

***The Consumer Finance Podcast x Regulatory Oversight*** – New York's FAIR Act: A Game-Changer for Regulatory Enforcement and Litigation

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**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 we're going to be talking about a pending amendment to New York's UDAAP statute called the FAIR Act, which promises to be very impactful for financial services companies. But before we jump into that topic, let me remind you to visit and subscribe to our blogs, [TroutmanFinancialServices.com](https://www.troutmanfinancialservices.com) and [ConsumerFinancialServicesLawMonitor.com](https://www.consumerfinancialserviceslawmonitor.com). And don't forget about all of our other great podcasts too. We have the [FCRA Focus](#) all about credit reporting, [The Crypto Exchange](#) about cryptocurrencies and digital assets, [Unauthorized Access](#), which is our privacy and data security podcast, [Payments Pros](#), all about the payments industry. And finally [Moving the Metal](#), which is our auto finance podcast. 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 platform of choice and tell us how we're doing now. As I said, we're going to be talking today about a potentially very significant amendment to the New York State UDAAP statute called the FAIR Act, which is in the middle of the legislative process in New York. And joining me to talk about this potential enactment and its also potential impact on the financial services industries are three of my partners, Bill Foley, Joe DeFazio, and Michael Yaghi. Bill and Joe are members of our Consumer Financial Services group, and Michael is a member of our RISE group, which houses our award-winning state attorney general practice. So gentlemen, welcome to the podcast. I'm glad you're here to talk about this today.

**Michael Yaghi:**

Thanks Chris.

**Chris Willis:**

So Bill, let me start with you. Can you give the audience just some background, what is the FAIR Act in New York and what is its current status in the legislative process there?

**Bill Foley:**

Thanks, Chris. Yes. So the FAIR Act, which is an acronym for Fostering Affordability and Integrity through Reasonable Business Practices Act. New York loves its acronyms. It's a proposed legislation that has actually passed the New York State legislature. It seeks to broaden the scope of consumer protection from just deceptive business practices, which had been traditionally a scope protected under New York's General Business Law 349, also known

as the Deceptive Practices Act. It will now look to expand the scope of that to protect not only deceptive practices, but also unfair and abusive practices to protect consumers against unfair abusive practices. And as it sits right now, this piece of legislation passed the legislature on June 18th and it is now waiting to be presented to the governor for her signature kind of reading that tea leaves most likely won't happen until later in the year, but it is awaiting her signature.

**Chris Willis:**

Okay, thanks a lot, Bill. So Joe, let me now move to you. Can you give the audience just some background on the preexisting New York UDAAP statute, which is General Business Law section 349, and what was there about it that made the legislature think that it might need to be amended?

**Joseph DeFazio:**

Great question, Chris. So the statute basically provides for consumer protection against deceptive business practices, and its focus is to prohibit businesses from engaging in acts or practices that are misleading or likely to mislead a consumer. The law is designed basically to safeguard consumers from what is deemed fraudulent or deceptive conduct in the marketplace. There's three key aspects to GBL or General Business Law 349. Is it consumer oriented conduct? Is it a deceptive practice? And then are there legal recourse? So on the consumer oriented conduct, that part of the statute focused on practices that affected consumers at large rather than isolated instances. As to deceptive practices, it obviously speaks to protecting consumers from business practices that are deemed to be deceptive. And then finally, it was a legal recourse where consumers could bring legal action mostly in the class setting against businesses that violated the statute, potentially recovering damages and attorney's fees, attorney's fees usually being the hook, particularly in a class action setting. So that's what the law is that is being amended. You asked why. My ultimate guess here is that with the CFPB kind of stepping to the side with the Trump administration as it is now, a lot of states as we know have really ramped up their enforcement efforts. And I think this is New York looking to do that here to make a more robust law and amendment to existing statutes to give the AG power to step in the place of the CFPB where it deems necessary.

