

Litigating Abusiveness: The CFPB and the Quasi-Fiduciary Duty of Care to Consumers

The Consumer Financial Protection Bureau (CFPB) filed a lawsuit just two days before US President Donald Trump's inauguration that sheds additional light on how the agency views its authority to prohibit "abusive" acts and practices and adds to a growing body of cases suggesting that the CFPB believes that in certain circumstances companies have a duty to act in the best interest of consumers. The lawsuit, against Navient Corp. and two subsidiaries, alleged that Navient's steering of student loan borrowers into forbearance as opposed to income-driven repayment programs and other servicing practices were illegal.¹ The steering claim is based, in part, on the CFPB's "abusiveness" authority.² Below, we discuss the nature of the CFPB's abusiveness authority, how the abusiveness claim against Navient squares with the agency's prior use of this tool and how the CFPB seems to be sending a message that companies need to look out for consumers' best interests in certain circumstances.

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 The terms "unfair" and "deceptive" have long-standing definitions in federal statutes and case law. "Abusiveness," however, was a newly introduced term in the Act.

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." The Act defines conduct as "abusive" if it:

- "Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service" (Prong (1));⁴
- "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)(A));⁵
- "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)(B));⁶ or
- "Takes unreasonable advantage of ... the reasonable reliance by the consumer on a covered person to act in the interests of the consumer" (Prong (2)(C)).⁷

The Lawsuit

Prior to this January's lawsuits, the CFPB had asserted 37 claims of abusiveness in 22 cases. The vast majority of those claims (27) involved alleged violations of Prongs (2)(A) and (2)(B) above, focusing on *taking unreasonable advantage* of either a consumer's ability to understand a term or condition of a consumer financial product or service or a consumer's inability to protect her interests in selecting or using such a product or service. The abusiveness claim against Navient broke with this pattern,

asserting that the conduct at issue was unlawful under Prong (2)(C) because it took unreasonable advantage of a consumer's reasonable reliance on the defendant to act in the consumer's interest.

In *Navient*, the CFPB alleged that Navient's failure to offer student loan borrowers the opportunity to enroll in income-driven repayment programs to which they were allegedly entitled, and instead offering them forbearance on their loans, constituted abusive conduct. Specifically, the CFPB alleged that "borrowers reasonably relied on Navient to act in their interests in advising about options to address their financial situation," including helping borrowers select "a suitable alternative repayment plan."⁸ The CFPB asserted that such reliance was reasonable because both Navient itself and the Department of Education had told borrowers that Navient (and other student loan servicers) would assist them. Thus, the Complaint quotes from Navient's website, where the company allegedly told borrowers to call the company for help, using statements such as "let us help you make the right decision for your situation," "Navient is here to help," and "[w]e can help you find an option that ... minimizes your total interest cost."⁹ The Complaint also quotes from the Department of Education website, which encouraged borrowers to "[w]ork with your loan servicer to choose a federal student loan repayment plan that's best for you" and stated that "[y]our loan servicer will help you decide whether one of these plans is right for you."¹⁰ The CFPB then alleged that Navient took unreasonable advantage of this reasonable reliance by "steering" borrowers to forbearance "rather than adequately advising them about income-driven repayment plans that would have been financially beneficial to those borrowers."¹¹

While the CFPB's reliance on Prong (2)(C) of the abusiveness standard is relatively uncommon, its abusiveness claim in this case is consistent with its prior use of this authority. As in most other cases where the CFPB has relied on Prong

(2)(C), the CFPB focused its claim on a particular consumer-company relationship in which usual market forces and the notion of *caveat emptor* did not necessarily apply. In prior cases involving students, the CFPB alleged that it was reasonable for students to rely on a for-profit college's financial aid staff to act in the students' interests¹² and that it was reasonable for student loan borrowers to rely on a debt relief provider specializing in student loan debt to act in the borrowers' interest.¹³ In another Prong (2)(C) case, the CFPB alleged that it was reasonable for consumers to rely on an attorney to provide them with independent advice concerning the sale of structured settlements.¹⁴ In all of these cases, the CFPB has taken the position that the ordinary rules of the market do not apply because it was reasonable under the circumstances for the consumers to rely on the defendant company to act in the consumer's best interest, notwithstanding the absence of any other legal obligation to do so.

Moreover, in each of those cases, as in *Navient*, the CFPB also alleged specific facts about how the defendant allegedly induced the consumer's reliance, thus making that reliance reasonable. In the CFPB's incipient abusiveness jurisprudence, therefore, such induced reliance seems to be an important part of a Prong (2)(C) claim. It remains to be seen how far the CFPB will push this concept and whether it—or the courts—will require affirmative statements inducing reliance (or a separate legal obligation to act in the consumer's interest) as the basis of a Prong (2)(C) claim or whether instead it will presume such consumer reliance to be reasonable in certain circumstances even absent affirmative conduct by defendants inducing such reliance.

