

NEW YORK COURT OF APPEALS

People v. Applied Card Systems, Inc.

11 N.Y.3d 105, 894 N.E.2d 1 (2008) · Decided June 26, 2008

OPINION

People v. Applied Card Systems, Inc. 11 N.Y.3d 105

CIPARICK, J.

OPINION OF THE COURT

Ciparick, J. This appeal arises out of a special proceeding initiated by the Attorney General, seeking restitution, civil penalties, and injunctive relief for violations of New York’s Executive Law and Consumer Protection Act (see Executive Law § 63 [12]; General Business Law §§ 349, 350). We are asked to determine whether the federal Truth-in-Lending Act (TILA) preempts these claims of a fraudulent and deceptive credit card solicitation scheme. We conclude that it does not. We hold, however, that res judicata effect should be granted to a prior nationwide class action settlement agreement, thereby precluding the Attorney General from recovering certain restitution.

I. Respondent Cross Country Bank (CCB) is a Delaware bank that, since 1997, has actively solicited consumers in the “subprime” credit market to apply for its credit cards. These consumers “generally would not qualify for credit under traditional underwriting guidelines and principles.”¹ Certain of CCB’s marketing materials claim that the company’s “purpose is to help people establish good credit.” Respondent Applied Card Systems (ACS) provided, as relevant here, debt collection services for CCB’s credit card accounts. On March 28, 2003, the Attorney General filed a verified petition asserting that CCB’s credit card solicitations and collections practices violated New York’s Executive Law and Consumer Protection Act (see Executive Law § 63 [12] [fraud]; General Business Law §§ 349 [deceptive business practices], 350 [false advertising]). The gravamen of the petitioner’s complaint *110was that CCB had misrepresented the credit limits that subprime consumers could obtain and that it failed to disclose the effect that its origination and annual fees would have on the amount of initially available credit. For example, in its mail solicitations CCB told consumers that they were “pre-approved” for a credit limit “up to” \$2,500 or \$1,000. These communications further clarified that the actually-approved credit limit could be substantially less, perhaps as low as \$350.² CCB’s solicitations also explained that upon approval consumers would incur a \$100 “Account Origination Fee” and a \$50 “Annual Fee.” But CCB’s explanation of the fact that those fees would be treated as charges that could greatly reduce the amount of credit initially available to consumers was oblique.³ In some cases, the initial fees depleted consumers’ credit limits by approximately 40% or more. As relevant here, the verified petition also contained allegations of fraud and deception pertaining to CCB’s marketing of “secured cards,” the Credit Account Protector (CAP) insurance program, the Applied Advantage

(AA) cardholder benefit program, and a debt collection device known as “re-aging.” With respect to secured cards,⁴ petitioner asserted that CCB’s advertisement was deceptive because its banner touted “no late fees*” and “no collections calls*,” but further clarified that such fees would be imposed and such calls made in certain instances. The marketing of CAP was fraudulent and deceptive, petitioner claimed, because the program was advertised as providing coverage in the event of “death, disability, unemployment, or family leave,” but—as CCB clarified in an insert and subsequently-mailed certificate of coverage—only life and *111dismemberment benefits were available to New York consumers.⁵ As for AA, petitioner asserted that CCB’s practice of automatically enrolling consumers in the benefit program—at a cost of \$34.95 per year—unless they expressly opted out of it was deceptive because the opt-out mechanism was confusing and misleading. Finally, petitioner alleged that ACS marketed re-aging as a means for severely delinquent cardholders to bring their accounts current through a series of payments, while failing to explain that over-the-limit fees would continue to accrue throughout the re-aging process and that both these fees and the previously imposed late fees would be due at the conclusion of the re-aging process.⁶ In addition to the alleged fraudulent and deceptive practices described above, the verified petition also set forth certain facts regarding respondents’ late fees, finance charges, balance calculation method, and the lack of any “grace period” for consumer payments. Pursuant to TILA, these terms must be disclosed in all credit card solicitations. But petitioner claimed that many consumers were “unaware” of the manner in which charges and penalties based upon the terms were assessed to their accounts.⁷ According to petitioner, these charges and penalties contributed to “trapping] . . . unwary consumers” in a “vicious cycle of pyramiding debt.” On February 11, 2004, Supreme Court issued a decision and order that, in relevant part, held that petitioner was barred by res judicata from seeking restitution for pre-January 1, 2002 “front-end claims,” or those concerning illegal conduct “at or near the inception of the cardholder relationship,” on behalf of New York consumers who had opted to accept the benefits of a nationwide class action settlement with CCB.⁸ The California Superior Court approved the settlement and dismissal of the action with prejudice on September 30, 2002 (see *Allec v Cross* *112Country Bank, No. 802894, final judgment and order of dismissal with prejudice [Sept. 30, 2002]). In their motion to reargue the February 11 order, respondents asserted that the credit card application and solicitation disclosure requirements set forth in TILA (see 15 USC § 1632 [c]; § 1637 [c], [e], [f]) and its accompanying regulation, Regulation Z (12 CFR part 226), preempted petitioner’s claims. Following oral argument, Supreme Court held that the claims were not preempted. After issuing its preemption decision, the court proceeded to find “as a matter of law and fact” that CCB had “repeatedly and persistently” engaged in fraud, deception and false advertising in connection with its credit card solicitations, and that ACS’s marketing of the re-aging process was similarly illegal. These rulings were based on the court’s review of “volumes of evidentiary proof,” including more than 100 pages of application and solicitation materials, more than 200 consumer complaints and affidavits, and the affidavits of former ACS collection

