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Navient Settles With State AG Coalition Over Alleged Unfair, Deceptive, and Abusive Student Loan Origination and Servicing Practices

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On January 13, a coalition of 39 state attorneys general — led by AGs from Pennsylvania, Washington, Illinois, Massachusetts, and California — reached a settlement with student loan servicer Navient over allegedly unfair, deceptive, and abusive student loan origination and servicing practices. The $1.8 billion settlement will undoubtedly draw eyes, but perhaps just as important is the validation that state AGs are keying in on ability-to-repay determinations as a source for potential unfair and deceptive acts or practices (UDAP) claims. Over the last several years, this ability-to-repay theory has gained major traction with the AGs as they combat what they perceive to be "predatory lending" in a number of industries.[1]

The AGs' original complaints generally alleged that Navient violated the states' consumer protection laws by unfairly and deceptively originating student loans to:

- borrowers with low credit scores;
- who were attending schools with low graduation rates;
- which carried high interest rates and origination fees;
- had a high likelihood of default;
- for which there were no set repayment options for borrowers unable to repay; and
- for which there was little to no chance for borrowers to discharge in bankruptcy.

The AGs' complaints also alleged that Navient failed to adequately inform struggling borrowers of the existence of alternative contractual arrangements and failed to inform borrowers that it had recourse agreements in place with educational institutions in the event of default by the borrower.

On the servicing side, the complaints generally alleged the following:

- **Unfairly Steering Borrowers Into Costly Forbearances.**

Navient allegedly misrepresented the suitability of certain federal loan repayment options to borrowers, failed to meaningfully disclose federal plans to help borrowers avoid default, misrepresented its willingness to work with borrowers, and offered forbearance plans to borrowers who demonstrated a long-term inability to repay.

- **Unfair Practices Related to Recertification.** Navient allegedly failed to disclose the date by which a consumer must recertify an income driven repayment plan, misrepresented the consequences of a failure to submit such materials, and failed to adequately notify borrowers who consented to electronic communication of the existence of the renewal notice.

- **Unfair Practices Related to Cosigner Release.** Navient allegedly misrepresented the requirements for cosigner release and created a likelihood of confusion as to the necessary requirements for cosigner release.

- **Unfair Practices Related to Payment Processing.** Navient allegedly made repeated errors in allocating and applying borrower payments and failed to implement adequate processes and procedures to prevent such errors from recurring.

Notably, Pennsylvania alleged both UDAP under its Consumer Protection Act and unfair, deceptive, and abusive acts and practices (UDAAP) under the Federal Consumer Financial Protection Act.

Under the terms of the settlement, Navient agreed to cancel the remaining balance on nearly $1.7 billion in private student loans for nearly 66,000 borrowers, as well as provide $95 million in restitution to approximately 350,000 federal student loan borrowers who were placed in certain types of long-term forbearances.

In addition, Navient must also:

- Maintain policies and procedures regarding:
    - oral communications and prioritization of alternative repayment plans,
    - oral and written communications related to alternative repayment arrangements and account status,
    - requests for assistance and account dispute resolution, and
    - post-default collections;
- Implement suitable cosigner release, payoff, and transfer of servicing practices and procedures;
- Designate personnel to act as alternative repayment specialists and public service specialists and provide enhanced training for such persons to aid consumers in determining eligibility for alternative payment plans and relief programs;
- Implement mandatory billing statement notices that include information, such as the total amount due and the

name of a borrower's current federal loan repayment plan;

- Implement mandatory written payment history requirements;
- Reform its payment processing practices to ensure proper crediting of payments; and
- Avoid charging certain fees, such as fees to enter a forbearance status or multiple fees for a single late payment.

