# Consumer Finance Monitor Podcast (Season 9, Episode 3): Earned Wage Access in the Crosshairs of the Center for Responsible Lending

Speakers: Alan Kaplinsky, Joseph Schuster, Lucia Constantine and Yesmin Farahi

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor Podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm. And I'm your host, Alan Kaplinsky, the founder and former Practice Group Leader for 25 years and now Senior Counsel of the Consumer Financial Services Group at Ballard Spahr, and I'll be moderating today's program.

For those of you who want even more information, don't forget about our blog, consumerfinancemonitor.com. We've hosted our blog since 2011 when the CFPB became operational. So there is a lot of relevant industry content there, including a lot of content about the topic that we're going to address today, which I will introduce you to in just a moment.

We also regularly host webinars on subjects of interest to those in the industry. So to subscribe to our blog or to get on the list for our webinars, you can visit us at ballardspahr.com. If you like our podcast, please let us know about that. You can leave us a review on whatever podcast platform you listen to this podcast show, be it Apple, YouTube, Spotify, or any other major platform. Also, please let us know if you have any ideas for other topics that we should consider covering or speakers that we should consider inviting as guests on our show.

So let me describe our topic for today. It has generated significant debate in recent months, maybe I should say really recent years, and I'm referring to earned wage access products, sometimes referred to as on-demand pay services. These products have become increasingly popular among employers and employees alike, offering workers early access to wages they've already earned. But there's been growing disagreement about how these products should be characterized and regulated. Are they a form of credit, akin to a payday loan, or are they something quite different?

To explore this issue today, we're very pleased to have with us two special guests from the Center for Responsible Lending, an organization that has been an outspoken critic of certain earned wage access models. First, I would like to introduce and welcome Lucia Constantine. Lucia is a senior researcher at the Center for Responsible Lending, or I might refer to it hereafter as CRL. Based in CRL's Durham, North Carolina offices, she focuses on mortgage lending and predatory debt practices. Prior to coming to CRL, she was a senior policy analyst at the North Carolina Housing Finance Agency. And before that, she worked in nonprofits and higher education where her work centered on immigration, civic engagement, and economic development. So a very warm welcome to you, Lucia.

Lucia Constantine:

Thank you, Alan. Thank you for having us on the show.

Alan Kaplinsky:

And joining Lucia is Yesmin Farahi. Yesmin is Deputy Director of State Policy and Senior Policy at CRL. Also, based out of the Durham, North Carolina office. Yesmin advises local organizations and lawmakers working toward fair financial practices in their states with a focus on small-dollar lending and student loans. Prior to CRL, Yesmin was an attorney at the Disability Rights North Carolina, and before that, at Charlotte-based Legal Services of Southern Piedmont, where she helped owners facing foreclosure. So, Yesmin, also, a warm welcome to you.

Yesmin Farahi:

Thanks, Alan. Thanks for inviting us to join you.

Alan Kaplinsky:

Okay. And both of our friends from CRL will be joined by my colleague, a partner at Ballard Spahr, Joseph Schuster, who, among other things, has a wealth of experience in the topic we're talking about today, earned wage access. And Joseph, it's always a pleasure to have you back.

Joseph Schuster:

Thank you, Alan. It's a pleasure to be here with you, and I'm very grateful for the Center for Responsible Lending for joining us on this podcast.

Alan Kaplinsky:

We'll be discussing the center's two reports that have helped shape the policy conversation around earned wage access. The first report, issued in September of this year, is titled Escalating Debt: The Real Impact of Payday Loan Apps Sold as Earned Wage Access Advances Called EWA. This report presents new data and argues that certain earned wage access products function as high-cost credit that can lead to cycles of dependency and escalating fees for consumers. The second and more recent report... The first report came out in September of this year. The second report, which came out in October of this year, is called Nickel and Dimed: How Payday Loan Apps Drain Workers' Pay and How to Stop Them. This report examines the growth of what CRL describes as payday loan apps, analyzing the fees, repayment mechanisms, and consumer risks the center associates with these products.

Throughout our conversation today, I'll be posing questions to Lucia and Yesmin about their findings and policy recommendations. And for some or maybe all of the questions I pose, I have invited Joseph to chime in to respond with an industry response to the critique of CRL. We hope that today's discussion will illuminate both sides of this very important and evolving debate, the consumer protection concerns raised by CRL and the countervailing view that EWA products are fundamentally distinct from credit and provide meaningful benefits to working consumers.