employees. On June 24, 2004, Supreme Court issued an order that, as relevant here, “permanently enjoined” respondents from engaging in future fraud, deception, and false advertising with respect to: credit limits, initially available credit, late fees and collection calls concerning secured credit card accounts, benefits available under CAP, and the benefits of account repayment plans, such as re-aging. Supreme Court also prohibited respondents from automatically enrolling consumers in AA without express authorization. The Appellate Division affirmed, rejecting respondents’ preemption argument (see 27 AD3d 104, 109 [2005]). On January 27, 2006, Supreme Court entered an order awarding the Attorney General approximately \$1.3 million in restitution and damages, \$7.9 million in penalties and \$2,000 in costs. In part, restitution was based upon costs incurred by virtue of the origination and annual fees as well as certain late and over-the-limit fees. The Appellate Division modified. Upholding Supreme Court’s *res judicata* ruling, the court held that the “public interest does not justify giving the New York consumers bound by the Allec settlement two chances to receive make-whole relief” (41 AD3d 4, 8 [2007] [internal quotation marks and brackets omitted]). As to respondents’ appeal, the court held that Supreme Court’s award of restitution for petitioner’s CAP and re-aging claims *113 was improper. Finally, the court affirmed each of the penalties assessed. This Court granted petitioner and respondents leave to appeal and we now affirm.

II. Under the US Constitution’s Supremacy Clause (US Const, art VI, cl 2), the purpose of our preemption analysis is singular and straightforward. “[O]ur sole task is to ascertain the intent of Congress” (California Fed. Sav. & Loan Assn. v Guerra, 479 US 272, 280 [1987]; Rosario v Diagonal Realty, LLC, 8 NY3d 755, 763 [2007]; see also Medtronic, Inc. v Lohr, 518 US 470, 485 [1996] [(“T)he purpose of Congress is the ultimate touchstone in every pre-emption case” (internal quotation marks omitted)]). Preemption can arise by: (i) express statutory provision, (ii) implication, or (iii) an irreconcilable conflict between federal and state law (see Balbuena v IDR Realty LLC, 6 NY3d 338, 356 [2006]). When dealing with an express preemption provision, as we do here, it is unnecessary to consider the applicability of the doctrines of implied or conflict preemption (see Cipollone v Liggett Group, Inc., 505 US 504, 517 [1992, plurality op] [statute’s preemptive scope is “governed entirely” by its “express language”]). Instead, the resolution in this case turns solely upon proper statutory construction of TILA’s credit card application and solicitation preemption provision (see Matter of Frew Run Gravel Prods. v Town of Carroll, 71 NY2d 126, 131 [1987]). In undertaking that task, we are guided by the “starting presumption that Congress does not intend to supplant state law” unless its intent to do so is “clear and manifest” (New York State Conference of Blue Cross & Blue Shield Plans v Travelers Ins. Co., 514 US 645, 654, 655 [1995]; Lohr, 518 US at 485; accord Balbuena, 6 NY3d at 356). The preemption provision at issue here was enacted as part of the Fair Credit and Charge Card Disclosure Act of 1988 (FCCCDA), which amended TILA.⁹ It states: “(e) Certain credit and charge card application and solicitation disclosure provisions *114 “The provisions of subsection (c) of section 1632 of this title and subsections (c), (d), (e), and (f) of section 1637 of this title shall supersede any provision of the law of any State relating to the disclosure of information in

