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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

# Will CFPB Adopt A More Nuanced Approach To Remedies?

By **Ori Lev** (January 24, 2018, 10:50 AM EST)

Ori Lev

In a decision expressly based on the novelty of the legal claims brought by the Consumer Financial Protection Bureau, a federal district court has rejected the CFPB's broad demand for consumer restitution and civil money penalties in a case that has already produced several important rulings. The case represents the second time that a federal district judge has rejected the CFPB's expansive view of remedies following a bench trial. The CFPB's loss suggests that parties willing to litigate against the CFPB may achieve success even if they lose on the merits, as courts appear reluctant to award the robust remedies the CFPB typically demands, particularly in cases where the CFPB's claims do not sound in fraud or are based on novel legal theories.

The decision at issue came in the CFPB's case against CashCall and related entities. As we've previously discussed, the CFPB brought the case based on a novel legal theory — that attempting to collect on loans that are void under state law because of state licensing or usury statutes constitutes a federal UDAAP (unfair, deceptive, or abusive acts or practices) violation. (Just last week, the CFPB voluntarily dismissed another lawsuit it had brought under this same theory, suggesting that new CFPB leadership is less likely to pursue such novel claims.) In CashCall's case, the court granted summary judgment to the CFPB on the merits of its claims, finding that collecting on such loans constituted deceptive conduct because it created the "'net impression' that the loans were enforceable.'" The court then held a bench trial to determine the appropriate remedy.

In keeping with its past practice, the CFPB sought to recover every dollar collected by the defendants as "restitution," a sum the CFPB calculated at over $235 million. The CFPB also sought a penalty of over $50 million and a permanent injunction. Following a bench trial, the district court rejected virtually all of the CFPB's demands, imposing no restitution, finding an injunction unwarranted and imposing a $10.2 million penalty.

In reaching its conclusion, the court first set forth in great detail how the defendants had sought legal advice regarding their lending model, noting that "although Defendants clearly sought at the outset to avoid state licensing requirements and usury laws, there was no evidence they decided to create and implement an unlawful scheme to defraud consumers." Importantly, the court noted that "[a]t the time, there was no case law that clearly established that the Tribal Lending Model [used by defendants] was not a lawful model or that any attempt to adopt and implement the Tribal Lending Model would subject Defendants to liability under the [Dodd-Frank Act]." This, of course, is the claim that many CFPB critics make when complaining about “regulation through enforcement.” And while the district court did not find this a relevant factor in deciding liability, it was clearly a key factor in rejecting the CFPB’s remedy demands.

In rejecting the CFPB’s request for restitution, the court first held that the CFPB had not demonstrated that restitution was appropriate because it “did not show that Defendants intended to defraud consumers or that consumers did not receive the benefit of their bargain.” In this regard, the court noted that the CFPB had not presented any testimony from consumers suggesting that they would not have entered into the loan transaction had they understood the legal structure behind the loans. The court also noted that “the evidence indicated quite clearly that consumers received the benefit of their bargain — i.e., the loan proceeds ... Defendants plainly and clearly disclosed the material terms of the loans to consumers — including fees and interest rates — before the loans were funded.” Separately, the court held that the CFPB also failed to prove that the “enormous” restitution award it sought was appropriate. As was typical of the CFPB, it had sought restitution for every dollar paid by consumers, without regard to whether such an award would approximate defendants’ unjust gains or whether it would create a windfall for borrowers.

The court also materially reduced the CFPB’s penalty request, which was based on alleged reckless conduct by the defendants. The court relied heavily on the novelty of the CFPB’s claim in rejecting a finding of recklessness, noting again that it was not until the court’s ruling on liability that the defendants could have known they were violating the law. “At best, the CFPB established that Defendants were willing to accept the business risks associated with structuring a lending model that would avoid relevant state and federal laws and employed legal counsel to assist with this endeavor.” Accordingly, the court found that the lowest penalty tier — which does not require a finding of recklessness — applies and awarded a penalty of $10.2 million. Finally, the court also rejected the CFPB’s request for an injunction, holding that the CFPB failed to present any evidence that there was a cognizable danger that defendants would violate the law in the future.

Although the $10.2 million penalty imposed is substantial, the court’s decision is clearly a rebuke of the CFPB’s extremely broad approach to remedies. This is the second time that a federal district court has rejected the CFPB’s remedy demands after a trial. In the prior case, the CFPB similarly sought all of the fees collected by defendants who were found to have engaged in deceptive conduct. As we’ve previously discussed, the court in the prior action — like the CashCall court — rejected the CFPB’s demands in part because the agency could not show that the defendants never provided a benefit to consumers or that fully informed consumers would have elected not to participate in the program.

These two court decisions should provide support for the CFPB’s new leadership to take a more measured approach to the remedies the agency seeks. Rather than apply a one-size-fits-all demand for complete restitution in every case in which a violation is found, one hopes that the new CFPB will adopt a more nuanced approach that distinguishes between those cases truly sounding in fraud and more technical or less impactful violations that warrant a different enforcement response. Particularly where cases rest on novel legal theories and the absence of regulatory guidance, or where complete restitution would provide a windfall to consumers, a more considered approach to remedies would be a welcome change.

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*Ori Lev is a financial services partner at Mayer Brown LLP in Washington, D.C. He was a founding member of the CFPB where he served as a deputy enforcement director for litigation. Before joining the CFPB, he was a senior adviser and then the head of enforcement at the Office of Foreign Assets Control.*