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An Analysis Of The CFPB's Abusiveness Claims: Part 1

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Since 1938, the Federal Trade Commission Act has rendered it unlawful to engage in unfair or deceptive acts or practices as a matter of federal law. The scope and meaning of that "UDAP" prohibition has been fleshed out in agency pronouncements and case law over the years, and has an accepted, if still somewhat amorphous, meaning. Then in 2010 along came the Dodd-Frank Act, which created the Consumer Financial Protection Bureau and gave it authority to implement and enforce a prohibition on unfair, deceptive, and abusive acts or practices. The age-old UDAP thus became UDAAP, and the $64,000 question (or, given the scope of CFPB penalties and remedies, the $64 million question) became what to make of the extra "A." What does abusive mean? And more specifically, what conduct would be deemed abusive that wouldn't already be deemed unfair or deceptive under the familiar UDAP prohibition?

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Nearly five years after the CFPB gained its authorities, the answer to those questions is not yet clear, although certain patterns have begun to emerge. In its existence, the CFPB has brought nearly 125 enforcement actions. In over 80 of those, it has alleged or found UDAAP violations.[1] In only 16 cases has the CFPB alleged abusive conduct, but fully half of those cases with abusiveness claims (eight out of 16) were filed in 2015 and 2016, suggesting an increased willingness to rely on this authority.

In this two-part series, we provide an analysis of the CFPB's abusiveness enforcement cases.[2] In this first part, we focus on the nuts and bolts of how the CFPB has used its authority to date. The second part will explore the lessons that can be learned from the CFPB's cases about what we might expect in the future.

Background

Under the Dodd-Frank Act, it is unlawful for any "covered person" or "service provider" "to engage in any unfair, deceptive, or abusive act or practice."[3] A covered person is generally "any person that engages in offering or providing a consumer financial product or service," while a service provider is generally "any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service ...."[4]

As noted above, the terms "unfair" and "deceptive" have long-standing definitions. An "unfair" act or

practice is one that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers," where "such substantial injury is not outweighed by countervailing benefits to consumers or to competition."[5] A "deceptive" act or practice is a representation, omission, act or practice that is likely to materially mislead a consumer whose interpretation is reasonable under the circumstances.[6]

The Dodd-Frank Act's definition of an "abusive" act or practice consists of four prongs, any one of which is sufficient to constitute abusiveness:

- Prong (1) — "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service."

- Prong (2)(A) — "takes unreasonable advantage of … a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service."

- Prong (2)(B) — "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."

- Prong (2)(C) — "takes unreasonable advantage of … the reasonable reliance by the consumer on a covered person to act in the interests of the consumer."[7]

Thus, while there is single test for unfairness and a single test for deception, there are four separate tests for abusiveness.

The prohibition on abusiveness is generally enforceable by the CFPB or, with respect to banks and credit unions having total assets of $10 billion or less, by federal prudential regulators.[8] Additionally, states generally have authority to bring abusiveness claims against covered persons and service providers that are not national banks or federal savings associations.[9]

The Prongs of Abusiveness in Action

Prong (1) — Material Interference: Rarely Used and Never Alone

As noted above, the CFPB has relied on prong (1) of the abusiveness definition only twice. Prong (1) prohibits "materially interfer[ing]" with a consumer's ability "to understand a term or condition" of the consumer financial product or service at issue. It is thus similar to prong (2)(A), which also looks to a consumer's understanding. But unlike prong (2)(A), in which the operative prohibition is on "taking unreasonable advantage" of a consumer's lack of understanding, prong (1) prohibits "materially interfering" with a consumer's ability to understand. Perhaps believing that establishing such material interference requires greater affirmative action on the part of respondents, the CFPB has shied away from prong (1). The only two cases in which it has made a prong (1) allegation both involved contested litigation and both included allegations that the same conduct at issue violated prong (2)(A).

