

Legal Update

CFPB and the Use of Abusiveness – Ten Years In

A little over 10 years ago, the US Consumer Financial Protection Bureau (“CFPB” or “Bureau”) gained authority to enforce a prohibition against abusive acts and practices in connection with the provision of consumer financial products or services. This new authority raised a host of questions about what conduct was abusive and how the CFPB would use this new tool. Five years ago, we reviewed the CFPB’s use of abusiveness in its first four-plus years of existence. This Legal Update summarizes our prior findings and examines the CFPB’s use of abusiveness in the exercise of its enforcement, supervisory and rulemaking authorities over the subsequent five-plus years.

Some patterns from the early years still hold true—abusiveness is more likely to be alleged in contested litigation than in settled enforcement matters; most abusiveness claims are either paired with, or could be paired with, unfairness or deception claims; and the agency relies on certain kinds of abusiveness claims more than others. Yet other patterns changed over the past five years—the CFPB substantially increased its reliance on claims that companies “materially interfered” with consumers’ understanding, and the CFPB relied on abusiveness in a rulemaking for the first time.

The big question from 10 years ago—what conduct is abusive that was not already proscribed by the prohibitions on unfair or deceptive conduct?—remains largely unanswered. As noted, most CFPB abusiveness claims are paired with claims of unfairness or deception. And those that are not—the seven “stand-alone” abusiveness claims we discuss below—appear susceptible to such unfairness or deception claims and do not reveal a clear pattern of conduct that the agency appears to believe is abusive.

From a compliance standpoint, the takeaway is that robust compliance systems to prevent and detect potentially unfair and deceptive acts and practices should be well positioned to prevent allegations of abusiveness as well. That said, understanding how the CFPB thinks about the various elements of abusiveness claims—such as the prohibitions on “materially interfering” with consumer understanding and “taking unreasonable advantage” of certain circumstances—can help companies avoid not just abusiveness claims but also claims of unfair or deceptive conduct.

New leadership has recently come to the CFPB with the confirmation of Director Rohit Chopra, and with it a potential new approach to thinking about abusiveness.¹ Companies subject to CFPB jurisdiction should carefully follow developments in this space to help ensure they understand the agency’s current thinking about this unique tool.

I. Background on Abusiveness

The Dodd-Frank Act defines an act or practice as abusive if it meets any one of four separate Prongs of the statutory definition. Those Prongs define abusive conduct 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."²

For ease of reference, we refer to these different definitions as Prongs 1, 2(A), 2(B) and 2(C), respectively, reflecting the statutory subsections of the abusiveness definition.

II. Prior Findings

In 2016, we reviewed the CFPB's use of abusiveness in its first four-plus years of existence.³ At that time, we noted that the majority of the CFPB's abusiveness claims were brought under Prongs 2(A) or 2(B)—the provisions that prohibit covered persons from taking "unreasonable advantage" of either a consumer's lack of understanding of the material risks, costs or conditions of a product or service (Prong 2(A)) or the consumer's inability to protect her interests in selecting or using a consumer financial product or service (Prong 2(B)).

We saw that the Prong 2(A) claims often were based on deceptive conduct, which caused the requisite "lack of understanding" by the consumer. That is, a misrepresentation or omission by the covered person caused the consumer to lack an understanding of the materials risks, costs or conditions of a product or service. We surmised that the CFPB believed that consummating the transaction under those circumstances constituted taking "unreasonable advantage" of the lack of understanding caused by defendants' misrepresentations or omissions. At the time, it appeared that Prong 2(A) was a "deception plus" sort of claim; and indeed in most cases where the CFPB alleged a Prong 2(A) claim, it also alleged a deception claim.

The CFPB's Prong 2(B) cases at that time fell into two categories. In some of the cases, the consumer's alleged inability to protect her interest was based on a deceptive statement by the covered person. In most of these cases, the CFPB alleged that the conduct at issue violated both Prongs 2(A) and 2(B). Although not expressly stated in the cases themselves, the CFPB's theory seemed to be that a consumer that lacks an understanding of the material risks, costs or conditions of a product or service as a result of a covered person's deception (the predicate for a Prong 2(A) claim) by definition cannot protect her interests in selecting or using the product or service (the predicate for a Prong 2(B) claim). In this rubric, any Prong 2(A) claim could be recast as a Prong 2(B) claim.⁴ The remaining Prong 2(B) claims at that time did not involve allegedly deceptive statements but rather focused on the underlying conduct to conclude that the consumers could not protect their interest. In two cases, the CFPB focused on forum selection clauses in contracts of adhesion that consumers could not

