



## Podcast Transcript

# AD-torneys@Law Episode 6: Insider's Predictions for the FTC

**Date:** January 5, 2022

**Guest:** Daniel Kaufman **Host:** Leeann Lee

**Run Time:** 13:47

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**Lee:** In a 23-year career at the Federal Trade Commission, Daniel Kaufman served as a senior official with extensive consumer protection experience on advertising and marketing practices, as well as privacy and data security issues. Most recently, Daniel served as the acting director for the Bureau of Consumer Protection at the FTC.

Daniel left the FTC in October and joined BakerHostetler as a Partner in our Washington, D.C. office. He is a member of the firm's Digital Assets and Data Management, DADM, Practice Group, where he will work with the group's advertising, privacy, emerging tech and cyber security teams.

I'm Leeann Lee, and you're listening to AD-torneys@law, our podcast series devoted to all things advertising, marketing and digital media law. Today we're chatting with Daniel to learn more about his experiences at the FTC, the current state of FTC actions and policies, and his predictions related to consumer protection.

Daniel, thank you for being here. We have a host of questions for you, so let's get started. First, can you tell us about your career before arriving at BakerHostetler and what kind of cases you worked on?

**Kaufman:** So, I joined the Federal Trade Commission in 1998 after about four years as a litigator in New York City. I had a really varied career at the Federal Trade

Commission. I started there litigating false advertising cases, spent a lot of time in federal court on just a number of different health cases, then became the advisor to former Chairman Majoras from about 2005 to 2008, and in that role, I started to get involved more broadly with the consumer protection work that the FTC does, including privacy and data security work.

After that, I had about a three-year tenure as the chief of staff for the Bureau of Consumer Protection, where I really focused on a lot of the behind-the-scenes work on how the Bureau functions and operates. And since about 2011, until I joined BakerHostetler, for most of that time I was the deputy director of the Bureau of Consumer Protection, where I basically worked on everything that the FTC does: advertising issues, privacy, data security, financial services, order enforcement, green issues, endorsers, testimonials. Really, just about everything that the Consumer Protection Bureau does. And also for the first half of 2021, when Commissioner Slaughter became acting chair, I was the acting director of the Bureau of Consumer Protection for the first half of 2021. Really, responsible for everything that goes on in the Bureau, and joined BakerHostetler a couple months ago in October in the Privacy and Advertising Group.

Lee: So, now let's talk about the FTC. What are the consumer protection priorities of the FTC under the new leadership of Chair Lina Khan?

Kaufman: Thanks for the question. So, it is a little bit challenging, and it does require a little bit of reading the tea leaves to understand the consumer protection priorities. I think on the competition side, there seems to be a much clearer roadmap of Chair Khan's priorities. Now, I will say backing up a little bit, when I was the acting director under Commissioner Slaughter, she made it very clear she had two primary consumer protection priorities: working on issues involving COVID and working on issues involving racial justice. But when Chair Khan took over, she's been a little bit less clear in terms of what her priorities are.

A few months ago, she did release a four-page memo to staff that set forth her priorities, and a lot of analysis and discussion has gone into that document, both of what was mentioned, what wasn't. But it is a little bit less of a clear roadmap than what Acting Chair Slaughter had done. But some of the key takeaways seems to be, now more broadly she wants to do work that affects both the competition mission and the consumer protection mission. So, sort of getting rid of some of the silos at the agency.

There is a lot of interest in issues involving workers and businesses, including franchises, gig workers. There is a strong desire to go upstream, to look after some of the larger players that may be causing significant harms to consumers, an interest in marginalized communities, a focus on root causes and sort of the structural incentives that may be causing unlawful conduct. Definitely less of an interest in whack-a-mole going after different fraudsters. Lots of concern about data, how data is being used, the consolidation of data. And finally, another issue that seems to be coming up more frequently is contract issues. Whether it is sort of noncompete agreements or issues like repair restrictions on consumers' ability to get certain products repaired.

So, I think it remains to be seen exactly what it is going to be, but those are sort of some of the broad takeaways that I've been able to glean so far.

Lee: And what is your take on the new public Commission meetings that started as soon as Chair Khan took over? Do you think our clients should be paying attention?

Kaufman: So, I will say, I was very surprised when they started. I was at the Commission in my deputy director role when Chair Khan took over, and, lo and behold, we were starting to have these public Commission meetings, which was very atypical. I think in my career I was not aware of any kind of public Commission meetings like these. So, and they've been interesting to watch, you're definitely seeing the dynamic among the commissioners. You're seeing a lot of partisan concerns being raised by the Republican commissioners. It's been an interesting experience to watch these Commission meetings unfold.

I do think there is a period in each of these meetings, it is quite interesting, where members of the public get an opportunity to speak for two minutes about an issue of concern, to put it on the radar for the FTC to consider. And every meeting, the meetings are occurring monthly, people from the public, about a dozen or so, talk about different issues. So, I do think if there are clients that have issues that they want to bring to the FTC's attention and to the public's attention, it is a venue that is definitely worth considering. There have been a lot of important consumer and competition issues discussed at these meetings. Now, it remains to be seen what the FTC will do with respect to the issues that are raised there. But it is another way of getting some attention at the FTC for issues that might be particularly important to you or your client.