**Chris Willis:**

Yeah, and I think on that note, Joe, I would note that the New York Attorney General is the one who has been most visible in taking enforcement cases that had been previously brought by the CFPB but then dismissed and refiling them by the New York Attorney General. There's two in particular that I'm aware of. And so I think your explanation makes a lot of sense. Let's now talk about, now having understood what the existing GBL 349 has and what its limitations are, would you mind talking us through the main changes to section 349 that the FAIR Act would make if it's ultimately signed by the governor?

**Joseph DeFazio:**

Sure. So I think there's a few big ones. First is that it adds unfair and abusive acts to existing prohibition on deceptive practices. It defines a practice as unfair when it causes or is likely to

cause substantial injury, which is reasonably avoidable and is not outweighed by countervailing benefits to consumers or to a competition.

**Chris Willis:**

Which that's the same standard as the FTC has always applied under section five of the FTC Act, right?

**Joseph DeFazio:**

That's correct, yep. And a practice is abusive when it materially interferes with the ability of a person to understand a term or condition of a product or service or it takes unreasonable advantage. One of the big things is a lack of understanding on the part of the person, the material risk, the inability of the person to protect such person's interest in selecting or using the product, the reasonable reliance by a person on a person engaging in the act or practice. So to me what it's doing is really making the terms more broad to cover a large swath, if you will, of different businesses that operate in the consumer space.

**Chris Willis:**

And Joe, that language that you just talked about in terms of abusive, I mean I didn't check every word of it, but it sounded remarkably similar to the definition of abusive in Dodd-Frank UDAAP for the CFPB. And I guess I'd remind our listeners that the Biden-era CFPB put out an abusiveness policy statement or some other statement about what constitutes abusive conduct, which essentially imposed no limit on it whatsoever. And even though the new CFPB is not going to be following that, the New York Attorney General might well be following it.

**Joseph DeFazio:**

Yeah, I agree wholeheartedly, and I think that goes back to my early comment, Chris, that the AG is being given the tools to step in where the CFPB has left a void.

**Chris Willis:**

Yeah, it makes sense. So in addition to the amendment to the statute to prohibit unfair and abusive, there's some other stuff too, isn't there?

**Bill Foley:**

Absolutely, Chris, this act is expanding the protections of the Deceptive Practice Act, not only to just individuals, but also to small businesses and nonprofits, whereas an AG can step in and enforce those rights. Another very important revision is the FAIR Act is eliminating the consumer-oriented piece that has traditionally been kind of a big hook for seeking relief under the Deceptive Practices Act. So the FAIR Act makes this conduct unlawful regardless of whether it's consumer oriented anymore, whether or not it affects the public at large or is part of a recurring pattern. And this covers a substantially wider array of alleged harmful transactions. For example, this was always a very handy tool in the mortgage context with Joe and I both

litigating significantly where a borrower would assert an affirmative defense or sometimes even a counterclaim of cause of action under a deceptive practices under GBL 349. An affirmative response to that was that this was a private transaction and not consumer oriented, but now seemingly that protection for financial services clients will disappear.

**Chris Willis:**

Okay, so we have a statute that is modeled on Dodd-Frank UDAAP but goes even further in terms of its coverage of small business alleged victims and nonprofits, and then the elimination of this idea that it has to be applicable to the public as a whole and it can be now individualized to just one actor, but there's also a very interesting geographic scope to the FAIR Act and what it would do to GBL 349. Would you mind telling the audience about that?

**Bill Foley:**

Sure Chris. And this is actually, having read the text of the proposed statute many times, of course it's a little confusing to sort through, but ultimately this new version of the GBL 349 will purport to authorize the Attorney General to enforce any violation of the Act by "any person conducting any business trade or commerce or furnishing a service in New York, regardless of where that person is located," meaning they can be out of state and any business located in New York, regardless of whether the allegedly unlawful act or practice was directed to an individual or business in a state other than New York. So it looks like the AG is going to have the ability to bring this enforcement power to activities theoretically taking place outside of the state. I think that's really going to raise some interesting challenges if and when that is actually put into effect.