The *Navient* case is also consistent with another pattern evident in the CFPB's abusiveness claims—the CFPB's assertion that "steering" consumers into particular products or services, when more consumer-friendly alternatives are available, is an abusive practice. The CFPB thus

framed its claim against Navient by alleging that Navient “steered” borrowers into forbearance, as opposed to more consumer-friendly income-driven repayment plans, by offering forbearance and not adequately advising consumers about income-driven repayment plans. In prior cases, based on other prongs of the abusiveness standard, the CFPB has alleged that steering consumers into high-cost tax refund anticipation loans, when cheaper alternatives were available, constituted “abusive steering” in violation of Prong (2)(B).¹⁵ And it has alleged that a company’s practice of purchasing leads from lead generators who allegedly made representations to consumers that they (the original lead generators) would find consumers the best rate or the lowest fees and then selling those leads to tribal or offshore payday lenders who allegedly “typically charge higher interest rates than lenders adhering to state laws” was abusive steering under Prong (2)(A).¹⁶ While the different conduct in these cases fits (in the CFPB’s view) under different rubrics of the abusiveness framework, the underlying concern animating the CFPB in all of these cases appears to be consistent: the CFPB believes that companies shouldn’t direct consumers to particular products or services when less-costly alternatives are allegedly readily available, regardless of whether companies have any fiduciary or other obligation to act in the consumer’s best interest.

Conclusion

Taken together, the CFPB’s abusiveness claims under Prong (2)(C) and its abusiveness claims alleging that “steering” is illegal suggest that the CFPB believes that companies have a legal obligation to act in a consumer’s interest in certain circumstances. First, that obligation appears to apply when it is reasonable for the consumer to rely on a company to act in her interest. To date, the CFPB has generally relied on affirmative marketing statements made by a company as a basis for concluding that it was

reasonable for consumers to rely on the company to act in the consumers’ interest. It has also focused on subsets of consumers where such reliance might be expected—students and consumers seeking independent legal advice. Second, in its “steering” cases, the CFPB has taken the position that companies have an obligation to provide a consumer with the best of available options, or at least offer the consumer all available options, when the company is in a position to provide more than one consumer product or service. The *Navient* case may provide a court the opportunity to opine on both strands of this aspect of the CFPB’s nascent approach to abusiveness. In the meantime, companies subject to the CFPB’s jurisdiction should consider reviewing both their marketing materials to ensure that they are not unwittingly laying the foundation for claims based on breach of an alleged duty of care through their statements to consumers and their sales practices to limit the risk of susceptibility to claims of “steering” consumers into less-consumer-friendly products or services when other options exist.

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Endnotes

- ¹ Complaint, Consumer Financial Protection Bureau v. Navient Corp., No. 3:17-cv-00101-RDM (M.D. Penn).
- ² The Financial Choice Act, introduced in the last Congress by Rep. Jeb Hensarling and expected to be re-introduced in this Congress, would repeal the CFPB’s abusiveness authority. It is not clear if any such legislation would apply retroactively to pending cases.
- ³ 12 U.S.C. § 5536(a)(1)(B).
- ⁴ 12 U.S.C. § 5531(d)(1).
- ⁵ 12 U.S.C. § 5531(d)(2)(A).
- ⁶ 12 U.S.C. § 5531(d)(2)(B).

- ⁷ 12 U.S.C. § 5531(d)(2)(C).
- ⁸ *Navient* Complaint, ¶ 139.
- ⁹ *Id.* ¶¶ 38-39.
- ¹⁰ *Id.* ¶ 37.
- ¹¹ *Id.* ¶ 140.
- ¹² Complaint, *CFPB v. ITT Educ. Servs., Inc.*, No. 1:14-cv-00292 (S.D. Ind.).
- ¹³ Complaint, *CFPB v. College Educ. Servs. LLC*, No. 8:14-cv-03078 (M.D. Fla.).
- ¹⁴ Complaint, *CFPB v. Access Funding LLC*, No. 1:16-cv-03759-JFM (D. Md.).
- ¹⁵ Complaint at 13-15, *CFPB v. S/W Tax Loans, Inc.*, No. 1:15-cv-00299 (D.N.M.).
- ¹⁶ Complaint at 9-11, *CFPB v. D & D Marketing, Inc.*, No. 2:15-cv-09692 (C.D. Cal.).

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