to exactly that effect.

And so choosing your customers means defining your expertise. So having a bank that has a reputation for a specific sector over another, or bank or federal credit union that, or federal savings bank that caters to one clientele among labor over management or other kinds of things. So long as they're not subject otherwise to anti-discrimination laws, then banks are permitted to choose their customers.

Now, Brian Knight's point earlier that this is a flavor not of public utilities' law, as I've characterized the fair banking laws, but indeed of anti-discrimination is a really interesting question. So what I regard anti-discrimination laws as being preempted, if they go farther than the federal legal standard, I'd be tempted to say absolutely yes. So I will accept the premise of Brian's argument and essentially agree with him.

And so that would be exactly the kind of disharmony that we're talking about. Where national banks under federal law, very specific anti-discrimination requirement under the ECOA and Civil Rights Laws. And states that want to extend them to prevent national banks from choosing customers beyond that footprint. That is the kind of conflict where preemption analysis comes into play.

And I think that ability to choose your customers, whether they're talking about specific sectors or because they have greater or lesser concerns about any money laundering, as the OCC clearly does in this case. Or about political affiliations which are nowhere entered into federal law. I think that is absolutely part of it.

So I would think that Florida law as applies to Florida State banks, there's no constitutional issue that I see. Florida law as applied to national banks doing business in Florida on the other hand, I do think that those would be preempted. And the Florida National Banks should look at the impact of this law on their ability to pursue their business. And call some lawyers and figure this out. Because I think that Florida should lose in litigation on a preemption analysis even after Cantero made that analysis less categorical.

Alan Kaplinsky:

Yeah, surprising to me, Peter, that there hasn't been a lawsuit initiated as yet. It seems like certainly the banks are not afraid of bringing lawsuits when they think the federal government has done something wrong. And they've challenged state actions quite frequently. So that surprised me a great deal. Brian, I want to give you an opportunity to respond to Peter.

Brian Knight:

Yeah, so this question I think is delightfully ironic because of course, cutting down on National Bank preemption of state law has been a progressive project for years. And the language that the court cited to in Cantero, yeah, it cited Barrett Bank, but in the context of the Dodd-Frank Act, which adopted the Barrett Bank standard or whatever it might be.

And so on the one hand, I agree with Peter, that I think this is a really thorny question under what guidance we have from the Supreme Court currently. And if you look at these laws looking at Florida, looking at Tennessee, there are all these different things they do. And some of them I think you can make a much stronger argument from preemption. And other elements of it, I think it's weaker.

And kudos to Peter for having the courage of his convictions to come out and say, "State anti-discrimination law is probably preempted against national banks." Which is a position the OCC did not take previously.

And kind of same deal with unfair and deceptive trade practice law, which the OCC is on the record, not through interpretive letters and such, saying, "Yeah, state law generally applies." It is possible. It is possible as a matter of law that anti-discrimination, state anti-discrimination law is the type of thing that could be preempted under the National Bank Act.

I don't know if that's the case. I have my doubts, in part because I don't know if you can say, "Oh, well part of the power that a national bank is given is to choose its customers for any reason, whatever." Maybe. Maybe the only limits are federal anti-discrimination law, but that's not a manifestly obvious conclusion to me.

So if nothing else, when and if the litigation comes, this will be a really interesting test for this question. And I expect we're going to see some very interesting bedfellows. Where Peter's submitting an amicus brief along with the Bank Policy Institute. And here I am working with public citizen submitting my amicus brief on the other side.

And it'll get real interesting and weird and it'll be a good time. And the legal nerds will have stuff to talk about for years and years. So if nothing else, we should thank the states doing this for that. But it is going to be a tricky question.

Alan Kaplinsky:

The other thing I would add is that the OCC clearly has its marching orders, I think. And that is, although the Supreme Court didn't directly say that their preemption regulations are invalid, they certainly implied that they are invalid. Even though ironically there's a footnote toward the end of the Cantero's opinion. Where they tell the Second Circuit to consider the impact of the regulations.