Lee: Now, let's go into a little detail about the new approaches being taken by the new FTC leadership. What is the significance of the 1,800 letters that the FTC sent out regarding endorsements and testimonials, money making opportunities, and for-profit schools?

Kaufman: In order to understand the significance of these letters, we really have to start with an important Supreme Court decision that issued earlier this year, *AMG*. And in that case, the Supreme Court substantially reduced the ability of the FTC to get monetary relief when they're suing in federal court. So, what the FTC is doing now is they're looking for every opportunity they have, every statutory provision and other means to get penalties or monetary relief against companies.

So, whether it is a rule that has a civil penalty component or these letters, there is an interesting provision in the FTC statute that provides that if the FTC, if a company has actual knowledge that the FTC has deemed a certain practice to be unfair or deceptive in an administrative proceeding, then the FTC can go after that party for civil penalties if that party violates those principles. So, it is a sort of convoluted, unpredictable statutory provision, but it is there, and it is unclear whether they're going to be successful.

So, what the FTC has done, they've sent out 1,800 letters to start that process of putting companies on notice and having actual knowledge that there are certain principles set forth in old FTC cases that have deemed certain practices as unfair or deceptive. And they focused on endorsements and testimonials and moneymaking opportunities and issues involving for-profit schools. And it is interesting, when you look at the endorsements or testimonials, the letter, they lay out some pretty basic consumer protection principles that, for example, you can't use an endorsement or a testimonial to make a claim for a product that is otherwise unsubstantiated. Fairly well-established consumer protection principles.

Now, it is unclear whether these letters will be able to be converted into a potential consumer protection action. But at a minimum, the letters are reminding a lot of companies out there about their compliance obligations to make sure that they're not using endorsements or testimonials in a way that is deceptive or unfair, that they're being cautious about what they say about moneymaking opportunities. So, it is a really interesting strategy that the FTC is taking.

Actually, my fellow Partners, Randy Shaheen and Amy Mudge, wrote an interesting blog raising some issues that would come to light if the FTC actually tried to enforce to get civil penalties in this context. But the principles set forth in the letters are pretty fundamental consumer protection principles, and companies should be looking at them closely to make sure they are in compliance.

Lee: Let's shift gears a bit. Chair Khan's September memo to all FTC staff emphasized the importance of the agency being, quote, connected to the communities that we serve, and stated that she would like to, quote, expand our regional footprint. A lot of our listeners may be familiar with the FTC's D.C. presence, but can you talk a bit about the regional offices at the FTC and how to interpret this statement?

Kaufman: Yeah. The regional offices at the FTC play a really important role for the agency. Now, they primarily do consumer protection work, though three of the regional offices also do competition work. So, the regional offices, they do a lot of law enforcement. They do a lot of outreach, and the kind of law enforcement they do is not necessarily sort of regional lawsuits. We've got regional offices that have brought a lot of large national advertising cases and many cases involving well-known companies.

Now, generally the regional offices have been overseen by the Bureau of Consumer Protection, but there are three offices, as I mentioned, that also do some competition work. So, it is something to keep in mind, that if the FTC is looking at your company's practices, there is a decent chance that it is not someone in headquarters, but a regional office will be leading the investigation and possibly working with someone in the D.C. headquarters on the matter. But the regional offices, not many folks necessarily experience them if you're not part of their investigation, but they do a lot of incredibly important work for the agency both on enforcement and on outreach.

Lee: So, Congress seems interested in giving the FTC more resources for its privacy work. What would \$500 million over 10 years mean for the FTC's privacy program?

Kaufman: So, just to give you a little bit of perspective, the FTC is a relatively small agency in D.C. standards. The budget is maybe about \$350 million a year for both the consumer protection and the competition mission. So, an extra \$50 million a year for the FTC's privacy program would be an enormous game changer. It would allow the FTC to do, certainly, a great deal more privacy work.

Also, it is worth noting that the \$500 million is requiring, or would require I should say, it hasn't happened yet, would require the FTC to create a Special Bureau of Privacy. So, it would really elevate the privacy work of the agency and allow the FTC to do a lot more privacy work, whether it is enforcement or rulemaking or policy work or studies. So, it would really be a dramatic change in the agency's ability.

One interesting thing to note is that although it is a lot more money, it doesn't come with any new authority at the moment. So, the FTC would still be using its traditional authority on privacy and data security matters but have a lot more resources to be able to do that work.

Lee: This has been a great conversation. Do you have any final words on what to expect from the FTC with respect to consumer protection for the next few years?

Kaufman: It is going to be a really interesting few years at the FTC. There is a lot of interest and a lot of expectations about what the FTC is going to be doing over the next few years, and it remains to be seen if the sort of aggressive agenda that folks are anticipating will actually be accomplished and how it will be accomplished. And I will say, I spent 23 years at the FTC. It has always been a great place to work. There are incredible career staff at the agency who are smart, talented, creative, and I can tell you I will certainly be watching closely to see what they are doing but from the outside now instead of working at the agency. But I do think it is going to be an interesting few years to see what the FTC does on advertising, on privacy, on all sorts of consumer protection issues.

Lee: We've covered a lot of ground today. Thank you so much, Daniel. If you have any questions for Daniel, his contact information is in the show notes. And if you haven't already signed up, be sure to subscribe to BakerHostetler's AD-torneys@law newsletter and blog at bakerlaw.com. As always, thanks for listening to BakerHosts.

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