Bloomberg BNA

BNA's Banking Report™

VOL. 105, NO. 19 NOVEMBER 23, 2015

Unfair, Deceptive, or Abusive Acts or Practices

The authors argue that the Consumer Financial Protection Bureau's silence on what exactly constitutes an ''abusive'' practice under the Dodd-Frank Act's provisions governing ''unfair, deceptive, or abusive'' acts or practices has proven problematic for consumer finance companies seeking to understand their compliance obligations.

BNA INSIGHTS: CFPB's Question Unanswered—What is 'Abuse'?



BY BEN SAUL, KYLE TAYMAN AND ANDREW KIM

Ben Saul is a Partner in Goodwin Procter's Consumer Financial Services Litigation Group and a leader in the areas of consumer financial services enforcement and fair and responsible banking.

Kyle Tayman is an Associate in Goodwin Procter's Consumer Financial Services Litigation practice group, and is also a member of the Government Investigation, Financial Technology and Antitrust practices.

Andrew Kim is an Associate in Goodwin Procter's Litigation Department and Appellate Litigation Practice and is a member of Goodwin Procter's Gaming, Gambling & Sweepstakes Practice.

The Dodd-Frank Act conferred broad and unprecedented powers on the Consumer Financial Protection Bureau (CFPB or Bureau) to police a vast array of activity. Chief among the Bureau's enforcement mechanisms has been the Act's UDAAP provisions, which authorize the Bureau to bring suit for ''unfair, deceptive, or abusive'' acts or practices.

Congress did not specifically define what makes an act ''unfair, deceptive, or abusive.'' Yet, for ''unfair'' or ''deceptive'' acts, it had no need to do so. As the Bureau has recognized, federal enforcement actions predating Dodd-Frank provide sufficient guidance as to what makes conduct ''unfair'' or ''deceptive.''[1] No such guid-

[1] *CFPB Supervision and Examination Manual*, UDAAP 1 (Oct. 2012) (''The principles of 'unfair' and 'deceptive' practices in the Act are similar to those under Sec. 5 of the Federal Trade Commission Act (FTC Act). The Federal Trade Commission (FTC) and federal banking regulators have applied these

 ISSN 0891-0634

ance exists, however, to explain the contours of what constitutes an ''abusive'' act. Nor does the CFPB have any current plans to fill this information gap. This lack of historical guidance coupled with the Bureau's silence on the matter has proven problematic for consumer finance companies seeking to understand their compliance obligations.

Although it is true that Congress itself provided little guidance in the text of the UDAAP statute and has previously prohibited ''abusive conduct'' in only specific contexts—e.g., in credit decisions, debt collection, and telemarketing—that does not excuse the Bureau's approach to regulating abusive conduct.[2] In fact, never before has an agency been given so much discretion to determine the legality of conduct, and yet done so little to inform the public of how it intends to exercise that discretion.

The law says the Bureau may declare conduct ''abusive'' only if it ''materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service'' or ''takes unreasonable advantage'' of one of three considerations: (1) the consumer's lack of understanding as to the ''risks, costs, or conditions of the product or service''; (2) the consumer's inability to protect himself ''in selecting or using a consumer financial product or service''; or (3) a consumer's ''reasonable reliance'' that a financial services provider would ''act in the interests of the consumer.''[3]

But it is the Bureau itself that has taken advantage of the abusiveness prong's vagueness, bringing a series of enforcement actions covering conduct that ranges from the mundane to the extreme. Both the plain text of the statute and Dodd-Frank's legislative history strongly indicate that the Bureau's authority to regulate ''abusive'' conduct is narrower than the Bureau seems to think. Unfortunately, despite the text, legislative history of Dodd-Frank, and strong arguments against the Bureau's broad interpretation of its abusiveness powers, it is unlikely that the CFPB will encounter a serious challenge to its approach to enforcing the UDAAP statute's abusiveness prong, and unlikely that the Bureau will voluntarily rein in its regulate-through-enforcement approach. Thus, entities falling within the Bureau's jurisdiction must take affirmative steps to ensure that their actions comply not only with the original intent of the UDAAP statute but also with the Bureau's emerging understanding of how it will enforce the law.

What Does the Statute Say?

Although the UDAAP statute's abusiveness provision may seem far-reaching at first glance, Congress's selection of certain words indicates that it intended for the scope of the provision to be narrow.

