

New York Law Journal

Corporate Update

WWW.NYLJ.COM

VOLUME 267—NO. 110

ALM.

THURSDAY, JUNE 9, 2022

FEDERAL CIVIL ENFORCEMENT

Chopra's Deputies: State Attorneys General and Consumer Protection



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In May 2022, the Consumer Financial Protection Bureau (CFPB) did something rare for federal agencies: It declared that state attorneys general have broader authority to enforce certain federal laws than does the federal government itself. CFPB's declaration came in the form of an interpretive ruling that instructed states of their ability to enforce the Consumer Financial Protection Act (CFPA) free from limitations, like industry carve outs, that apply to CFPB.

Although the ability for states to enforce the CFPA is as old as the Act itself and has been used on occasion, the new interpretation highlights a crucial consideration for businesses whose activities fall within the ambit of the CFPA's consumer financial protections. Under President Biden, CFPB Director Rohit Chopra has forcefully

returned CFPB to prominence through high-profile subpoenas to big tech companies, the unwinding of COVID-measures that gave companies regulatory flexibility, and the expansion of CFPB's strongest tool—its power to target Unfair, Deceptive and Abusive Acts and Practices (UDAAP). The new Director is seeking to flex and strengthen all of CFPB's dormant muscles. This is a significant shift from the Trump CFPB, which focused on rolling-back rulemaking, relaxing enforcement priorities to target more hard and true violators, and providing clarity to industry participants on the rule of law. And now, CFPB seeks to recruit to its mission the 50 states to enforce federal protections.

Passed in July 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (CFPA) quietly deputized state actors to pursue violations of federal consumer financial protection laws, including UDAAP. Dodd-Frank empowers state enforcers—both attorneys general and state agencies—to investigate and enforce its provisions through civil lawsuits.

In December, prior to the new inter-

pretive guidance, Director Chopra had already urged states to act in the vanguard of consumer protection at a speech he delivered to the National Association of Attorneys General (NAAG). Director Chopra's call-to-arms firmly rejected any notion that his CFPB views the states as competitors. Rather, he suggested that past “federal preemption of strong state consumer protections led to disastrous consequences” resulting in the

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2008-09 financial crisis. Signaling a new regime, Chopra announced that he has “directed CFPB staff to explore ways that states could be able to get more out of the remedies available under the Consumer Financial Protection Act.”

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Businesses, and the lawyers who represent them, should know the contours of these rules and the way that state enforcement action are shaping the federal enforcement landscape.

Robust Financial Incentives And UDAAP

Section 1042 of the Dodd-Frank Act empowers state attorneys general and enforcement agencies to investigate and sue consumer finance companies for a broad range of federal consumer financial protection violations. The CFPB's recent interpretative ruling makes clear its view that even where the CFPA carve-out certain industries from CFPB's reach (e.g., attorneys, real estate brokers, accountants), those limitations apply to the Bureau, and states can enforce the CFPA free from those handcuffs. The most significant tool the Bureau has at its disposal—and states too—is Dodd-Frank's UDAAP prohibition. 12 U.S.C. §5536. The UDAAP provisions prohibit:

- an act or practice as unfair if it “is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers”;
- a representation, omission, or act as deceptive if it “misleads or is likely to mislead the consumer”; and
- an act as abusive if it interferes with, or takes advantage of, “a consumer's ability to understand a consumer financial product or service.”

5531(c-d); CFPB Examination Manual at 5. Just recently, CFPB announced that it was adjusting its interpretation

and use of the “unfairness” prong to target potentially discriminatory conduct in the consumer financial space—a significant expansion into the area of fair lending and equal protection that previously was carefully legislated only by Congress. *CFPB Targets Unfair Discrimination in Consumer Finance*, CFPB (March 16, 2022). By doing so, CFPB handed states a new federal enforcement tool to target potentially discriminatory conduct and fill voids in state law.

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Dodd-Frank permits many remedies, including injunctive relief, rescission, restitution, disgorgement or unjust enrichment, and damages. Dodd-Frank also imposes civil penalties in the amount of \$5,000 per day per each offense, and permits a court to increase the penalty up to \$1 million per day if the violation was intentional. §§5565(a-c).

Dodd-Frank's provisions extend beyond most pre-existing comparable state laws in a number of significant respects. First, the act's UDAAP provision imposes no scienter requirement for a finding of direct liability and permits suits for unfair, deceptive or abusive practices. By contrast, many state laws do require a showing of an intent to deceive (e.g., Illinois Consumer Fraud and Deceptive Practices Act (815 ILCS 505/2)) or (as in New

York) do not permit suits for abusive practices. NYGBL §349. Significantly, with the recent announcement that CFPB will use UDAAP to target discriminatory conduct, the states' power to enforce UDAAP can no longer be seen as static—the reach under UDAAP can expand (or contract) as CFPB itself determines is appropriate.

