You Can't Always Get What You Want: Recent District Court Decisions Limit CFPB Claims

After a summer featuring two significant losses,[1] the Consumer Financial Protection Bureau ("CFPB" or the "Bureau") began the fall of 2017 with a mixed record before the federal courts. In three separate cases, the CFPB obtained split decisions, affirming some and rejecting other claims brought by the agency. Although none of the opinions resulted in an outright dismissal, the courts in these matters did limit claims, dismiss certain parties or counts, and curtail available remedies. Notably, one court recently refused to allow the CFPB to pursue deception and abusiveness claims for conduct prior to the July 21, 2011, passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). Another court refused to award any consumer restitution when the CFPB attempted to collect restitution for every customer who signed up for an allegedly deceptive service without providing a basis for the theory that every customer was deceived. The cases demonstrate a willingness by the judiciary to carefully examine CFPB claims and may embolden more parties to litigate rather than accept the CFPB's settlement demands.

Background

On September 8, 2017, the US District Court for the District of Minnesota dismissed claims brought by the CFPB against TCF National Bank ("TCF") related to the violation of Regulation E's opt-in and disclosure requirements related to overdraft protection.[2] However, the court allowed the CFPB to proceed with its claims that TCF's activities violated the Dodd-Frank Act's prohibition on abusive or deceptive acts or practices. In its complaint, the CFPB alleged TCF misled consumers into opting in to overdraft services offered by the bank.

Also on September 8, 2017, the US District Court for the Northern District of California issued an opinion and order in the CFPB's case against Nationwide Biweekly Administration, Inc. ("Nationwide Biweekly") finding that certain marketing statements made by Nationwide Biweekly in connection with its Interest Minimizer program were false or misleading in violation of the abusive and deceptive prongs of the Dodd-Frank Act.[3] Ruling after a bench trial, the court rejected the CFPB's core claim that Nationwide Biweekly's disclosure of the setup fee in connection with its enrollment contracts was inadequate, but found that other marketing statements made by Nationwide Biweekly in connection with the program were misleading. While the court granted the CFPB civil money penalties and injunctive relief, it did not award any consumer redress, finding that the CFPB failed to meet its burden of proof to establish that all consumers were harmed.

Finally, on September 13, 2017, the US District Court for the District of Maryland dismissed claims against lawyer Charles Smith, citing the Dodd-Frank Act's "practice of law" exclusion.[4] In its complaint, the CFPB alleged that Mr. Smith engaged in unfair, deceptive, and abusive acts and practices ("UDAAP") in violation of the Dodd-Frank Act by participating in a scheme to mislead structured settlement holders into signing away future settlement payments to Access Funding, LLC ("Access Funding") in exchange for a lump-sum payout. The court also dismissed a claim against Access Funding that alleged that the company provided substantial assistance to Mr. Smith in committing these unfair, deceptive, and abusive acts or practices. The court allowed the CFPB to proceed with its claim that Access Funding engaged in abusive acts or practices with respect to the advances it provided consumers while the consumers waited to complete their paperwork and finalize the structured settlement transfers.

Implications

In addition to demonstrating that the CFPB can't always get what it wants in court, these three cases provide additional insight into how courts in the future may interpret and possibly curtail some of the CFPB's go-to claims.

CONFLATING DECEPTION AND ABUSIVENESS STANDARDS

The Dodd-Frank Act defines abusiveness as an act or practice that: "(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) takes unreasonable advantage of (a) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; b) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (c) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer."[5] As we discussed in a *Law360* analysis, most of the CFPB's early abusiveness claims appeared to be variations of deception or unfairness claims. These three cases further support that thesis. In each case, the CFPB alleged that the defendants engaged in abusive conduct that was no different from deceptive conduct. And the courts' analyses of those abusiveness claims do little to distinguish what constitutes abusive conduct from what constitutes deceptive conduct under the Dodd-Frank Act.

In *TCF*, the CFPB alleged that the manner in which TCF obtained consent from consumers to sign them up for overdraft services constituted both abusive and deceptive conduct. Specifically, the Bureau alleged that TCF provided consumers with the opt-in notice for overdraft services early in the account opening process, asked customers to initial the form opting in to overdraft services immediately after being asked to initial items that were mandatory to open an account, and directed employees to use a short and uninformative script when discussing the items to convey the impression that they were part of one document that was necessary to open the account. The court, in refusing to dismiss these claims, did not conduct a separate legal analysis of the deception and abusiveness claims. Rather, the court merely found that the actions alleged by the CFPB as part of the account-opening process were sufficient to demonstrate that TCF's conduct was likely to "deceive or confuse customers about its overdraft services."[6] Presumably, the reference to "confus[ion]" was intended to cover the abusiveness claim, but the court did not explain how such confusion would meet the applicable legal standard or how, if at all, that differed from the deception standard.