Indeed, part of the abusiveness prong is effectively functionless because it is subsumed into other parts of the UDAAP statute. The first half of the abusiveness provision allows the Bureau to bring an action if a financial service provider's conduct ''materially interferes'' with a consumer's ability to ''understand a term or condition of a consumer financial product or service.'' But the better understood ''unfair'' and ''deceptive'' prongs of the UDAAP statute cover much of the same ground, right down to the requirement that the provider's action be ''material.''

As one federal court has noted, Dodd-Frank's UDAAP provision is ''virtually identical'' to prohibitions against unfair or deceptive acts or practices in the Federal Trade Commission Act.[4] Rightly so. It is difficult to see how an ''abusive'' action may ''materially interfere'' with a consumer's ability to understand the terms or conditions of a financial product or service, without that action also being deceptive or misleading. Many of the Bureau's abusiveness cases to date bear out this interpretation as they tend to lean on the second half of the abusiveness provision, which prohibits financial service providers from taking ''unreasonable advantage'' of consumers, while ignoring the ''materially interfering'' provision.[5]

So what does it mean for a financial services provider to take ''unreasonable advantage'' of a consumer? Traditional principles of statutory interpretation dictate that each word of a statute must be given effect.[6] Because Congress inserted the word ''unreasonable'' to

standards through case law, official policy statements, examination procedures, and enforcement actions that may inform CFPB.'').

[2] 7 U.S.C. § 9b (Commodity Exchange Act); 15 U.S.C. § 1692d (Fair Debt Collection Practices Act).

[3] *See* 12 U.S.C. § 5531.

[4] *Illinois v. Alta Colls., Inc.*, No. 14-C-3786, 2014 WL 4377579, at *4 (N.D. Ill. Sept. 4, 2014).

[5] *See* Compl. ¶¶ 25, 28, *CFPB v. Sec. Nat'l Auto. Acceptance Co.*, No. 1:15-CV-401 (S.D. Ohio filed June 17, 2015); Compl. ¶ 71, 75, *CFPB v. PayPal*, No. 1:15-CV-1426 (D. Md. filed May 19, 2015); Compl. ¶ 62, *CFPB v. Nationwide Biweekly Admin., Inc.*, No. 3:15-CV-2106 (N.D. Cal. filed May 11, 2015); Compl. ¶¶ 41, 47, 63, 65, *CFPB v. S/W Tax Loans, Inc.*, No. 1:15-CV-299 (D.N.M. filed Apr. 14, 2015); Compl. ¶¶ 55, 59, *CFPB v. Coll. Educ. Servs. LLC*, No. 8:14-CV-3078 (M.D. Fla. filed Dec. 11, 2014); Compl. ¶¶ 166-182, *CFPB v. ITT Educ. Servs., Inc.*, No. 1:14-CV-292 (S.D. Ind. filed Feb. 26, 2014); Compl. ¶¶ 61, 63, *CFPB v. CashCall, Inc.*, No. 1:13-CV-13167 (D. Mass. filed Dec. 16, 2013); Compl. ¶¶ 56, 61, 62, *CFPB v. Am. Debt Settlement Solutions, Inc.*, No. 9:13-CV-80548-DMM (S.D. Fla. May 30, 2013); Consent Order ¶¶ 15, 16, 17, *In re Fort Knox Nat'l Co.*, No. 2015-CFPB-0008 (filed Apr. 20, 2015), *available at* http://files.consumerfinance.gov/f/201504_cfpb_regulation-fort-knox-mac-settlement.pdf; Consent Order ¶¶ 41, 43, *In re Colfax Capital Corp.*, No. 2014-CFPB-0009 (filed July 29, 2014), *available at* http://files.consumerfinance.gov/f/201407_cfpb_consent-order_rome-finance.pdf; Consent Order ¶¶ 28, 30, *In re ACE Cash Express, Inc.*, No. 2014-CFPB-0008 (filed July 10, 2014), *available at* http://files.consumerfinance.gov/f/201407_cfpb_consent-order_ace-cash-express.pdf.

[6] *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (''cardinal principle'' of statutory interpretation is that ''courts must give effect, if possible, to every clause and word of a statute'' (citation and internal quotation marks omitted)).