But the acting comptroller himself has come out and said that, "We're going to be taking a fresh look at National Bank Act preemption." He said that in a speech about six, seven weeks ago, but I haven't heard anything further.

In the meantime, the briefing in the Second Circuit is moving ahead. Amicus briefs are being filed there. The Ninth Circuit, which has got its own case, they're actually three cases, one in the second. One in the First Circuit, case coming out of Rhode Island. And one in the Ninth Circuit.

The Ninth Circuit got it all screwed up. They just basically thumbed their nose at the Supreme Court and didn't apply Dodd-Frank or Barnett Bank or any of the other cases. They just said there's a federal statute that for high cost mortgage loans requires that mortgage escrow accounts be maintained and that interest be paid. So they went in there a completely different direction. They're going to get slapped down, I'm sure by the Supreme Court. First Circuit, the briefing I think is about to begin, but it's not gone very far.

I think the next question, I think we really have answered, so I think this shouldn't take very long. As a matter of sound public policies, it makes sense to banks who comply with the Equal Credit Opportunity Act and the Fair Housing Act can't make business decisions based on what's in the best interest of its shareholders.

What makes banks any different than other businesses then? You've already made the point, Peter, banks are not utilities. They never have been. And do you want to add anything to your comments on National Bank Act preemption?

Peter Conti-Brown:

I think just to respond to Brian, I am not anyone's idea of a paragon of the progressive left. But at the same time, I'll confess the idea that I would ever work with BPI on a project is not something I would ever take seriously.

But the strange bedfellows point that Brian makes is a really good one. So what is good for BPI shareholders, and they are one of the most magnificent knife fighters in Washington representing those shareholder interests, in this case will deeply offend the progressive cause against preemption.

And my answer to that is much more as a historian, as opposed to as a politico, which I in fact am not. And this is what the dual banking system is. There's this ability for national banks to be subject to different standards than the states subject their own banks. If we accept that, then the question as Brian posed it is exactly correct. Then what are the contours? Where do we permit it?

And I think where I see Cantero going a little bit differently than what pre would have proceeded it in other preemption cases, is this emphasis that there are going to be questions about banking powers. That national banks are going to have... Laws

about those banking powers that national banks are going to have to obey state by state, where those laws are marginal to the business of banking.

And for some banks that specialize at that margin, and there are banks that specialize in every niche of financial services that you can imagine, those will be existential. And the question is going to be not, I think the analysis is going to be not does this specific bank live or die by this marginal exercise? But does the business of banking live or die by this exercise? That's where I think the question is going to come in most prominently.

And in my view as I read the Florida law especially, this looks to me like it is existential for national banks as a class. But when you write standards as broad as the Cantero court did, your mileage is going to vary. And I will not I, while I have a strong view about what the law is and indeed what it should be, I don't have a betting view of what the law is going to be. Because I have no idea where judges are going to come out on this.

Alan Kaplinsky:

Yeah. Well, and my guess is the Cantero case is going to end up back in the Supreme Court. And at that point, they're really going to have to decide rather than to kick the can down the road.

We're drawing toward the end of our program. So let me throw out one final question to get a response from all of you. And that is what's wrong with letting competition rather than state law determine who banks want to serve? How about if I start with you on this one, Brian? What's wrong with competition?

Brian Knight:

Well, I think in the case of banks, there are certain reasons why we should be skeptical of competition in at least some cases. First off, and again, if you accept the premise of anti-discrimination law, then you acknowledge that there are certain situations where competition may not adequately address a problem.

And with banks, I think you can make an argument that those problems are particularly acute in certain areas. One, banks, unlike other businesses, most other businesses, are granted a ton of power and protection by government, by law. Why? To facilitate a lawful economy.

If instead banks are being used, either by management or by some other group, to try to control or de facto regulate, arguably that's a problem and a misuse of that power. Then we also have the concern that if what we're talking about are issues, and then obviously it varies, right? Issues around political engagement, issues around constitutional rights, vary from issues around say fossil fuel extraction.