any credit or charge card application or solicitation which is subject to the requirements of section 1637 (c) of this title or any renewal notice which is subject to the requirements of section 1637 (d) of this title, except that any State may employ or establish State laws for the purpose of enforcing the requirements of such sections” (15 USC § 1610 [e]). Respondents repeatedly assert that section 1610 (e) expressly preempts “any and every state law ‘relating to the disclosure of information in any credit or charge card application or solicitation.’ ” Petitioner counters that its claims are not preempted because they do not relate to the disclosure of credit information, but rather to affirmative deception. Based upon the statutory text, legislative history, and administrative interpretation of section 1610 (e), we agree with petitioner. Section 1610 (e) does not preempt every state law that could potentially touch upon any credit information that respondents might choose to include in their credit card applications and solicitations. Instead it preempts those state laws that relate to “disclosure of information” in credit card applications and solicitations “subject to the requirements of section 1637 (c),” not those that prevent fraud, deception and false advertising. Preemption is limited, then, to laws that purport to alter the format, content, and manner of the TILA-required disclosures and those that require credit issuers to affirmatively disclose specific credit term information not embraced by TILA or Regulation Z (see 15 USC § 1610 [e]; § 1637 [c] [5]; see also 54 Fed Reg 13855, 13863 [“State laws relating to the terms of credit required to be disclosed or the manner in which such terms must be disclosed are preempted”]; Official Staff Interpretations of Federal Reserve System Board of Governors, 12 CFR part 226, Supp I, ¶ 28 [d] [1] [eff Jan. 14, 2008] [explaining that state laws are preempted when they require the disclosure of credit terms]). Neither aspect of such preemption is present in this case. This is because New York’s Executive Law and Consumer Protection Act, collectively, do not require respondents to disclose anything. These statutes simply require that they refrain from fraud, deception, and false advertising when communicating with New York consumers. The misleading statements in respondents’ applications and solicitations regarding potential credit limits, initially available credit, secured card benefits, credit insurance coverage and re-aging benefits, and their deceptive automatic enrollment of consumers in the AA program do not constitute the disclosure of any information “which is subject to the requirements of 1637 (c)” (see 15 USC § 1610 [e]).¹⁰ The only information in a credit card application or solicitation that must be disclosed pursuant to section 1637 (c) is that describing: (i) annual percentage rate, including whether such rate is variable, (ii) annual and other periodic fees, including, “membership fee[s] imposed for the issuance or availability of a credit card,” (iii) minimum finance and transaction charges, (iv) grace period, (v) balance calculation method, (vi) cash advance fee, (vii) late fee, (viii) over-the-limit fee, and (ix) a statement that charges incurred are due when a periodic statement is received (see 15 USC § 1637 [c] [1] [A] [i] [I], [II]; [ii] [IJ-[III]; [iii], [iv]; [B] [i]-[iii]; [4] [A] [iii]; 15 USC § 1637 [c] [2] [mandating, with certain exceptions, disclosure of information described in section 1637 (c) (1) (A) in telephone solicitations]; 12 CFR 226.5a [b]). Pursuant to 15 USC § 1637 (c) (5), however, the Federal Reserve Board of Governors

(the Board) has authority to enact regulations requiring “the disclosure of information in addition to” that described in section 1637 (c). The verified petition does make reference to the fact that many consumers were “unaware” of the manner in which certain credit terms, including late and over-the-limit fees, ¹¹⁶annual percentage calculation method, and the lack of any grace period, were applied against their accounts. But petitioner “take[s] no issue” with the substance or sufficiency of respondents’ TILA disclosures and he has obtained no relief based upon consumers’ purported lack of awareness. As we previously have held, the mere fact that a complaint makes reference to certain matters that are preempted by a federal statute does not “transform” a state law action into one that is preempted under federal law (see *Nealy v US Healthcare HMO*, 93 NY2d 209, 220 [1999]).¹¹ Respondents argue, however, that the statutory text compels us to conclude that section 1610 (e) bars the Attorney General’s claims. Their textual argument is based primarily upon the purportedly settled construction of the phrase “relating to” in U.S. Supreme Court precedent. The U.S. Supreme Court’s interpretation of the phrase “relating to” does not help respondents. When construing other statutes, the Court has concluded that the phrase has a meaning that “ express [es] a broad pre-emptive purpose” (see *Morales v Trans World Airlines, Inc.*, 504 US 374, 383 [1992]; accord *Rowe v New Hampshire Motor Transp. Assn.*, 552 US —, —, 128 S Ct 989, 994 [2008]). It has been defined as “having a connection with, or reference to” the subject matter set forth in a particular preemption clause (see *Morales*, 504 US at 384). But the Court has made clear that the scope of its interpretation of “relating to” is subject to some limitation. This is because “[i]f ‘relate to’ were taken to extend to the furthest stretch of indeterminacy, then for all practical purposes pre-emption would never run its course” (*Travelers*, 514 US at 655). Thus, the U.S. Supreme Court has “cautioned against an ‘uncritical literalism’ that would make pre-emption turn on ‘infinite connections’ ” (*Egelhoff v Egelhoff*, 532 US 141, 147 [2001], quoting *Travelers*, 514 US at 656). We applied these principles in *Nealy* to conclude that even when a complaint refers to matters preempted under federal law, no preemption occurs if the effect of the relief sought upon the federal scheme is “ ‘too tenuous, remote, or peripheral’ ” (*Nealy*, 93 NY2d at 220, quoting *Shaw v Delta Air Lines, Inc.*, 463 US 85, 100 n 21 [1983]). We hold this rule of limitation to be applicable here. Quite simply, petitioner’s claims do not relate ¹¹⁷to the disclosure of federally-mandated information in credit card applications or solicitations. Instead, they relate to the inclusion in those materials of certain fraudulent and deceptive misinformation—none of which is even addressed by the federal disclosure scheme. The preemption clause at issue here is very different from that in *Morales*, a case that respondents’ textual argument hinges upon. There, the Airline Deregulation Act of 1978 (ADA) preempted “any law ‘relating to rates, routes, or services’ of any air carrier” (*Morales*, 504 US at 378-379, quoting 49 USC Appendix § 1305 [a] [1] [now codified at 49 USC § 41713]). Based on the comprehensive preemptive intent evidenced in this provision, the Court had little trouble concluding that a set of purportedly enforceable guidelines adopted by the National Association of Attorneys General, which described in excruciating detail the “content and format” of airline advertising, frequent flyer programs, and