**Chris Willis:**

Right. So if you, for example, under the statute as it passed the legislature and is awaiting the governor's signature, if a New York based company did something to consumers in Montana, for example, the statute would authorize the New York AG to sue under New York's amended GBL 349 for that conduct. Right?

**Bill Foley:**

Absolutely. And that's again, as drafted, that's what it says. I think we're going to have to keep a close eye on that to see how that winds its way up the court. I mean, for one, I think there's definitely some potential jurisdictional challenges to that.

**Chris Willis:**

Yeah, maybe even constitutional too, but we'll leave that for litigation. There's one last piece though that I'd like you to comment on, Bill, if you don't mind, which is the sort of statutory penalties associated with the new powers under the FAIR Act. Can you comment on that please?

**Bill Foley:**

Yeah, sure. There's a couple of other civil penalties that are always available to the Attorney General that has not really changed all that much with this bill. But in particular with respect to the FAIR Act, they've increased statutory damages available to litigants anywhere from \$50 to \$1,000 per violation with treble damages if violations are proven to be willful and knowing. And there's a specific provision in the Act that the prevailing plaintiffs may be entitled to their attorney's fees pursuant to this statute, which as Joe mentioned earlier, is an incredibly strong hook for plaintiff's counsel, especially in the class context.

**Chris Willis:**

Okay. So we've got some pretty significant changes being made here to the statute, a lot of which are to the benefit of New York's Attorney General if the law goes into place later this year. So Mike, let me turn to you. You're a member of our nationally renowned state attorney general group. What do you think the potential impact of this on state attorney general activity in New York would be? And I'm almost afraid to ask.

**Michael Yaghi:**

Yeah, you could almost assume what the response is going to be, which is it's going to have a huge impact. The Attorney General was advocating and asking the legislature for this earlier this year, essentially to expand your office's powers, essentially to fill the void being left by the CFPB at the federal level, right, with the CFPB sort of receding and federal priorities changing. As you noted earlier, I think Chris, all the states are going to try to step in or most states to step in and fill a void they perceive at the federal level. And that's exactly what the Attorney General in New York was doing when asking for and advocating for this law and specifically to expand her office's authority and power, right, to enforce not just deceptive behavior, but abusive behavior and unfair behavior to really give her that power enforcement authority. And it's going to increase, what we perceive to be an increase, in enforcement actions in the consumer finance space. I think she even noted when she was advocating for an expansion of powers for her office, they're going to be looking at mortgage servicers, mortgage companies, the charging of exorbitant fees, health insurance companies engaging in unfair billing practices, for example, debt collectors, garden variety, predatory lending practices. It's really just expanding the ability to go after not just deceptive, but now if it's passed unfair and abusive behavior to sort of fill in that CFPB void. And with the extra territorial stuff you talked about earlier, they're attempting to really, it seems to make the state AG and New York replace the CFPB and try to police things nationally, not just within New York's jurisdiction, but as noted already, Joe and William and you Chris, we'll see how that plays out in litigation and sort of jurisdictional limits and what courts ultimately decide if the law is passed and those issues are brought before the courts, which I'm sure they will be.

**Chris Willis:**

Yeah, you would think because the New York Attorney General has been so aggressive in the positions she's taken in a number of the cases she's brought in the financial services industry that they have resulted in litigated enforcement actions, not in consent orders or settlements. And there are a number of very high profile ones pending right now with that state's AG office.

So Mike, thanks for the discussion about what we may see from the attorney general, which I think is very important for our audience. But Joe, Bill, what do you think the impact will be of the potential amendment on private litigation?

