Consumer Finance Monitor Podcast (Season 9, Episode 39): When Consumer Protection Disclosures Work Too Well: New Podcast Explores the Distributional Costs of Effective Consumer Regulation

Speakers: Alan Kaplinsky and Florencia Marotta-Wurgler

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. And I'm your host, Alan Kaplinsky, the founder and former practice group leader for 25 years, and now senior counsel of the Consumer Financial Services Group at Ballard Spahr. And I am delighted to be moderating today's program. For those of you who want even more information about the world of consumer financial services, don't forget about our blog, which was organized on July 21, 2011, the very same day that the CFPB became operational. We've hosted the blog since that day, so there's a lot of relevant industry content there. We try to follow all the important developments that are occurring in the world of consumer finance.

We also regularly host webinars and subjects of interest to those in the industry. So to subscribe to our blog or to get on the list for our webinars, you can visit us at ballardspahr.com. And if you like our podcast, please let us know about it. You can leave us a review on whatever platform you may be using to access the podcast. And also, please let us know if you have any ideas for other topics that we should consider covering or speakers we should consider inviting as guests on our show. We very often get some very good ideas for topics and speakers.

Okay. Today, we're going to be discussing a new and a very thought-provoking article. The title of the article is called The Distributional Costs of Effective Consumer Regulation. And the article is co-authored by Tamar Kricheli-Katz and Professor Florencia Marotta-Wurgler of NYU Law School. At its core, this article explores attention that exists at the heart of modern consumer protection policy. Interventions designed to improve decision making, especially disclosure rules, may not affect all consumers equally. In fact, they may improve outcomes for some groups while unintentionally shifting behavior in ways that disadvantage others, particularly financially vulnerable consumers. This article draws on a set of quasi-field experiments involving credit card style gift cards, and it tests how different disclosure formats work and how they affect consumer choice across income groups. They range from hidden terms to fully displayed terms to what I would refer to, and the author refers to, as salient simplified disclosures.

What makes this work especially important is that it pushes beyond the traditional question of whether disclosure works and instead asks the question, for whom does it work, under what conditions, and at what cost? Let me just say that the article is available for your reading pleasure on SSRN. You just need to do a search of the person I'm about to introduce who is our very special guest today, Professor Florencia Marotta-Wurgler. And I'm going to tell you a little bit about Florencia. She is what I would describe as a leading scholar in consumer law, behavior law and economics. She's a professor at NYU Law School and has done influential work on consumer contracts.

Florencia is a leading scholar in consumer law and behavioral law and economics. She is a professor at NYU School of Law and has done influential work on consumer contracts, disclosure, and digital markets. Her research frequently examines how consumers actually behave in real world markets and how legal rules interact with bounded rationality and market design. I got to know Florencia when she was a co-reporter of the American Law Institute Project, which resulted in the restatement of consumer contracts. Florencia was a co-reporter on that project. Took a lot of time to get it through, but it eventually made it through. So Florencia, a very warm welcome. Great to have you here.

Florencia Marotta-Wurgler:

Alan, thank you so much for having me here. It's terrific to be with you again after all these years.

Alan Kaplinsky:

Thank you. Thank you. Okay. So I've got a bunch of questions about your article, which I thought was absolutely outstanding. Your article starts with a familiar assumption in consumer protection that better disclosure improves decision making, but your findings complicate that. How would you summarize the central tension that you and your co-author are identifying?

Florencia Marotta-Wurgler:

Thanks for that question. So yeah, so the traditional or standard assumption in consumer protection for years has been that many types of market failures, specifically in consumer markets, stem from imperfect information. So we just don't know what the terms are. We just don't know all of the aspects of a transaction. And the standard answer, both in theory, which is quite elegant and simple, but also in practice has been just more disclosure. Of course, the evidence have been mixed on that. A lot of disclosures have failed. And the answer to that has been to double down on disclosure and to make it better. So as you say, the assumption has been lately that if we have better disclosures, we will have fewer mistakes and better informed choices. Now, interestingly, we find that that is indeed the case, that when you make disclosures behaviorally informed... And by that we mean disclosures that are simple, that focus on just maybe the core, the most important terms, and are just given just in time when you're making the decision.