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modify the word ''advantage,'' it expressed its intent to allow financial service providers to take actions of a reasonably prudent business in its dealings with consumers, and that only the extreme or ''unreasonable'' would be unlawful. And the plain text also suggests Congress intended to give financial service providers a wide berth—''reasonableness,'' as seen in other contexts, is generally a low bar to clear.[7] Although, as the enforcing agency, the Bureau's interpretations of Dodd-Frank's ambiguous provisions are entitled to deference[8], no such deference is warranted if a statute's meaning is clear and unambiguous, and here, the operative parts of the UDAAP statute are unambiguously worded to reach only extreme types of conduct.

What Did Congress Say?

Dodd-Frank's legislative history confirms what the plain text strongly suggests—Congress intended for the abusiveness provision to be sparingly used in circumstances where a provider engaged in extreme conduct. Many statutes are enacted with nary a word said about them. Not so for Dodd-Frank. Congress was unusually specific in the type of conduct it thought abusive. Consider the Senate Banking Committee's report on Dodd-Frank,[9] which declared the following types of conduct to be abusive:

- **Consumer credit:** ''Double-cycle billing, universal default, retroactive changes in interest rates, over the limit fees even where the consumer was not notified that a charge put him or her over the allotted credit limit, and arbitrary rate increases.''[10]
- **Debt collection:** ''Debt collectors threatening violence, using profane or harassing language, bombarding consumers with continuous calls, telling neighbors or family about what is owed, calling late at night, . . . falsely threatening arrest, seizure of property or deportation, . . . filing collection suits against the wrong people; filing suits past the statute of limitations; collection attorneys not having any proof of the debt sued upon and falsely swearing they do; suing for more than is legally owed; and laundering a time-barred debt with a new judgment.''[11]
- **Payday lending:** ''Consumers . . . being threatened with jail for passing a bad check, even when the law specifically says they cannot be prosecuted if the check bounces.''[12]
- **Auto lending:** Steering minorities, lower-income borrowers, and servicemen to high-rate loans.[13]

The common thread of these actions can only be described as coercive and extreme activity. Of course, legislative history is not the end-all-be-all of statutory analysis, especially with a broadly worded conferral of authority like the UDAAP statute. But given (i) the plain text of the abusiveness provision, which prohibits providers from only *unreasonable* conduct in dealing with consumers, (ii) the existing prohibitions of unfair and deceptive conduct, and (iii) the legislative history identifying only extreme conduct as ''abusive,'' the only reasonable conclusion is that the Bureau should proscribe conduct and pursue enforcement actions that are coercive and extreme, just as Congress intended. Unfortunately, the Bureau has strayed from Congress' mandate and instead pursued a more expansive view of ''abusive'' conduct.

What Does the Bureau Say?

The Bureau's ''abusiveness'' actions to date have covered a broad range of acts and practices that differ significantly in severity, making it difficult to get a sense of the Bureau's understanding of the meaning of the word ''abusive.'' This uncertainty is compounded by the fact that the Bureau continues to refrain from issuing any advisory regulations. That the Bureau has avoided revealing its playbook should not be surprising; since the Bureau's early days, Director Richard Cordray has made it clear that abusiveness is a ''fact and circumstances issue,'' evading calls for the Bureau to set a cognizable standard.[14] And the little guidance that the Bureau has provided repeats the same refrain. For example, a September 2014 bulletin states that ''[d]epending on *all of the facts and circumstances*,'' the failure to disclose adequate information about certain material costs and conditions associated with promotional credit card offers could be deemed ''abusive.''[15]

In the absence of meaningful prospective guidance from the Bureau, consumer finance providers must instead look to the Bureau's enforcement actions. Those enforcement actions provide limited data points and analogues for the types of conduct that financial services providers should aim to avoid to remain off the Bureau's sights. These include:

- *Colfax Capital Corporation:* In an agency consent order, the Bureau concluded that attempting to collect on debts with interest rates higher than those allowed under state usury laws was abusive because it ''takes unreasonable advantage of . . . a lack of understanding on the part of the consumer

[7] *See, e.g.*, *United States v. Hurt*, 527 F.3d 1347, 1356 (D.C. Cir. 2008) (in ineffective assistance cases, ''the bar of objective reasonableness is set rather low''); *Dunkin' Donuts Franchised Restaurants LLC v. Sandip, Inc.*, 712 F. Supp. 2d 1325, 1327 (N.D. Ga. 2010) (adopting the Black's Law Dictionary definition of ''unreasonable'' in the commercial context—''irrational or capricious'' or ''not guided by reason'' (quoting *Black's Law Dictionary* 1679 (9th ed. 2009)).

