

## CFPB Abusiveness Claims Aren't Dead Yet

By **Ori Lev**

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Many thought that with former Director Richard Cordray's resignation, the Consumer Financial Protection Bureau would stop using its abusiveness authority in enforcement actions. After all, claims of abusiveness were the epitome of what critics derided as regulation by enforcement, as abusiveness was a new concept whose contours were not well defined. While that has largely proven true, there have been some exceptions.

Last October, under then-Acting Director Mick Mulvaney, the CFPB issued a consent order against a payday lender that also offered check-cashing services, which contained a single claim of abusiveness. That claim was based on the entity's practice, when providing check-cashing services, of using check proceeds to pay off outstanding payday loan debts and providing only the remaining funds to the consumer. That, however, was the only abusiveness claim among the 10 enforcement actions of the Mulvaney era (although the Mulvaney-led CFPB did continue to litigate abusiveness claims filed under Cordray).



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For a while, it appeared that current CFPB Director Kathy Kraninger would avoid abusiveness. No abusiveness claims appeared in the first 16 enforcement actions the bureau initiated under her leadership. Moreover, in a June settlement with a credit union service organization, or CUSO, the CFPB seemed to go out of its way to avoid asserting an abusiveness-related claim.

That matter involved claims against the CUSO, which funded and then purchased private student loans made to students of ITT Technical Institute. The CFPB had previously filed suit alleging that ITT engaged in both unfair and abusive practices in coercing students to take out these loans, which the CFPB alleged most students could not afford.

The CFPB settled its claims that the CUSO substantially assisted ITT's illegal conduct. Notably, however, the CFPB's consent order with the CUSO only referenced the CUSO providing substantial assistance to ITT's unfair conduct, ignoring the abusiveness claims that the CFPB had previously brought against ITT.

Now, however, it appears that the abusiveness arrow is back in the agency's quiver. On Sept. 6, the CFPB filed a complaint<sup>[1]</sup> against Certified Forensic Loan Auditors LLC, a mortgage relief services provider, alleging that the company misled consumers into believing that its services would help them avoid foreclosure. The complaint alleges that the defendants in the case sold consumers "Securitization

Audits" and other documents constituting a "Quiet Title Package," which the defendants claimed would help consumers avoid foreclosure or negotiate loan modifications.

In addition to asserting claims for deception and violation of Regulation O for the alleged misrepresentations regarding the efficacy of these products, the CFPB also asserted that the conduct is abusive. Specifically, the CFPB asserted that the defendants' misrepresentations "took unreasonable advantage of consumers' lack of understanding of the material risks, costs and conditions" of the goods and services sold by the defendants, in violation of Title 12 of U.S. Code Section 5531(d)(2)(A).

In this respect, the abusiveness allegation is reminiscent of the Cordray era, in that the CFPB is alleging that the same conduct that it believes to be deceptive also violates this prong of the abusiveness standard. As previously discussed,[2] the CFPB appears to use subsection 5331(d)(2)(A) as a proxy for deception; this aspect of abusiveness focuses on a lack of understanding by the consumer, which is often caused by the same conduct that the CFPB alleges is deceptive.

The CFPB does make some effort to explain why it believes the conduct at issue meets the abusiveness standard, but fails to dissociate it from the underlying deception. In this most recent case, the complaint includes 10 paragraphs of allegations that consumers do not understand the complexities of the residential mortgage industry and foreclosure defense law, lack the expertise to determine the effectiveness of the defendants' products, and are not in a position to evaluate the accuracy of the marketing representations.

These allegations are helpful to flesh out why the CFPB believes that the allegedly deceptive marketing constituted taking unreasonable advantage of consumers' lack of understanding. But at the end of the day, the abusiveness claim is still inextricably tied to the defendants' alleged misrepresentations, as it hinges on the fact that, in the CFPB's words, "[defendants] promised consumers ... a solution to their mortgage problems" and sold them products and services "that were not effective and did not contain the information described."

On Sept. 13, one week after filing the lawsuit, the CFPB issued its latest edition of "Supervisory Highlights,"[3] which summarizes key findings from the bureau's supervisory work. This is the 19th edition of "Supervisory Highlights" since the bureau began periodically publishing these reports in the fall of 2012.

In the seven years and 18 previous editions, the bureau has cited a practice as abusive on only one occasion, in June 2016. Yet the latest edition, which is the first to cover examinations conducted under Kraninger, contains such a citation.

The bureau's abusiveness finding relates to the sale of guaranteed asset protection, or GAP, coverage to consumers who take out auto loans. GAP provides coverage for the difference, if any, between the amount a consumer owes on her auto loan and the amount received from an insurer if the car is stolen or totaled. The bureau noted that such coverage is more likely to be needed in an auto loan with a high loan-to-value, or LTV, ratio than one with a low LTV, because the insurance payout is likely to cover the outstanding debt on a low LTV loan.

The bureau noted that its examiners observed that lenders sold GAP to consumers whose low LTV "meant that they would not benefit from the product." The bureau goes on to note that the fact that consumers purchased a product from which they would not benefit "demonstrated that they lacked an understanding of material aspects of the product." And because the lenders had sufficient information

to know that these consumers would not benefit from the product, the lenders "took unreasonable advantage of the consumers' lack of understanding of the material risks, costs, or conditions of the product," which, as noted above, is one of the definitions of abusiveness.

Although here the lack of understanding was not alleged to have been caused by the lenders' deceptive conduct, the underlying conduct — knowingly selling a consumer a product from which they cannot benefit — could just as easily have been categorized as unfair as opposed to abusive. Given the rarity with which the bureau has cited abusiveness in the examination context, it was surprising to see it do so here.

The recent enforcement action and supervisory finding suggest that Kraninger will not be shy about using the agency's abusiveness authority. Earlier this year, the CFPB held a symposium regarding what abusiveness means, how it should be used and whether it covers conduct not already proscribed by the prohibitions on unfair and deceptive acts and practices.

These most recent cases suggest that the CFPB does not intend to set aside its use of this authority until those questions are resolved or additional guidance is provided. This, coupled with the bureau's continued emphasis on unfairness and deception in its enforcement actions, suggests that companies subject to the CFPB's supervisory or enforcement jurisdiction would be wise to ensure that they have in place effective unfair, deceptive, or abusive acts or practices compliance programs.

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[1] [https://files.consumerfinance.gov/f/documents/cfpb\\_CFLA-lehman-carrigan\\_complaint\\_2019-09.pdf](https://files.consumerfinance.gov/f/documents/cfpb_CFLA-lehman-carrigan_complaint_2019-09.pdf).

[2] <https://www.mayerbrown.com/-/media/files/news/2016/03/an-analysis-of-the-cfpbs-abusiveness-claims-part-1/files/ananalysisofthecfpbsabusivenessclaimspart1/fileattachment/ananalysisofthecfpbsabusivenessclaimspart1.pdf>.

[3] [https://files.consumerfinance.gov/f/documents/cfpb\\_supervisory-highlights\\_issue-19\\_092019.pdf](https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-19_092019.pdf).