The Consumer Finance Podcast – New York's Bold Move to Create a Mini CFPB
Host: Chris Willis
Guests: Jesse Silverman and James Kim
Date Aired: 4/3/25

Chris Willis:

Welcome to *The Consumer Finance Podcast*. I'm Chris Willis, the co-leader of Troutman Pepper Locke's Consumer Financial Services Regulatory Practice, and today's episode is another in our continuing series on the activities of state legislatures and regulators on the consumer financial services front. But before we jump into that topic, let me remind you to visit and subscribe to our blogs, TroutmanFinancialServices.com and ConsumerFinancialServicesLawMonitor.com. And I'm sure you'll also enjoy all of our other podcasts, *FCRA Focus*, *Unauthorized Access*, *The Crypto Exchange*, *Payments Pros*, and *Moving the Metal*. All of those are available on all popular podcast platforms. And speaking of those platforms, if you like this podcast, let us know. Leave us a review on your podcast platform of choice and let us know how we're doing. Now, as I said, we've been talking on the podcast recently about the likely reaction of state regulators and legislatures to a perceived either shrinking or more of the CFPB and a vacuum of consumer protection at the federal level. And we're going to be talking more about that today in the context of some specific recent developments in New York.

Joining me to talk about that are two of my colleagues, Jesse Silverman and James Kim. Jesse, James, you're veterans of the podcast, and I'm always glad to have you here. But thanks for being here.

Jesse Silverman:

Thanks for having us.

Chris Willis:

So, the triggering event for today's episode was a couple of developments in New York. Jesse, let me start with you. And there's been a new piece of legislation introduced in both houses of the New York legislature that bears a striking resemblance to a certain Title 10 of Dodd-Frank that created the CFPB. So do you mind just starting to talk to the audience about what this legislation that's pending in New York, and that's been endorsed by the New York Attorney General, says?

Jesse Silverman:

Oddly enough, it is very similar. So in New York, we have the Fair Business Practices Act, and what the Fair Business Practices Act is seeking to do amongst other things is amend the existing law, their existing UDAP authority, which now is essentially just deception to prohibit both unfair and abusive acts and practices, which anyone who practices in the federal land knows very well from Dodd-Frank and CFPB authority and the definitions of which would largely mirror those found in the Consumer Financial Protection Act administered by the CFPB. It would also permit the Attorney General to bring claims against entities that engage in just single acts. That to me, really stood out. Most states have, and frankly most statutes have some measure of a de minimis requirement where if you participate in one act, you're not "engaged in the business of." This, however, was explicit and it noted that liability could accrue from one single instance.

It also gives the Attorney General the power to assess heightened civil penalties and collect restitution on behalf of consumers, civil penalties of $5,000 per violation or for knowing or will for violations, the greater of $15,000 per violation are three times the amount of restitution. So, as you can imagine for any large company, those numbers add up very, very quickly. And it also contemplates enhanced civil penalties for harm to "a vulnerable person", which is basically any person under 18 or over 65, active-duty service members, veterans, physically or mentally impaired persons, etc. So, it is a quite material step up in both enforcement scope and in penalties for enforcement violations.

Chris Willis:

And Jesse, one of the things that I found most interesting about this legislation is, first of all, it contains kind of a grab bag of other specific consumer protection provisions that all seem borrowed from recent headlines. So, for example, there's a piece of the legislation that would require transparency in pricing and fees, which is like the FTC's junk fee rule. There's one about prohibiting various kinds of creditors and services from steering borrowers into higher cost repayment plans, which is echoes of the forbearance steering litigation that the CFPB and a number of state AGs engaged in.

There's a little piece of it that mirrors the FTC's click-to-cancel rule about hard-to-cancel subscriptions. And another very important thing is there's a specific provision in there about the prohibition on businesses using deceptive contracts or misleading terms that would take advantage of consumers with limited English proficiency. And this is an area that the CFPB was not very active on even during the last administration. But there you have it in this New York legislation and the non-English speaking people are also in the definition of a vulnerable consumer. So those heightened penalties, Jesse, that you were talking about also apply if the offense is against a person or a population of people who are non-English speakers. They've taken a potpourri of greatest hits of the last few years and merged them all into this one bill.

Jesse Silverman:

As the kids say, the New York AG is shooting her shots.

Chris Willis:

Yeah. For sure.

Jesse Silverman:

They are absolutely going for everything. And I would say as we've talked about on other podcasts, this is not a surprise at all. This is the Ghost of Christmas Future.

James Kim:

Just one thing I want to add is the bill would also give a lot of enhanced remedies for class action lawsuits. So, it would allow class action lawsuits to recover many of the same remedies available to the New York AG, so actual damages, statutory damages, and punitive damages. So, I just want to throw that in there that it's primarily there to empower the New York AG, but it's also there to empower the plaintiff's bar.

Chris Willis:

It's like Dodd-Frank with a private right of action.