passenger compensation policies, was preempted (see *Morales*, 504 US at 379, 388, 390-414; see also *American Airlines, Inc. v Wolens*, 513 US 219, 227-228 [1995] [preemptive provision in ADA bars claims under Illinois's Consumer Fraud and Deceptive Business Practices Act]; *Air Transp. Assn. of Am., Inc. v Cuomo*, 520 F3d 218, 223 [2d Cir 2008] [ADA preempts New York's Passenger Bill of Rights because that statute requires airlines to provide certain amenities to travelers and therefore relates to "the service of an air carrier"])). But the reach of section 1610 (e) is not as expansive as that of the ADA preemption provision at issue in *Morales*. Section 1610 (e) preempts only those state laws that relate to the format, content, manner, or substance of the TILA-required disclosures. Thus, there is no preemption here because neither petitioner's claims nor the relief he was granted below have any effect upon those disclosures (see *Nealy*, 93 NY2d at 220 [no preemption where "(p)laintiff's claims do not bind an employee plan to any particular choice of benefits, do not dictate the administration of such a plan and do not interfere with a uniform administrative scheme"]; see also *Harvey v Members Empls. Trust for Retail Outlets*, 96 NY2d 99, 106 [2001] [state insurance law and regulation relate to an Employee Retirement Income Security Act (ERISA) plan because they "impose a basic benefit structure"])). To the contrary, Supreme Court's affirmed orders did not mandate any alteration of or addition to the required section 1637 (c) disclosures. Rather, its injunction simply prevents respondents from affirmatively misrepresent¹¹⁸ing the nature of credit terms that, at present, are not even subject to regulation under TILA or Regulation Z. Indeed, petitioner's entitlement to the relief granted below exists wholly apart from respondents' section 1637 (c) disclosure obligations; it is based upon "a more general obligation—the duty not to deceive" (see *Cipollone*, 505 US at 528-529 [plurality op]). But respondents maintain that Congress's intent to create a uniform system of disclosure in credit card applications and solicitations militates in favor of preemption. We again emphasize, however, that petitioner's success in this case does not force respondents to make any alterations to their section 1637 (c) disclosures or to affirmatively disclose any additional credit terms. This is dispositive. In any event, the sort of "indirect economic influence" upon respondents' solicitations practices resulting from the relief accorded below is not sufficient to overcome the presumption against preemption of state law (see *Travelers*, 514 US at 664 [although ERISA contains a broad, "relating to," preemption clause New York law imposing surcharges on all insurers was not preempted because the law "d[id] not impose (a) . . . substantive coverage requirement"]; accord *Nealy*, 93 NY2d at 220). We acknowledge that the U.S. Supreme Court recently reiterated that state tort judgments impose substantive requirements that "can be ... a potent method of governing conduct and controlling policy" (see *Riegel v Medtronic, Inc.*, 552 US —, —, 128 S Ct 999, 1008 [2008] [internal quotation marks omitted]). But *Riegel* is not controlling here for two reasons. First, the Medical Device Amendments preemption provision at issue there is substantively different from 15 USC § 1610 (e). It preempted "state requirements 'different from, or in addition to, any requirement applicable ... to [a medical] device' under federal law" (see 552 US at —, 128 S Ct at 1006, quoting 21 USC § 360k [a] [1]). The scope of