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negotiate; in two other cases, the underlying conduct involved aggressively pushing consumers into loans that they could not afford; and in one case the conduct involved payment allocation across multiple loan products. In all these cases, the CFPB alleged that in light of the nature of the conduct, the consumer could not protect her interests. These cases sound in unfairness, where a required element of the legal standard is that the harm to consumers is not reasonably avoidable by the consumer. Although the CFPB pled that the conduct was unfair in only some of these cases, it could reasonably have alleged unfairness in all of them. As a result, we concluded that Prong 2(B) appeared be akin to "unfairness plus."

At the time of our analysis in 2016, the CFPB had asserted only two claims under Prong 1, which requires a covered person to "materially interfere" with a covered person's ability to understand a term or condition of a product or service. In both cases, the CFPB appeared to assert that deceptive statements constituted the "material interference" with a consumer's understanding; and in both cases, the CFPB also pled that the conduct at issue violated another Prong of the abusiveness standard and was both unfair and deceptive. These cases, therefore, shed little light on how the CFPB interpreted Prong 1.

The CFPB's use of Prong 2(C) at the time did provide a clearer sense of the agency's thinking. Prong 2(C) is based on taking unreasonable advantage of a consumer's "reasonable reliance" on a covered person to act in the consumer's interests. In most of the Prong 2(C) cases that the CFPB had brought at the time of our prior analysis, the agency alleged that the covered person had taken some affirmative action—through interactions with consumers or marketing—to induce a consumer's reliance. The cases also all involved products that were unlikely to benefit consumers (e.g., services the consumer did not qualify for or loans the consumer was unlikely to be able to repay).

We also made some other observations about the CFPB's use of abusiveness in 2016. First, we noted that abusiveness claims were proportionally more likely to be brought in contested litigation than in settled enforcement actions and that, at the time, the CFPB had not made a single abusiveness claim against a depository institution. Second, we observed that some of the CFPB's abusiveness claims focused on concepts of suitability (selling consumers products or services that they were unlikely to benefit from) and steering (directing consumers to products with less favorable terms than may otherwise be available to them). Third, we noted that the CFPB was inconsistent in its allegations of abusiveness—similar conduct was sometimes alleged to be abusive in one case but only deceptive or unfair in another case. Finally, we noted that at that time, the use of abusiveness was almost entirely limited to enforcement cases; the CFPB had not relied on abusiveness in any completed rulemakings and did not reference findings of abusiveness in its supervisory work.

III. Enforcement

We identified 18 new cases since our last review in which the Bureau made a finding or allegation of abusiveness.⁵ Those 18 cases involved 45 separate claims of abusiveness.⁶ Over half of those claims (24), however, were made in just two of the cases, both involving allegations of unauthorized account openings (or "sales practices"). Because those claims tend to skew the analysis, we report separately below on the 21 non-sales-practices claims brought in the remaining 16 cases and separately address the CFPB's handling of sales practices allegations. In addition, several district courts have issued opinions addressing abusiveness claims brought by the Bureau (as well as abusiveness claims brought by the states). Below, we provide a brief summary of each claim or opinion, organized by the Prong of abusiveness at issue. As before, in some instances the CFPB alleged that a particular act or practice

violated more than one Prong and in many cases also alleged that the act or practice was unfair and/or deceptive. After describing the cases, we offer some observations about the Bureau’s use of abusiveness as an enforcement tool.

A. PRONG 1 – MATERIALLY INTERFERING WITH CONSUMER UNDERSTANDING

As noted above, a Prong 1 violation is based on a covered person “materially interfering” with a consumer’s ability to understand a “term or condition” of a consumer financial product or service. In our 2016 article, we noted that the CFPB had relied on Prong 1 in only two of the 23 abusiveness claims brought to that point and that it was not clear what conduct the Bureau considered to constitute “material interference.” Since our last article, the Bureau’s reliance on Prong 1 has increased significantly. Of the 21 non-sales-practices abusiveness claims brought by the CFPB since our last article, six (or nearly one-third) have been based on Prong 1.

i. Overdraft Protection Services

Two of the Prong 1 cases involved conduct related to bank overdraft protection services. In both cases, the Bureau cited policies or actions taken by the bank or bank employees during the account-opening process that allegedly materially interfered with a consumer’s ability to understand terms and conditions of the overdraft service offered.