Jesse Silverman:

When I read through this bill, the overarching macro thought that I had was for all of those companies who were hoping and praying that the CFPB didn't exist, this bill was pretty much their worst-case scenario. This was the fear that the states would step in and fill that void and do so in perhaps a more aggressive, more radical approach. This bill, and again, we don't know if this bill is going to make it through, and we don't know exactly what fashion this bill will make it through in, but this is a very, very powerful tool for a state AG.

Chris Willis:

Yeah, and you talked about the Ghost of Christmas Future, Jesse. I'd now like to just get you and James both to comment on, this is New York, but New York's not the only state out there, and I feel like this might be part of a larger trend. Can you all address that, please?

James Kim:

I'll start and then I'll turn over to Jesse because this is a little bit personal. I don't mean that in a bad way. It's a lot of people that Jesse and I know personally and professionally. I think the larger context is this is New York's take on creating a mini CFPB, which is not new. The two states that kind of started this were, in no particular order, Pennsylvania. They created a mini CFPB within their state AG's office led by a former CFPB enforcement attorney. And then California, if we recall years ago at about when President Trump was president the first time, California enacted significant statutory changes that gave, what was then the Department of Business Oversight, substantial new powers under a statute that looks very similar to Title X of Dodd-Frank. And at that time, California enlisted former director Richard Cordray to help draft their statute.

So basically, it was to reorganize and to reinvigorate the California DPO into the DFPI and give them a lot more statutory power. So, I just want to give that larger context here that one way to look at it is this is a substantial development. Now, another way to look at it is I'm kind of surprised New York is late to the game. Why weren't they doing this years earlier?

Chris Willis:

But I think the biggest takeaway is there's more states coming, and in fact, the CFPB towards the tail end of the last administration, knowing that there'd be an administration change and potentially a weakening of consumer protection at the federal level published this sort of blueprint for states to follow. And it was all legislative stuff like this. And so what's to stop the states from picking that up and legislating it? And it seems like there's a lot of will to do so.

Jesse Silverman:

Yeah. And in particular with New York, you just mentioned what everyone's sort of calling the CFPB state roadmap, which is a perfectly accurate description, but in the case of New York, the CFPB almost exactly one year ago today published a blog describing letters that they'd sent on their own volition to the New York governor, the New York State senate leaders, New York State assembly leaders, basically highlighting the importance of a ban on abusive and unfair conduct. They have been playing the long game in making sure that these powers, authorities, and responsibilities have been pushed out to the states for quite a while. This is a very concerted effort on the part of the last CFPB administration to empower the states to take over a lot of this. And we're seeing that happen.

Chris Willis:

And that I think is a good segue into the next thing that I think we wanted to talk about in today's episode, which is during the last four years, I felt like there was a very high level of cooperation and communication between the CFPB and both state AGs and state financial services regulators. And we talked in our last episode of the podcast where we were talking about this, about the training, so to speak, that was going on of those state regulators, but it's not just that they got together and shared ideas. There's a pretty free exchange of personnel too, between the CFPB and the various state regulators. And in fact, there were some recent news about that in New York too. So, would you mind talking about that?

Jesse Silverman:

Yeah, the New York DFS, the financial regulator, they just recently named one of the former assistant heads of enforcement from the CFPB to run their enforcement. So, he's obviously bringing all of his knowledge, training, and experience to the New York DFS. So, I think we can expect to see some actions from the New York DFS that look an awful lot more like CFPB type actions, even more so than in the past. And let's just be frank here with the CFPB in whatever state it is, it is certainly diminished currently, it is not dead, but there are an awful lot of CFPB lawyers who are currently looking for work, and I would expect that there are an awful lot of state banking regulators and state Attorney General offices that are going to be more than happy to take those lawyers in. I think to your point, beyond just the actual sharing of knowledge and ideas, you're seeing the cross population of actual people and personnel to execute on that vision.

James Kim:

If I could just add on that. Of course we focus on the technical, legal, and regulatory components meaning statutory changes, rulemaking, and then softer things like guidance and the state roadmap. But I always say this to anybody who will listen, including clients and people I work with. This is about human beings, and this is about people and what they think and where they're positioned and what they believe and what they're empowered to do. And in addition to Gabe O'Malley leaving his position as one of the deputy enforcement directors to be the head of enforcement at New York DFS, congratulations to him, by the way, this kind of cross pollination between other federal and state agencies and CFPB that's been going on for years. So just a couple of examples. I've referred to Pennsylvania creating its own mini CFPB. The head of that unit for years has been a gentleman, really good guy named Nick Smith.

He's a former CFPB enforcement attorney from the very early days. He went from Treasury to CFPB from day one, and then he moved back home. He's a Pittsburgh guy, he's a big Steelers fan, and he's been running that unit and they're quite litigious. Aggressive is, I think, an understatement. Litigious is the word. And then I think similarly, there's a gentleman named Chris D'Angelo. He was also one of the very first enforcement attorneys, worked as kind of a chief of staff role for Richard Cordray. And then he moved to the New York AG several years ago, I think about six years ago. And he's got a very high title. It's Chief Deputy Attorney General for Economic Justice. So, he is above consumer protection at the New York AG's office. In other words, Jane Azia is the head of consumer protection. Chris is above her. He's got a larger portfolio.