The first case to assert a prong (1) violation was an action against an online payday lender.[10] The complaint in that case alleged that the defendants' efforts to collect on loans that were allegedly void as a matter of state law, because they were either usurious or made by unlicensed lenders, constituted abusive conduct. In a single abusiveness claim, the CFPB relied on both prong (1) and prong (2)(A). The

CFPB had brought similar abusiveness claims in two other cases, but in those cases the agency had relied solely on prong (2)(A). It is not clear whether some factual difference in the defendants' conduct or loan documents led to this pleading change, whether it was inadvertent, or whether it reflects a more aggressive use of the abusiveness authority by the CFPB. In any event, not only did the CFPB allege prong (2)(A), but it also alleged that the same conduct was also unfair and deceptive.

The other prong (1) case likewise relied on prong (1) in conjunction with other prongs of abusiveness and other elements of UDAAP. In a case against two so-called "pension advance" companies and their managers, the CFPB alleged that by denying their product was a loan and obscuring the true nature of the credit transaction, and by failing to disclose or denying the existence of an interest rate or fees associated with the pension advance, the defendants violated prongs (1), (2)(A), and (2)(B).[11] At the same time, the CFPB also alleged that essentially the same conduct was unfair and deceptive.

These two cases — which both contain a single claim of abusive conduct relying on multiple prongs of the definition of abusive conduct — are emblematic of a "kitchen sink" or "belt and suspenders" approach to pleading abusiveness. As a result, they shed little light on what the CFPB considers to be "material interference" under prong (1). As discussed below, in both cases the CFPB alleged that defendants made misrepresentations that prevented consumers from understanding a term or condition of the financial product or service at issue. Presumably, it was these misrepresentations that constituted — at least in part — the "material interference" with consumers' "ability to understand" that is necessary to plead a prong (1) claim. Why these misrepresentations rose above simple deceptive conduct, however, is not clear, nor is it clear why the agency chose to plead prong (1) in addition to prong (2)(A).

Prongs (2)(A) and (2)(B) — Taking Unreasonable Advantage: The Workhorses

The vast majority of the CFPB's abusiveness claims have been brought under prongs (2)(A) or (2)(B) (or both). Prong (2)(A) prohibits an act or practice that "takes unreasonable advantage of ... a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service," while prong (2)(B) prohibits an act or practice that "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."

Prong (2)(A): Deception Plus?

Eight of the 23 abusiveness claims asserted by the CFPB to date have been based on prong (2)(A). In all of these cases, the "lack of understanding" that the defendants allegedly took unreasonable advantage of was caused by alleged misrepresentations or omissions of the defendants or those acting in concert with them. Thus, most of the (2)(A) abusiveness claims pled by the CFPB include an allegation of misrepresentation as part of framing the abusiveness claim: the complaints and consent orders talk about how "contrary to representations" consumers were steered to high-cost loans;[12] how the defendants "obscured the true nature" of their pension advance product by "fail[ing] to disclose" certain information;[13] how the defendants "guarantee[d]" savings in a mortgage payment plan that they knew wouldn't materialize for a substantial number of consumers;[14] how the defendants "did not adequately disclose" fees related to the use of allotments;[15] and how the defendants' conduct in operating a debt relief program was not "as it represents to consumers."[16] All of these allegations formed the basis for the consumers' "lack of understanding" for purposes of prong (2)(A) in these cases. Such allegations, of course, sound in deception, and not surprisingly, the CFPB also alleged that the conduct at issue was deceptive in four of the five cases. (The CFPB alleged unfairness in the fifth.)

The three other prong (2)(A) cases involved allegations that collecting on loans that state law allegedly renders void constitutes abusive conduct.[17] In these cases, the CFPB simply alleged that "consumers likely were unaware," "lacked an understanding," or "generally do not know or understand" the impact of state law on the validity of their debt, without relying on underlying deception as part of the abusiveness claim. On their face, these cases appear to be based on consumers' "lack of understanding" not caused by the defendant's conduct. But all three cases also included a deception claim based on the theory that by seeking to collect on these loans the defendants misrepresented that consumers had a legal obligation to pay them. Whether the prong (2)(A) abusiveness claims would stand alone absent that deception theory is unclear.

