



Written Testimony
by the
Student Borrower Protection Center
at the
Joint Legislative Budget Hearing on Economic Development

January 30, 2024

The Student Borrower Protection Center (SBPC) writes in favor of Governor Hochul’s proposed Consumer Protection Act, Part JJ of the Transportation, Economic Development and Environmental Conservation Article VII bill in the FY 2025 Executive Budget, and to call to the Legislature’s attention critical amendments to the Governor’s proposal that must be made to ensure New Yorkers have the same protections as residents of other states. Specifically, we urge the Legislature to incorporate the Consumer and Small Business Protection Act (Comrie S.795/Weinstein A.7138) into its One House Budget proposal, as it resembles the Governor’s proposal while filling in important gaps.

The SBPC is a national non-profit organization focused on eliminating the burden of student debt for millions of Americans, including over 2.5 million New Yorkers. We engage in advocacy, policymaking, and litigation to rein in industry abuses, protect borrowers’ rights, and advance racial and economic justice.¹

Background on UDAAP Protections and New York’s Dated Law.

The SBPC regularly partners with state and federal policymakers and law enforcement across the country to protect consumers. This requires passing and enforcing strong consumer protection laws, especially those that prohibit unfair, deceptive, or abusive acts or practices, often referred to as “UDAAP” laws.² Every state in the country has a form of UDAAP law,³ and UDAAP provisions are enforced nationwide by federal agencies such as the Consumer Financial Protection Bureau and the Federal Trade Commission.⁴ The UDAAP standards—unfairness, deception, and abusiveness—are well defined in state and federal law and have been interpreted by courts for nearly a century.⁵ They are intentionally broad, covering all aspects of trade and commerce, and are flexible enough to address new and emergent consumer harms without the need for legislating issue-specific fixes.

¹ Student Borrower Protection Center, www.protectborrowers.org.

² Laws in jurisdictions that do not prohibit “abusive” conduct are generally referred to as “UDAP” laws.

³ Nat’l Consumer L. Ctr., *Consumer Protection in the States: a 50-State Evaluation of Unfair and Deceptive Practices Laws* (Mar. 2018), https://www.nclc.org/wp-content/uploads/2022/09/UDAP_rpt.pdf.

⁴ 12 U.S.C. § 5531 (CFPB’s UDAAP authority); 15 U.S.C. § 5 (FTC’s UDAAP authority).

⁵ See generally Prentiss Cox, Amy Widman, & Mark Totten, *Strategies of Public UDAP Enforcement*, 55 Harv. J. on Legis. 37 (2018).

New York's UDAAP law is one of the weakest in the country, in large part because it is not a "true" UDAAP law: N.Y. General Business Law § 349 prohibits only deceptive acts and practices. This leaves New York households and small businesses open to all manner of unfair and abusive economic conduct that is unlawful elsewhere, and puts honest companies at a competitive disadvantage. New York—often considered a bastion of consumer protection—is one of only 8 jurisdictions in the nation without meaningful protections against unfair or abusive conduct, along with states such as Mississippi, Tennessee, and South Dakota.

In addition to missing key protections, the existing N.Y. General Business Law § 349 protections have been eroded over time by courts limiting their applicability. Although the Legislature's intent with § 349 was to broadly apply its protections "in the conduct of any business, trade or commerce or in the furnishing of any services,"⁶ courts have imposed a "consumer-oriented" standard that effectively limits the law's applicability to conduct that affects the entire public.⁷ If a consumer cannot establish that the public at large experienced the same unlawful conduct that they did, courts will throw out their case. This effectively requires all enforcement to emulate class action litigation, which was never the Legislature's intent and has no support in the text of the law itself.

Finally, New York's law has severely outdated damages provisions. The current statutory damages are \$50, which is a meaningless deterrent for bad actors.⁸ Where an actor is found to have willfully and knowingly engaged in unlawful conduct, courts may order treble damages capped at \$1000, which may have been severe when initially enacted in the 1980s, but is merely the cost of doing business today, when willful bad actors may collect millions of dollars in profit from their conduct.⁹

As a result, New York's UDAAP law, already partial, cannot protect households and small businesses from some of the most common injustices. For these reasons, the National Consumer Law Center called New York's law "toothless."¹⁰

These deficiencies are not hypothetical. Specific examples of student loan servicer conduct that student loan borrowers in New York experience without recourse, but that would likely be actionable in other jurisdictions, include:

- Taking advantage of borrowers' reasonable reliance on the servicer's advice to steer them in payment plans that are financially advantageous to the company but are not in the borrowers' best interests;
- Improperly rejecting borrowers' applications for affordable payment plans;
- Collecting on a student loan that has been discharged in bankruptcy;
- Failing to adequately staff call centers such that borrowers must wait on hold for hours;

⁶ N.Y. Gen. Bus. L. § 349(a).

⁷ See *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 25 (1995) ("Thus, as a threshold matter, plaintiffs claiming the benefit of section 349 . . . must charge conduct of the defendant that is consumer-oriented.")..

⁸ N.Y. Gen. Bus. L. § 349(h).

⁹ *Id.*

¹⁰ Nat'l Consumer L. Ctr. *supra* note 3 at 44.

- Applying loan payments incorrectly;
- Preventing cosigners who qualify for a cosigner release from getting off the loan; and
- Sending bills to borrowers whose loans qualify for complete cancellation without notifying the borrower of this opportunity.