In the first case, the CFPB cited the bank’s account-opening process and other actions that allegedly interfered with customers’ ability to read, consider and understand the contents of required opt-in notices and gave the impression that opting in to overdraft protection was mandatory.⁷

In the second case, the CFPB cited the bank’s opt-in procedures, including the timing of providing disclosure and pre-checking the opt-in box.⁸

In both cases, the CFPB appeared to focus on affirmative conduct taken by the bank to allegedly impede a consumer’s understanding of the overdraft service being offered; in the CFPB’s view, such conduct constituted the “material interference” required to state a Prong 1 claim. In addition to the findings or allegations of abusive acts or practices, both cases also included claims of deceptive acts or practices that were based on largely the same conduct.

ii. Other Conduct

The other Prong 1 claims brought by the CFPB involved a variety of conduct. In one case, the Bureau asserted that a defendant check-cashing company materially interfered with consumers’ understanding by taking steps to prevent consumers from learning of the applicable check-cashing fees and making false or misleading statements about consumers’ ability to cancel or reverse the transaction or to cash their check elsewhere.⁹ The CFPB also alleged that similar, related conduct was unfair and deceptive.

In another case, the Bureau found that a specialty finance company that originates and services automobile title loans violated Prong 1 by utilizing a sales pitch and sales materials that emphasize the monthly payment amount but obscure the actual terms and total cost of the transaction.¹⁰ The CFPB did not make a finding that the same conduct was deceptive, although the same rationale—that the company was obscuring material information from consumers—could presumably support a deception claim.

Together with the New York Attorney General, the CFPB filed a lawsuit against a group of companies and individuals offering advances on payments from settlements and compensation funds.¹¹ The

complaint included a Prong 1 abusiveness claim based on the defendants' alleged misrepresentations to consumers that the contracts were valid and enforceable assignments and not extensions of credit.¹² The complaint also included allegations of deceptive acts or practices based on the same conduct. The district court held that the allegations of abusiveness were sufficient to survive a motion to dismiss, holding that "[r]epresentations that a transaction is a sale when it does not, in fact, transfer validly any rights of ownership from the consumer to the RD Entities are materially misleading because such representations are false. To that end, the Government is correct that these false representations prevent Consumers from evaluating accurately whether this transaction is in their best interest."¹³

Finally, the most recent case involving a Prong 1-based allegation of abusiveness involved a group of companies and individuals offering bond payment services.¹⁴ The complaint, which was filed by the CFPB along with the attorneys general of Massachusetts, Virginia and New York, alleged that defendants served as intermediaries between the immigration detainees and the sureties and bond agents who post immigration bonds and contains a series of deception claims alleging that defendants misrepresented the services they were offering and the true costs of the services. The Prong 1 claim was specifically based on the defendants' use of predominantly English-language documents with non-English-speaking consumers, coupled with a rushed enrollment process that omitted or misrepresented material terms.

All of the Prong 1 allegations discussed above involved some affirmative conduct by the defendants/respondents that was alleged to materially interfere with consumers' understanding. In most cases, this involved deceptive statements or omissions, but it also included other aspects of engagement with consumers, such as rushed enrollment processes or use of English language documents with non-English-speaking consumers.

B. PRONG 2(A) – TAKING UNREASONABLE ADVANTAGE OF LACK OF CONSUMER UNDERSTANDING

In 2016, we noted that Prongs (2)(A) and (2)(B) were the workhorses of CFPB abusiveness claims, with the vast majority of such claims relying on one or both of the Prongs. And Prong 2(A) continues to feature prominently in the non-sales-practices abusiveness claims, with a total of nine out of the 21 claims being based on this Prong. In 2016, we commented that Prong 2(A) appeared to be closely related to deception claims, as the "lack of understanding" that defendants allegedly took unreasonable advantage of was typically caused by an alleged misrepresentation or omission of the defendant, with the possible exception of cases involving collection of loans rendered void by state law violations. The more recent Prong 2(A) cases also fit this pattern, with virtually all of the cases including alleged misrepresentations or omissions that caused or contributed to the alleged consumer "lack of understanding."