[8] 12 U.S.C. § 5512(b)(4)(A); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–44 (1984); *CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1091 (C.D. Cal. 2014).

[9] S. Rep. No. 111-176 (2010).

[10] *Id.* at 17.

[11] *Id.* at 19–20.

[12] *Id.* at 21.

[13] *Id.* at 22.

[14] *How Will the CFPB Function Under Richard Cordray: Hearing Before the Subcomm. on TARP, Fin. Servs., and Bailouts of Pub. And Private Programs*, 112th Cong. 69 (2012) (statement of Richard Cordray, Director, Consumer Financial Protection Bureau).

[15] *Marketing of Credit Card Promotional APR Offers*, CFPB Bull. No. 2014-02, at 4 (Sept. 3, 2014), *available at* http://files.consumerfinance.gov/f/201409_cfpb_bulletin_marketing-credit-card-promotional-apr-offers.pdf.

of the material risks, costs, or conditions of the product or service.''[16]

- *Security National Automotive Acceptance Company:* The Bureau contended that an auto-finance company's threats to contact the commanding officers of delinquent military borrowers took ''unreasonable advantage of [a] consumer's inability to protect his or her interests in selecting or using a consumer financial product or service.''[17]
- *ACE Cash Express*: The Bureau stated that inducing delinquent borrowers to take out new loans with fees in order to pay for the old debts takes ''unreasonable advantage of . . . the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service.''[18]
- *College Education Services*: The Bureau claimed a financial advisory firm that enrolled and took fees from consumers who were ineligible for loan consolidation engaged in abusive conduct because it took ''unreasonable advantage of . . . the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.''[19]
- *ITT Educational Services, Inc.:* The Bureau argued that steering students into private student loan products took ''unreasonable advantage of consumers' inability to protect their interests in selecting or using the . . . Private Loans.''[20]
- *PayPal:* The Bureau considered PayPal's alleged failure to disclose how payments were allocated to consumer balances to be abusive because the company took ''unreasonable advantage of . . . the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product of service.''[21]
- *Freedom Stores:* The Bureau asserted that a contract of adhesion containing a venue-selection clause was abusive because it ''took unreasonable advantage of the inability of consumers to protect their interests while using or choosing credit agreements.''[22]

While these actions give lenders limited insight into what constitutes ''abusive'' conduct to the Bureau, it remains too early to fashion a set of best practices based on the scattershot of enforcement actions the Bureau has undertaken. Part of that is attributable to the fact that the CFPB's overall approach to discerning abusiveness seems to be in flux. Consider, for example, the Bureau's treatment of the attempted collection of debts void under state law. In *CFPB v. NDG Financial Corp.*, the CFPB argued that the provider's actions ''materially interfered with consumers' ability to understand that they were not under legal obligation to repay the loan amounts that were void under state law,''[23] a violation brought under 12 U.S.C. § 5531(d)(1). But, nearly two years earlier, the CFPB had previously claimed in *CFPB v. CashCall* that a provider's similar actions took ''unreasonable advantage of consumers' lack of understanding about the impact of applicable state laws on the parties' rights and obligations regarding . . . loans,''[24] a violation of a different provision, 12 U.S.C. § 5531(d)(2)(A). The Bureau has provided no explanation for this change in legal theory, and it seems unlikely that one is forthcoming.

One thing that is apparent from the Bureau's fluctuating understanding of abusiveness is that it is widening its net to cover a broader range of offenses. Despite the Bureau's initial position that ''abusive'' conduct must be ''outrageous enough,''[25] the agency has since gone to court over mundane and technical offenses.[26] For now, financial services providers would do well to closely monitor the CFPB's most recent enforcement actions and avoid analogous conduct, at least until a cognizable and coherent standard of abusiveness emerges.

What Should the Bureau Say?

Congress intended for the Bureau to promulgate rules defining abusiveness, and the Bureau's case-by-case approach contravenes this intent. In enacting the UDAAP statute, Congress specifically instructed the Bureau to ''prescribe rules to identify [unfair, deceptive, and abusive] acts or practices.''[27] Congress expressed its desire to ''stop regulatory arbitrage''—i.e., to ''write rules and enforce those rules consistently, without regard to'' the type of service or provider.[28] But no workable framework seems to be on the horizon.

The Bureau cannot sustain its current tack for much longer. As the Supreme Court has made eminently clear, agencies cannot announce a new interpretation of

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[16] Consent Order ¶¶ 41-44, *In re Colfax Capital Corp.*, No. 2014-CFPB-0009 (filed July 29, 2014), *available at* http://files.consumerfinance.gov/f/201407_cfpb_consent-order_rome-finance.pdf.