section 1610 (e) preemption is, however, expressly limited to state laws relating to the disclosures specifically required under section 1637 (c), it does not extend to the additional state requirement that respondent must refrain from fraud and deception when making statements about credit terms that are not even within the scope of TILA or Regulation Z. Second, unlike the tort law claims in *Riegel*, the Attorney General's success in this action will not "disrupt[] the federal scheme" of disclosure mandated under TILA (see 552 US at —, 128 S Ct at 1008). Petitioner has not sought relief based upon *119the TILA-required disclosures. Nor has he sought to alter the format, content, or manner of those disclosures. The relief granted below does not impose any additional disclosure requirements upon respondents, it merely precludes them from making fraudulent and deceptive statements regarding certain credit terms (compare *Riegel*, 552 US at —, 128 S Ct at 1008 [state tort law claim preempted because Food and Drug Administration's (FDA) exacting standards for premarket approval of medical devices would be disrupted by judgment "that requires a manufacturer's catheters to be safer, but hence less effective, than the model the FDA has approved"])). Respondents' disruption argument assumes that Congress intended the TILA disclosures to provide consumers' sole protection against credit card companies' fraudulent and deceptive marketing practices. But the qualified nature of the preemption provision's text belies that sweeping assertion, as does the statute's legislative history. The FCCCDA's House Conference Report states that section 1610 (e) preempts "State credit and charge card disclosure laws" (see HR Conf Rep 100-1069, 100th Cong, 2d Sess, at 22, reprinted in 1988 US Code Cong & Admin News, at 3951, 3960). An example of such a law is California's Areias Credit Card Full Disclosure Act of 1986, which contains application and solicitation disclosure requirements very similar to TILA's (see Cal Civ Code §§ 1748.10-1748.12; Furletti, Comment, The Debate Over the National Bank Act and the Preemption of State Efforts to Regulate Credit Cards, 77 Temp L Rev 425, 451, 451 n 233 [2004]; see also Wis Stat Ann § 422.308 [1] [a] [requiring that "every application for (an) open-end credit plan" shall set forth certain specific information, including "(t)he annual percentage rate"])).¹² Although the Senate's version of FCCCDA would have saved provisions of such state laws that required disclosure of information in addition to that set forth in section 1637 (c) from preemption if they were reenacted within two years of the Act's passage (see S Rep 100-259, 100th Cong, 1st Sess, at 9-10, reprinted in 1988 US Code Cong & Admin News, at 3936, 3945-3946), the Senate compromised and "recede[d]" to the House *120version, which "preempted the provisions of all state laws with respect to the disclosures mandated under its bill" (see HR Conf Rep No. 100-1069, 100th Cong, 2d Sess, at 21, reprinted in 1988 US Code Cong & Admin News, at 3960 [emphasis added]; see also Gelb and Cubita, Credit Card Application and Solicitation Disclosure Legislation: An Alternative to the Rate Ceiling Approach, 43 Bus Law 1557, 1564 [1988]). The Attorney General's claims in this case do not affect any of the mandated disclosures ultimately codified by the FCCCDA nor do they require respondents to make any additional affirmative disclosures regarding their credit products. Thus, this case does not concern the sort of credit card disclosure laws preempted under TILA. Congress

also made clear that, even when enforcing the TILA disclosure requirements, states could use their unfair and deceptive trade practices acts to “requir[e] or obtain[] the requirements of a specific disclosure beyond those specified in Section [1637] (c) in the settlement or adjudication of a specific case or cases” (see HR Conf Rep 100-1069, 100th Cong, 2d Sess, at 22, reprinted in 1988 US Code Cong & Admin News, at 3960).¹³ In sum, the legislative record shows that Congress only intended FICCDCA to preempt a specific set of state credit card disclosure laws, not states’ general unfair trade practices acts. Even more significantly, the Senate Banking Committee Report states that TILA does not preempt “the use of State mini-Federal Trade Commission [FTC] statutes to address unfair or deceptive acts or practices” (see S Rep 100-259, 100th Cong, 1st Sess, at 9, reprinted in 1988 US Code Cong & Admin News, at 3945). General Business Law §§ 349 and 350 comprise, of course, just such a “mini-FTC” act (see *Oswego Laborers’ Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 26 [1995]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 323-324 [2002]). The Senate Report’s understanding of TILA’s disclosure requirements is reflected in the Official Staff Interpretations of the Federal Reserve Board of Governors, the agency charged by statute with administering TILA (see 12 CFR part 226, Supp I, ¶ 28 [d] [3] [eff Jan. 14, 2008] [“(S)tate laws prohibiting unfair or deceptive acts or practices concerning *121credit and charge card applications, solicitations and renewals are not preempted”]; 54 Fed Reg 13855, 13864 [1989] [“(A)ny prohibitions against unfair and deceptive acts or practices (such as state ‘mini-FTC acts’) . . . are not preempted”]). That interpretation is entitled to great deference (see *Ford Motor Credit Co. v Milhollin*, 444 US 555, 565 [1980] [“(D)eference is especially appropriate in the process of interpreting the Truth in Lending Act and Regulation Z. Unless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive”]).¹⁴ Therefore, we hold that petitioner’s Executive Law and Consumer Protection Act claims are not preempted by TILA or Regulation Z. III. We turn next to the res judicata effect of the Allec settlement upon a portion of the Attorney General’s claims for restitution. Pursuant to California’s procedural rules (Cal Rules Ct rule *1223.769 [f]), New York consumers were provided with notice of the settlement and the opportunity to “opt-in” to a nationwide settlement class. In exchange for certain payments or account credits, consumers who opted-in: “forever released and discharged [respondents] from any claims ... of any nature . . . that [they] have had in the past, or now have against [respondents], which relate to the solicitation or origination of the cardholder relationship, the ‘pre-approval’ of persons being solicited for CCB credit cards, the Initial Credit Card Fees, the assignment of credit limits and/or the Disclosure Claims; and all claims set forth in the [Allece] Action.” The California court approved the settlement. And the parties do not dispute that the Allece action was dismissed with prejudice, thereby “forever barr[ing]” all settlement class members from prosecuting the released claims against respondents. Under California law, such a finally-approved settlement is entitled to res judicata effect (see e.g. *Johnson v American Airlines, Inc.*, 157 Cal App 3d 427, 431, 203 Cal Rptr 638, 640 [1984]; see also *Moore and Thomas*, Cal Civ Prac Procedure § 32:17 [2008 ed] [“A