i. Making or Servicing Void Loans

Three of the cases involving a Prong 2(A) claim related to the making or servicing of loans that were wholly or partially void under state law ("state-law-voidness claims"). These cases were brought over a seven-month period and feature very similar facts, both to each other and to three pre-2016 state-law-voidness cases that the CFPB brought alleging that collecting on loans rendered void by state law violated Prong 2(A).¹⁵

In two of the more recent cases, the Bureau based its abusiveness allegation on the collection of loan payments that the customer allegedly did not owe as a result of relevant state usury or licensing

laws.¹⁶ In each case, the Bureau’s claim was based on a consumer’s lack of understanding that the loans at issue were void under state law. While the consumer’s lack of understanding that the loans were void was not directly caused by the defendants in these cases, the CFPB alleged that attempting to collect on such loans implicitly represented to the consumer that the loans were valid. And in each of the two cases, the CFPB also alleged that the same conduct was both deceptive and unfair. In the third more recent case, the Bureau issued a consent order with a finding that the respondent company violated Prong 2(A) when it sold payday and installment loan applications to lenders it knew were likely to make loans that the lenders had no legal right to collect based on state usury and licensing requirements.¹⁷ The CFPB did not allege that this same conduct was unfair or deceptive, and, because the alleged conduct involved the sale of loan leads as opposed to collection activity, there was no allegation that any conduct by the respondent caused the consumer’s lack of understanding.

It is somewhat surprising that the CFPB chose to rely only on Prong 2(A) in these more recent state-law-voidness cases, as the only court opinion to uphold a CFPB abusiveness claim in such a case based its decision on Prong 1, rather than 2(A). In December 2016, before the CFPB filed the three cases described in the prior paragraph, the district court hearing the CFPB’s action against NDG Financial (one of the cases discussed in our prior article) denied the defendants’ motion to dismiss the abusiveness claim against them. The court held that, at least at the pleading stage, “[f]alsely representing to consumers that the loans they sought (1) are valid and must be repaid and (2) are not covered by state or federal law ‘materially interferes’ with consumers’ ability to understand the terms and conditions of their loans.”¹⁸ The court did not address the CFPB’s Prong 2(A) claim. In a separate state-law-voidness action brought by the State of Pennsylvania, a separate district court did find that the state’s allegations under Prong 2(A) were sufficient to withstand a motion to dismiss and a motion for summary judgment by the defendants.¹⁹

ii. Other Conduct

With one exception, the remaining non-sales-practices Prong 2(A) claims all relied, at least in part, on alleged misrepresentations or omissions of the respondents/defendants that were alleged to have caused or contributed to the consumers’ alleged “lack of understanding.” In one case, the CFPB asserted that the same alleged misrepresentations regarding the enforceability of contracts for advances on payments from settlements and compensation funds that constituted “material interference” with consumers’ understanding under Prong 1 also formed the basis for a Prong 2(A) claim because the company took unreasonable advantage of the resulting lack of understanding.²⁰ As noted above, the CFPB also alleged this conduct was deceptive.

In another case, the CFPB alleged that a debt settlement company did not disclose to its customers that when creditors refused to negotiate with the company, the customer would need to negotiate on their own, and that defendants took unreasonable advantage of the customers’ resultant lack of knowledge.²¹ The CFPB also alleged that this conduct was deceptive.

In another case, the CFPB alleged that a group of companies and individuals offering mortgage relief services marketed and sold audits and litigation documents purportedly to assist consumers in fighting foreclosure, but that the description of the services provided were misleading or false. The CFPB asserted a violation of Prong 2(A) based on consumer lack of understanding caused in part by the alleged misrepresentations, though the CFPB also alleged that consumers lacked the necessary understanding of the mortgage industry and foreclosure processes to be able to evaluate the value of defendants’ products.²² The CFPB also alleged that this conduct was deceptive.

In another case, the Bureau alleged a Prong 2(A) violation against a lawyer who held himself out as providing independent advice with respect to the purchase of structured settlement streams.²³ Because the lawyer was allegedly not independent due to his ties to the defendant company purchasing the settlement streams, the Bureau alleged that he took unreasonable advantage of consumers' lack of understanding of his lack of independence. The Bureau also alleged that this conduct was unfair and deceptive. The Bureau also brought a separate Prong 2(A) case against the defendant company based on the company's alleged misrepresentation to consumers who received advances from the company that they were obligated to complete the transaction with the company.²⁴ The Bureau did not allege that the company's conduct was unfair or deceptive. In both of these Prong 2(A) abusiveness claims, the Bureau relied in part on the alleged misrepresentations of the defendant to assert its Prong 2(A) claim.