**Joseph DeFazio:**

That's a great question, Chris. So the AG has hired former CFPB attorneys, and they are signaling a more aggressive posture towards enforcement, particularly towards AI-based schemes, hard-to-cancel subscriptions, data breaches. And what I think this has a trickle down effect, if you will, on private litigation because typically plaintiff's lawyers, if the CFPB was doing it or the AG is doing it, they sometimes then also pick up the mantle and bring lawsuits as well based on similar proposed misconduct by the business. So I think that if the AG is going to pick up a case, it's going to heighten that business's stature to where plaintiff's attorneys will pick up on whatever conduct is being deemed abusive or deceptive or unfair by the AG and also file private lawsuits. So I think that it will broaden the scope of plaintiff's attorneys testing the limits of this law and how it applies to consumers individually. And I think you could see particularly in the class setting, lawsuits that pick up where either the AG left off or bringing theories based under this new law themselves in the class setting.

**Michael Yaghi:**

I'll add to that, even if they don't have the same standard, if the law passes, right, the unfair and abusive conduct is only new for the AG's enforcement, I agree with Joe, plaintiff's lawyers are going to say, well, we're going to call it deceptive anyway. We're going to take that conduct and we're going to pursue similar litigation and say it's also deceptive. And in reality, I think that the state AG would probably bring an argument or a claim under all of those standards and say it's deceptive, it's unfair and abusive. So that lack of clarity I think does even though the private plaintiffs don't have the same brought in authority, Joe's right. I think we're going to see plaintiff's lawyers just test it anyway under a deceptive standard and say, "Hey, us too. We want to bring our class action against banks and consumer finance companies for similar misconduct."

**Chris Willis:**

And honestly, the interchangeability of unfair, deceptive and abusive was made quite obvious by the fact that the CFPB did a lot of times, Mike, what you just described is that they would bring a case and say it's unfair, deceptive and abusive or some combination of them. They weren't very meticulous about saying this is unfair, but not deceptive and not abusive or vice versa. And so I think you're right to flag that danger for the audience for the New York Attorney General's Office, which as you said, all of this is patterned after the Rohit Chopra CFPB.

**Joseph DeFazio:**

I was just going to add that to kind of piggyback off of Mike's comments is that where facts of unfairness and abusiveness overlap, to me that's going to be where the private plaintiffs are going to pick up and bring their lawsuits.



**Bill Foley:**

And if I can piggyback on that, Chris and Mike and Joe, you guys all make fantastic points about how the lines are potentially intentionally blurred and we'd need look no further than the prior version of the bill, which actually included a private right of action for individual litigants to sue under the broadened scope. They've always had a right to sue for "deceptive practices," but the initial version of this bill looked to expand that to give them the same powers as the AG that ultimately did not pass. But to your points, I believe that this is just the next steps as litigants trying to push the boundaries of what is deceptive.

**Chris Willis:**

It also seems to me gentlemen that a law like this, particularly if it's applied in an extra territorial manner as the statute envisions by the Attorney General, could make New York a less hospitable place to be your headquarters if you're a consumer finance business that does lend to consumers nationally. One of the great phenomena that we've seen in consumer finance over the past 10 years or so is the migration of consumer financial services companies from California, for example, to other places like Texas. And there are a number of high profile instances of that happening. What do you think the prospect is for people doing that in New York too?

**Bill Foley:**

I mean, I'll start here. That is something that we discuss ad nauseam with our clients. I mean, it was starting with the Foreclosure Abuse and Prevention Act just called FAPA in New York. That was an incredibly dangerous bill for mortgage lenders, making it so they may not want to lend it New York because of how difficult it is to carry a foreclosure process all the way through to the end. We're kind of reading the tea leaves thinking the same thing may be applicable here.

**Joseph DeFazio:**

I think that this question is always on the mind of our clients to some extent, but I think when you have big populous states like California and in New York, there's so much business to be had that companies kind of factor that in. So I think sometimes when these bills pass, what is not talked about often is that some of these costs of doing business do get borne back on to the consumer. So in doing what the AG is doing here in terms of broadly expanding this bill, I think one of the drawbacks it has is that it creates more litigation, how we've discussed. Private plaintiffs may test these bounds, the AG is going to have broader authority, and that has one or two reactions from businesses usually. They either pass those costs off to the consumers because there are so many consumers here, so they don't want to exit the state. Or it could have the effect of having them do much less business in the state and focusing elsewhere.