And anyone who's been following the New York AG, they've always been, but I think they've been increasingly aggressive and litigious. And I think a lot of that is driven by Mr. D'Angelo, and the final thing I'll say is this is a little bit of the name game. I get that the current state of the CFPB, which is I think unusual, to put it mildly, it's kind of pushing a lot of people out and then who knows where they're going to ultimately land. But there has been healthy cross-pollination between other federal and state agencies and the CFPB going in both direction for many years.

I'm an example of that. My time at the CFPB was my second stint in the government. I started as a prosecutor at the Manhattan DA's office, and there have been actually other alums of that office who are currently at the CFPB. So, you have law enforcement types like me. Jesse, he has a background with the Connecticut Department of Banking, but there's plenty of other folks. Almost all of the enforcement attorneys came from another law enforcement agency before they arrived at the Bureau. And a lot of them are going back. Gabe O'Malley's one, Wendy Weinberg is a good example. She was at the DC AG's office, went to the CFPB, and then went back to the DC AG's office.

Jesse Silverman:

There's one fascinating thing, and maybe this is apropos of nothing, but it has been a stark reminder throughout my career. I think I've been in financial regulation for, I don't know, somewhere between 20 and 25 years now. And there has always been one remarkable aspect. I have worked with several states when I was a state regulator, when I was with the CFPB, and frankly, I dealt with them on the other side when I was in-house general counsel. The one remarkable aspect is the power that one person can have, one very particularly driven person.

And I can think of several states where this is true. Colorado had been historically very, very active in the AG in financial services regulation more so than most other states. And if you go look, there was one person who was driving that, right? There was one person who was particularly talented, particularly aggressive, and he drove the entire Colorado AG in a particular direction. I can think of Vermont several years ago, there had been an Attorney General who was at Vermont who was very talented and very aggressive. He moved the entire Attorney General's office. I think that's a long way of saying it doesn't take much to see real wholesale changes out of an entire organization like the AG's office. It takes one very competent, talented, and aggressive individual, and all of a sudden, the AG's office looks very different.

Chris Willis:

And I think what we've talked about here with the most recent examples in New York is obviously something our listeners need to know because New York is a big state. But in addition to hearing that message, what I hope our listeners hear is that if in fact we have a period of time when the CFPB is less active in whatever quantum that may be, because we don't know yet, all that's going to do is encourage more of this behavior from the states in terms of strengthening their laws, being more aggressive in terms of financial services enforcement and being more aggressive in terms of regulation through their state banking and state financial service regulators. And so, keeping an eye on what's going on in the states is something that's a top priority for us here at Troutman Pepper Locke. You heard us say that in the last podcast in this series. We're going to keep saying it because we think it's so important, and we would suggest to everybody listening that that should be a priority for them as well. So, any parting words, James or Jesse, before we close the episode?

Jesse Silverman:

Yeah, I'll probably have the same parting words I think I had last time, which is all of those companies out there who are thinking that they're going through a period of free pass because the CFPB is not necessarily on the beat right now, I would temper those expectations because nature abhors a vacuum. And we can see as we've spent lots of time talking about, the states are filling in some portion of that vacuum, and I think this is the beginning and not the end. So unfortunately, I think that's going to be my same parting words on every one of these episodes.

Chris Willis:

If it's true, we might as well keep saying it.

Jesse Silverman:

Yeah.

Chris Willis:

James, you've got the last word.

James Kim:

I obviously agree, and this shouldn't be a surprise to people, especially if you're in the non-bank or FinTech world where you're dealing with emerging products and services, you don't have the benefit, at least directly of federal preemption. States have always been at the forefront of legislating, rulemaking, enforcing around these emerging companies, around these emerging products. Buy now, pay later, earn wage access, income share agreements, you name it. The action has always been predominantly at the state level, not at the federal level. And I think, again, you got to put it in that larger perspective. Obviously, what's going on now is significant, but all that means is it's just turbocharging, I think is the word in my mind. The shifting of people and ideas and target selection from the CFPB to the states.

Chris Willis:

All right, gentlemen, thank you very much for joining me on the podcast today. And of course, thanks to our audience for listening in as well. Don't forget to visit and subscribe to our blogs, TroutmanFinancialServices.com and ConsumerFinancialServicesLawMonitor.com. And while you're at it, why not visit us on the web at troutman.com and add yourself to our consumer financial services email list. That way we can send you copies of the alerts and advisories we send out, as well as the invitations to our industry-only webinars. And of course, stay tuned for a great new episode of this podcast every Thursday afternoon. Thank you all for listening.