I think the restaurant letter grades are the poster child of this kind of disclosure. So what we find, that there's two effects. In a way, we find what regulators would love to hear, which is... And which surprised us in a way, because I've spent more than a decade finding how disclosure has failed miserably. Now, when you actually make it better and simpler and involves key terms, we do find that better disclosures, these behaviorally informed salient disclosures in fact reduce mistakes. But we discovered an additional effect, which is yes, that behaviorally informed disclosure actually works in having the individual focus on the terms, but we also found that this disclosure shapes how people think about trade-offs. And so what we find is that for financially strained consumers, salient disclosures may activate what behavioral economists have identified and call as a scarcity mindset.

So the paradox is the same disclosure that improves decision making overall may also intensify these scarcity mindset features, which are this focus on short term, immediacy focused choices among the financially vulnerable consumers in a way that leads them to make choices that might be fine for the short term, might actually end up hurting them later on. So this is why we say that these types of new behaviorally informed disclosures might "work too well," in that disclosure can reduce mistakes while simultaneously increasing inequality in outcomes. So you can't really have it both ways, at least in the settings that we studied, when the choices involve trade-offs. And we can talk about that a little bit more. So this is a tension at the heart of the paper.

Alan Kaplinsky:

Yes. Let's talk about the experimental design and what's new. You examined three disclosure formats that you describe in the article as expandable, full disclosure and salient disclosure. The salient condition seems especially policy relevant. What is the key innovation in how you designed these experiments compared to prior disclosure research?

Florencia Marotta-Wurgler:

Thank you for that. So there's terrific prior disclosure research. In fact, wonderful field studies that explore, for example, the extent to which different types of disclosures affect individuals' propensity to select the best or less dominated 401(k) or whether behavioral interventional disclosures affect people when they're seeking payday loans. Now in the context of standard form contracts, we've seen a bit less of that. And the innovation in our study is, we do two main things. One is, we're interested in evaluating the extent to which currently and legally enforceable disclosures, these are disclosures that would satisfy... So one of the things that we learned from the restatement of consumer contracts is how central how you present terms is to deciding whether a contract is enforceable or not, especially online. So the first thing we do is, well, let's evaluate in a real setting where, not when people are asked hypothetically what they would pick, but actually when they're getting paid to select different cards. Let's use the three different forms of enforceable disclosure regulations.

So these are the types of disclosures that even though they differ in how effective or saliently they present terms to consumers, courts have decided that this is okay. One is when basically you have to agree to something or the terms are expandable in a hyperlink. The other one is when the terms of a credit card appear in a block of text in front of your face. And the other one is when the terms, in addition to the block of text, are summarized in a Schumer type box disclosure so that you can make your choices. So that's the first innovation, which is to say, how do currently legally enforced disclosures work? And what we find is that the full disclosures, the textbooks in your face and the expandable disclosures are basically as good as nothing. Nobody clicks and nobody reads, glosses over the block of text. So that's the first thing.

And then, of course, we have the more saliently or behaviorally informed disclosure, and that seems to have an effect. And we were surprised about that. So that's the first innovation. It's a quasi-field study because it affects people actual choices. The second innovation is to focus on something that's slightly different empirically, which is, let's focus on the distributional effects. Do disclosures work in the same way for all people? Most of the research has focused on, do disclosures work at all in the aggregate? And we really are interested in seeing this distributional effect. And finally, we're interested in seeing the extent to which this behaviorally informed disclosure is actually activating processes that might actually have an effect on how we think about the choices that we make. So those are the three innovations.

Alan Kaplinsky:

Right. So let me ask you this. You chose for the experimental setting, credit card gift cards. They're not really credit cards, but they're gift cards, I guess, the kind that either are loaded already with cash and can be used to make purchases, and some that are one time purchases, and some are reloadable, I assume. Why did you choose that particular experimental setting?