judgment rendered in a proper class action is res judicata as to the claims of every member of the class although they are not formal parties to the suit”)).¹⁵ In New York, res judicata, or claim preclusion, bars successive litigation based upon the “same transaction or series of connected transactions” (see Siegel, NY Prac § 447 [4th ed]) if: (i) there is a judgment on the merits rendered by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was (see *Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]; Weinstein-Korn-Miller, NY Civ Prac ¶ 5011.08 [2d ed]). Here, the parties’ dispute focuses solely upon the second prong of the res judicata test, privity. The Attorney General argues that he is not in privity with members of the Allec settlement class because his interest in *123seeking restitution on those consumers’ behalf is far broader than their individual pecuniary concerns. Rather, he seeks restitution as a means of deterring future fraud, deception, and false advertising and restoring the public’s trust in the consumer credit marketplace. Amici, the Attorneys General of 30 states, agree with that view and urge us to consider the problem of “class action abuse,” which, they say, has led to collusive and undervalued settlements such as that entered in Allec. Respondents counter by invoking our traditional solicitude towards settlement agreements, urging us to permit the Allec settlement class members only one opportunity to obtain make-whole relief. We agree with respondents. Our precedents have repeatedly explained that privity is not susceptible to a hard-and-fast definition (see *Watts v Swiss Bank Corp.*, 27 NY2d 270, 277 [1970] [(T)he term privity does not have a technical and well-defined meaning”]; *Gramatan*, 46 NY2d at 486 [(P)rivity is an amorphous term not susceptible to ease of application”]; *Buechel v Bain*, 97 NY2d 295, 304 [2001] [(P)rivity is ‘ “an amorphous concept” ’ ”]). Although we have provided examples of cases in which privity is present (see *Green v Santa Fe Indus.*, 70 NY2d 244, 253 [1987]; see also *Buechel*, 97 NY2d at 305), none of those are applicable here. Ultimately, we must determine whether the severe consequences of preclusion flowing from a finding of privity strike a fair result under the circumstances (see *Buechel*, 97 NY2d at 304-305). This inquiry is, of course, informed by reference to the policies that res judicata is designed to protect (see *Matter of Reilly v Reid*, 45 NY2d 24, 28 [1978]). It is a “ ‘familiar doctrine’ ” that a class action judgment is binding upon class members who were adequately represented in the action (see *Richards v Jefferson County*, 517 US 793, 800 [1996], quoting *Hansberry v Lee*, 311 US 32, 42 [1940]; see also *Taylor v Sturgell*, 552 US —, —, 128 S Ct 2161, 2172 [2008] [“Representative suits with preclusive effect on nonparties include properly conducted class actions”]; Restatement [Second] of Judgments § 41 [1] [e] and Comment e [in properly authorized class actions “persons within the class are bound by a judgment for or against the representative”]; 18-131 Moore’s Federal Practice—Civil § 131.40 [3] [e] [iii] [“All class members will be bound, under (res judicata), by a final judgment in a class action, including a judgment following settlement, assuming the action met the necessary procedural due process prerequisites”]). The adequacy of representation in the Allec ac*124tion is not at issue here (see Restatement [Second] of Judgments § 42 [1] [d]-[e]). The

Attorney General argues, however, that his interest in protecting the public was not represented at all in the Allec case. Indeed, he points out that he was not provided with notice of the settlement or an opportunity to object to it. Nevertheless, one specific portion of the relief petitioner seeks here—restitution for pre-January 1, 2002 claims—is identical to that which the New York members of the Allec settlement class have already pursued to a final and binding judgment. As to that measure of relief alone, we hold that there is privity.¹⁶ Our conclusion is supported by a core principle of res judicata, a party’s right to rely upon the finality of the results of previous litigation (see *Matter of New York State Labor Relations Bd. v Holland Laundry, Inc.*, 294 NY 480, 493 [1945] [(“T)he public tranquillity demands that, having been once . . . tried, all litigation of (a) question, and between (the) parties, should be closed forever”]; *Reilly*, 45 NY2d at 28 [“Res judicata is designed to provide finality in the resolution of disputes”]; cf. *Matter of Olympic Tower Assoc. v City of New York*, 81 NY2d 961, 962-963 [1993] [settlement agreements entitled to res judicata effect]; *Siegel*, NY Prac § 444 [4th ed] [judgments entered pursuant to settlement are entitled to res judicata effect]). A similar respect for finality has informed our longstanding rule that—absent exceptional circumstances such as duress, illegality, fraud, or mutual mistake (see *Mangini v McClurg*, 24 *125NY2d 556, 563 [1969])—a settlement must be enforced according to its terms (see *Denburg v Parker Chapin Flattau & Klimpl*, 82 NY2d 375, 383 [1993]). Permitting the Attorney General to seek additional restitution on behalf of the Allec settlement class members would undoubtedly “destroy or impair rights” conclusively established in the Allec case (see *Schuykill Fuel Corp. v Nieberg Realty Corp.*, 250 NY 304, 307 [1929, Cardozo, Ch. J.]). Indeed, the Attorney General has asserted that restitution is about making consumers whole. The problem here is that the Allec settlement class members have already compromised their entitlement to a full measure of make-whole relief in a proper judicial forum (cf. *EEOC v Waffle House, Inc.*, 534 US 279, 297 [2002] [(“I)t ‘goes without saying that the courts can and should preclude double recovery by an individual’ ”]). Although we recognize the importance of permitting petitioner to seek restitution to deter Executive Law and Consumer Protection Act violations, we cannot allow him to do so at the expense of undermining a validly-entered judgment of a sister state, which it is our constitutional duty to protect (US Const, art IV, § 1; 28 USC § 1738; *O’Connell v Corcoran*, 1 NY3d 179, 184 [2003]; cf. *Matsushita Elec. Industrial Co. v Epstein*, 516 US 367, 374 [1996] [(“A) judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit”]). Our holding does not, however, substantially prejudice the public interest served by the Attorney General in pursuing this action. Indeed, respect for the finality of the Allec settlement still permits the Attorney General to seek restitution on behalf of those not bound by the settlement and for the time periods not embraced therein. In addition, the claims for injunctive relief, civil penalties, and costs remain undisturbed. And, as Supreme Court noted, the Attorney General might be able to obtain disgorgement—an equitable remedy distinct from restitution—of profits that respondents derived from all New York consumers, whether within the Allec

