The Consumer Finance Podcast – The Evolving Landscape of Earned Wage Access Regulation
Host: Chris Willis
Guests: James Kim and Jesse Silverman
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Chris Willis:

Welcome to *The Consumer Finance Podcast*. I'm Chris Willis, the Co-Leader of Troutman Pepper Locke's Consumer Financial Services Regulatory Practice. Today, we're going to be talking about the current and future regulatory environment for earned wage access products. Before we jump into that topic, let me remind you to visit and subscribe to our blogs, TroutmanFinancialServices.com and ConsumerFinancialServicesLawMonitor.com.

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Now, as I said, today, we're going to be talking about the regulatory environment, both past and future, around earned wage access products, which have been the subject of a whole lot of activity. I'm joined for that discussion by two of my colleagues, James Kim and Jesse Silverman, who are the co-leaders of our FinTech practice area. James, Jesse, thanks for being on the podcast again.

Jesse Silverman:

Thanks, Chris.

Chris Willis:

Let's dive into it and start with a recap of what's happened with earned wage access, starting on the federal level. James, the CFPB has taken positions with respect to earned wage access. I think it's a good place to start to talk about what the Bureau has done in that regard.

James Kim:

Sure. Thanks, Chris. The CFPB's flip-flopped once on earned wage access, and I expect it will happen again next year when it's under new leadership with the Trump administration. Just to rewind a little bit, because I think we're going to focus on the states where their real action is with this product. Way back in November of 2020, the CFPB under Republican leadership at that time issued an advisory opinion, so its guidance stating that earned wage access products, I'm simplifying here, are not extensions of credit under TILA and Reg Z, with certain conditions.

Some consumer advocates in some states did not like that advisory opinion. Under the current administration, Director Chopra, the Bureau changed his position, and earlier this year over the summer, the CFPB, well, first rescinded that advisory opinion that happened first a while ago. Then in its place issued a proposed interpreted rule, interpretive rule, and I pause on that, because I don't really know what a proposed interpretive rule is.

There are proposed substantive rules, I don't know what a proposed interpretive rule is, but the Bureau issued one and the Bureau flip-flopped. It stated very broadly that earned wage access products very broadly are covered credit products under Truth and Lending and Reg Z. You had a 180 on the product, but again, it's only a proposed interpretive rule. No further action was taken, and it's not expected. That's the gossip here. There's no expectation among anyone who's following this issue for the CFPB to issue a final interpretive rule. We're seeing right now that Director Chopra is a lame duck director, is pushing at all sorts of stuff, lawsuits, you name it, but I don't think he's going to push out a final rule on earned and wage access.

Because it's one, interpretive and not substantive and two, it's only proposed, I think the new director can easily let this proposed interpretive rule die on the vine, rescind it, or whatever the director wants to do. It's going to have no effect. It's going to be meaningless in other words.

Therefore, in this space with this product, earned wage access has always been a state-by-state battlefield. I think that's going to be even more so in the next four years, because the Bureau is basically going to step back and advocate from the EWA debate and let the states really step in and I'll stop there, but I think it's very state-specific.

Chris Willis:

Okay. Well, so since we know that the action is going to be at the state level, and in fact, a lot of action has happened at the state level, let's start to review that. Jesse, do you mind starting to talk about what different states have done with respect to earned wage access products in the recent past?

Jesse Silverman:

Sure. I mean, we can start with my home state of Connecticut, which has taken what I lovingly referred to as the most thoughtless approach to the challenge of EWA. They simply named the EWA as a small loan and inserted it into their small loan section. It's plainly credit in Connecticut. It is plainly subject to a very onerous regime. That's the bleeding edge of one side. Then you've got several other states which have taken a more nuanced approach, Nevada being one of them to treat this as not credit as essentially what it is, a new category of product. It is neither credit nor not credit. It is its own product, earned wage access.