Finally, the Bureau found a violation of Prong 2(A) by a check-cashing company based on the company's failure to inform consumers of its practice of withholding funds during check-cashing transactions to satisfy outstanding amounts on prior loans.²⁵ Although the abusiveness claim was predicated on this allegedly material omission, the Bureau did not allege that this conduct was deceptive.

In addition to the new Prong 2(A) cases discussed above, one court addressed a pre-2016 Prong 2(A) case brought by the Bureau. There, the court held after a bench trial that certain marketing statements made by defendant company in marketing its bi-weekly mortgage payment service were deceptive. In a footnote, the court concluded that "[t]he conclusions set forth above that defendants made certain misrepresentation[s] and omissions is sufficient to support liability under both the 'abusive' and 'deceptive' prongs of the CFPA . . ."²⁶ Recognizing that the remedies for the alleged conduct would be the same whether it was categorized as deceptive or abusive, the court apparently felt no additional analysis was necessary. While it is unwise to read too much into a single sentence of analysis, the court's conclusion bolsters our analysis that Prong 2(A) claims are often based on allegedly deceptive statements that impede a consumer's understanding.

C. PRONG 2(B) – TAKING UNREASONABLE ADVANTAGE OF CONSUMERS' INABILITY TO PROTECT THEIR INTERESTS

In its first four-plus years, the CFPB relied on Prong 2(B) more than any other prong. Since then, the agency has brought only three Prong 2(B) claims outside of the sales practices context. In our 2016 analysis, we noted that Prong 2(B) claims fit into two general categories: (a) cases where the consumer's alleged inability to protect her interest was caused by an alleged misrepresentation or omission of the respondent/defendant (i.e., claims that could also be pled as Prong 2(A) or deception claims), and (b) cases where the consumer's inability to protect her interests was based on the nature of the underlying conduct at issue, as opposed to any misrepresentation or omission, and was more akin to unfairness cases where a consumer is alleged to be unable to "reasonably avoid" consumer harm. The three Prong 2(B) claims since our 2016 analysis continue to fit these buckets, with one claim sounding in deception and two of the claims sounding in unfairness.

The Prong 2(B) claim sounding in deception was made in the case involving contracts for advances on payments from settlements and compensation funds discussed above. Without elaborating, the CFPB relied on the same alleged misrepresentations regarding the contracts' enforceability to allege violations of Prongs 1, 2(A) and 2(B) of the abusiveness standard (as well as claims for deception).²⁷

The other two Prong 2(B) claims sound more in unfairness than deception. The first claim related to check-cashing services and was brought in a complaint that also included a Prong 1 allegation, discussed above. The Prong 2(B) allegation was based on the company pressuring or coercing consumers into using check-cashing services by taking active steps, such as processing checks without consent or retaining custody of checks to prevent consumers from leaving, among others.²⁸ Some conduct served as the basis for both the Prong 1 and Prong (2)(B) claim, but the latter focused on more coercive conduct. The Bureau also alleged unfair and deceptive acts and practices based on substantially similar conduct. This is a Prong 2(B) claim that sounds in unfairness—the acts alleged relate not to a lack of consumer information but alleged conduct by the defendant that precludes consumers from avoiding the injury alleged.

The second Prong 2(B) claim sounding in unfairness involved private student loans issued to students of a now-defunct for-profit college. In a settled matter, the Bureau alleged that the defendants took unreasonable advantage of student borrowers' inability to protect their interests in selecting or using student loans by funding, supporting and then purchasing student loans made to students at Corinthian Colleges, Inc.²⁹ The CFPB alleged that the loans were part of a ruse designed to allow Corinthian's students to qualify for, and Corinthian to benefit from, Title IV federal student loans and that Corinthian and the defendants knew that the private loans were likely to default. The case is more akin to an unfairness claim, as it relates to alleged borrower harm that was not caused by a misrepresentation made by the defendants to the students, although the CFPB did not allege that the conduct was unfair or deceptive.