Nationwide involved claims of deception and abusiveness against a company that offered consumers the option of making bi-weekly mortgage payments for a fee. The court rejected the CFPB's core claim that Nationwide Biweekly's disclosure of the setup fee in connection with its enrollment contracts was inadequate, but found that other marketing statements made by Nationwide Biweekly in connection with the program were misleading. Specifically, the court found that Nationwide Biweekly's mailers and phone scripts created a misleading impression as to the relationship between the company and the potential customers' lenders, found that Nationwide Biweekly's representations as to the timing and amount of interest savings in connection with the payment plan were false or misleading, and found that Nationwide Biweekly's representations that the consumer must use the Interest Minimizer Program to achieve the advertised savings were materially misleading. As in *TCF*, the legal analysis supporting the CFPB's deception and abusiveness claims is indistinguishable. In fact, in *Nationwide*, the court rather explicitly conflates the two standards, stating in a footnote that "the conclusions set forth above that defendants made certain misrepresentations and omissions is sufficient to support liability under both the abusive and deceptive prongs" of the Dodd-Frank Act.[7] Presumably the court did not bother to distinguish between the two claims because they involved the same underlying conduct and it made no difference from a remedies perspective whether the conduct was deemed deceptive, abusive, or both.

Although there was no separate deception claim against *Access Funding*, the court's analysis in that case is entirely based on the defendant's alleged misrepresentations to consumers and, therefore, would be equally applicable to a deception claim. Specifically, in *Access Funding*, the CFPB alleged that the defendant company engaged in abusive conduct when it offered consumers advances before they entered into agreements with the company. The CFPB alleged that the company then told consumers who could not otherwise repay the advances that they were obligated to go forward with the transaction even if they realized it was not in their best interest. The CFPB alleged that consumers did not understand the risks or conditions of the advances, including that the advances did not bind them to complete the transactions. The court refused to dismiss this claim at the motion to dismiss stage, finding that "if defendants misrepresented to the consumers the nature of the advances and the obligations that were incurred once an advance was accepted, that would constitute 'taking unreasonable advantage of consumers' lack of understanding of the material risks, costs, or conditions of [a] product or service.'"[8] As the abusiveness claim rested squarely on Access Funding's alleged misrepresentation, it is difficult to see how it is at all different from a straightforward deception claim.

On the one hand, the courts' minimal attention to the abusiveness claims in these cases is surprising, given the novelty of this new authority. On the other hand, the CFPB's practice of asserting abusiveness claims in parallel with deception (as in *TCF* and *Nationwide*) or for conduct that is clearly deceptive, may lessen the sense of importance courts ascribe to these particular claims.[9] In any event, these decisions shed little light on what conduct – if any – would meet the abusiveness standard without also meeting the deception (or unfairness) standard.

TECHNICAL COMPLIANCE WITH DISCLOSURE REQUIREMENTS CAN STILL RESULT IN A UDAAP CLAIM

The court in *TCF* dismissed the CFPB's claims that the bank violated Regulation E's overdraft notice and opt-in requirements based on its findings that the CFPB's own complaint alleged technical compliance with the Regulation's requirement. However, the court rejected TCF's argument that because the bank complied with Regulation E it could not have violated the Dodd-Frank Act's UDAAP provisions, finding that "the Court cannot say the Bureau has failed to plausibly allege abusive or deceptive conduct simply because the required notice was provided at some point during the account-opening process."[10] This ruling, if it survives further litigation, may have broad implications in other regulatory areas, as it suggests that compliance with a prescriptive regulatory regime may not foreclose UDAAP claims for the same underlying conduct. It will be important to watch whether the CFPB's UDAAP claims survive further scrutiny (as the opinion only addressed a motion to dismiss) and whether the CFPB sees it as license to pursue more aggressive claims in other regulatory contexts.

LIMITATIONS ON UDAAP CLAIMS

The court in *Access Funding*, while allowing the CFPB to proceed on its abusiveness claim against the company, dismissed all UDAAP claims against the lawyer, Mr. Smith, and the claim against Access Funding that it provided substantial assistance to Mr. Smith. The court determined that Mr. Smith's alleged conduct constituted the provision of financial advisory services and, thus, was subject to the CFPB's UDAAP authority. However, the court nonetheless held that the claims were barred by the Dodd-Frank Act's Practice of Law exclusion. Under the Dodd-Frank Act, "the Bureau may not exercise any supervisory or enforcement authority with respect to an activity engaged in by an attorney as part of the practice of law under the laws of the state in which the attorney is licensed to practice law."[11] Rejecting the CFPB's argument that the lawyer's allegedly perfunctory conversations with consumers did not constitute the practice of law, the court held that those arguments go to the quality of the legal advice provided but not to the nature of the advice. That is, even allegedly bad legal advice is excluded from the CFPB's jurisdiction. This is the first holding of which we are aware where a court dismissed the CFPB's claims against a lawyer on the basis of the Practice of Law exclusion. Given the number of claims the CFPB brings against lawyers, this aspect of the decision may have broader implications for the agency.[12]

Additionally, although the court in *TCF* refused to dismiss the CFPB's UDAAP claims, the court did limit those claims to conduct that occurred after July 21, 2011, the date the CFPB came into existence. The court expressly rejected the CFPB's theory that it could "salvage earlier claims under a type of continuing-violation theory" because the conduct post-dates the effective date.[13] The court noted that accepting such an argument "theoretically could render unlawful every account opening ever conducted by TCF, since some of them occurred" after the Dodd-Frank Act's effective date, which is "clearly not the law."[14] This aspect of the decision further solidifies the principle that the CFPB cannot bring UDAAP claims for conduct before that date.