So with that introduction out of the way, I'm going to get into it, and we'll start with Lucia. And of course, for all these questions, Yesmin, you're invited to chime in. And Joseph, you are invited as well. So CRL has produced several research and policy reports on what you refer to as payday loan apps. We prefer to refer to it as earned wage access, but we are talking about the same product. Why has this been a focus of CRL's work?

Lucia Constantine:

CRL's work has always focused on curbing predatory lending and protecting consumers. And as technology evolves and regulations change, lenders find new ways to target vulnerable consumers. And so for us, payday loan apps are just the latest iteration of this. As these have become more common across consumers, we've seen the prevalence of harms among some of the folks using them. And Yesmin and colleagues on the state policy team have been tracking companies' efforts to lobby state legislatures to evade credit loss. And so because of that, we've spent the past year and a half both researching the impacts of these loans as well as some of the implications for regulation and enforcement.

Alan Kaplinsky:

Okay. Joseph, any reaction?

Joseph Schuster:

Absolutely, Alan. I have a few thoughts, and one thing just from the introduction too. I would argue that I'm also a consumer protection advocate here from the standpoint of consumers really appreciate and enjoy these products. And I think continuing to be able to support them and support products that consumers use and desire is important. And the industry, I think, is doing that, so it is the industry view as well.

With respect to earned wage access, there always has been a necessity for addressing a fundamental timing mismatch. I think earned wage access products are a great way to do that from the standpoint of a consumer has earned wages and they have an obligation that is due now. Rather than taking out credit, rather than taking out a loan, they're able to, at no cost, receive funds that they have already earned to pay for an obligation that they've already incurred. I think that's why we've seen the growth of these products. They really solve a fundamental timing mismatch need that consumers have.

Alan Kaplinsky:

Okay. So let me go back to you, Lucia. What data has CRL used for the research that's conducted? What did you look for in the data, and what insights have you obtained?

Lucia Constantine:

Anonymized consumer transaction data from a panel of users associated with SaverLife. SaverLife is a financial technology nonprofit that connects their members to different budgeting and financial health tools. And so their members connect a savings or checking account to the platform. And through a use agreement, we were able to see transactions associated with 16,000 of their members.

We used company names to search through those transactions and investigate the borrowing patterns of consumers. We looked at the incidents of overdraft, and also, we examined some of the costs associated with these loans. And so what our research shows across all three reports is that consumers are taking out small loans, typically, less than $100, and paying a high cost because of the fees and tips associated with taking out this loan. When we did an annual percentage rate calculation, we found it to be 383%, which is lower than what some attorney generals and financial regulators have found.

And so beyond the cost of using these products, companies are trapping consumers in a cycle of debt. We see that 75% of consumers take out a loan either the same day or the day after they repay the loan, which suggests that they are seeking to make up the shortfall that was initially created by that loan. And every time they take out a loan, they're paying more fees and more tips that is straining their finances.

And so the last thing I'll say about our research is that we looked at the incidents of overdraft. These companies are advertising that they are a way to prevent overdrafts, but what our research shows is that consumers who are taking out these loans are seeing their overdraft increase in the three months after. And those users that are having to take out loan after loan are paying $421 a year in overdraft and expedite fees for using these products. And so despite claims that these loans increase financial stability for consumer, our research has shown time and time again that actually, it's adding to their financial strain.

Alan Kaplinsky:

Okay. Joseph, any response?

Joseph Schuster:

Yeah. And it occurs to me that we didn't really define what the product is, earned wage access. I'm going to start with that if you don't mind. And Lucia, feel free to jump in if you have differing views on this, certainly. But the way that I think about earned wage access for purposes of this podcast and in general, I think of how the industry generally thinks about it, is earned wage access is available to employees who have earned wages and they want access to those wages before they would otherwise be dispersed to the person.

Maybe they're paid monthly, and they've earned a week worth of wages, and they'd like to have access to those wages. And in some circles, you could just go to your employer and say, "Hey, could I receive some of the money that you're going to pay me at the end of the month? I have this obligation here." That does happen, but I think we're seeing there are employers who do not have that. Maybe in the gig economy you're working for something and you want some of those wages sooner. So earned wage access is really looking at you have earned wages, you want to receive those sooner.

