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A Closer Look at New York's Proposed Abusiveness Prohibition

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In January, New York Governor Kathy Hochul introduced a budget bill that proposed the headline-grabbing Buy Now Pay Later licensing regime. Less attention has been given to another proposed provision: adding a prohibition on unfair or abusive acts or practices to New York's existing prohibition on deceptive acts or practices in Section 349 of the New York General Business Law. The bill adopts the unfairness standard found in federal law, which has a long history. New York's proposed abusiveness prohibition could be more of a moving target because of the breadth of the abusiveness standard and the relative newness of the prohibition under federal and state law.

New York is not the first state to add an abusiveness prohibition to its state trade practices statute. However, as one of the most populous states and a state with a historically aggressive regulator, New York's potential addition of an abusiveness prohibition warrants headlines itself. Here are a few observations about the proposed addition of an abusiveness prohibition to New York's Section 349:

The proposed abusiveness standard closely tracks the language under the federal Consumer Financial Protection Act (CFPA) abusiveness standard, with one notable exception. Specifically, the proposed New York abusiveness standard does not include the last prong of the federal abusiveness standard—"takes unreasonable advantage of ... the reasonable reliance by the consumer on a covered person to act in the interests of the consumer." Even with this omission, the proposed New York abusiveness standard is broad.

Unlike the federal abusiveness standard, which is limited to consumer financial products or services, the proposed abusiveness prohibition would apply to goods, services, or property for consumer *or* business purposes. New York's abusiveness prohibition also would not be limited to financial products or services. Other states such as California apply their abusiveness standard to small business products.

In addition to authorizing the New York Attorney General to assert claims under Section 349 for unfair, deceptive, or abusive acts or practices, the proposed bill would modify the existing Section 349 provision that sets forth a private right of action and permits a court to award reasonable attorneys' fees to a prevailing plaintiff. The proposed bill would, instead, *require* a court to award reasonable attorneys' fees *and costs* to a prevailing plaintiff in connection with any violation of Section 349.

The bill places limits on actions under Section 349. For private litigants, the bill requires a person to provide notice of the alleged violation and demand corrective action in writing within 30 days prior to commencement of an action or an amended complaint for monetary damages exceeding $500. If appropriate corrective action is made within a certain time, then no action for damages greater than $500 may be maintained. The bill also limits actions for monetary damages under Section 349 if a person, who has allegedly engaged in unfair, deceptive, or abusive acts or practices, corrects the allegedly unlawful conduct with respect to similarly situated consumers.

The bill does not revise Section 349's existing language that it is a complete defense to a claim under Section 349 if an act or practice complies with the rules and regulations of, and the statutes administered by, the Federal Trade Commission (FTC) or any official department, division, commission, or agency of the United States as such rules are interpreted by those governmental entities. While the existing language is broad enough to include the Consumer Financial Protection Bureau (CFPB), it is curious that the proposed bill does not revise this language to refer to the CFPB, which is the primary federal regulator with abusiveness authority.

In sum, the proposed abusiveness prohibition could give the New York Attorney General another enforcement tool to allege unlawful conduct in the financial services and other industries.

Federal abusiveness standard and the broader context

If passed, the New York Attorney General could bring abusiveness claims under the federal CFPA or separately under New York law. Since it was enacted, the financial services industry has called for more guidance on the contours of the federal abusiveness standard. In April 2023, the CFPB published a policy statement that summarized the CFPB's existing abusiveness enforcement actions and endeavored to provide guidance to the industry and other regulators on how to identify abusive conduct. (The CFPB previously published a policy statement in 2020 that was rescinded in 2021.) The CFPB also recently proposed to use its abusiveness authority under the "lack of understanding" prong to prohibit certain non-sufficient funds (NSF) fees. The proposal provides another window into the CFPB's current position on the federal abusiveness standard.

The CFPB's view of abusiveness continues to evolve and be a moving target. While the 2023 CFPB policy statement and NSF fee rulemaking proposal illuminated aspects of the federal abusiveness standard, many questions remain on the scope and meaning of the standard, and the case law interpreting the standard is thin. The CFPB's incremental approach means that the federal abusiveness standard will remain open to interpretation as well as susceptible to the shifting views of CFPB leadership over different administrations.

If a separate abusiveness standard is enacted in New York, the New York Attorney General would not necessarily be bound to follow the CFPB's evolving interpretation of the federal abusiveness standard, particularly with respect to abusiveness claims involving small business funding products or services. While we expect the CFPB's interpretation of the federal abusiveness standard to be influential to state regulators generally, New York would have the discretion to interpret the abusiveness standard under its own law in different or novel ways.

Contact us

We regularly advise clients on the interplay of federal and state laws, including state trade practices statutes, and the contours of the CFPB's abusiveness authority. One of the co-authors played a critical role in drafting the CFPB's abusiveness policy statements and two rulemakings applying the standard. If you have questions about New York's proposed abusiveness prohibition or the CFPB's abusiveness authority, contact Susan Seaman, Mike G. Silver, or your Husch Blackwell attorney.