What is clear is that prong (2)(A) has been used to date as a sort of "deception plus" claim, relying on alleged deceptive conduct as the basis for the consumers' "lack of understanding," and alleging that consummating the transaction that was the subject of the alleged deception somehow constitutes "taking unreasonable advantage" of the lack of understanding the defendants created. And in all instances, the CFPB has pled a parallel deception or unfairness claim, or both. Such an approach to prong (2)(A) does little to distinguish it from general deception, and the CFPB's actions to date do not provide a clear sense of when deceptive conduct will also be alleged to be abusive under prong (2)(A).

Prong (2)(B): Unfairness Plus?

Prong (2)(B) is the most commonly pled prong of abusiveness, accounting for 10 of the 23 abusiveness claims to date.

Half of the prong 2(B) cases seem very much like the prong (2)(A) cases in that the CFPB alleges that the "inability of the consumer to protect her interests" was based on a lack of information caused by defendants. Not surprisingly, in many (though not all) of these cases, the CFPB pled violations of prong (2)(A) in addition to (2)(B).

Thus, for example, the CFPB alleged that a car dealership that misrepresented the annual percentage rate on its loans (which constituted a separate deception claim) and did not include sticker prices on its cars engaged in abusive conduct because "these actions left consumers unable to protect their interests."[18] In another case, the CFPB alleged that defendants engaged in abusive conduct under prong (2)(B) (in addition to prong (2)(A)) by "failing to disclose" and "misrepresenting" key aspects of their pension advance product.[19] And in yet another case, the CFPB pled that a defendant's failure to disclose the existence and charging of fees caused the consumers' "inability to protect their interests" and violated prong (2)(B) in addition to prong (2)(A).[20] Lastly, the CFPB alleged that "[b]y failing to disclose" the defendant's affiliation with a lender to whom consumers were referred for tax refund anticipation loans, and by withholding crucial information regarding the receipt of consumers' tax refunds, the defendant violated prong (2)(B) (two separate counts).[21]

In all these instances, it is not clear why the CFPB chose to plead prong (2)(B) as opposed to prong (2)(A), or why it chose to plead both prongs. In each case, the consumers' alleged inability to protect their interests was caused by alleged deceptive statements or omissions, rendering these prong (2)(B) cases very similar to the prong (2)(A) cases discussed above.

The remaining prong (2)(B) cases are different, focusing more on the nature of the conduct at issue, without regard to whether consumers had sufficient information to avoid it. This is most evident in two cases in which the CFPB alleged that conduct expressly authorized by contracts of adhesion that

consumers had signed was abusive under prong (2)(B).

In one case, the CFPB alleged that a retail store that sold goods on credit to military service members violated prong (2)(B) by filing all collections litigation in Virginia, notwithstanding the forum selection clause in the consumer credit contract that arguably informed consumers that litigation would be filed in Virginia.[22] In pleading its abusiveness claim, the CFPB asserted that: "*Even if consumers read and understood the venue-selection clause*, there was no opportunity to bargain for its removal because the clause was non-negotiable."[23] Similarly, in a case against an auto finance company, the CFPB alleged that threatened and actual contact with a military consumer's commanding officer in connection with the lender's debt collection activities was abusive under prong (2)(B), notwithstanding the contractual language authorizing such conduct, because "*[e]ven if [consumers] had been aware of the provision*, they had no opportunity to bargain for its removal."[24]

In both of these cases, some consumers presumably did understand the contract clauses at issue, so arguably a claim that the defendant took unreasonable advantage of those consumers' "lack of understanding" under prong (2)(A) would not have been a viable theory. Relying on prong (2)(B), however, the CFPB asserted that there was nevertheless an "inability of the consumer to protect the interests of the consumer" due to the fact that the clauses were allegedly non-negotiable.