I think that as we think about the fees and other costs associated with this product, the way that the products are generally set up is that there is a no-fee option that a consumer may avail themselves of. "I need $100 today that I've already earned. Providers are willing to ACH that money to me today." You heard the mention of an expedited fee. The expedited fee allows for those funds to be delivered much faster, maybe within 30 minutes, an hour by using debit card rails. Dispersing funds through the debit card network does have a cost associated with it as opposed to AC... Well, there's a cost to ACH as well, but that's minimal.

The tip piece is something that a number of providers offer, and it was even looked at by the CFPB when these products started coming out about a decade or so ago. They're voluntary tips to be able to continue to offer these types of products. Those are the two main fees or costs associated with it. I would add there are some who have memberships that consumers are able to enroll in. Most of the time, those memberships provide benefits unrelated to the EWA product, but I think that's... That's why I described the product, first of all, before I responded, but I'm going to pause for a moment in case, Lucia, you have a differing view on any part of the product.

Lucia Constantine:

I would say that these products are advertised as free and instant, but that is not consumers' experience of them through surveys that we've done, through evidence provided by attorneys general, through the CFPB's own research. We've found that the majority of consumers are paying an expedite fee because they are living for paycheck to paycheck and need this money instantly. And so the idea that these products are free is not borne out by consumers' experience. And then beyond that, the idea that you would pay a tip, we see that most consumers do leave a tip because they are prompted over and over again to decline. And so the reality is that the free option is not really accessible to the majority of consumers using these products.

Alan Kaplinsky:

Let me ask you a question, Joseph. Let's focus on the tip piece of it for a minute. What happens, based on your discussion with clients and your knowledge of the industry, if somebody just declines to leave a tip? I mean, is there a box that you have to check that, "I'd like to leave a tip," and then you fill in the amount, or if you don't do anything, is it automatic that you've left a tip? How does that work operationally?

Joseph Schuster:

Great question. I think that there are... Different providers approach this differently. There are providers who do not use tips at all. Some providers do have tips, and they have the suggested amount already populated in the tip. So I think there's a wide spectrum there of how that can work. But if a person chooses not to tip, it does not affect their ability to access the advances as well. I guess the piece that I should have added about the product that I didn't was that these are also non-recourse. Meaning, that if the funds are not available to the consumer on their pay date when the provider seeks to recoup the funds that they've advanced, it's the EWA provider that is out those funds. There's no recourse for the consumer. There's no credit bureau reporting. There's no debt collection actions, which are things that you would generally see with a credit product, which, as we continue, I'll explain why I don't think that's the case here, but that's also a fundamental component of these products.

With respect to the question about the data and insights that have emerged, the only piece that I would add to that is that providers of these products do surveys of their customers as well, and consumers really appreciate these products, that there is that fundamental timing gap of, "I have earned wages, I have an obligation, and this allows those two things to be resolved." So we do see high satisfaction results from consumers who are using these products just when we're talking to those actual consumers.

Alan Kaplinsky:

I'm curious whether in the studies that you've done, you inquired consumers about their level of satisfaction or whether any of the fees that they ended up paying were properly disclosed to them in advance before they bound themselves to the transaction, or were the fees hidden in some fashion?

Joseph Schuster:

Yeah, it's a great question, and this is where I think CRL and I will agree in that if there are issues with how fees are disclosed, that's problematic. And I would argue that existing laws address that. That becomes a UDAP concern. And I said UDAP with one A there in case you didn't hear it, but I think that's something that can be evaluated under today's laws. Consumers should understand the products that they are using. I think that providers generally try to disclose things in the right manner. They are monitoring for complaints. And if consumers do raise complaints about not fully understanding how the product works or any optional fees that they choose to... any optional fees for optional products that they're using, there are adjustments that are made to those products, and I would argue that there needs to be.

Alan Kaplinsky:

Right. Lucia?

Lucia Constantine:

We've done online discussion board with consumers using these loans. We asked them questions over the course of three weeks about their usage and their experiences. And consistently, they expressed confusions about the fees that they were paying. They also expressed confusion over why they were being asked for a tip to take out a loan, and they documented some of the harms that it's causing on their finances, where every pay cycle, they are taking out a loan to cover the previous loan that they took out and paying $15, $20 in fees that is taking money away from their paycheck. So what we have heard from consumers is also consistently reflected in complaints submitted to the Consumer Financial Protection Bureau, and I think the evidence shows that consumers are misled by what companies are offering and are confused about the fee structures.

Alan Kaplinsky:

Okay. So companies that you're familiar with don't assess tips. Some do, some don't. I understand the debate about that. But on the expedited fee, the fee that gets charged for expediting, you don't have to do that. Right? It's voluntary. You could elect to get the fee through... I'm sorry. You could elect to enter into the transaction using ACH rather than expedited expedition.