Second, most state consumer finance laws contain remedial provisions that are a shadow of Dodd-Frank's broad remedies, such as its stiff civil penalties. Section 408 of New York Financial Services Law, for example, permits civil penalties of up to only \$5,000 per offense in connection with an intentionally fraudulent financial product.

Third, Dodd-Frank authorizes state regulators to sue on behalf of citizens of any state. State laws typically restrict enforcement action to suits on behalf of state residents, significantly decreasing the bite of any state suit and oftentimes creating substantial jurisdictional and evidentiary hurdles for the state.

Fourth, Dodd-Frank empowers state actors beyond just state attorneys general—for example, only the New York Attorney General can sue to enforce New York's prohibition against deceptive practices, but Dodd-Frank gives UDAAP enforcement authority also to NYDFS and other state actors.

Last, Dodd-Frank's grant of authority to state actors to enforce certain federal consumer finance regulations departs from previous federal preemption rules and restrictions on state enforcement. 12 U.S.C. §5552(d).

Coordinated Federal-State Actions

Beyond expanding the scope and power of state enforcement of federal consumer finance rules, Dodd-Frank also encourages increased coordination at the state and federal level. Before a state attorney general or agency can file suit under Dodd-Frank, it must provide notice to CFPB, which has the right to intervene and take over a lawsuit at any time. §5552(b).

A parade of cases since late 2019 demonstrates how states are capitalizing on their power under Dodd-Frank through both coordination and independent action. In August 2019, Arkansas and CFPB contemporaneously filed a complaint and proposed settlement with three credit brokerage firms alleging violations of the UDAAP provisions of Dodd-Frank, and violations of Arkansas's Deceptive Trade Practices Act. *CFPB v. Gamber*, No. 4:19-cv-565 (E.D. Ark. Aug. 14, 2019).

In January 2020, NYDFS, in conjunction with the NY Attorney General, announced that it had reached a settlement with a real estate company to resolve allegations under the CFPA, TILA, and Regulation Z that the company misleadingly sold and unlawfully financed sub-standard properties. *New York ex rel. James v. Vision Prop. Mgmt.*, No. 1:19-cv-7191 (S.D.N.Y. Jan. 10, 2020). The original complaint, filed in August of 2019, asserted the state's authority to bring claims from §5552(a) and alleged violations of UDAAP and TILA.

In May 2020, the Massachusetts Attorney General teamed up with CFPB in a UDAAP suit against a credit repair company. *CFPB v. Commonwealth Equity Grp.*, No. 1:20-cv-10991 (D. Mass. May 22, 2020). The complaint targeted allegedly deceptive marketing practices for credit repair services and a violation of an arcane billing rule under the Tele-marketing Sales Rule, 16 C.F.R. §310, et seq. Although the suit also included allegations under the Massachusetts Unfair and Deceptive Practices Act (MA-UDAP), that statute primarily serves as a piggy-back mechanism—allowing recovery in state law for violations of federal consumer protection laws—and notably does not allow suits for solely “abusive” practices.

On April 21, 2022, CFPB along with the New York Attorney General (NY AG) filed a joint complaint against one of the largest international payment companies in *CFPB v. MoneyGram International*, No. 22-cv-3256 (S.D.N.Y. April 21, 2022). The seven-count complaint challenged the company's remittance transfer practices under Regulation E and the CFPA. In addition to joining in two of CFPB's counts for violations of the CFPA for unfair acts and regulatory violations, the NY AG alleged an additional violation of Regulation E that was not joined by CFPB.

And, in perhaps the most notable example, 39 states announced in January 2022 a settlement with student-loan servicer Navient, which resulted in the cancellation of \$1.7 billion in student debt. The settlement, filed in the U.S. District Court for the Middle District of Pennsylvania, alleged violations of

TILA and the Higher Education Act, 20 U.S.C. §1078, et seq., and accused Navient of steering borrowers into forbearance rather than more consumer-friendly repayment options. In an earlier order rejecting Navient's motion to dismiss the states' complaint, the Third Circuit held that parallel enforcement actions by the states and CFPB to enforce federal law were permissible under §5552. *Pennsylvania v. Navient*, 967 F.3d 273 (3d Cir. 2020). Thus, not only were the states' claims not preempted by the statute itself, but even a concurrent lawsuit with the same allegations filed by CFPB did not preclude independent state action.

States are using their Dodd-Frank powers to bring suits sounding in federal laws like UDAAP, TILA or other CFPA provisions. With the Bureau staff apparently eager to see state action, this could mean more joint-enforcement actions. The Director has a whole host of eager deputies in state attorneys general who have shown that they are up to the task of enforcing robust federal consumer finance laws.