To me, the most interesting situation is probably in Wisconsin, where Wisconsin recently passed a new statute which created a new EWA earned wage access regime. Their earned wage access providers can impose fees for delivery, expedited delivery. They can charge a subscription, or membership. They can ask Wisconsin consumers to provide a voluntary tip. Those are all the things that EWA providers are allowed to do under the earned wage access statute. What they can't do is they can't share any of the fees with their employer. They can't leverage the consumer's credit report in order to provide any of the earned wage access. They

can't accept payment by a charge card, credit card. They can't charge a late fee. They can't credit report. There are some fairly robust consumer protections in Wisconsin.

That's pretty much where the easiness ends. The regulator issued some FAQs on earned wage access. For lack of a better description, they appear to say that earned wage access exists as its own category of products, earned wage access. Importantly, in Wisconsin, earned wage access, they define it as earned but unpaid income. It means salary, wages, compensation, or other income that a consumer, or employer has represented and that a provider has reasonably determined has been earned, or accrued to the benefit of the consumer in exchange blah, blah, blah for their work. They very clearly defined what earned wage is. Under that definition, it's very clearly not credit.

However, in the regulator's FAQs, the questions asked, are earned wage access services considered loans or credit for purposes of the Wisconsin Consumer Act? To which they respond in the FAQs, yes. Earned wage access is credit. It appears as if they've created an earned wage access regulatory regime, which again, it has some robust consumer protections, but then they want to overlay the Wisconsin Consumer Act over the top of that, which, frankly, I just don't even understand how that could possibly work. One of the other questions and answers they have in their FAQ was, are fees and voluntary tips paid to an earned wage access service provider considered finance charges? They say yes, but the earned wage access section specifically unquestionably excludes voluntary tips from the definition of fee. There are some significant conflicts that are floating around in Wisconsin that surely have to be resolved, which is parenthetically why I find it so interesting.

Chris Willis:

Well, it sounds to me, Jesse, like the product in Wisconsin is the credit equivalent of Schrodinger's cat. It's both credit and not credit at the same time. The tips are both a finance charge and not a finance charge at the same time. It's totally easy.

Jesse Silverman:

It depends on who's looking at it and when.

Chris Willis:

Yeah, exactly. Wisconsin isn't the only state where we've seen action with respect to EWA. There are others too, aren't there?

Jesse Silverman:

Absolutely. California and obviously, given California's size and scale when they pass new regulations in consumer finance, they move the market and everybody can pay attention. Just from a top level, they took a different approach, and this is why it's so interesting. They took a different approach. I'm going to guess, everyone who's listening to this podcast knows that there are largely two different flavors of earned wage access. There is consumer direct, or direct to consumer, or then there's employer provided. For those who get their earned wage access

directly from their employer, it's a different regulatory regime than those who get it direct to consumer.

Wisconsin draws those same distinctions, but they don't really treat them any differently. California has essentially treated those direct-to-consumer EWA products as loans under the consumer finance lenders' laws. They both have the same registration requirements and there's various consumer protections. In California, however, they define charges to include gratuities and expedited payment fees. Again, we can see, I've mentioned California, Connecticut and Wisconsin now, all three of them approach EWA in completely different ways. That's really what we're seeing now across the states.

Chris Willis:

Okay. Not much hope of uniformity there. But we're not even done, I think, with the states yet, because, James, Maryland is in on this action, too. What's going on there?

James Kim:

Yeah. Yeah. I do want to circle back to California, but Maryland is another interesting state. They don't have legislation enacted yet, or rule enacted yet. Connecticut is an example where they have enacted legislation. California is an example of where they have a rule in place that creates this registration requirement. By the way, February 15th, 2025 is the registration effective date. Depending on your activity, you actually need to submit an application before the 15th of February.

Anyway, talking about Maryland, Maryland is worth discussing, because it does not have a rule yet. It does not have legislation yet, but they are actively studying the earned wage access industry and the product, I think, to inform potential legislation and rulemaking. I think particularly legislation. There was an EWA bill last year in committee. Did not go anywhere. I think it's going to be on the table from potential enactment, or at least getting passed in 2025. Maryland's interesting. In my view, in my opinion, it's an up in the air state. There are states like Connecticut that have fallen on one side of the ledger. There are states like Arizona that are on the other side of the ledger. Meaning, it's credit or not credit to oversimplify. I think Maryland is, I think, in my view, generally up in the air, right? We know that the legislature is interested in the product. We know that the office of financial regulation is studying the product and has sent information requests to many companies offering the product. We know that the Maryland attorney general's office is conducting investigations into multiple companies in the EWA space.