Joseph Schuster:

That's exactly right. So the product that you described, I would argue, is already out there in the market, that the products do exist, that there is a free option for everyone. There are voluntary things that can be added on, and people choose to use those voluntary items, like the expedited funding. That's fine, but there is still a free option there.

I would compare this to credit products in the sense that with a credit product, you have an obligation. As you look at APRs, those are generally associated with interest rates or things that must be paid. Expedited funding is something that is voluntary. It's similar to if you applied for a new credit card and you want to get that credit card tomorrow, and the credit card company says, "Well, we can do that, but we're going to have to charge you an expedited fee to send it to you faster, or overnight, or whatever the case is."

That's not been considered a finance charge. In fact, the regulations make it very clear that that is not a finance charge. It's also not any other type of charge that would need to be disclosed under existing law. Now, I think from a UDAP perspective, making sure that people understand the products, understand the nature of voluntary services that do have fees associated with them is very important. But I believe that the product already exists with a no-fee option.

Alan Kaplinsky:

Yeah. Okay. Do you think, Yesmin, that if you took away... I know you don't like even the option of an expedited fee or no expedited fee, but let's just say you didn't have the option, that the companies wouldn't expedite it. They just had a policy, and they also didn't charge a tip. Does that sound like a fair transaction, or is that still problematic?

Yesmin Farahi:

That sounds like a transaction that under existing credit laws would be legal in all of the states, right, as opposed to the way that we've found through our research and all of the data that we've pointed to about the vast majority of these transactions. And in 21 states and the District of Columbia that have regulations that were brought about mostly... Well, some of them are really usury laws that have been around for hundreds of years. But others in the face of the payday lending industry coming in the 1990s, in the early 2000s, and making the same arguments that we're hearing Joseph make today, right, that they were innovative, they were a way to access your pay early, and that, therefore, they should be regulated differently.

So they did succeed in some states in getting exceptions from the usury laws. But what we've found is that the most effective way to protect those states that have taken the step, decided from a policy perspective that we don't want these kinds of harmful, high-cost credit products. So they have regulations against around short-term and small-dollar lending products that includes rate caps. They're not a ban. They're just saying they have to be responsible. And so the product that you're describing would fall within that. Unfortunately, the vast majority of the transactions based on the data are actually in the states with those rate caps are happening outside of the law.

Alan Kaplinsky:

Right. Well, now, let me just drill down on this. Joseph, if I understand your position, you're saying that under the Truth and Lending Act and Reg Z, an expedited fee you pay for expediting the receipt or proceeds of a loan is not a finance charge. Have I gotten... understood that?

Joseph Schuster:

Yes.

Alan Kaplinsky:

Yeah. And so my question for you, Yesmin, is under these state laws that you described. Do they treat that differently than it's treated under TILA and Reg Z? In other words, do they treat an expedited fee paid, an optional fee as interest subject to usury limits?

Yesmin Farahi:

So some states do. Let me take a step back and say the CFPB in 2024 proposed an interpretive rule that confirmed that these loans are subject to TILA and Reg Z. It affirmed that these products are loans, and the tips and expedite fees are finance charges subject to disclosure under federal law. While that rule wasn't finalized, it was an interpretive rule interpreting existing federal law. And so the legal analysis set out in that proposed rule was well-reasoned, and it remains valid and demonstrates that existing federal law governing loan products applies to these app-based payday loans as well.

Alan Kaplinsky:

So you're meaning that Acting Director Russell Vought overlooked this guidance that you're referring to? I'm surprised that that hasn't been withdrawn or repealed. Joseph, you want to respond to that?

Joseph Schuster:

Here's where maybe they haven't for a reason. This is a proposed rule. The CFPB, I would say, did not affirm that these are credit products under Reg Z. They proposed an interpretive rule, and they sought comment on that interpretive rule. Those comments go both ways. There are comments out there that say that these products should be classified as credit. There are a lot of comments out there that say that this product should not be classified as credit.

I'd like to see a final interpretive rule that looks at those comments and says, "No, this is not credit." And I would say that the CFPB has also affirmed that this is not credit in the past. If you look at the proposed rule and the final rule from the small-dollar lending UDAP rule that the CFPB came out with, these products with tips were specifically exempted from what was considered a small-dollar loan in that final rule. So as you look at this comparison, that was a rule that was really promulgated to regulate payday lending and products of this nature were specifically excluded from that rule, and that's something that is out there that's final.