**Michael Yaghi:**

Yeah, and I'll add, I think it really depends on how courts ultimately enforce that extra territorial reach. If courts say that for example, the New York AG has the authority to enforce against the New York based company for all its activity in Montana or Wisconsin or some other jurisdiction,

that might make it a little bit more incentive for businesses and banks to say, or consumer finance companies say, maybe we go across to New Jersey or something to sort of get away from that piece of it. But at the same time, when the CFPB comes back and is enforcing nationwide and active, which will most likely happen in the future, maybe banks and clients realize they have the same issues at the federal level anyway. It really, I think, just depends on how the AG's going to enforce these new standards and how successful the AG's office is in enforcing them, especially in that extra territorial space before I think a lot of companies really consider moving to different jurisdictions. That's just my take.

**Chris Willis:**

Yeah, I think you're probably right. Well, let's close out the episode by giving our clients some practical feedback on what they should do in response to this development, assuming it does develop later this year as anticipated. So gentlemen, what do you think about that?

**Joseph DeFazio:**

I would say that with any statute that passes that tends to broaden these laws and the potential for expanded litigation, that the first thing our clients, which probably they're already doing and being advised on, is to reassess their internal policies to ensure they're addressing this broader definition of unfair and abusive practices. Additional training on the expanded definitions, enhancing their monitoring systems for the broader range of prohibited conduct, updating their policies and procedures are things that they probably are already doing whenever a bill like this is being proposed with the thought that it will likely get passed ultimately and signed by the governor.

**Bill Foley:**

And add on to that too, obviously as Joe and I are litigators, so we'll speak to it from that context. The courts will eventually begin to create a body of case law around what these definitions are and how they're interpreted. So obviously keeping abreast of that, staying in touch with your qualified outside counsel and your internal legal team to just see where the winds are blowing with respect to these developments is always a very important part. Also, something to be aware of as the AI is here to stay and is everywhere now be mentioned in the preamble portion of the bill of new and emerging technologies. That's in the purpose section of the proposed legislation. You really need to keep a lookout on how your AI and data collection efforts are being done at the business level so as not to run afoul of these new broadened protections.

**Michael Yaghi:**

And I'll just add on one area I think clients should focus on, given this new loss, it passes sort of the fees they charge, right? Is there any way that fees being charged in any context could be deemed abusive or unfair? Because the AG is going to come after companies where the office perceives some sort of unfairness or abusive behavior in terms of increased fees passed on to consumers. And I say that because all these, there are a lot of states that have passed anti junk fee laws, right? And that's essentially this is going to help sort of attack that perceived abuse in the marketplace by the office. So I would say really take a look at how are we charging fees,



how are we disclosing fees? What do they support? What's the legitimate purpose of those fees? All of that sort of thing to really assess and protect against some enforcement after this law if it ultimately passes to prevent sort of enforcement by the AG for those issues.

**Chris Willis:**

Alright gentlemen, well thank you for that. And thank you for all of your very informative comments during this episode. I know I appreciated them, and I'm sure the audience did too. And of course, thanks to our audience for listening to today's episode as well. Don't forget to visit and subscribe to our blogs, [TroutmanFinancialServices.com](https://www.troutmanfinancialservices.com) and [ConsumerFinancialServicesLawMonitor.com](https://www.consumerfinancialserviceslawmonitor.com). And while you're at it, why not visit us on the web at [Troutman.com](https://www.troutman.com) and add yourself to our consumer financial services email list. That way we can send you copies of the alerts and advisories that we release from time to time as well as invitations to our industry only webinars. And of course, stay tuned for a great new episode of this show every Thursday afternoon. Thank you all for listening.

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