Not surprisingly, the CFPB also alleged in these two cases that the same conduct was unfair. In these cases, at least, prong (2)(B) abusiveness appears to be very similar to unfairness. While prong (2)(B) focuses on a consumer's "inability" to protect her interests and unfairness requires substantial injury "not reasonably avoidable" by consumers, they both turn on a perceived market failure in which consumers are deemed excused from the usual rules of caveat emptor due to the nature of the transaction at issue. While the overlap of prong (2)(B) and unfairness makes sense given the similarity in the required elements for each claim, these cases do not provide insight into what conduct is abusive that is not also unfair, or when the CFPB will decide to allege abusiveness in addition to unfairness.

The other prong (2)(B) cases also involve conduct that could have been alleged to be unfair, although the CFPB did not plead unfairness. In two of the cases, the CFPB alleged that aggressively pushing consumers to take out loans they allegedly could not afford was abusive. One case involved a payday lender who allegedly created a sense of "artificial urgency" in the collection process to get consumers to roll over their loans;[25] the other involved a for-profit school that allegedly pushed students into high-cost loans that the defendant knew were likely to default.[26] In both cases, the conduct could easily have been alleged to be unfair as opposed to abusive, for the very same facts that might lead one to conclude that consumers were unable to protect their interests under prong (2)(B) could similarly have been used to allege that consumers could not reasonably avoid the injury alleged under the unfairness doctrine.

The final prong (2)(B) case involved deferred-interest promotions in connection with online purchases. The CFPB asserted that the company's conduct in allegedly providing little information explaining its practices of allocating payments proportionally across most, if not all, balances, coupled with consumers' alleged inability to effectively change that allocation, was abusive.[27] Again, the same conduct arguably could have been alleged to be unfair and, as discussed in part 2 of this article, similar payment-allocation conduct has been described by the CFPB as unfair in other contexts.

Comparing Prongs (2)(A) and (2)(B)

In the above analysis, prong (2)(A) is akin to deception, and prong (2)(B) is akin to unfairness. And just as

deceptive conduct can be the cause of a consumer's inability to reasonably avoid certain harm (thus rendering the conduct unfair), so too deceptive conduct can cause not only the consumer's "lack of understanding" under prong (2)(A), but also her "inability to protect her interests" under prong (2)(B). In that respect, every prong (2)(A) case could be recast as a prong (2)(B) case (in the same way that deception is sometimes considered a subset of unfairness).[28]

There are, however, two ways in which prong (2)(B) may be a slightly easier standard to satisfy than prong (2)(A). First, prong (2)(B) does not require a misrepresentation by the defendant, or another factual basis, to conclude that a consumer lacks understanding. Second, prong (2)(A) relates to "material risks, costs, or conditions" of the product or service, while prong (2)(B) relates to "selecting or using" the product or service. The latter may be a less demanding standard, because there is no express materiality threshold, nor is there an express requirement that the abusive practice directly relate to the characteristics of the product or service.

For example, in a complaint against tax preparers who allegedly marketed tax refund anticipation loans offered by an affiliated lender, the CFPB alleged that the tax preparers failed to disclose their financial interests in the lender to consumers and so allegedly violated prong (2)(B).[29] Arguably, this undisclosed financial relationship was not a "risk, cost, or condition" of the loans themselves, and so even though the claim turned on defendants' material omission of that information, a theory under (2)(A) would not have been viable. But evidently the CFPB considered the relationship to be relevant to "selecting or using" the loans under (2)(B).

We expect to continue to see the CFPB rely primarily on these two prongs when it alleges abusiveness, given its apparent reluctance to allege "material interference" under prong (1) and the unique nature of prong (2)(C), discussed below.