This settlement represents the expanded scrutiny of lending practices we noted in our recent article on 2022 state AG predictions (click here), and continues a movement by both state and federal regulators to pay attention to consumers' ability-to-repay in the loan origination context. In these instances, state attorneys general are using their consumer protection acts and UDAP powers, arguing not that lenders have engaged in any affirmative misrepresentation, but rather that the lender should have known at the time of the loan's origination that the borrower would be unable to pay.[2]

While this theory originated in the mortgage space, it has been expanded to other types of lending, including the student loan context with this Navient multistate settlement. Three of the five states leading this multistate enforcement action (Washington, Illinois, and Pennsylvania) advanced claims in their complaints under their consumer protection and UDAP statutes based on allegations that Navient (operating as Sallie Mae) "made predatory subprime loans to students attending for-profit schools and colleges with low graduation rates even though it knew that borrowers would be unable to repay the loans."[3] This is in line with the enforcement trend of expanding ability-to-repay under state consumer protection acts and UDAP to different lending industries and lending-adjacent industries. Beyond the student loan and mortgage context, state attorney generals have advanced this theory in their investigations of auto lenders[4] and debt settlement companies.[5]

Ability-to-repay statutory requirements already exist in some instances, such as for credit card accounts under the Credit Card Accountability Responsibility and Disclosure (CARD) Act and for payday, short-term, and motor vehicle title lending under some state laws. However, this concern seems to be evolving into additional products. In a November 2021 hearing before the House Financial Services Committee, Chairwoman Maxine Waters specifically mentioned ability-to-repay concerns in the rapidly growing buy now pay later (BNPL) space, which was followed in December 2021 by the CFPB issuing orders to five companies offering BNPL products, with its topics for inquiry including potential applicability or non-applicability of a range of consumer financial protection laws.

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[1] Press Release, Office of Attorney General Maura Healey, *In Largest Settlement of Its Kind, AG Healey Secures $27 Million for Thousands of Massachusetts Consumers from Subprime Auto Lender* (Sept. 1, 2021), https://www.mass.gov/news/in-largest-settlement-of-its-kind-ag-healey-secures-27-million-for-thousands-of-massachusetts-consumers-from-subprime-auto-lender; *See e.g.,* Final Judgment, *Commonwealth v. DMB Financial, LLC.*, No. 1884CV01472-BLS1 (Aug. 2, 2021), https://www.mass.gov/doc/dmb-financial-final-

judgement-0/download; Complaint, *District of Columbia v. Opportunity Financial, LLC*, No. 1:2021cv01233 (Apr. 5, 2021), https://oag.dc.gov/sites/default/files/2021-04/OppLoans-Complaint-final.pdf.

[2] *See e.g.*, *Com. v. Fremont Inv. & Loan*, 897 N.E.2d 548, 556 (2008) (holding that although the mortgages issued by Fremont Investment & Loan's did not violate federal or state statutes and were not considered unfair by industry standings, they nevertheless violated Massachusetts law because the bank did not adequately assess the consumer's ability to pay).

[3] *Common Questions*, Navient AG Settlement, https://navientagsettlement.com/Common-Questions (last visited Jan. 14, 2022 10:17 AM). *See also* Complaint ¶¶ 133, 148-215, 468(a), *Illinois v. Navient Corp.*, No. 2017-CH-00761 (Cook Cty. Chancery Div. Jan. 18, 2017); Complaint ¶¶ 9.1-9.5., *Washington v. Navient Corp.*, No. 17-2-0111501 (Sup. Ct. Wash. Jan. 18, 2017).

[4] Complaint at ¶171, *Commonwealth v. Credit Acceptance Corp.*, No. 20-1954 (Aug. 28, 2020).

[5] Final Judgment at (IV)(8)(h), *Commonwealth v. DMB Financial, LLC.*, No. 1884CV01472-BLS1 (Aug. 2, 2021), https://www.mass.gov/doc/dmb-financial-final-judgement-0/download. The budget analysis must evaluate the consumer's "total aggregate and discretionary income, and itemized monthly expenses." *Id.* at IV(8)(h)(i). DMB must not enroll any consumer whose "monthly income, after expenses are deducted, is less than the cost of DMB's program." *Id.* at IV(8)(h)(ii).

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