settlement class or not (see 41 AD3d at 8 n 2; cf. *Securities & Exch. Commn. v Fischbach Corp.*, 133 F3d 170, 175 [2d Cir 1997] [“As an exercise of its equity powers, the court may order wrongdoers to disgorge their fraudulently obtained profits”]; accord *Official Comm. of *126Unsecured Creditors of WorldCom, Inc. v Securities & Exch. Commn.*, 467 F3d 73, 81 [2d Cir 2006]).¹⁷ We have considered petitioner’s arguments regarding the Appellate Division’s reversal of those portions of Supreme Court’s January 27 order awarding restitution for damages allegedly incurred through consumers’ participation in the CAP and re-aging programs and we find those arguments meritless. In addition, respondents’ argument that extrinsic evidence of consumer deception is required to establish petitioner’s Consumer Protection Act claims is unpreserved for our review. Accordingly, the order of the Appellate Division should be affirmed without costs. . CCB also solicits consumers who have yet to establish a credit history. . In some of its solicitations, CCB also explained that “historically,” the average approved credit limit was \$400. . For example, in one of its mail solicitations, CCB described the origination fee as a “one-time” charge. Further, near the bottom of the first page of CCB’s “Credit Card Agreement,” the company stated: “Our Charges. You agree to pay us the following fees in connection with your Account. Such fees will be treated as Purchases on your Account. . . “1. Annual Fee. Your account is subject to an Annual Fee and it will be imposed when your Account is approved and in about the same Billing Cycle of each following year.” . Such cards were “secured” by funds on deposit in savings accounts maintained by CCB. Secured cards’ credit limits corresponded to the amount of funds on deposit in those accounts. According to the verified petition, those limits were reduced by a \$50 account origination fee and a \$10 monthly maintenance fee. And, like its other credit cards, CCB’s secured cards were subject to monthly \$30 late and over-the-limit fees. . Petitioner further claimed that CCB’s solicitations deceptively positioned the CAP authorization signature line in close proximity to the line that consumers were required to sign to accept CCB’s credit card offer. . Re-aging refers to a federally-regulated process through which credit card companies enter into agreements with delinquent card holders to avoid “charging-off” such accounts due to persistent nonpayment (see 65 Fed Reg 36903, 36903 [2000]). . With respect to CCB’s secured card advertisement, petitioner asserted that the late and over-the-limit fee information was “buried” in the application and its terms and conditions chart. . Of the New York members of the Allec class, only 12 chose not to accept the settlement’s benefits. . Since its enactment in 1968, TILA has also contained another preemption provision (see 15 USC § 1610 [a] [1]). In contrast to 15 USC § 1610 (e), that provision preempts state laws “relating to the disclosure of information in connection with credit transactions” only to the extent of their inconsistency with TILA or Regulation Z (see 15 USC § 1610 [a] [1]; see also *Clontz *114and Pannabecker, Truth-In-Lending Manual: Text and Forms ¶ 2.03 [4] [2007]*). . Petitioner’s claims also do not concern the tabular format of certain TILA disclosures, disclosures in renewal notices, disclosures of percentages used to determine fees, or the disclosure of the range of fees applicable in different states. Accordingly, these claims do not implicate section 1632 (c) or subsection (d), (e) or (f) of section 1637, which