But at least some of these cases, we have issues about whether or not this is the type of thing that a state government has legitimate interest in protecting the meaningful exercise of the right. And the market is not going to tell you on a political question or on a moral question, the market's not going to tell you who's right. It's going to tell you who's rich. Now, for a lot of questions, that's what you want know, but not for all of them.

And then finally, in a world where, I mean, I know we have north of 4,000 banks. Though really that number can be a little bit misleading because most of them are not actually available to any given customer. We should also be wondering about how robust the market actually is at solving these problems.

And so I think those are all reasons for some skepticism, and those are reasons that have been used in the past to curtail discretion. And so obviously, if you look at the stated problems or the stated concerns, and you don't think those are valid or worthwhile, these arguments don't have force.

But the people of Florida, the people of Tennessee, they did, and they acted accordingly. And so I think that's a concern that we should have or a reason we should have on this.

Alan Kaplinsky:

Well, Peter, I'm going to give you the final say, Peter Conti, the final say. And then we're going to sign off.

Peter Conti-Brown:

Well, my wife and kids will make me correct you. My last name is Conti-Brown, just so you know.

Alan Kaplinsky:

I'm sorry. Yes.

Peter Conti-Brown:

No problem at all. Conti was my wife's maiden name and that side of the family cheers you every single time you call me that to make me a celebrity at Thanksgiving this year.

If we had more time, I think I would devote my disagreement with every one of Brian's sentences in that last statement. But I would regard this debate as a debate among friends because I think that the ideas here that we are engaging are pretty vital. And I think that the differences boil down in important ways to what it is that we think the relationship between the banks and the state actually is.

I just don't agree at all that the market is so dominated by a couple of the big banks, which are so captured by their regulators. That a bank that fires a prominent conservative as a conservative would face no retribution in the marketplace. I think that argument on its face is factually wrong.

Brian Knight:

Did I make that argument?

Peter Conti-Brown:

You make the argument that we don't have the benefits of competition because of the way that-

Brian Knight:

If I might, that's not... Respectfully, I don't think, and shame on me if I didn't make it clear. I think my argument's more nuanced than that. Now, I know we're short time, so I'll let you get back to it, but just for the record.

Peter Conti-Brown:

Yeah, so then let me not put words in Brian's mouth, let me instead either take on an argument as I see it, or which Brian can characterize as a straw mat if he wants.

I think that this is precisely the kind of question of where markets are going to be at their best. And I think the 4,000 number of banks undersells exactly the vibrant competition that we have in the 9,000 IDIs that we have in the United States, thousands of which are very able to participate in the service of clients of any ideological stripe.

What this does instead is ossifies the debate that we're having in October of 2024. And makes it the problem of bankers who have not yet even graduated from high school yet, years and decades down the line. Far better, they let the dynamism of the market, which is alive and well in the banking sector, to punish or reward those banks who've selected their clientele in a way that will lead to better or worse business opportunities as the markets unfold.

And I think that's true even if you get far left or far right. Regulators up in the business of these banks, because blessedly in America, we have elections. And those elections mean that we kick the bums out and let the others try again until we kick those bums out and let the others try again. So that's why I think in this sense, I am a deeply committed pro-market analysis of the banking sector. And think that this problem, if there is one, is one that the market can solve.

Alan Kaplinsky:

Okay, we have come to the end of our program. And I want to thank my three guests today, my two special outside guests, Peter Conti-Brown and Brian Knight. And I want to thank my colleague, Peter Hardy, who is very much focused on, very

concerned about AML issues. And I know this is an issue that has been covered on Peter Hardy's blog and all. What is the name of your blog again, Peter?

Peter Hardy:

The first blog is Money Laundering Watch.

Alan Kaplinsky:

Money Laundering Watch. Yeah. And we have republished it on Consumer Finance Monitor. So thanks to all of you.

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