Alan Kaplinsky:

Right, right. Okay. Let's move on. Joseph has raised the issue, is it credit or is it not credit? Let's focus on that for a moment. In light of the fact that people are only getting money that they've already earned through work that they've done for their employer, they're getting it earlier than they would otherwise get it through the regular... whatever the regular pay program is. Why do you consider that or why do CRL consider that to be credit? And the individual is just getting money that's already owed to him or her.

Yesmin Farahi:

Because these advances are simply an agreement to receive money now and pay it back in the future. They are going to have to pay back the lender that they receive this money from. It isn't that their employer is advancing them their funds, it's a lender. And as Lucia mentioned, people are taking these loans, sometimes many from different companies, at the same time. And we're seeing over time that that loan stacking happens more and more, and so people are essentially borrowing against the same paycheck.

So there are two different kinds of models, and we didn't really get into it in detail here. There's employer-based, employer-integrated, and there's direct-to-consumer models. If it's an employer-integrated one, it's still that there's a third-party involved. It's not money coming from their employer, but many of these are not really tied to your paycheck at all. Right? That's exactly what a payday lender used to do, was you're going to get paid, and we'll lend you money against... and payday lenders do do, traditional storefront payday lenders do do, "We're going to lend you money against that."

I mean, anytime you borrow money, it's against future earnings, right? Money you will get later. And here, in this case, they're just... and it's an agreement. You're receiving money now, you're paying it back in the future, usually with a fee that will be paid to the lender. So in every other context, we call such an agreement a loan. So a different delivery model, which is what this is, right, you're now getting out an app, doesn't change the fact that this is a loan and should be regulated as other loan products are.

Consumers think these are loans. We know that through focus groups and because borrowers and their bankruptcy lawyers are listing these as debts in their bankruptcy filings. Even companies like MoneyLion internally in the New York AG lawsuit, it was laid out. They refer to these products as single-payment loans, which sounds a whole lot like a balloon payment on a traditional two-week payday loan, and call their outstanding advances "principle."

And so courts agree too. Courts have said, and over the last year, we've seen many decisions where companies have come in and said these aren't loans and tried to get the cases brought by these plaintiffs, classes of plaintiffs, bringing actions saying that these loans are violating interest rate caps, that these loans are happening, unlicensed lending is happening. And courts have sided with the plaintiffs in saying, "No, these are loans."

Really, it's a matter of what the consumer... what all parties agree and think this is. They know they're borrowing money now, and it will have to be repaid later. And to the point that Joseph made earlier that these are non-recourse, they don't need traditional legal recourse. Right? We found out from the AG lawsuit against DailyPay that the most common loan size for DailyPay, for example, is $20. The average loan sizes of these are very small.

Traditional legal recourse doesn't make sense in the context of these, and they actually have something much more powerful than that. They have direct access to borrower's bank account, or they have direct access through the payroll system in the case of an employer integrated model, and they're recouping these loans at 97%. That's an incredible rate. So they don't need access to traditional legal recourse. That's not part of their business model. In fact, the direct access to borrower's bank account is a much more powerful tool.

Alan Kaplinsky:

Joseph, it sounds like... I mean, she's made a pretty good case.

Joseph Schuster:

She absolutely has, but I'd quibble with a few items. Number one, saying that you have to pay these back. You don't. I mean, that goes to the point at the end. They are non-recourse. If the funds are not made available to the consumer and the consumer does not have those funds, the provider loses out. That is different than a loan where you have an obligation to repay that product. The fact that we're seeing a percentage where the provider is not able to recoup the funds, that shows that this being identified as a non-recourse product, the consumer doesn't have any obligations if they do not repay those funds.

Alan Kaplinsky:

Well, let me ask you something, Joseph. Could the consumer... I'm not saying this really happens, but let's just assume the consumer has buyer's regret. Could they notify their stop payment of... Could they do something to stop the repayment?

Joseph Schuster:

Absolutely. That can be done, and the provider has no recourse against the consumer. So that's the first part. The second part of why these are not loans, why they're not credit, I would say, has to do with you're not taking out something where you're going to earn money in the future to repay it. This is money the consumer has already earned. It's not taking something out saying, "Hey, I think I'm going to make some money in the future that I'll be able to repay that."