There's not much to discuss publicly in Maryland. I think we are involved in a lot of this non-public activity. I just flagged that what I think about what are the leading states that tell you what direction the country and other states may follow, Maryland is on that very short list.

Chris Willis:

Okay. Got it. What's the practical takeaway for earned wage access providers, given this seeming variance among states about how they treat the product? I mean, what's the industry supposed to do?

Jesse Silverman:

Should I give the obvious answer, which is hire good lawyers?

Chris Willis:

I'm happy for you to give that answer.

James Kim:

Well, and lobbyists, right?

Jesse Silverman:

Absolutely. Honestly, I think that's the answer. It is complicated. The interesting thing to me is there's a lot more agreement on EWA, even across many aspects of the aisle politically, than there are with lots of other products, right? I expect to see wide policy disagreements on issues, like small dollar credit, and we see that across the country. Wide policy disagreements, which reflect themselves in widely disparate treatment under the regulations.

I don't see the same political disagreements here, so it's interesting that the just as a policy matter that we're seeing such a wide divergence in treatment under the states. I will say, just on the off chance that we get some legislators, or regulators listening to our wonderful podcast, I think that there are some interesting policy choices being made. I think the first one comes down to what I mentioned earlier with respect to employer direct, or direct to consumer, I don't think that's the right division of regulation. Meaning, the real question at the root of it, what transforms this in my mind from credit into something else is, does the EWA provider reasonably know that the money has in fact been earned and is owing?

The easiest way to do that is to partner with the employer, so that makes sense that that is treated differently. But it's not the only way. If you're a direct-to-consumer provider, you can know that the money has been earned and has been owing. You could partner with payroll providers. There are many ways to do it. I just find the regulatory distinction between direct to consumer and employer provided to just be the wrong focus. The focus should be on, do they know whether or not the money has been earned? I also just, if I take it even a step higher, labor laws tell me, once I have earned that money, it's mine. That is my money. It's not obligating. It's not, they can't decide whether or not they're going to give it to me. That is officially my money. It's due and owing. They just happened to be holding it, because of the vagaries of payroll processing. They're holding on to my money, even though I have already legally earned it.

I mean, to me, from a philosophical perspective, it doesn't feel all that different from a bank. A bank is holding my money. That's unquestionably, legally my money. Sometimes if I want that money faster, through an ATM, I have to pay an ATM fee. It's unambiguous. I don't think anyone's out there saying, we should curtail ATM fees. I just find the policy debate around EWA challenging, mostly because I think it's such a wonderful product for a cohort of Americans.

Again, I don't think there is a single product that is the best product for all people under all circumstances at all times.

For many consumers who have an income, they make a good living, but they have challenging cash flow needs across the weeks, this is a wonderful product that is just demonstrably better than a lot of other products that are out there. I really don't want to see regulators kill it in its grave when it's just better.

Chris Willis:

You know, Jesse, who I think actually agrees with you on the distinction between money that's already rightfully yours, versus money that's not necessarily earned yet, and that's the CFPB. Because when the CFPB finalized the 1071 rule, they defined what constitutes small business credit and what's not. They included in small business credit that has to be reported under 1071, which is part of ECOA and Reg B, merchant cash advances. For true factoring, where the accounts receivable by the business that's getting the advance are already receivable, because the goods have already been delivered or whatever, that's factoring and the CFPB excluded that from the definition of credit under the 1071 rule.

Jesse Silverman:

Right. It's interesting that they've taken such a different approach. Again, to James's point, it's not likely to have impact, but it is interesting as a policy matter to treat it differently. Again, labor laws, I'm pretty sure in every state, certainly the majority of states, they say once you have earned that money, it is yours, right? I'm not asking for a loan of my own money. This is my money that you owe me.

