
New York Governor Hochul Seeks to Strengthen and Expand State Consumer Protection Laws

JANUARY 24, 2024

In her State of the State address earlier this month, New York Governor Kathy Hochul proposed a significant expansion of New York’s consumer protection laws.¹ As part of her efforts aimed at “Protecting Consumers and Their Pocketbooks,” Hochul announced that she plans to strengthen the state’s consumer protection laws to prohibit “unfair” and “abusive” business practices by entities doing business in New York and to expand the scope of New York’s consumer protection laws to residential real estate transactions and business-to-business sales. She also seeks to authorize the state’s Department of Financial Services (DFS) to regulate the Buy Now Pay Later (BNPL) industry.

Hochul’s consumer protection proposals reflect a change in governing philosophy from that of her predecessor, Andrew Cuomo. Four years ago, Governor Cuomo proposed to expand the powers of DFS, the state’s banking and insurance regulator, by creating a Consumer Protection and Financial Enforcement Division within the department, with new and substantial enforcement powers over consumer products and services, business-to-business arrangements, and securities and investment advice.² This proposal was viewed as an attack on the powers of the attorney general, the state’s consumer and investor protection regulator and enforcer, which operates independently of the governor.³ The legislature declined to take up the Cuomo proposal.⁴ Now, Hochul is proposing to expand both agencies’ powers in a manner consistent with their current differentiated authorities and responsibilities.

The proposals were released last week as part of Hochul’s executive budget presentation.⁵

1. Hochul’s Proposal to Expand and Strengthen New York’s Consumer Protection Law

State UDAP laws—which generally prohibit unfair, deceptive or abusive acts or practices by businesses that victimize consumers—are modeled after Section 5 of the Federal Trade Commission Act and serve as each state’s essential consumer protection law. New York’s UDAP law, General Business Law (GBL) § 349, is by its terms more limited. Only “deceptive acts or practices in the conduct of any business, trade or commerce” are unlawful; the law does not expressly prohibit “unfair” or “abusive” practices, as is the case in 42 states.⁶ State attorneys general enforce state UDAP laws. In some states, including New York, private plaintiffs can also

bring suit.

Hochul's Consumer Protection Act proposal expands GBL § 349 to make “*unfair, deceptive or abusive* acts or practices in the conduct of any business, trade or commerce” unlawful.⁷ The proposal defines unfair acts and practices as those that cause or are “likely to cause substantial injury” that is “not reasonably avoidable” and “is not outweighed by countervailing benefits to consumers or competition.”⁸ Abusive acts and practices are those that “materially interfere[] with the ability of a person to understand a term or condition of a product or service” or “take[] unreasonable advantage of” either “a person’s lack of understanding of the material risks” or “a person’s inability to protect their interests in selecting or using a product or service.”⁹

Although UDAP laws generally apply only to the sale of goods and services where the end user is a consumer, Hochul's proposal expands GBL § 349 to apply “regardless of whether or not the underlying violation is directed at individuals or business or involves the offering of goods, services or property for personal, family or household purposes.”¹⁰ The law would thus reach business-to-business transactions, and the use of the term “property”—if interpreted to mean real property—could bring GBL § 349 into the realm of residential property transactions, such as home sales and apartment leases.

GBL § 349's private right of action empowers private plaintiffs to bring actions concerning alleged deceptive acts or practices, and authorizes courts to award attorneys' fees and costs to prevailing plaintiffs. Concomitant with its expansion of the attorney general's power, Hochul's proposal enables private plaintiffs to bring actions to remedy “unfair” or “abusive” acts or practices¹¹ while requiring courts to award attorneys' fees and costs to successful plaintiffs.¹² Prior to an action by a private plaintiff, however, Hochul's proposal would institute a new requirement for the plaintiff to give notice to the alleged offender and enable it to cure.

Hochul's proposal also increases the penalties for violation from \$50 per violation to \$1,000 per violation or the amount of actual damages, whichever is greater.¹³

The practical impact of the expansion of the law's scope from deceptive acts and practices to include unfair and abusive business practices might be less than meets the eye. New York courts do not regularly reject actions by the attorney general regarding business practices that are merely unfair or abusive; indeed, in one case, a New York court rejected the defendants' argument to dismiss the attorney general's GBL § 349 claim because the allegations were not deceptive acts covered by the statute but instead unfair practices beyond the statute's reach, calling it a “largely semantic argument.”¹⁴ However, the expansion of the scope of GBL § 349 to cover business-to-business and residential property transactions could be quite significant. Though California's UDAP law is somewhat similar in scope, most other states' UDAP laws are not so far-reaching.¹⁵

2. Hochul's Proposal to Regulate the Buy Now Pay Later Industry

A BNPL loan serves as a close substitute for credit cards. BNPL is a form of interest-free credit that allows a consumer to fully purchase a product and pay back the loan over installments (usually four), with the first installment typically being a down payment on the purchase. In recent years, BNPL activity has grown substantially, increasing globally more than tenfold across five firms that

the Consumer Financial Protection Bureau (CFPB) surveyed from 2019 through 2021.¹⁶ These products are not currently subject to licensing requirements in New York.¹⁷ While BNPL transactions are typically designed not to fall under the Truth in Lending Act, they are extensions of credit.¹⁸ The CFPB's authority thus extends to these loans.

