Podcast: *The Consumer Finance Podcast* x *Payments Pros – The Payments Law Podcast*
Episode: EWA Litigation Trends: Unpacking EWA Class Actions, Mass Arbitrations, and State Enforcement
Host: Jason Cover
Guests: Erin Edwards, Joe DeFazio, and Dave Gettings
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Jason Cover (00:05):
Welcome to a special crossover edition of the *Payments Pros* and *The Consumer Finance Podcast*. I'm Jason Cover, one of the hosts of the *Payments Pros* podcast, and today I'm joined by Erin Edwards, Joe DeFazio, and Dave Gettings to discuss EWA litigation trends. But before we jump into today's episode, don't forget to visit our Financial Services Hub, TroutmanFinancialServices.com, and subscribe so you can get the latest updates. Don't forget to check out our other podcasts on Troutman.com/podcasts. We have episodes that focus on trends that drive enforcement activity, digital assets, consumer financial services, and more. Make sure to subscribe to hear the latest episodes. Erin, Joe, Dave, thanks so much for joining us today.

Erin Edwards (00:45):
Thanks, Jason.

Dave Gettings (00:46):
Thanks for having us, Jason. It's very exciting to be on a crossover episode. It feels like one of those special TV shows.

Jason Cover (00:52):
It truly is, Dave.

Dave Gettings (00:54):
I'm very excited.

Jason Cover (00:55):
I think we've talked a lot on both *Payments Pros* and in the *Consumer Financial Services* podcast about EWA products and maybe a little bit more from a regulatory product design spin. But we haven't really done a dedicated episode focused on litigation trends. So with that in mind, Erin, I think just to remind everyone, could you give us a little background on what EWA is, just to reset the table, if you will?

Erin Edwards (01:19):
Sure. Happy to. At its core, EWA means giving a worker early access to wages that the worker's already earned before their scheduled payday. So for example, a worker's

worked 40 hours, their scheduled payday is Friday, but they would like their money on Wednesday. And there's a couple of different models. There's an employer partner model where the provider has a relationship with the employer and then integrates with that employer's payroll system, can verify the hours that were worked and the earnings associated. So obviously that's really built around current payroll information rather than an estimate. And then there's also a direct-to-consumer model, which is slightly different, where the provider works directly with the worker, often using bank account data or other information to estimate earnings. And there's no real direct relationship with the employer there.

Jason Cover (02:17):
And Erin, I guess what I've noticed over the last five to 10 years is we had a couple clients that were interested in something along these lines 10 years ago, and now it seems like everybody is interested in these products. They've become very mainstream. Do you get that sense that that's what's going on in the market as well?

Erin Edwards (02:33):
Oh, absolutely. Let me start with the size of the market. By 2022, employer earned wage access, or EWA transactions, had reached approximately 22.8 billion. That's a figure that was sourced from the CFPB's advisory opinion. That market is still expected to expand substantially. Projections call for roughly 300% growth through 2034, which would mean obviously a several-fold expansion over the next decade. So that scale really matters. EWA is no longer a fringe product. It's a significant financial services market that involves millions of consumers and real money. So the stakes are really very high for the people using the products and the businesses providing them.

Jason Cover (03:20):
Erin, with all of that growth comes scrutiny and questions have arisen as to what this product is. I think both regulators, plaintiffs, AGs have sought to recharacterize these products as credit. And leading the way, I suppose, has been the CFPB. I think we've talked in the past about how the rules keep changing at the federal level. But could you just give everyone a quick reminder on at least the CFPB's current position, if not its past positions?

Erin Edwards (03:48):
Yeah, absolutely. You're totally right. When a market grows this large and this fast, regulators and plaintiffs' lawyers, they're going to take notice. That pace and scale naturally brings more scrutiny and opportunity for litigation. And like the regulatory front, litigation has generally focused on the central issue of whether or not EWA should be treated as credit or something else. That's really the question that's at the heart of the debate. And so you're right, this CFPB story can be understood through three key moments in 2020, 2024, and 2025. And each really reflects a sharp shift in the Bureau's position. In 2020, the CFPB issued an advisory opinion saying that certain EWA products were not credit under TILA and Regulation Z. That was built really on a

rationale that the products involved no fees, no interest, no mandatory repayment from the next paycheck.