[17] Compl. ¶¶ 25-29, *CFPB v. Sec. Nat'l Auto. Acceptance Co.*, No. 1:15-CV-401 (S.D. Ohio filed June 17, 2015).

[18] Consent Order ¶¶ 28-31, *In re ACE Cash Express, Inc.*, No. 2014-CFPB-0008 (filed July 10, 2014), *available at* http://files.consumerfinance.gov/f/201407_cfpb_consent-order_ace-cash-express.pdf.

[19] Compl. ¶¶ 54-61, *CFPB v. Coll. Educ. Servs.*, No. 8:14-CV-3078 (M.D. Fla. Dec. 11, 2014).

[20] Compl. ¶¶ 170, *CFPB v. ITT Educ. Servs., Inc.*, No. 1:14-CV-292 (S.D. Ind. filed Feb. 26, 2014)

[21] Compl. ¶¶ 70-75, *CFPB v. PayPal, Inc.*, No. 1:15-CV-1426 (D. Md. filed May 19, 2015).

[22] Compl. ¶¶ 72-78, *CFPB v. Freedom Stores, Inc.*, No. 2:14-CV-643 (E.D. Va. filed Dec. 18, 2014).

[23] Compl. ¶ 140, *CFPB v. NDG Fin. Corp.*, No. 1:15-CV-05211-CM (S.D.N.Y. filed July 31, 2015).

[24] Compl. ¶ 63, *CashCall, Inc.*, No. 1:13-CV-13167 (D. Mass. filed Dec. 16, 2013).

[25] *How Will the CFPB Function Under Richard Cordray*, 112th Cong. at 70.

[26] One ''mundane'' example can be seen in *Freedom Stores*, a case where the Bureau alleged that forum-selection clauses were abusive because they forced consumers to litigate disputes related to their debts far from where they lived. Compl. ¶¶ 72-78, *CFPB v. Freedom Stores, Inc.*, No. 2:14-CV-643 (E.D. Va. filed Dec. 18, 2014). Yet courts have routinely upheld similar forum-selection clauses, absent evidence of fraud, undue influence, or, as one court put it, ''overweening bargaining power.'' *See, e.g.*, *Titan Indem. Co. v. Hood*, 895 So.2d 138 (Miss. 2004). Despite the fact that forum selection clauses are presumed to be valid, *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1083 (9th Cir. 2009), and that there typically is a high fact-intensive bar to clear for declaring them invalid, the Bureau has claimed all forum selection clauses that may burden consumers with distant travel as ''abusive.''

[27] S. Rep. No. 111-176, at 172.

[28] *Id.* at 11.

  BBR ISSN 0891-0634

a statute for the first time in an enforcement proceeding and attempt to enforce that interpretation in the same proceeding.[29] It is especially troubling if the Bureau continues to try and do so by litigating and deciding cases at the agency level, rather than in federal courts. The Bureau has already been severely criticized for announcing new interpretations in its first contested administrative proceeding.[30] It seems imprudent as a matter of law and policy, therefore, for the Bureau to continue the case-by-case approach to discerning abusiveness, particularly at the agency level and away from federal courts where consumer finance companies likely stand on a more level playing ground with the Bureau.

The Bureau and regulated consumer finance entities would be far better off if it established the meaning of ''abusive'' by rulemaking. The Bureau's enforcement actions would then be on more solid legal footing, and regulated entities would have some degree of certainty as to whether their policies comply with the Bureau's vision of the law. But until the Bureau softens its position that abusiveness may be discerned only on a case-by-case basis, financial services providers have limited options for guarding against abusive practices. Regulated providers can at most monitor new CFPB abusiveness actions, either internally or with the assistance of outside counsel, and amend existing policies to avoid conduct that is analogous to what legislative history reveals Congress intended to target, as well as the conduct actually pursued by the Bureau.

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[29] *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (no agency deference where agency ''announces its interpretations for the first time in an enforcement proceeding'').

[30] Petrs.' Br. at 24-32, *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. filed Sept. 28, 2015) (arguing that the Bureau's new interpretation of RESPA, announced for the first time during the adjudication, deprived Petitioners of fair notice). Disclaimer: The authors' law firm, Goodwin Procter LLP, represents the *PHH* Petitioners.