are referenced at the beginning of the preemption clause at issue here (see 15 USC § 1632 [c] [1] [requiring presentation of “the information described in paragraphs (1) (A), (3) (B) (i) (I), (4) (A), and (4) (C) (i) (I) of section 1637 (c)” to be set forth in a tabular format, commonly known as the “Schumer Box” after FCCCDA’s House sponsor, then-Representative Charles Schumer (N.Y.)]; § 1637 [d] [1] [B] [requiring disclosure in renewal statement of “the information described in subsection (c) (1) (A) or (c) (4) (A)”]; § 1637 [e] [requiring disclosure of percentage and amount used to determine “any fee required to be disclosed under subsection (c) or (d)”]; § 1637 [f] [permitting disclosure of range of fees “required to be disclosed . . . under (certain subparagraphs) of subsection (c)”]). . This case does not present the question whether a New York Executive Law or Consumer Protection Act claim seeking relief based upon specific section 1637 (c) disclosures would be preempted. Accordingly, we offer no opinion upon the propriety of such a claim. . Like TILA, these state credit card application and solicitation laws mandated disclosure of only “selected costs associated with credit cards” (see Gelb and Cubita, *The Fair Credit and Charge Card Disclosure Act of 1988: A Federal Alternative to the Rate Ceiling Approach*, 44 Bus Law 941, 941 n 1 [1989], quoting 1986 Cal Stat, ch 1397, § 1 [a], reprinted in Cal Civ Code § 1748.10 Historical and Statutory Notes [West]). . The Conference Report’s approval of the prospect of settlements and adjudications by which state agencies would gain the right to demand disclosures beyond those required under section 1637 (c) stands in marked contrast to the dissent’s claim that Congress “wanted to cut off and fully supplant” all state regulation of credit card applications and solicitations (see dissenting op at 138). . That the Board has recently proposed certain amendments to Regulation Z that would require credit card issuers to disclose in their applications or solicitations the effect of “fees or a security deposit” upon an applicant’s credit limit, if such fees “are 25 percent or more of the minimum credit limit offered for the account” (see 72 Fed Reg 32948, 32954 [June 14, 2007]; see also 73 Fed Reg 28866, 28890 [May 19, 2008] [proposing disclosure of effect of fees or security deposit in “initial disclosure,” or account-opening, statements]) does not alter our conclusion. After all, “[t]he proposal of regulations is not synonymous with [their] adoption” (see *State by Malone v Burlington N., Inc.*, 311 Minn 89, 92, 247 NW2d 54, 55 [1976]). Moreover, the Board, the Office of Thrift Supervision, and the National Credit Union Administration, pursuant to their authority under the Federal Trade Commission Act, have also recently proposed Regulation AA, a provision of which would prohibit charging fees and security deposits that constitute a majority of a consumer’s credit limit during the first 12 months of the account and would also require credit issuers to spread the cost of fees totaling more than 25% of a consumer’s credit limit equally over the course of the year (see 73 Fed Reg 28904, 28923-28925 [May 19, 2008]). The agencies’ rationale for adopting proposed Regulation AA is that the practice of charging fees that quickly deplete a new customer’s credit limit “appears to be an unfair act or practice” under the Federal Trade Commission Act, the very statute General Business Law §§ 349 and 350 were modeled upon (*id.* at 28924). And to support their conclusion that consumers “may lack the information necessary to avoid harm” from this

practice, the agencies cite to the Appellate Division’s initial decision in the instant case (see *id.* at 28924 [quoting Appellate Division’s conclusion (see 27 AD3d at 108) that CCB’s post-2001 solicitations “ ‘did not represent an accurate estimation of a consumer’s credit limit’ ”]). Thus, from these recent regulatory proposals, we can infer that TILA and Regulation Z have not previously embraced the regulation of credit limit practices that were determined to be deceptive below. . The California court’s September 30 order states that “[a]s of Final Approval, the Action is . . . dismissed with prejudice.” No order granting final approval (see Cal Rules Ct rule 3.769 [h] [providing for entry of judgment “after the final approval hearing”]), however, appears in the record. Nevertheless, neither party disputes Supreme Court’s statement that “there is no question that the Allec class action was dismissed with prejudice on the merits” pursuant to the Allec settlement. . Our holding is in accord with the U.S. Supreme Court’s recent rejection of “virtual representation” as a basis for claim preclusion under federal common law (see *Taylor*, 552 US at —, 128 S Ct at 2178). With respect to petitioner’s claim for restitution, the members of the Allec settlement class, on whose behalf the Attorney General sues, have already had their “day in court” (see 552 US at —, —, 128 S Ct at 2171, 2175). Moreover, there is no dispute that the settlement class members’ interests were adequately represented in the California court, where they were afforded “the procedural safeguards” codified in California’s procedural rules governing class actions (see 552 US at —, 128 S Ct at 2176). Furthermore, our holding today does not authorize “ ‘de facto class actions,’ ” rather we give effect to the results obtained in an actually-litigated class action (see 552 US at —, 128 S Ct at 2176, quoting *Tice v American Airlines, Inc.*, 162 F3d 966, 973 [7th Cir 1998]). Finally, our conclusion does not result in the proliferation of an amorphous balancing test, requiring the evaluation of myriad case-specific factors (see 552 US at —, 128 S Ct at 2176). Instead, we look simply to the judgment approving a class action settlement and the nature of the claims released therein to determine the extent to which petitioner’s claim for restitution is precluded. . Although the Attorney General sought disgorgement as an alternative measure of relief in this case, Supreme Court did not grant that relief and—in the present posture—it would be inappropriate for us to do so.