CFPB Enforcement Actions: Less Volume, Same Substance

By **Ori Lev**
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The Consumer Financial Protection Bureau, also known as the Bureau of Consumer Financial Protection, recently announced its latest enforcement action, and it demonstrated yet again that, notwithstanding Acting Director Mick Mulvaney's rhetoric, the bureau intends to continue to pursue claims of unfair, deceptive and abusive acts and practices, or UDAAPs. Indeed, just days after announcing that the bureau will consider rule-making to define "abusiveness" — because the standard is not well-developed in the law in the same way that unfairness and deception are — the bureau brought its first new abusiveness claim of the Mulvaney era. This continues a trend where on the one hand Mulvaney announces the end of "regulation by enforcement" and on the other hand continues to assert the same substantive legal claims that have been the bureau's bread and butter since it was formed. While the volume of enforcement actions has dropped, the substance of the actions that are brought hasn't changed.

The latest action was against Cash Express, a small-dollar lender based in Tennessee. The bureau asserted three claims, which are discussed below, in a consent order issued against the company. The consent order requires the company to pay a $200,000 civil money penalty and to provide approximately $32,000 in consumer restitution. While those are relatively modest sums, there are several surprising aspects to the bureau's order, when considered against the backdrop of its public pronouncements over the past year.

The first claim asserted by the bureau was that the company engaged in deceptive conduct by sending consumers debt collection letters that threatened suit when the company had either no legal right to file suit (because the statute of limitations had expired) and/or no intent to file suit. The consent order notes that the company sued only five consumers out of more than 11,0000 to whom it sent collection letters with respect to time-barred debt. The bureau found this to be a deceptive practice. This is not a novel claim and is one in a series of cases in which the bureau has made similar allegations. The claim itself, therefore, is not surprising.

What is surprising is the remedy — a requirement that the company reimburse consumers for the debt payments they made in response to such letters. There is no allegation in the consent order that the amounts paid by consumers were not in fact owed. The only allegations related to the misrepresentations in the collections letter, which, according to the bureau, would reasonably affect consumers' decisions by encouraging them to pay their debts to Cash Express in an effort to avoid being sued. The bureau under former Director Richard Cordray's leadership often — but not always — required consumer redress in similar debt collection cases. But the two prior debt collection actions brought under Mulvaney's leadership did not require consumer redress — even in a case in which the bureau alleged that the debt collectors improperly inflated the amounts due to them. That such redress would be required in this case — essentially returning to consumers moneys that they had in fact owed the company — is surprising given the lack of such redress in the

prior debt collection cases brought under Mulvaney’s leadership.

The second claim in the recent enforcement action was also a rather straightforward deception claim based on the bureau’s findings that the company told consumers that it may furnish information about borrowers to consumer reporting agencies (credit bureaus) when in fact it did not do so. The inclusion of this claim is not noteworthy; it simply suggests that the bureau will enforce the law when companies affirmatively misrepresent material information to consumers. It demonstrates that the old rule “do what you say and say what you do” still applies.

The third claim was the most surprising. It involved the company’s set-off practices. According to the consent order, when the company cashed a check for a consumer who had an outstanding debt to the company, its practice was to use the check proceeds to pay off the outstanding debt and provide only the remaining funds to the consumer. The consent order notes that this practice was disclosed to consumers at the time they took out a loan with the company and that consumers signed an acknowledgement in the application that they had received these disclosures.

Nevertheless, the bureau found the company’s set-off practices illegal for several reasons. First, the bureau noted that the disclosures sometimes occurred months or years before a consumer presented a check to be cashed. Second, the bureau recounted in detail the company’s policies and procedures to not inform consumers coming in for check-cashing services that their check proceeds may be set off against any outstanding debt. In addition to these policies, the bureau cited a company training document that instructed employees not to leave the check in a place where it could be retrieved by the consumer. These practices, in the bureau’s words, “nullified” the disclosures that consumers had been provided. As a result, the bureau concluded that these practices constituted abusive conduct because they took unreasonable advantage of a consumer’s lack of understanding of the material risks, costs or conditions of the company’s check-cashing service.

There are several surprising aspects to this claim. The first is that the Mulvaney-led bureau would disregard the disclosures provided to consumers about the possibility of set-off. While the company took affirmative steps to not inform consumers of the possibility of set-off at the time they presented a check to be cashed, there are no allegations that the company made affirmative misrepresentations to consumers regarding set-off. The bureau nevertheless found the company’s conduct to have “nullified” the disclosures previously provided. One might expect such a result from a regulator focused on substantive unfairness — indeed, the Cordray-led bureau brought several cases in which contractual language was deemed insufficient to protect a company from UDAAP claims — but it is surprising that a believer in the power of markets such as Mulvaney would authorize such a claim.