Prong (2)(C): Focus on Reliance and Lack of Benefit

Prong (2)(C) makes it unlawful to take "unreasonable advantage" of a consumer's "reasonable reliance" on a provider of consumer financial services to act in the consumer's interest. With the exception of the agency's first abusiveness case, which was brought against a debt relief firm and which appeared to rely on prong (2)(C) in addition to prong (2)(A), the CFPB's reliance on prong (2)(C) has focused on college students and circumstances in which the defendants allegedly took affirmative steps to induce the students' reliance on the defendants' acting in their interests. Thus, in its complaint against a for-profit college, the CFPB alleged that the school's staff solicited students' reliance and trust, rendering the students' reliance on the school to act in their interests reasonable.[30] The complaint further alleged that the school's practice of aggressively pushing students into expensive, high-risk loans that the school knew were likely to default took unreasonable advantage of the reliance the school had induced.[31]

Similarly, in its case against a debt relief provider focused on student loans, the CFPB alleged that the defendant's telemarketers held themselves out as loan counselors and advisers and created the illusion of expertise and individualized advice to induce consumers to reasonably rely on the company to act in the consumer's interest.[32] The complaint then alleges that the company took unreasonable advantage of this reasonable reliance by enrolling and taking fees from consumers who did not qualify for the relief the company promised.[33]

These cases provide the clearest articulation of a pattern in the CFPB's limited abusiveness jurisprudence. They suggest that the agency believes prong (2)(C) is appropriate in instances where companies take affirmative action to induce consumer reliance, particularly in instances where the

target population or other circumstances suggest such reliance is reasonable.

The CFPB's first prong (2)(C) case — against a debt relief provider — does not fit this pattern.[34] But that case was the first in which the agency alleged abusiveness, and, as noted above, the single abusiveness claim in that case appears to be based on prong (2)(A) in addition to prong (2)(C). There is nothing in that complaint alleging that the defendant took specific actions to induce consumers' reliance or explaining why such reliance would be reasonable. As such, it appears to be an aberrational use of prong (2)(C).

There is, however, one similarity between all three prong (2)(C) cases: in all three, the CFPB alleged that the abusive conduct entailed providing consumers a financial product or service from which they were unlikely to benefit — debt relief services the consumers couldn't afford or didn't qualify for or expensive student loans that the defendant knew were likely to default. Although those facts don't align with the statutory criterion of reasonable reliance on an institution to act in the consumer's best interest under prong (2)(C), they do suggest that this is the kind of conduct that the CFPB is concerned about and likely to tag as abusive.

Conclusion

In the second part of this two-part series, we will draw on the cases discussed above to explore the broader patterns that are emerging from the CFPB's abusiveness cases and what the financial services industry should expect in the future.

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[1] The CFPB alleges a UDAAP violation when it files a complaint in federal district court, and such an allegation is not a finding of a violation. It finds a UDAAP violation when it issues an administrative consent order based on such findings. For ease of reference, we refer to both complaints and consent orders as containing "allegations." In entering a settlement with the CFPB, companies generally do not admit the allegations (or findings) contained in the complaint or consent order.

[2] At least four state attorneys general have used their authority under the Dodd-Frank Act to bring separate actions alleging abusive acts or practices. See 12 U.S.C. § 5552. Those cases are not discussed herein, as they do not shed much light on how the CFPB intends to use this authority.

[3] 12 U.S.C. § 5536(a)(1)(B).

[4] 12 U.S.C. § 5481.

[5] 12 U.S.C. § 5531(c); see also 15 U.S.C. § 45(n).

[6] See, e.g., CFPB, Supervision & Examination Manual at UDAAP 5 (Oct. 2012), available at http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf; FTC Policy Statement on Deception (Oct. 14, 1983), appended to Cliffdale Assocs. Inc., 103 F.T.C. 110, 174 (1984).

[7] 12 U.S.C. § 5531(d).

[8] See 12 U.S.C. §§ 5516(d)(1), 5531(a).

[9] 12 U.S.C. § 5552(a).

[10] Amended Complaint at 51-52, CFPB v. NDG Fin. Corp., No. 1:15-cv-05211 (S.D. N.Y. Dec. 11, 2015).

[11] Complaint at 17-18, CFPB v. Pension Funding LLC, No. 8:15-cv-01329 (C.D. Cal. Aug. 20, 2015).