That is what happens with credit. Credit providers are looking at, "Will somebody have the ability to repay that in the future?" This is simply providing access to funds that the person has already earned, and in the scenario where those funds are not able to be recouped by the provider, the consumer has no liability. If you look at what credit is, credit generally does have an obligation to repay. Again, look at the credit laws, look at Regulation Z. It says that... like a layaway plan. A layaway plan is not credit, unless the consumer is obligated to make all the payments. That obligation has a very impactful correlation to whether or not something is debt, whether it's credit. That doesn't exist here.

Alan Kaplinsky:

Yesmin said that many courts have looked at this issue, it's been litigated, and courts have, I think... I don't want to put words in your mouth, Yesmin, but have uniformly concurred with that view that it constitutes credit? Are you aware of cases like that?

Joseph Schuster:

I'm not sure that there have been cases that are fully adjudicated. There have been some motions to dismiss recently. And I will say that I'd like to see more from the industry in providing education about these products at that stage, citing some of the things I'm talking about of what Reg Z has within the definition of credit, talking about that expedited item with respect to credit cards that exist in Reg Z. So I think that we as an industry, we have the legal analysis for why these are not credit and therefore, not subject to Regulation Z. I think we need to do a better job of educating courts on that. So I agree on that respect.

Alan Kaplinsky:

Yesmin, anything you want to respond to there? I do have some other questions for you that I'd like to get to.

Yesmin Farahi:

Yeah. I mean, ultimately, people pay back these loans. The recoupment rate, as we said, is around 97%. That's from industry's own estimates. Consumers, businesses, and courts all view these as loans. And while these cases are relatively early, the industry has laid out their cases related to these, and courts have rejected the idea. EarnIn, in particular, in several court cases this year, has made the argument that they're non-recourse. And the courts concluded that whether a transaction is a loan depends really on the real intent and understanding of the parties and that they need to be analyzed in that way.

It's been in other cases, I believe, also. EarnIn and other courts around the country have specifically addressed the issue of whether their state lending laws apply, whether TILA applies, and the courts have held that, for example, in Maryland, that Maryland lending law applies to transactions purported to be non-recourse. So I think that, obviously, we're relatively early in seeing what happens with some of these lawsuits in the long run. But this year, there are really a string of defeats for the industry on these arguments. In all of these cases, courts ruled that plaintiffs had validly stated their claims that these payday loan app companies offer loans.

Alan Kaplinsky:

Yeah. Have these cases, Yesmin, gotten up to the appellate level yet, or the cases you're referring to, trial court decision?

Yesmin Farahi:

Trial court. Yeah, US district courts throughout the country in Pennsylvania, Maryland, Washington, California.

Alan Kaplinsky:

But they came up on motions to dismiss, I take it, that were denied, and the cases are now in discovery and being further litigated, right?

Yesmin Farahi:

Yes. Yeah. Yeah. It'll be very interesting to see over the next few years what happens with these kinds of cases and also with the attorneys general lawsuits that have been brought now by New York and DC bringing cases... State regulators and attorneys generals are starting to take notice as we learn more about these industries. Sometimes it takes years to catch up.

These lenders came in a little bit like using the Uber model of coming in, starting to operate, and asking permission later in many places in violation of existing credit laws that protect consumers from high-cost loan products and the associated harms, and in violation of, as Joseph had mentioned, UDAP comes into play. And so we're seeing the attorney general in DC last year and in New York this year, I think, in April, brought lawsuits, and the companies involved in those are MoneyLion, DailyPay, and EarnIn. And so we've learned through that more about their lending practices, and it'll be interesting to follow over the coming years, what happens with these cases.

Alan Kaplinsky:

So let's just clarify this for our listeners. At the federal level, right now... I mean, if I were to ask you directly, would the CFPB today, at least as it's being managed today, have they gone after any of these earned wage access companies on the basis that constitutes credit, that they're violating Reg Z, that they're violating UDAP? Are there any cases like that out there? Because I'm not aware of them.

Yesmin Farahi:

As to the CFPB under the current administration, they have indicated that they are moving to reduce supervision of non-bank entities and earned wage advanced companies, these payday loan app companies would fall under that category. They've also withdrawn various assorted advisory opinions regarding the application of TILA to payday loan apps. And so I don't expect that there's going to be a lot of action in this area, especially that is to protect consumers by this current CFPB.

Alan Kaplinsky:

And what about the Federal Trade Commission? Have they done anything with the earned wage access companies? I haven't heard of anything. I recently had, as a guest on our podcast show, a senior lawyer at the Federal Trade Commission who talked about what their priorities are this year, and I don't recall her mentioning EWA as one being a focus.