Florencia Marotta-Wurgler:

So many experimental settings have gift cards of particular things, an Amazon card, a Starbucks card. We didn't want to do that because we didn't want the different types of cards to have an effect on preferences, in a way. By choosing a gift card that it's almost like it's cash with strings attached. So this is as close as you can get to the types of choices that individual make. And of course, we're not interested in how they're going to spend the money, but we're interested in how they think about the strings attached to the money that they're likely going to get.

Alan Kaplinsky:

And so I guess you're referring to reloadable cards, a card that might be issued not by a retailer, but by a Visa, MasterCard or something like that. Yeah. Okay.

Florencia Marotta-Wurgler:

Yes. The cards were taken for... So nothing is... So the disclosures are taken from actual disclosures and the cards with their terms are taken from actual card issuers, like Visa, American Express and MasterCard. And what's interesting is in that how they vary their terms. So some have different activation fees, how much it's going to cost you to activate the card. So there's a price. Others, they also differ in when the money will become available. And then there's transaction fees and all sorts of other fees if you want to reload the card. And these are secondary terms that we're studying now in a follow-up study. Here, we're focusing on the main terms. So price and availability, which are as central as they get.

Alan Kaplinsky:

Yeah. It's interesting. One of the points that the article makes is that sometimes there's certain salient terms that will appeal more to people who are of lower income, who might, immediacy of the funds could be more important than anything, even more important than the fees. Is that right? Do you think that's why the results came out the way they did, that you had this variation in outcomes depending upon whether people were lower income and probably had a greater need to get funds than the other disclosures that were made?

Florencia Marotta-Wurgler:

Right. You raised a really interesting point in the paper. So there's two things that we study. One is, well, what happens when you give consumers three choices and one has a single best choice? So there's a clear better card. It's a card that has the lowest fees and its most immediate availability. When we present that condition, individuals of all incomes do better with better disclosures. In fact, more financially strained individuals make many more mistakes when the disclosures are not very salient. So in a way that the salient disclosure, when there's a single best choice, acts as an equalizing thing, in that it corrects mistakes a lot more for the more financially constrained consumers.

Now, what happens when there is no single best choice anymore, there's one choice that's clearly inferior? But now you need to choose between receiving $100 now and paying a fee of $10, and then we raise it to $40. So that's huge. It's a huge amount. Or waiting two weeks, which is almost nothing. And what we find is that as you increase, as you make disclosures more salient, the propensity to choose the dominated card, the card that has the worst fees and the worst times actually does go down. So that might lead you to think, well, this is a win-win. A salient disclosure is great. Now, when you divide individuals by their income or financial stress level, you see different things. That when the disclosure is salient, that means that it's this thing in the box that you get to... One thing you see is you get the money now. And if you're struggling for cash, the money now acts almost like this kind of luring siren that you cannot resist.

Alan Kaplinsky:

A magnet.

Florencia Marotta-Wurgler:

A huge magnet. And you just pay less attention to the fee. So a perfectly expected pushback is to say, "Well, wait a minute. Well, that makes perfect sense. So I'm financially strained. It's perfectly rational for me to select, even if it's a higher fee, the money now, because I really need the money. And maybe I need to pay a credit card that has an even higher fee." So how can you distinguish this scarcity activation thing that leads me to make decisions that had I been in a different mindset, I would've made a different choice, and one that is perfectly consistent with a rational choice response. So we do a bunch of studies to explore this. And one of the things that we do is we assess their level of financial stress After they make their selection. So we present them with this trade-off. And the financial scarcity literature has a bunch of exercises. In asking them financially stressful question, they find that people that are experiencing financial stress enter into this mindset and they perform worse on cognitive tasks. They make these tunneling decisions that are very immediacy focused.

And so we find that those individuals who are experiencing financial stress, when they're presented with this salient disclosure, but not in any other condition, their level of stress is off the roof. It's much higher than when they don't have this. So there's some kind of activating effect that happens. Now, is this true for every single individual? Probably not. We cannot say that, but there's something going on. And the other thing, we had some colleagues that pushed back on this and we said, "Well, what would convince you that this selection of the card of $10 is not rational?" And a colleague said, "Well, if you charge $40 for the card, then I won't believe that it's rational." And so we redid it. We charged $40 to have the $100 or whatever, $60 now versus waiting two weeks, 14 days, and we found the same result.