And on that reasoning, the products really didn't meet the definition of credit. For the industry, that opinion really operated as a green light and companies started building products and compliance programs around that guidance. Then in 2024, the CFPB reversed course. The Bureau said EWA is credit, and that position swept in a broad range of products. The theory there was that the money advanced to consumers that has to be repaid is credit. And once the product is treated as credit, then other lending law obligations start cropping up. But then in 2025, the CFPB rescinded that opinion and returned to the 2020 position, saying certain EWA products are not credit. So really the practical impact is significant. In litigation, both sides are arguing various versions of the CFPB's guidance and the flip-flop causes litigation uncertainty. And of course, plaintiffs' counsel want to rely on the 2024 opinion that EWA is credit to give them a foothold for certain claims.

Jason Cover (06:04):
Erin, that's absolutely right. The CFPB's guidance is generally tracking the controversy at the state or plaintiffs' level as well. One important note on the current CFPB opinion, it really sets a safe harbor for that employer-partner model Erin talked about. It doesn't really extend to the direct-to-consumer model as much. It would have been nice if they had covered that, but they sort of decided not to take a position as I understand it. So be careful, I suppose, if you're... The products that you're working with, the structure matters.

And then the other thing that I think has been a controversy that we'll talk about is whether the fees involved at EWA are or aren't finance charges or interest under state law. And the newest order, unlike the Biden administration order, seeks to clarify that expedited funding fees and tips and things like that are clearly not finance charges under federal law, which I think would have been our position for quite some time. And I suppose with that in mind, Dave, could you tell us a little bit about what's happening at the private litigation level, whether it's class or individual arbitration?

Dave Gettings (07:11):
A lot is happening and we are on the, I would say sort of the front end of a lot of the litigation I think we're going to see as this area develops. So we are certainly seeing class actions and we're seeing private lawsuits against EWA providers. The other important wrinkle is we're also seeing a fair amount of mass actions. And what's happening there is obviously many of these EWA providers have arbitration agreements in their consumer-facing documents. So we're seeing a lot of threatened mass arbitrations in the EWA space, which can obviously be very, very expensive for EWA providers. So it's a new area that's really developing and that's requiring a lot of thought and a lot of strategic insight. In terms of the claims we're seeing, they really run the gamut, but we're seeing a lot of, for example, TILA claims, we are seeing Military

Lending Act or MLA claims, and we're also seeing a lot of state lending law claims and UDAP claims.

Effectively, the allegations supporting most of those claims is that EWA products are disguised loans and should be treated as credit, which would trigger certain obligations under statutes like TILA and MLA and to a maybe to a lesser extent, state UDAP laws. So we've really seen a lot of these cases percolating up through the district courts at this point, and many of the decisions we're seeing are coming in the forms of motions to dismiss or even motions to compel arbitration where the court has to decide whether it believes that the products are credit. And I think in this initial volley, a lot of these decisions have come out in favor of plaintiffs' counsel, or plaintiffs, I should say, but not all. And that's why it's going to be really important to look at the developing appellate landscape as it comes. In doing their analysis, courts have often looked at the definitions of credit. For example, to paraphrase, some have held that credit is the right granted to a consumer by a creditor to defer payment of debt. That is a really high-level definition and I think, in my view, often doesn't capture some of the nuance.

But using this definition, some courts have held that EWA products are credit despite, for example, the consumer often having absolutely no obligation to repay the EWA advance and even the specific text in the agreement specifically disclaiming the obligation to pay. So it's a really sort of interesting, I would say, nuance or conflict we've got here where you've got some courts calling EWA products credit even though everybody agrees there is no obligation to repay some of these products. And that's the design of the product. But these decisions have really opened the floodgates to more litigation, to more mass arbitrations challenging whether these EWA products do in fact violate laws like TILA, for example.

So really what we're looking at in the litigation landscape now is still having these cases percolate through the district courts, some percolating through arbitration, and ultimately we're going to have to wait and see on some of these appellate decisions how they ultimately look at these products.