Yesmin Farahi:

Yeah. We don't anticipate much at the federal level.

Alan Kaplinsky:

The action here is at the state level of what you're saying, and you're saying there's some 21 states that have enacted laws that specifically address EWA?

Yesmin Farahi:

So what I was saying is 21 states plus the District of Columbia have rate caps of about 36% or less in line with the Military Lending Act that addresses small-dollar, short-term loan products in their state.

Alan Kaplinsky:

Right. So they don't... Just to clarify. They're not statutes that specifically deal with EWA. They're general usury laws that... and you have to make the leap that it constitutes credit under the state usury law in order to claim that there's been a usury violation. Am I right? In other words, there aren't states that have enacted specific laws that regulate... it's just general laws?

Yesmin Farahi:

Yeah. So states should regulate these like other small-dollar loan products in their state. And obviously, it's hard to draw a complete brush and say the different laws in these 21 states plus DC may have slightly different definition of loans. But under these laws, these... With taking into account slightly different definitions, slightly different forms of these laws, they regulate small-dollar loan products like earned wage advances.

So in a state that has strong regulations around traditional storefront payday lending, like those 21 states plus DC, the same rule should apply. State regulators and attorney general have begun in the last year or so really challenging the industry violations of their credit laws and what we would say is unlicensed lending activity. So, for example, in DC and New York, where the attorney generals have filed suit in the last year, they are bringing these violations under their existing usury laws and credit laws, and also, making other claims about unfair and deceptive practices.

Joseph Schuster:

The piece that I respond with is a lot of what we've been talking about of whether or not these are credit, or at least from my analysis has been from a Reg Z perspective. I agree that looking at how products could be considered under state law is important as well to the extent that there are analogies that can be drawn to the federal level that can be helpful for the industry. But just because something is not considered credit at the federal level doesn't mean that there aren't potentially state laws that could be implicated.

And I do think though that a number of states... Again, I'm putting on my consumer protection hat here of protecting access to these products for consumers. A number of states are passing EWA laws specifically. Like, Utah just earlier this year passed Utah's Earned Wage Access Services Act that does address regulating these products. You do have to register to the point about being unlicensed. It identifies though that it is not credit. So I think that that clarification from some states is useful, but I think we are seeing more action at the state level. It's great that states like Utah and others are protecting access to these products for their consumers, I think, but I think it is important for providers to evaluate the products under state law.

Alan Kaplinsky:

Okay. Is there anything going on in Congress, any kind of legislation there? Not that Congress is going to enact anything or this Congress is going to do anything, but wondering if there is any activity at all. Does anybody know?

Yesmin Farahi:

Yeah. I'm happy to respond to that. In Congress, an industry-backed bill was introduced last year in the House of Representatives in 2024 that would exempt payday loan app loans from TILA, and that was considered in 2024. That bill did not advance to the floor for a vote, and it expired at the end of the last congressional term. So there's not an active piece of federal legislation that Congress is considering.

A bill has not been reintroduced yet this year, but we know through media articles and otherwise that the American FinTech Council, which represents a lot of these lenders, is pushing Congress to take action. So we may see another similar bill to what we saw last year in 2024, but there is not active legislation.

Alan Kaplinsky:

Yeah. The industry bill, did that purport to preempt, override any state laws, or was it intended to supplement state law, if you know?

Yesmin Farahi:

It didn't. States traditionally hold a real role in protecting their consumers in lending. And so that's why many states, you'll see, have taken those steps to protect consumers from high-cost lending products, and this did not preempt the ability there to do that. It really just addressed TILA and exempted them from that.

It did also... I want to say a couple of things about it. It would obscure the relative cost of these loans by not requiring APR disclosures, which is in contradiction to what the CFPB interpretation that I outlined, the proposed interpreter rule from 2024. It would've continued to perpetuate what we say as a myth that these loans are not credit, and it would've exempted them from the Military Lending Act, which would leave service members without important protections that they have under the MLA, which does limit the cost of these loans to 36%. And again, that was passed on a bipartisan basis at the request of the Department of Defense recognizing the harms of these loan products in the context of what we were seeing back then, which was more storefront traditional payday lending.

Alan Kaplinsky:

Again, to clarify, does the Military Lending Act apply to EWA products?

