

Holding The CFPB's Feet To The Fire

By **Ori Lev, Mayer Brown LLP**

Law360, New York (December 7, 2016, 12:50 PM EST) -- Claims brought by the Consumer Financial Protection Bureau alleging that a company engaged in deceptive conduct must be accompanied by specific factual allegations or face dismissal, according to a ruling by a federal judge in the Central District of California.[1] Because the Central District of California is a favorite forum of the CFPB's and allegations of deceptive conduct are a common claim brought by it, the decision may have long-term implications for how the CFPB pleads its cases, which cases it brings and where it brings them.



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The case involves a complaint filed by the CFPB against Prime Market Holdings LLC (PMH), a company that provides credit repair services to consumers — that is, it offers to dispute items on a consumer's credit report. The complaint alleged that PMH had violated both the Telemarketing Sales Rule (TSR) and the Consumer Financial Protection Act by making misrepresentations regarding its services.[2] Specifically, the complaint alleged violations of the TSR based on PMH's alleged misrepresentations of (1) the efficacy of its services, (2) the terms of its money-back guarantee, and (3) the cost of its services.[3] The complaint also alleged that the same conduct violated the CFPB's prohibition on deceptive conduct.[4]

In support of these claims, the complaint contained generalized allegations regarding the alleged misrepresentations. For example, the complaint alleged that "PMH has misrepresented that it could remove virtually any negative information from a consumer's credit report," but did not identify any specific instances where such misrepresentations were made. The same was true of the other deception allegations.[5] In addition, the complaint alleged that PMH violated the TSR's advance-fee provision by charging fees for its services before providing consumers with documentation demonstrating that the promised results have been achieved.[6]

PMH moved to dismiss the complaint on multiple grounds, including by arguing that the CFPB's allegations sounded in fraud and were thus subject to Federal Rule of Civil Procedure 9(b)'s heightened pleading standard. That rule provides that, contrary to the general "notice pleading" applicable to most

civil claims, “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.”[7]

The district court agreed with PMH with respect to the four claims based on alleged misrepresentation. The court first noted that the Ninth Circuit has “held that in cases where fraud is not an element of a claim, but a plaintiff alleges that the defendant has engaged in ‘a unified course of fraudulent conduct,’ the claim ‘sound[s] in fraud’ and therefore must meet Rule 9(b)’s heightened pleading requirements.”[8] The Ninth Circuit case cited by the district court also held that even “where a plaintiff does not allege a unified course of fraudulent conduct, but instead alleges ‘some fraudulent and some nonfraudulent conduct,’ the allegations of fraud are subject to Rule 9(b).”[9] The district court then looked to other district court precedent applying the heightened pleading standard to deception claims brought by the Federal Trade Commission and concluded that the deception-based claims in the CFPB’s complaint (all but the advance-fee claim) “sound in fraud and must meet the heightened pleading standards of Rule 9(b).”[10]

Applying this holding to the complaint, the court readily concluded that the complaint’s general allegations of deception, which “fail[] to identify any specific instances where the defendant made such a misrepresentation,” failed to meet the 9(b) standard.[11] Because the CFPB failed to plead “what representations were made, when these representations were made and to whom they were made,” the court dismissed without prejudice the four deception-based claims.[12]

The CFPB recently filed an amended complaint, bolstering its factual allegations.[13] In place of the original 89-paragraph, 16-page complaint, the amended complaint contains 207 paragraphs and runs 40 pages long. The additional allegations appear to provide the type of “who, what, where and when” that was missing from the original complaint. Thus, the amended complaint describes various specific representations allegedly made by PMH to CFPB investigators who called PMH (presumably without identifying themselves as CFPB employees) on specified dates[14]; quotes representations allegedly found on PMH’s website on specified dates[15]; describes call scripts provided by PMH to the California Department of Justice (presumably either pursuant to a license the company had from the CDOJ or as part of a CDOJ investigation)[16]; and quotes consumer complaints alleging that PMH made specific misrepresentations on specified dates.[17] It remains to be seen whether these more robust factual allegations will pass muster with the court.

The case’s import, however, extends far beyond the outcome of the case against PMH. The Central District of California has become a favorite forum of the CFPB’s. Indeed, nearly one-third of the CFPB’s contested federal court cases have been filed there. Moreover, allegations of deception are the bread and butter of CFPB enforcement, with a majority of enforcement cases including at least one deception claim. If other courts follow the ruling in PMH and require heightened pleading of deception claims, it may affect which cases the CFPB brings, and will certainly affect how they are pled.

While the CFPB’s precomplaint subpoena power means that it can typically obtain the kind of evidence necessary to plead with particularity, imposing such a requirement on the agency would necessarily impact its assessment of the strength of its cases before filing suit. Even where the CFPB chooses to

proceed, its complaints are likely to contain substantially more detail, something that should be of benefit to defendants.

The amended complaint in PMH is a case in point. Rather than have to defend against general allegations of misrepresentation, PMH is now on notice as to the precise allegations that the CFPB believes violated the law. It is also on notice that the CFPB appears to have engaged in “mystery shopping” by having its investigators call the company posing as consumers and that the CFPB has cooperated with, and obtained information from, the CDOJ. While neither of those facts is surprising, they may help PMH formulate discovery requests in the case and allow it to better prepare a defense.

Time will tell whether the requirement for “heightened pleading” of deception allegations becomes the norm in the Central District of California, the Ninth Circuit and beyond. If it does, it could have significant implications for contested CFPB enforcement cases.

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[1] Order Re Defendant’s Motion to Dismiss [Docket 14], CFPB v. Prime Market Holdings LLC, No. 2:16-cv-07111-BRO-JEM (Nov. 15, 2016) (order).

[2] Complaint for Permanent Injunction and Other Relief [Docket 1], CFPB v. Prime Market Holdings LLC, No. 2:16-cv-07111-BRO-JEM (Sept. 22, 2016) (complaint).

[3] *Id.*, ¶¶ 63-80.

[4] *Id.*, ¶¶ 81-88.

[5] *Id.*, ¶ 42.

[6] *Id.*, ¶¶ 60-62.

[7] Fed. R. Civ. P. 9(b).

[8] Order at 8 (quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003)).

[9] Id. (quoting Vess, 317 F.3d at 1104).

[10] Id. at 9-10 (citing FTC v. Lights of Am. Inc., 760 F. Supp. 2d 848, 851 (C.D. Cal. 2010); FTC v. Ivy Capital Inc., No. 2:11-CV-283 JCM (GWF), 2011 WL 2118626, at *1, *3 (D. Nev. May 25, 2011)).

[11] Id. at 12-13.

[12] Id.

[13] Amended Complaint for Permanent Injunction and Other Relief [Docket 35], CFPB v. Prime Market Holdings LLC, No. 2:16-cv-07111-BRO-JEM (Nov. 28, 2016) (amended complaint).

[14] See, e.g., id., ¶¶ 33, 67-68, 100, 126-27, 131.

[15] See, e.g., id., ¶¶ 73-85, 108-10, 124-25, 130, 147-161.

[16] See, e.g., id., ¶¶ 72, 104-05, 128, 145.

[17] See, e.g., id., ¶¶ 69-71, 88-91, 114-17, 132-36, 139-43.

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