Jason Cover (10:43):
Dave, I've been surprised. In my mind, the core concept of what credit is is an absolute obligation to repay both at common law, state level, and federal level. And it just seems like courts are sort of reaching result-oriented orders and ignoring that concept. And then we've always cited to Veale, V-E-A-L-E, which is an 11th Circuit case that basically says if a fee is optional or avoidable, it's not a finance charge. And again, it seems like courts have just ignored that entirely to get the result that they want.

Dave Gettings (11:18):
It's actually kind of remarkable. You've got the EWA provider in court saying there's no obligation to repay, the contract says there's no obligation to repay, and we never, for example, report credit or we never file collection actions because there's no obligation to

repay. And the courts, to your point, tend to have, at least at this point, have a little bit more of a consumer-focused result.

Jason Cover (11:40):
Dave, you also mentioned arbitration provisions, and I think there's a general sense of, “Hey, I've got a good arbitration provision with a class action waiver. It creates an alternative mechanism for me and the consumer to work things out.” I've seen a lot of these styled as Military Lending Act claims. Is there a reason for that? Is that why we have class actions here despite the arbitration provisions?

Dave Gettings (12:03):
With respect to the MLA, if a borrower is a covered borrower under the MLA, then they're not subject to binding arbitration even if there's an arbitration agreement in the agreement. So that is some of the reasons we've seen class actions. It's, for example, MLA class actions where you can't enforce an arbitration provision. But actually, ironically, we've got a case right now. You probably know this, Jason. There's a safe harbor in the MLA that says if you get a credit report and it says the consumer's not a covered borrower, then the MLA doesn't apply. So we've got a situation now where we are actually moving to enforce arbitration against someone who claims to be a covered borrower. We got a credit report that said she wasn't. So all sorts of developing nuance in MLA and EWA and class actions running amok.

Jason Cover (12:52):
Yeah, I think it's a really interesting question if you're an EWA provider and if recharacterized, if the APR exceeded an MAPR of 36%, whether to lend to covered borrowers and use a credit report for the safe harbor like you said, Dave. It's certainly something I've discussed with a lot of clients because of that back-end risk of MLA covered borrowers being able to form a class. Joe, you and I have discussed in the past that it would be great to have a legislative fix for some of this, and I know there's been at least some talk of that floated in Congress. Is that the case, or what are your thoughts on that?

Joe DeFazio (13:25):
Let me pick up where Dave left off because all of this uncertainty is exactly why Congress has started to get involved. So whether EWA counts as credit really shouldn't change every time a new administration comes in. So that kind of whiplash is bad for the industry, it's bad for consumers, and bad for anyone trying to plan around the rules. So there's some proposed bills out there, as you've probably seen, Jason, that would set up a federal framework that treats EWA as its own product category separate from credit. The idea has support actually from both parties because a stable federal approach beats watching an agency reverse itself every few years and this kind of logjam of litigation that Dave was discussing that we're starting to see not only in courts, but in arbitration as well.

So the idea is to write consumer protections that actually fit EWA rather than forcing these products into lending laws that were never designed for them. The way I think about it practically is picture applying full TILA to a $100 advance on wages someone has already earned where there's no interest and no fees. That to me would confuse consumers more than it helps them because an APR on a small, short-term advance would look absurdly high when the product actually costs the consumer nothing. So rules written for the product may protect consumers better, and that would settle the credit question once and for all instead of leaving it to agencies, the courts, et cetera. So I think there's some real design questions there, like what consumer protections should be required, should employer-partnered and direct-to-consumer models be treated the same? And probably the biggest one for our listeners that they would mostly care about is: should federal law preempt the states?

So kind of where does that leave us is there's bipartisan interest to have a legislation passed, which I think is a good sign. Unfortunately, I wouldn't call passage of this imminent, and there are other legislation making its way through Congress that have more priority than this, but it's definitely something that we should be watching and our clients should be watching closely.

Jason Cover (15:31):
To your point, these are products that were designed with the existing rules and they don't fit within the existing framework. BNPL lending is very similar, where both EWA and BNPL products were designed based on these rules, they don't fit within TILA, and then you have the rules shift under people's feet every four years. It's very frustrating, I think.