James Kim:

I may pay a fee, optional, for the value add of accessing my money faster than if I waited for a traditional payroll. Just piggybacking on some of Jesse's comments about what I think is the illogical differentiation between direct to consumer and payroll-driven is, I mean, California is an example of this. I want to be fair to California, because I think a lot of what they're doing is reasonable and I think a compromise, but on this one issue, the distinction between direct to consumer and payroll, I think they're wrong, because it's a regulator, picky winners and losers in the marketplace. It is favoring one business model over the other for no good reason. One way to think about it is California's decision to treat direct to consumer as loans under the CFL and payroll to be excluded from that is clearly favoring one model over the other.

Also, I think the practical consideration is more and more people in our society are not traditional W2 employees working at large companies. It's typically larger companies that are going to assume the cost of paying a third-party EWA provider to provide that product for their employees. It's not going to be the small businesses, and it's not going to be all of the Americans that are 1099, or gig economy workers. I don't think California is intentionally trying to exclude, or restrict access of earned wage access to those people. But that's I think the unfortunate net effect of how they're treating the two models. To be fair in California, I do want to give them kudos. I respect that they're – I think they're taking a measured approach where for now they're saying direct to consumer are loans under the CFL, but they're not imposing all of

the CFL requirements, right? You don't need a full blown CFL license. A lot of the CFL substantive provisions, some apply, many do not. It's, like I said, a more reasonable registration requirement rather than full blown licensure. Because I think, California, like I said, is being reasonable and wants to study the product without killing it in the cradle.

Jesse Silverman:

I will. I entirely agree. I wish that they had just removed that. What I've said is I believe is an artificial distinction and focused on does the EWA provider genuinely reasonably know that the money has been earned. Like I said, as a policy matter, that's the part that everyone should care about, and then create a regime around that. Again, I agree with you. Kudos to them for not taking the approach that Connecticut took, which was to just add earned wage access into their small dollar lending statute and just leave it at that. It could have been worse in California.

Chris Willis:

Let me ask you guys to each give your concluding remark, or message to the industry about this. I mean, what should they look forward to and what should they do about it?

Jesse Silverman:

I'll go first, I guess. I think what they should do is really start talking to the legislators in the States across America, because here's another aspect. If you look at the complaints, the number of complaints regarding this product are so small, right? The complaints at the CFPB, the one thing seems clear to me, consumers genuinely want this product. If we start from that position that consumers genuinely want this product, but they also want it done in a safe way, we're seeing some good regulatory receives, again, Wisconsin notwithstanding the oddities of the regulator trying to apply the Wisconsin Consumer Act after the fact. The regulatory regime is quite good there. Provides a lot of robust consumer protections, requires licensure so that they know who's doing it. There are some good models out there. I think that all the companies need to get out. They need to talk to the legislators. They need to talk to the regulators, but really, they need to educate them. They should just be looking at the States, because the States are going to be looking at them.

Chris Willis:

Great advice. How about you, James?

James Kim:

I think for the EWA providers, and I think that's probably our primary audience, I'm an optimistic person by nature, so I think there's a real opportunity for this industry to continue to grow and continue to get mainstream acceptance. I think the caution is, even at least at the federal level, or more friendly regulatory environment, I would say, to me, the long-term strategy is to self-police in a reasonable way so that you can demonstrate that this is a legitimate consumer-friendly product, and don't let, I would hope, one bad actor, one bad apple who doesn't properly disclose fees, or whatever the issue may be, sour the picture for everyone else.

Because I really think there is, across the board, sincere desire by the vast majority of EWA providers to offer the product in a responsible way and to cooperate with regulators, right, as long as it's reasonable. I think that means that the industry has to be self-disciplined and not create fodder for its enemies.

Chris Willis:

Also, a great point, James. Thanks very much. James, Jesse, thanks very much for joining me on today's episode. Of course, thanks to our audience for tuning in to today's show as well. Don't forget to visit and subscribe to our blogs, TroutmanFinancialServices.com, and ConsumerFinancialServicesLawMonitor.com. While you're at it, why not visit us on the web at Troutman.com and add yourself to our Consumer Financial Services email list. That way, we can send you copies of the alerts and advisories we send out from time to time, as well as invitations to our industry-only webinars. Of course, stay tuned for a great new episode of this podcast every Thursday afternoon. Thank you all for listening.