The second surprising aspect of this claim is that the bureau chose to bring it as an abusiveness claim just days after Mulvaney’s speech noting that abusiveness is not a well-defined legal concept and stating that the bureau would consider rule-making to define its contours. There are two ways that agencies make law — through rule-making and through adjudication. The latter has been criticized — most prominently by Mulvaney himself — as “regulation by enforcement.” Yet that is precisely the route Mulvaney chose to take in this case. This is all the more surprising because the bureau could just as easily have labeled

the company’s conduct as unfair or deceptive.

A practice is unfair where it causes substantial injury not reasonably avoidable by consumers and not outweighed by benefits to consumers or competition. To the extent that the bureau found the company’s practice of going out of its way to not inform consumers that their checks might be subject to set-off troubling, the bureau could readily have found that the practice would cause substantial injury to consumers (the proceeds consumers did not receive) not reasonably avoidable by consumers (because the company took steps to not inform them of the possibility of set-off and physically kept the check away from the consumer) and not outweighed by benefits to consumers or competition. Alternatively, the bureau could have found that failing to inform consumers of the possibility of set-off at the time of check cashing was a material omission that rendered the transaction a deceptive practice because it created the net impression that consumers would receive the full value of their checks. That would certainly have been less novel than claiming that the company’s conduct “nullified” valid disclosures and constituted abusive practices.

The only reason to frame this claim as abusive conduct is to continue to provide additional contours to the meaning of abusiveness. In this respect, the bureau’s claim is similar to the abusiveness claim that the bureau brought in a prior check-cashing case that also involved allegations of affirmative steps to keep relevant information away from consumers — in that case, the applicable fees. To the extent the bureau was seeking to provide greater clarity to the meaning of abusiveness, however, it helped muddy the waters by pleading its claims against the company under a different prong of abusiveness than it had previously used in similar circumstances.

In the prior case, the bureau claimed that taking affirmative steps to hide check-cashing fees from consumers was abusive because it “materially interfere[d] with the ability of a consumer to understand a term or condition” of the cash-checking service under prong (d)(1) of the abusiveness standard.[1] In its most recent action, by contrast, the bureau claims that taking affirmative steps to not inform consumers about the possibility of set-off is abusive because it “takes unreasonable advantage of a lack of understanding on the part of the consumer of the material risks, costs or conditions” of the check-cashing service under prong (d)(2)(A) of the abusiveness standard.[2] Although these standards are both defined as abusive conduct under the Dodd-Frank Act, they represent separate legal theories and separate legal claims. To the extent the bureau believes that the kind of intentional obfuscation at issue in both cases is abusive because it prevents consumers from understanding the terms of the service they are purchasing, one would expect the agency to settle on a view as to which prong or prongs of abusiveness apply and then consistently rely on that prong(s) as a way of educating the marketplace about the meaning of abusiveness. Instead, the only thing consistent about the bureau’s approach is its inconsistency in determining what prong of abusiveness applies to similar sets of facts. We previously discussed[3] this phenomenon under Cordray; it is apparently continuing under Mulvaney.

Mulvaney talks a good game about changing the nature of enforcement at the bureau. But his actions have not always matched his rhetoric. We have written previously[4][5] about how the bureau under Mulvaney has continued to assert novel claims of abusiveness brought under Cordray. Now it seems that Mulvaney is going to bring such claims himself, while continuing the bureau’s tradition of inconsistent pleading, which does little to clarify the bureau’s understanding of what the different prongs of abusiveness mean. There is no

doubt that the pace of enforcement under Mulvaney has slowed dramatically. But the substance of enforcement actions has not changed nearly as much as Mulvaney seems to want you to think.

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[1] 12 U.S.C. § 5531(d)(1).

[2] 12 U.S.C. § 5531(d)(2)(A).

[3] https://www.mayerbrown.com/files/News/2a45fa15-f453-496e-a641-3c8c57371e1f/Presentation/NewsAttachment/aba847be-c11c-4cd7-8aa0-3e6b75cc6747/AnAnalysisOfTheCFPBsAbusivenessClaimsPart2.pdf

[4] https://www.cfsreview.com/2018/05/meet-the-new-boss-same-as-the-old-boss-the-cfpbs-take-on-udaap-might-surprise-you/

[5] https://www.cfsreview.com/2018/05/udaap-strikes-again-the-new-bcfp-seems-a-lot-like-the-old-cfpb/