Yesmin Farahi:

Yes. The courts are addressing that issue now. So there have been several cases, as we mentioned earlier, that are in relatively early stages of what, unfortunately, takes years with litigation, but they have begun to address this issue. There have been cases that are being brought by plaintiffs alleging violations of the Military Lending Act, and the industry is trying to compel those cases to arbitration. And actually, because of the Military Lending Act, courts have rejected that and are saying that they will go forward with litigation because these are loans under the MLA.

Alan Kaplinsky:

Yeah. Joseph, I'm going to give you an opportunity to respond to Yesmin and then give you the opportunity to go first and just a final brief statement or defense of these products. And then I'm going to turn to either Lucia and/or Yesmin as our guests. I want to give them the final say.

Joseph Schuster:

Certainly. With respect to the Military Lending Act and its application, it goes to the Truth and Lending Act analysis that we've been discussing of whether these products are credit, because the Military Lending Act uses the credit definition from the Truth and Lending Act. That's why those two often get bundled together. So I think that if Congress or somebody else could clarify that these are not credit for purposes of Reg Z, it'd be very helpful to continue to allow access to these products.

In terms of views on the products overall just as we finalize, these are products that provide tremendous benefit to consumers. Consumers do have a mismatch in timing of when they receive their earned wages, their paycheck, and when they have obligations to, and that can be outside of their control. Earned wage access products facilitate consumers' ability to close that gap, to smooth out any unexpected obligations that arise between when they earn wages and when they receive those funds.

It's, I think, a wonderful innovation that the industry has come out with to help with that, and there's nothing like it. It's a free option that exists here that can help reduce people's reliance on credit products or loan product, which I also support as well. Don't get me wrong. Big fan of regulated products, financing products like this one or others. So I think that removing this option from consumers will lead to negative impacts for consumers. The need to satisfy an obligation does not go away if the ability for a consumer to access earned wages is removed from them. I'm cautious of trying to push consumers to unregulated sources of funding as opposed to a product that can be monitored like this one, so.

Alan Kaplinsky:

Thank you, Joseph. Either, Lucia, Yesmin, either or both of you, you get the final say.

Yesmin Farahi:

I'll respond first, if that's okay. I want to say in response to really earlier, I should have jumped in and said that as it relates to the state efforts around the country, because Joseph mentioned Utah and others, that these app-based payday lenders are going all over the country, lobbying in state legislatures, trying to say that there's something different. Right? They're trying to say that they're not alone when in fact they're alone and should be regulated as such.

And so yes, some states have taken action, and what the industry is essentially saying, they're promoting what are essentially deregulatory measures under the guise of their purported desire for regulation. Most of the states that have authorized payday loan apps and these EWA products are states that are already permitting storefront payday lending. In those states, like Utah, there's no practical impact on consumers who were not already protected against high-cost, short-term loans through existing laws.

But states with strong protections against storefront payday lenders have also seen a lot of bills introduced amidst really a heavy lobbying blitz, but most have opted not to codify the industry's business model through legislation, which is what these bills are generally doing. And then some states, as we've seen, like New York and DC, are starting to take action to enforce their existing laws, clarifying that these are, in fact, loans. So yes, there has been a lot of action at the state level, both legislatively and through the courts. Industry is lobbying heavily to try to get their own model codified.

I will just also want to note that these are not free products. I mean, that's a lot of what these courts cases are about, right? They're advertising them as free, and actually, in order for you to get that money instantly now, which is how they're advertised, you have to pay. Consumers are paying, and this is not no-cost or low-cost for low-income and middle-income consumers who are accessing these products, accessing them repeatedly. As Lucia said, the costs really add up, and the research has kind of borne that out. So these are not free, and these costs are really adding up for consumers.

They also are being borrowed repeatedly. The data has shown, I think, something like 36 a year, maybe even higher. People are getting these loans multiple in a pay period, sometimes from multiple companies, and over and over again. So the costs are really adding up, and the repeat reborrowing is exactly why something like an APR is really important. Right? It's showing the costs over time because people are taking these out immediately almost as soon to fill that same gap in their paycheck.

Alan Kaplinsky:

All right. Well, Yesmin and Lucia, we really appreciate your taking the time to share your views on these two studies that you've conducted. And I think we're probably in the early innings of this game, and there's going to be a lot more development as time wears on. And if the Democrats should have the presidency in hand, there'll be a new head of the CFPB, and who knows what will happen then. And I want to thank you, Joseph, as well, for doing an excellent job in presenting an industry point of view.

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