Hochul proposed legislation not only requiring BNPL providers to acquire a license to operate in the state of New York but also authorizing New York's DFS to regulate BNPL services and transactions.¹⁹ In her State of the State address, Hochul listed six specific issues with BNPL loans that pose risks for consumers, including overextending borrowers, inadequate dispute resolution, inadequate disclosure of terms, and excessive fees.²⁰ The proposed legislation aims to address these issues.²¹

The Buy Now Pay Later Act (the BNPL Act) would require that any business offering BNPL loans in New York State must obtain a license from DFS.²² DFS would assess all applications for a license to determine whether the applicant meets the capital requirements laid out in the bill, "command[s] the confidence of the community," and warrants "the belief that the business will be conducted honestly, fairly and efficiently."²³ BNPL lenders would be prohibited from "false, misleading, or deceptive" advertisements for loans and may only charge interest at a rate of "six per centum per annum unless a different rate is prescribed in section fourteen-a of the banking law."²⁴

Under the BNPL Act, lenders would be required to disclose the terms of the loans, implement procedures for maintaining accurate data to report to credit agencies, handle returns and resolve disputes in a fair and transparent manner, and "clearly and conspicuously" disclose how a consumer's data may be used.²⁵ Lenders could not charge "unfair, abusive, or excessive" penalties or fees in connection with a loan.²⁶

The BNPL Act would also grant authority to DFS "to promulgate such general rules and regulations as may be appropriate, in their sole discretion, to implement the provisions of this article, protect consumers, and ensure the solvency and financial integrity of buy-now-pay-later lenders."²⁷ Such rulemaking includes setting capital requirements to ensure the financial integrity of BNPL lenders, establishing regulations requiring BNPL lenders to reasonably determine the ability of consumers to repay BNPL loans, and making any "specific rulings" as "may be necessary for the proper conduct of the business."²⁸

Finally, the BNPL Act would grant DFS the authority to examine BNPL lenders.²⁹ While the CFPB has required BNPL providers to produce reports concerning their operations and has reportedly engaged in some supervisory activity at these entities, nonbank BNPL providers have not generally been subject to federal supervision.

The BNPL Act would thus provide DFS general rulemaking and regulatory authority over the industry. The expansion of supervisory authority to DFS, in particular, would represent a meaningful increase in supervisory scrutiny of these companies. The stated purposes of the BNPL Act, and in particular the concerns cited by Hochul in her State of the State address, also align with the concerns articulated by the CFPB regarding BNPL products. The CFPB has issued multiple public reports describing concerns with BNPL products from a consumer perspective, including the absence of

consumer protections that would accompany a credit card transaction, lack of clarity about late fees or other fees, and borrowers becoming overextended because BNPL has not historically been subject to the same kind of underwriting as credit cards.³⁰

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Entities doing business in New York should monitor these proposals to determine how they may be impacted should the legislation be approved. Consumer finance companies offering BNPL products will be the most directly impacted, given they will be subject to DFS regulation in addition to the CFPB's authority. But all companies doing business in New York should take note of the proposed expansion of New York's UDAP law, which would greatly strengthen the powers of the attorney general—and the plaintiffs' bar—to file suit concerning not only cases of consumer deception but also cases of allegedly unfair or abusive business practices impacting consumers and businesses as well as residential renters and buyers.

WilmerHale is closely monitoring developments in state and federal enforcement, as well as private litigation, related to consumer protection laws. If you have any questions or require assistance with an enforcement or litigation matter, please feel free to reach out to this alert's authors or any of your contacts at WilmerHale, as the appropriate measures and recommendations depend on the particular facts at issue.

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1. Press Release, Governor Kathy Hochul, Governor Hochul Unveils First Proposal of 2024 State of the State: The Consumer Protection & Affordability Agenda (January 2, 2024), <https://www.governor.ny.gov/news/governor-hochul-unveils-first-proposal-2024-state-state-consumer-protection-affordability>.
 2. Brian Mahanna, et al., *Governor Cuomo Proposes Significant Expansion of Powers of New York Department of Financial Services*, WilmerHale Client Alert (February 18, 2020), <https://www.wilmerhale.com/insights/client-alerts/20200218-governor-cuomo-proposes-significant-expansion-of-powers-of--new-york-department-of-financial-services#:~:text=The Governor's proposal would enlarge,services, business to business arrangements,>.
 3. *Id.*
 4. *Id.*
 5. Transportation, Economic Development and Environmental Conservation (TED) Bill, pt. CC and pt. JJ (January 14, 2024), <https://www.budget.ny.gov/pubs/archive/fy25/ex/artvii/ted-bill.pdf>. *see also* Memorandum in Support of TED Bill, pt. CC and pt. JJ (January 14, 2024), <https://www.budget.ny.gov/pubs/archive/fy25/ex/artvii/ted-memo.pdf>;
 6. N.Y. Gen. Bus. Law § 349(a); Press Release, Governor Kathy Hochul, Governor Hochul Unveils First Proposal of 2024 State of the State: The Consumer Protection & Affordability Agenda (January 2, 2024), <https://www.governor.ny.gov/news/governor-hochul-unveils-first-proposal-2024-state-state-consumer-protection-affordability> (“New York is one of only eight states in the nation whose law fails to protect against unfair and abusive business