Joe DeFazio (15:50):
Yeah, I completely agree. And I think part of one of the issues that we're also seeing that's probably frustrating our clients is the states' outlook on this. So while Congress is working through all that, the states aren't waiting as you know, it's probably one of the most active areas in financial services regulation right now, and it's playing out on two fronts that we've seen. One is Attorney General enforcement and the other is legislation. So on enforcement, state AGs are actually alleging that EWA products are really loans in disguise. I believe Dave touched on that and that providers are violating state lending and licensing laws.

On the legislative side, there's states that have passed or are considering passing EWA-specific laws. They usually include licensing requirements, some consumer protection standards, disclosures written for EWA. There's states that are still considering bills and others haven't addressed it at all. So where does that leave us? It's a patchwork in place. Some states say EWA isn't credit and regulated under their own EWA laws and others the AG is suing under lending laws. And there's states that haven't weighed in, which I would call are the gray zones. So if you're a national provider, that's a serious compliance burden. You need a state-by-state analysis. You

could be fully compliant in one state and face an enforcement action in the next. The rules can change anywhere at any time. It's creating ongoing litigation risk at the state level, and federal and state law could end up pointing in different directions depending on where your case is venued.

So really the bottom line there is, until we get federal legislation, this patchwork is only going to continue to grow. So my takeaway on all that is watch Congress and watch the state houses. A federal law could really resolve a lot of this uncertainty, but we're not there yet. So until then, this state patchwork will keep growing and companies really need a 50-state strategy for where they're going to offer these products.

Jason Cover (17:44):
Joe, 100% agree. I think 10 years ago when clients called and said, “Hey, I want to do an EWA product,” they based it in one of those models that Erin described, the employer-based or the consumer-oriented, and largely rolled those out on a 50-state basis based on the underlying legal theory that this isn't a credit product. It was really something that you could launch on a 50-state or nearly 50-state basis very quickly. And to your point, it's become a hodgepodge with registrations and licensing and good states and bad states, sort of as with any product at this point. So it's not quite as much of a quick-to-launch product as it used to be, but I think for those that are exploring it, it still is probably quicker and may overlay some of your existing products than trying to go through the traditional licensed lending model or something along those lines. But 100% agree that it has been certainly a very, very active area. It seems like legislation or enforcement or guidance pops up every couple of months in this area. I think we've given a great overview here. Curious if the three of you just have any closing thoughts or wrap-up on the topic here.

Dave Gettings (18:55):
Yeah, I can go first. I mean, first I will say crossover podcasts are the best, and so thank you for inviting us to this crossover podcast.

Jason Cover (19:02):
Of course, Dave.

Dave Gettings (19:03):
Second, I just think from a litigation perspective, we just have to start looking at what happens in the courts of appeals because we've got some district court decisions now in EWA on arbitration, for example, in the MLA context. I think what happens in the appeals court will be informative for the years to come.

Erin Edwards (19:20):
Totally agree with Dave. And I think that although we have a more recent CFPB opinion that is helpful for EWA providers, really relying on it is tricky with all the back and forth

and uncertainty. So I wouldn't make that your focal point in litigation, just relying on that guidance.

Joe DeFazio (19:42):
Yeah, and I would say what all three of these have in common is the most basic question in this space: whether EWA is credit doesn't have a settled answer. And a federal framework could finally provide one, and the bipartisan interest is encouraging, but I wouldn't plan around a bill passing anytime soon. So my advice to providers and to the employers who partner with them is to build for the world we actually are living in right now. So that means compliance programs flexible to absorb the next swing at the CFPB, a clear view of exposure in every state where you operate, and close attention to the appellate docket, as Dave mentioned, and the Capitol Hill.

Jason Cover (20:17):
Erin, Dave, Joe, thank you so much for joining us today. And thank you to our audience for listening to today's episode. Don't forget to visit our Financial Services Hub, troutmanfinancialservices.com, and subscribe so you can get the latest updates. Please also make sure to subscribe to this podcast on whatever platform you use. We look forward to the next time. Thanks so much.

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