Alan Kaplinsky:

Interesting.

Florencia Marotta-Wurgler:

And the other thing we did was, well, let's, again, borrow from the scarcity literature and perform cognitive tests and see whether the salient disclosure when you're stressed out somewhat freaks you out in a way that activates the scarcity mindset. And we found some suggestive evidence that cognitive performance goes a little bit down when you are financially stressed and are presented with this. And of course, it shouldn't be an enormous thing because it's a small choice. But all of these different pieces of evidence taken together lead us to conclude that there might be something going on that is clearly in need of further exploration. And nevertheless, the bottom line is different people are making very different choices and some in ways that might not be best for their long-term financial health.

Alan Kaplinsky:

Florencia, let me ask you how the people that you chose for the tests, how did these people get chosen? And was it done online? Was it done any of it in person? Just tell us a little bit about... And how did you know who was lower income and who was not? And how many people were involved in these tests?

Florencia Marotta-Wurgler:

Oh, this is great. So all of this was done online using a nationally representative sample through a company called Prolific that does this. We had a lot of attention checks. We had a lot of bot type checks. I think we did this before AI exploded so much. And what this sample does is it recruits individuals from, as I said, from a representative sample, and it includes important demographic information that we also collect, including income. Of course, income varies depending on whether your income will lead you to become financially stressed, depends on where you live, what's your family situation and so forth. So we collect all of that information. How many people you live with? Are you employed? What's your employment? What's your zip code? So we calculate all these things. And then in addition to that, we ask subjectively, "Are you financially stressed?" And we use these two measures, income and financial stress as a way of determining how to group these individuals.

Alan Kaplinsky:

Okay. Interesting. And how many people?

Florencia Marotta-Wurgler:

Over 3,000 people.

Alan Kaplinsky:

Wow.

Florencia Marotta-Wurgler:

So that's a lot of people. Yes.

Alan Kaplinsky:

Right. I take it the names were redacted. You didn't know who they-

Florencia Marotta-Wurgler:

Yeah. We cannot know who they are. They have an ID and we protect their identity. And we don't want to know.

Alan Kaplinsky:

Did they get paid for participating?

Florencia Marotta-Wurgler:

Yes. We pay them for participating and many of them who win the card get the card.

Alan Kaplinsky:

Yeah. Okay. Yeah. They get a card that's loaded with the compensation, right?

Florencia Marotta-Wurgler:

Yes. We were kind enough, we just gave them $100 regardless of what they picked, even though many of them would've had 60.

Alan Kaplinsky:

Right.

Florencia Marotta-Wurgler:

Yeah.

Alan Kaplinsky:

You were very kind. So Florencia, your results suggest that salient disclosure can both reduce mistakes and increase inequality in outcomes. That seems like a difficult trade-off for regulators. What should consumer protection agencies take away from this?

Florencia Marotta-Wurgler:

Of course, consumer protection agencies don't want things that further complicates the already complicated tasks that they've been assigned to do. So I think the first thing is to say that on the plus side, we find that disclosure actually matters and it has a positive effect and that it reduces mistakes. It also informs them that a lot of enforceable type disclosures are not really working very well and that salience does improve attention. But I think the takeaway point for regulators is that we should stop thinking about disclosure in aggregate terms. And maybe we should start thinking about what might be the differential effects of disclosures by exploring in a bit more detail whether there might be any type of behavioral effects. The behavioral attention has been given to the dark pattern type literature. So when sellers use certain types of disclosures that are behaviorally motivated to distract or confuse individuals.

Now, what happens when a disclosure is meant to be neutral and just to inform? And we find that in some context, they might be doing more than that. So what we're hoping to communicate is that seemingly neutral interventions might not be. And to the extent that they're not, we should think about the distributional effects of these particular types of interventions. So just zeroing in more on these things.