This gap in protection stems both from the current law’s limited applicability—i.e., the need to demonstrate that any misconduct affects the public at large—and the lack of protection against unfair or abusive conduct. These weaknesses are not limited to student loans, but are present in the mortgage and housing markets, medical care and insurance, auto sales, debt collection, environmental protection, and more.

The Governor’s Proposed Consumer Protection Act Addresses Some, But Not All, of New York’s Consumer Protection Shortcomings.

As proposed in her initial Article VII bill, Governor Hochul’s Consumer Protection Act (CPA) would address some of the issues with the current General Business Law § 349. It would prohibit unfair and abusive acts and practices, alongside deceptive conduct, and would increase statutory damages to \$1000. These are meaningful changes, but the bill both omits critical fixes to existing law and contains additional amendments that undermine its efficacy.

First, the CPA fails to address the courts’ “consumer-oriented” limitation. Without this, New Yorkers will still lack meaningful protection against deceptive conduct and will not be able to protect themselves from unfair or abusive conduct, either. This omission must be addressed for the CPA to provide any relief.

Second, the CPA’s proposed definition of “abusive” does not track the federal standard. It specifically leaves out a prong that would prohibit taking advantage of a consumer’s reasonable reliance on another to act in their best interests.¹¹ This deprives borrowers of complete protection against abusive acts or practices and unnecessarily deviates from a federal standard.

Third, the CPA would permit consumers to collect the greater of their actual damages or \$1000, up from \$50, but does not allow them to collect both actual and statutory damages. Further, the proposed act does not increase the maximum penalty for willful violations, leaving it at \$1000.¹² This has the effect of putting willful and unlawful violators on the same footing, rather than imposing meaningfully higher penalties to deter willful conduct.

Finally, the CPA introduces a “notice to cure” provision, whereby in most scenarios a consumer must give a putative defendant 30 days’ notice of the consumer’s intent to sue and must give them an opportunity to address the alleged violation before filing suit. Although well intentioned, as drafted, this notice provision does not include exceptions that are necessary to make it workable, such as in the instance of UDAAP claims made via counterclaim, or to reflect pro-consumer policy, such as to waive the requirement if the statute of limitations is about to run out on a UDAAP claim. If enacted, the CPA’s notice provision would likely serve as a barrier to

¹¹ Compare TED Part JJ § 349(a)(2)(ii) (definition of “abusive” containing only subparagraphs A and B) with 12 U.S.C. § 5531(d)(2) (definition of “abusive” containing subparagraphs A, B, and C).

¹² See TED Part JJ § 349(h).

justice for New York consumers and businesses, especially low-income consumers and small businesses, rather than giving a meaningful opportunity for well-intentioned businesses to correct their behavior.

The Legislature’s Consumer and Small Business Protection Act Would Address the Consumer Protection Act’s Shortcomings.

Senator Comrie and Assemblymember Weinstein have already introduced legislation that would bring New York’s consumer protection law into parity with the national standard by adding protections against unfair or abusive acts or practices. The Consumer and Small Business Protection Act (CSPA) is similar to the Governor’s proposed CPA, but with the following critical differences:

- CSPA explicitly covers unfair, deceptive, or abusive acts or practices regardless of whether the conduct is consumer-oriented, directly addressing the court’s narrowing of the existing law, whereas the CPA is silent on this issue;
- CSPA allows New Yorkers to recover actual damages and statutory damages, whereas the CPA limits recovery to the greater of the two. This mirrors federal consumer protection law and would help make harmed consumers whole;
- When unlawful behavior is done willfully and knowingly, CSPA allows judges to determine what punitive damages are appropriate, whereas the CPA would cap these damages at \$1000, the same amount as permitted for violations that are not done willfully or knowingly. Limiting courts’ ability to impose damages that are commensurate with the underlying offense prevents the penalty from having any meaningful deterrent effect against future misconduct;
- CSPA includes a definition of “abusive” that mirrors the federal standard and maximizes protections for New Yorkers;
- CSPA clarifies small businesses’ right to sue under the law, codifying a general practice and reducing any uncertainty about the law’s applicability;
- CSPA explicitly authorizes class action penalties, as required under New York law, whereas the CPA is silent and would likely be interpreted as not authorizing these damages;
- CSPA would allow non-profit organizations that engage in consumer testing and mystery shopping to bring lawsuits when they uncover unlawful conduct, rather than waiting for an actual consumer to experience harm, whereas the CPA does not include a “tester standing” provision; and
- CSPA includes a notice and opportunity to cure provision for actions seeking injunctive relief only, whereas the CPA would apply to actions seeking monetary relief.

The amendments contained in CSPA reflect best practices from across the country and incorporate New Yorkers’ lived experiences navigating the state’s courts. In this way it represents the gold standard for consumer protection and the Empire State would become the new national standard if it is enacted. Although the CPA includes several of these elements, it does not address critical components and is not as comprehensive as CSPA.

The Legislature Should Use CSPA as a Basis to Negotiate with the Executive in the Budget.

New York households and small businesses need stronger consumer protections immediately. The state lags behind the vast majority of the country, and its residents pay the price. For this reason, we urge the Legislature to engage with the Executive and to amend General Business Law § 349 as part of the budget process. Adopting CSPA into the One House Budget proposal maintains the beneficial parts of the CPA in the Executive Budget while incorporating the missing components listed above, most critical of which is addressing the consumer-oriented limitation. With a true UDAAP in place, honest businesses will thrive and consumers will navigate the marketplace without fear of being taken advantage of.

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