[12] Complaint at 9-11, CFPB v. D & D Marketing Inc., No. 2:15-cv-09692 (C.D. Cal. Dec. 17, 2015).

[13] Complaint at 17-18, CFPB v. Pension Funding LLC, No. 8:15-cv-01329 (C.D. Cal. Aug. 20, 2015).

[14] Complaint at 9-10, CFPB v. Nationwide Biweekly Admin. Inc., No. 3:15-cv-02106 (N.D. Cal. May 11, 2015).

[15]Consent Order at 8, In the Matter of Fort Knox Nat'l Co., File No. 2015-CFPB-0008 (Apr. 20, 2015).

[16] Complaint at 13-15, CFPB v. Am. Debt Settlement Solutions Inc., No. 9:13-cv-80548 (S.D. Fla. May 30, 2013).

[17] Amended Complaint at 26-27, CFPB v. CashCall Inc., No. 1:13-cv-13167 (D. Mass. Mar. 21, 2014); Consent Order at 10-12, In the Matter of Colfax Capital Corp. (f/k/a Rome Finance Co., Inc.), File No. 2014-CFPB-0009 (July 29, 2014); Amended Complaint at 51-52, CFPB v. NDG Fin. Corp., No. 1:15-cv-05211 (S.D.N.Y. Dec. 11, 2015).

[18] Consent Order at 14-15, In the Matter of Y King S Corp., File No. 2016-CFPB-0001 (Jan. 21, 2016).

[19] Complaint at 17-18, CFPB v. Pension Funding LLC, No. 8:15-cv-01329 (C.D. Cal. Aug. 20, 2015).

[20] Consent Order at 8, In the Matter of Fort Knox Nat'l Co., File No. 2015-CFPB-0008 (Apr. 20, 2015).

[21] Complaint at 13-15, 17-18, CFPB v. S/W Tax Loans Inc., No. 1:15-cv-00299 (D. N.M. Apr. 14, 2015).

[22] Complaint at 15-16, CFPB v. Freedom Stores Inc., 2:14-cv-00643 (E.D. Va. Dec. 18, 2014).

[23] Id. (emphasis added).

[24] Complaint at 7, CFPB v. Security Nat'l Automotive Acceptance Co. LLC, No. 1:15-cv-00401 (S.D. Ohio June 17, 2015) (emphasis added).

[25] Consent Order at 10-11, In the Matter of Ace Cash Express Inc., File No. 2014-CFPB-0008 (July 10, 2014).

[26] Complaint at 30-31, CFPB v. ITT Educ. Servs. Inc., No. 1:14-cv-00292 (S.D. Ind. Feb. 26, 2014).

[27] Complaint at 14-15, CFPB v. PayPal Inc., No. 1:15-cv-01426 (D. Md. May 19, 2015).

[28] See, e.g., J. Howard Beales, The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection (May 30, 2003) ("Commission precedent incorporated in the statutory codification makes clear that deception is properly viewed as a subset of unfairness …. Material misleading claims prohibited by the Commission's deception authority almost invariably cause consumer injury because consumer choices are frustrated and their preferences are not satisfied. That injury is substantial as long as enough consumers are affected. Moreover, consumers cannot reasonably avoid the injury precisely because the seller misled them about the consequences of the choice."), available at https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection.

[29] Complaint at 13-15, CFPB v. S/W Tax Loans Inc., No. 1:15-cv-00299 (D. N.M. Apr. 14, 2015).

[30] Complaint at 31-32, CFPB v. ITT Educ. Servs. Inc., No. 1:14-cv-00292 (S.D. Ind. Feb. 26, 2014).

[31] Id.

[32] Complaint at 14-16, CFPB v. College Educ. Servs. LLC, No. 8:14-cv-03078 (M.D. Fla. Dec. 11, 2014).

[33] Id.

[34] See Complaint at 13-15, CFPB v. Am. Debt Settlement Solutions Inc., No. 9:13-cv-80548 (S.D. Fla. May 30, 2013).

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