Alan Kaplinsky:

I take it... Well, let me ask the question. I don't think this is what you mean, that regulators ought to consider different types of disclosures for the same product depending on certain demographic information that they have about the potential recipients of the product.

Florencia Marotta-Wurgler:

We're not advocating that. Although there's some scholarship that advocates for personalized disclosures, and in that sense, it would matter. And we're not saying that this would happen in every single situation and for every single choice. When there's a single best choice, the salient disclosure is great, but there are some circumstances where perhaps the number or the proportional financially vulnerable consumers might be affected by salient disclosures that involve these types of trade-offs. And so in those circumstances, it would actually be helpful to think a bit more along these lines. Again, it's an additional layer of consideration that might be helpful in some settings and irrelevant in others.

Alan Kaplinsky:

Right, right, right, right. As I was asking the question, I couldn't help think of surveillance pricing.

Florencia Marotta-Wurgler:

Oh, yes, I'm working on that too with Orrin Flugel.

Alan Kaplinsky:

Oh, okay. Well, I have to have you back on the program with Orrin.

Florencia Marotta-Wurgler:

Yes.

Alan Kaplinsky:

Yeah. Well, I did have him very recently on a webinar that we did where we talked about agentic AI and he has co-authored that book.

Florencia Marotta-Wurgler:

Yes, it's terrific. The work is terrific.

Alan Kaplinsky:

Yeah, he talked about that. Even though he claims not to be an expert in consumer finance, I think he's quite an expert. Anyway, let me ask a normative question, and that is, what does good regulation mean here? If a policy improves overall accuracy, but increases disparity in outcomes, how should we evaluate that?

Florencia Marotta-Wurgler:

That is a really hard normative question. And I think the first step, and this is where I hope our paper contributes to, and I'm not trying to punt, is that just being aware of this tension is an important first step. I don't think we have been there yet with regards to these types of interventions. And then there can be a discussion regarding how do we think of these trade-offs and in what context, and what should be the considerations? But becoming aware of it is the first step.

Alan Kaplinsky:

Right, right. So I want to ask you a broader question about the implications of the work that you've done for behavioral law and economics. So stepping back, what does your article suggest about the limits of behavioral nudges in consumer finance regulation?

Florencia Marotta-Wurgler:

So I think the takeaway point is that a lot of this behavioral regulation perhaps assumes that making information more salient will move consumers towards welfare enhancing choices. But what we find, at least we find some evidence of salience being quite psychologically powerful in ways that regulators may not have fully anticipated or controlled. And we find that salience does not just merely inform. So having the terms in the box is not necessarily informed, but it captures your attention and the way you think about the choices in ways that affect how you think about them. So it affects your decision making. So not only it directs attention, but it reframes priorities. And in that way, it's something that could be treated more carefully.

And my former colleague, Ryan Bob, and current colleague, Rick Pildes, have a wonderful paper from many years ago warning against the use of... And this was in the context of mandatory opt-in retirement accounts, which is to say, "Well, people are not saving for retirement enough. We're going to opt them in." And it's true that many people, when they get jobs, they just do nothing and they're opted in into the retirement choice. What the authors are noting is that this opt-in is quite sticky and if the amount of retirement is not high enough, people might end up under saving. So we need to be... It's powerful, but also sometimes it can be too powerful.

Alan Kaplinsky:

Yeah. Yeah. Let me ask you a question, a very mundane question. And that is, did you reach a conclusion in your article, or maybe you reached a conclusion, but it's not in your article, about the quality of the disclosures that are provided for these kinds of reloadable gift cards? Disclosures that were put together by the CFPB quite some time ago, probably close to 10 years ago, maybe not that long.

Florencia Marotta-Wurgler:

We were not guided by any of it. We were interested in seeing whether these types of standard enforceable disclosures have any effect on the quality of the choices individuals make. Our prior was that they wouldn't work, just because in other studies I found that disclosure doesn't really work. And for the most part, they don't, with the exception of this salient disclosure that has this added bonus of really shifting choices.