IMPOSING LIMITS ON CONSUMER RESTITUTION

Finally, and perhaps most importantly, while the court in *Nationwide Biweekly* found for the CFPB on several of its abusiveness and deception claims, the court rejected the CFPB's request for $74 million in consumer restitution. That figure was based on all of the set-up fees the defendant had received since the CFPB's inception. As noted above, the court rejected the CFPB's claim that Nationwide's representations about the set-up fees were deceptive. In rejecting the CFPB's request for restitution, the Court found that the CFPB could not show that Nationwide Biweekly's program never provided a benefit to consumers or that "no fully-informed consumer would ever elect to pay to participate in the program," and emphasized that "some of the matters found to constitute misrepresentations or omissions did not apply to all customers."[15] This ruling rejects the CFPB's typical approach to consumer restitution in deception cases, which is to allege that every consumer who encountered a misleading or deceptive representation was impacted by it and, thus, should be compensated. The court noted that because the "CFPB has not offered a basis for any restitution that might be limited in some way so as to make it a just result," then "no restitution award will issue."[16] Instead, the court only awarded a civil money penalty of $7.93 million for the deception claims it upheld.

The court's holding here may mark the beginning of a tempering of the CFPB's broad approach to restitution. The notion that the CFPB should identify a "basis for any restitution that might be limited in some way so as to make it a just result" is a welcome change from the CFPB's typical blunderbuss approach and may provide a further basis for companies engaged in settlement negotiations (or litigation) with the CFPB to reject broad-based demands for consumer restitution that are untethered from any demonstrable consumer harm.

Conclusion

It was easy to gloat about the CFPB's "undefeated" record before many litigated cases had been decided.[17] Now that more cases are making their way through the courts, the CFPB will inevitably win some and lose some. Which ones it wins, which it loses, and the reasons why will help shape the consumer financial landscape for years to come.

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Endnotes

1 *See CFPB v. Borders & Borders, PLC*, 2017 WL 2989183 (W.D. Ky. July 13, 2017) (dismissing the CFPB's Section 8(a) RESPA claims, holding that, although Borders & Borders had violated Section 8(a) of RESPA, it satisfied the affiliated business arrangement ("AfBA") requirements under Section 8(c)(4) and so was entitled to summary judgment as a matter of law); *CFPB v. Universal Debt Solutions, LLC, et al.,* C.A. 1:15-CV-859-RWS, (N.D. Ga. Aug. 25, 2017) (dismissing the CFPB's claims that payment processors provided substantial assistance to debt collector's alleged unfair or deceptive acts and practices in violation of Dodd-Frank's UDAAP provisions). The CFPB did prevail in one matter in September. On September 29, 2017, a district court denied a motion for judgment on the pleadings filed by the defendant debt collectors in *CFPB v. Weltman, Weinberg & Reis, Co. L.P.A.*, No. 1:17 CV 817 (N.D. Ohio).

2 *CFPB v. TCF National Bank*, 17-166, (D. Minn. Sept. 8, 2017).

3 *CFPB v. Nationwide Biweekly Administration, Inc., et al.,* 15-CV-02106-RS (N.D. Cal. Sept. 8, 2017).

4 *CFPB v. Access Funding, LLC, et al.,* 16-CV-03759-JFM, (D. Md. Sept. 13, 2017).

5 12 U.S.C. § 5531(d)

6 *TCF*, slip op. at 6.

7 *Nationwide Biweekly*, slip op. at 18.

8 *Access Funding*, slip op. at 27-28.

9 By contrast, other courts have recognized that where the CFPB has adequately established deception, there was no need to reach the abusiveness claim. *See, e.g.*, *CFPB v. Cash Call,* No. CV 15-7522-JFW (RAOx), at 14 (Aug. 13, 2016).

10 *TCF*, slip op. at 7.

11 12 U.S.C. § 5517(c)(I).

12 The CFPB recently filed a motion for leave to file an amended complaint in *Access Funding*. The proposed Amended Complaint expressly alleges that Mr. Smith "did not have an attorney-client relationship with the Maryland consumers he spoke to" and additional facts in support of that allegation.

13 *TCF*, slip op. at 9.

14 *Id.*

15 *Nationwide Biweekly*, slip op. at 19-20.

16 *Id.* at 21.

17 *See, e.g.*, Christopher L. Peterson, Consumer Financial Protection Bureau Law Enforcement: An Empirical Review, 90 Tulane L. Rev 1057, 1093-95 (2016) ("During the studied period, extending from the Bureau's inception to December 31, 2015, the Bureau did not lose any of its 122 publicly announced enforcement actions.").