practices.”); *see also* Carolyn Carter, *Consumer Protection in the States; A 50-State Report on Unfair and Deceptive Acts and Practices Statutes*, p. 12, National Consumer Law Center Inc. (February 2009), https://www.nclc.org/wp-content/uploads/2022/08/report_50_states.pdf (“Eight state UDAP statutes [] do not include a general prohibition of unfair or unconscionable practices.”).

7. Consumer Protection Act, TED Bill, pt. JJ (Jan. 14, 2024) (emphasis added).
8. *Id.* at § 349(a).
9. *Id.*
10. *Id.* at § 349(b).
11. *Id.* at § 349(h).
12. *Id.*
13. *Id.*
14. *State v. Daicel Chem. Indus., Ltd.*, 2004 NY Slip Op 30195[U], 2004 BL 1615 (Sup. Ct. Sept. 24, 2004).
15. Unfair Competition Law, Cal. Bus. & Prof. Code § 17204 (“Actions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General [] *or by a person who has suffered injury in fact and has lost money or property* as a result of the unfair competition.”) (emphasis added).
16. Consumer Financial Protection Bureau, *Buy Now, Pay Later: Market trends and consumer impacts* (September 2022), https://files.consumerfinance.gov/f/documents/cfpb_buy-now-pay-later-market-trends-consumer-impacts_report_2022-09.pdf.
17. *See generally* Licenses Granted by New York’s Department of State, <https://dos.ny.gov/all-licenses>.
18. BNPL products do not impose an interest charge and are payable in no more than four installments, and BNPL products typically are not subject to the Truth in Lending Act, as implemented by the CFPB’s Regulation Z, which requires lenders to provide, among other things, standardized disclosures to consumers regarding key terms of a loan, when and how fees are assessed, and when payments are due. 15 U.S.C. §§ 1601–1667f; Consumer Financial Protection Bureau, *Buy Now, Pay Later: Market trends and consumer impacts* (September 2022), https://files.consumerfinance.gov/f/documents/cfpb_buy-now-pay-later-market-trends-consumer-impacts_report_2022-09.pdf.
19. Press Release, Governor Kathy Hochul, Governor Hochul Unveils First Proposal of 2024 State of the State: The Consumer Protection & Affordability Agenda (January 2, 2024), <https://www.governor.ny.gov/news/governor-hochul-unveils-first-proposal-2024-state-state-consumer-protection-affordability>; Buy Now Pay Later Act, TED Bill, pt. CC (January 14, 2024).
20. Governor Kathy Hochul, 2024 State of the State, pages 41–42 (January 2024), <https://www.governor.ny.gov/sites/default/files/2024-01/2024-SOTS-Book-Online.pdf>.

21. Buy Now Pay Later Act, TED Bill, pt. CC (January 14, 2024) (“[t]he banking law is amended by adding a new article 14-B” covering Buy Now Pay Later Lenders).
22. *Id.* at § 737.
23. *Id.* at § 738.
24. *Id.* at §§ 744–745; General Obligations Law § 5-501(1).
25. Buy Now Pay Later Act, TED Bill, pt. CC (January 14, 2024) at §§ 746(1), (3)–(7).
26. *Id.* at § 746(6).
27. *Id.* at § 747.
28. *Id.* at §§ 738(3), 746(2), 747.
29. *Id.* at § 742 (DFS “shall have the power to make such investigations as the superintendent shall deem necessary to determine whether any buy-now-pay-later lender or any other person has violated any of the provisions of this article or any other applicable law, or whether any licensee has conducted itself in such manner as would justify the revocation of its license”).
30. Consumer Financial Protection Bureau, *Buy Now, Pay Later: Market trends and consumer impacts* (September 2022), https://files.consumerfinance.gov/f/documents/cfpb_buy-now-pay-later-market-trends-consumer-impacts_report_2022-09.pdf; Cortnie Shupe, Greta Li, and Scott Fulford, *Consumer Use of Buy Now, Pay Later: Insights from the CFPB Making Ends Meet Survey*, CFPB Office of Research Publication No. 2023-1 (March 2023), https://files.consumerfinance.gov/f/documents/cfpb_consumer-use-of-buy-now-pay-later_2023-03.pdf.

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