Alan Kaplinsky:

Do you think, this is one of the things that occurred to me, that the results in real life rather than in a test situation could be markedly different? Just looking at my own situation, I never read what's in the contract or what's in the disclosures. I just don't do it. And I think that's very common. People don't read. They don't want to take the time to do it. They've got other things that they think are more important to them. In this test environment, everybody read everything, I assume. They were getting compensated and they wanted to do a good job in answering your questions. Do you think that it could be different in real life?

Florencia Marotta-Wurgler:

So two things. I agree that nobody reads anything. So we were very aware of that. And that's why the way in which we set up the experiment, and that's why it's a quasi-field study, is that the experiment was about something else. We just asked them a bunch of questions. When it was time for them to get paid, when the experiment was over, that's when we studied their behavior. It was no part of the experiment in their view. And they were paid with real cards. It was all as if you were buying your own credit card gift card. So that's the cool thing about this study. I agree with you that people don't read anything at all. And for the most part, they don't.

The one thing that is important to keep in mind, and we're doing a follow-up study now, is that the terms that we're varying are not your typical arbitration clause or limitation on remedies or even late penalty fees or overdrafting fees, this is the price. And so people always look at price, you'd think. So we're looking at price and when you get it. So this is what defines the product. The product is money. Money, how much it costs you to get that money and when you get that money. So we had another study where we vary all of this and we had non-core terms and the effects were way more muted. So yes. So two things. Yes, this replicated a real life environment to the extent possible outside of the experiment. And the terms at issue are the most important terms and people were still not reading them.

Alan Kaplinsky:

Right. So what additional research... You said you're doing some follow-up research right now. What are you working on there?

Florencia Marotta-Wurgler:

So the follow-up research to this study is to repeat this type of analysis, but with non-core terms. A lot of courts focus on the salience of class action waivers, arbitration clauses, or certain types of late penalty fees or automatic recurrent charges or automatic renewals. And the solution has been, "Well, you just need to put it front and center." And what we're trying to see is, well, does it work when you put it from front and center? And does it work differently for different kinds of people? That's the follow-up study from this line of work. And then I'm working on other projects on dynamic pricing and so forth and dominated contracts, which is quite exciting.

Alan Kaplinsky:

Yeah. We've covered a lot during this podcast, but is there anything else that I neglected to ask you that is an important point that our audience ought to understand?

Florencia Marotta-Wurgler:

One of the things that's... You've covered everything. One of the interesting findings that spawned another research with Ian Aris is that many times when consumers are asked to choose from menus, a retirement plan, a credit card, many times the menus include choices that are dominated by the other choices. So it's just a crappy alternative. The question is, the law doesn't do much about crappy alternatives, and so we're focusing on that, how do consumers avoid them? And if they can't, what should be the way we think the law thinks about these bad alternatives that are presented in a single choice set?

Alan Kaplinsky:

I see. Okay. So Florencia, this has been really a fascinating discussion and I hope our audience enjoyed it as much as I did. First, reading the article and then hearing you explain it today. For the sake of our audience, let me try to distill what I would consider a few takeaways from your article. First, that disclosure absolutely matters. There are a lot of people who say disclosures are worthless, but you've reached an opposite conclusions. But its effects aren't uniform across different kinds of consumers. Design choices that improve outcomes in one dimension can shift behavior in unexpected ways across income groups. Second takeaway I have is that making information more salient can reduce simple mistakes, but in situations involving real trade-offs, it may amplify behavioral responses driven by financial stress or scarcity.

And third, perhaps most importantly, your work highlights a deeper policy tension. Interventions that improve average decision quality may still have distributional consequences that are normatively significant and often underappreciated in regulatory design. This suggests that the future of consumer protection policy may need to move behind the question of does disclosure work to a more nuanced question, for whom does it work? Under what psychological conditions and at what equity cost? So I want to thank you again, Florencia, for being our guest today. And I want to thank all of our listeners for logging into our show today. And I hope everybody enjoys the remainder of this day.