D. PRONG 2(C) – TAKING UNREASONABLE ADVANTAGE OF CONSUMER RELIANCE

The CFPB brought only three non-sales-practices-related abusiveness claims based on Prong 2(C) during the review period. In our 2016 analysis, we noted that the Bureau's Prong 2(C) claims involved circumstances in which defendants took affirmative steps to induce consumers' reliance on the defendants' acting in the consumers' interests. The Prong 2(C) claims brought since then have not all met this paradigm. Instead, in at least some instances, the CFPB seems to infer the reasonableness of consumer reliance from the circumstances.

One of the three Prong 2(C) claims during this review period did involve alleged reliance-inducing statements. In that case, the CFPB alleged that a student loan servicer steered borrowers experiencing long-term financial hardship to forbearance rather than adequately advising them about income-driven repayment plans that would have been financially beneficial to those borrowers.³⁰ The CFPB alleged that consumers' reliance on the company acting in the consumers' interest was reasonable because both the defendant company and the Department of Education "repeatedly encouraged borrowers to rely on their servicer to help them" select a suitable alternative repayment plan.³¹ The CFPB also alleged this alleged "steering" of consumers was unfair.

The other two non-sales-practices Prong 2(C) claims did not fit the pattern described above. First, in the case involving the sale of structured settlements discussed above, the CFPB brought a Prong 2(C) claim against the lawyer to whom consumers were referred for independent legal advice prior to consummating sale of their structured settlement payments (in addition to the Prong 2(A) claim based on the same conduct).³² The CFPB alleged that the lawyer "held himself out as providing independent professional advice" and that consumers therefore "reasonably relied on [him] to provide independent professional advice *that took their best interests into account*" (emphasis added). In addition to alleging that this conduct violated Prong 2(C), the Bureau also alleged that failure to provide independent professional advice under the circumstances was also unfair and deceptive.

In the final Prong 2(C) case, the CFPB alleged that a debt settlement company did not tell consumers that it had a financial connection to entities with which it negotiated for the consumers and, thus, took unreasonable advantage of the consumers' reasonable reliance that the company would protect their interests.³³ Notably, the complaint does not allege any specific representations by the defendant company that it would act in consumers' interests (although it otherwise quotes extensively from the defendant's marketing materials); it only includes a generic statement that the company told consumers it would work in their interests. It is not clear, therefore, what conduct the CFPB believes induced reasonable consumer reliance in this case. The CFPB did not allege that the same conduct was unfair or deceptive.

E. SALES PRACTICES CLAIMS

As noted above, the CFPB brought two actions against banks for alleged unauthorized account openings and related sales practices.³⁴ Those two cases involved a total of 24 abusiveness claims, brought under all four prongs of abusiveness. Both cases involved Prong 1 claims. In the first case, the Bureau found that (1) opening unauthorized deposit accounts and funding them with transfers from consumers' existing accounts and (2) opening credit card accounts using consumers' information without their knowledge or consent violated Prong 1. The CFPB also found this conduct to be unfair.³⁵ In the second case, the Bureau alleged that the following actions taken without consumers' knowledge or consent violated Prong 1: (1) opening deposit accounts (but not the funding of those accounts via transfers from consumers' existing accounts), (2) applying for or issuing credit cards, (3) enrolling consumers in online banking services, (4) opening lines of credit on consumers' accounts, (5) enrolling consumers in overdraft protection and (6) enrolling consumers in other consumer-financial products (including prepaid debit cards). As in the first sales practices case, the CFPB alleged that all of the conduct alleged to violate Prong 1 was also unfair.³⁶

The CFPB made two Prong 2(A) claims in the second of the two sales practices cases. First, the Bureau alleged that the bank's sales practices as a whole "lead to product issuances and product changes without consumer knowledge and consent," and thus took unreasonable advantage of consumers' lack of understanding of the material risks, costs or conditions of products or services.³⁷ The CFPB made this claim in addition to, and separate from, its claims that (as discussed above) the opening of different types of unauthorized accounts constituted abusive conduct under Prongs 1 and 2(B). Second, the CFPB averred that the bank's alleged failure to "make reasonable efforts to identify additional consumers that it subjected to unauthorized financial products or services or applications therefor" (and presumably to provide remediation to such consumers)³⁸ itself constitutes an abusive practice in violation of Prong 2(A).³⁹ This view of abusiveness suggests that the Bureau may view certain failures to identify and remediate consumers when an institution is aware of prior legal violations as an independent legal violation. The CFPB has recently moved for judgment on the pleadings on this claim, so a court decision on the issue may be forthcoming.

As discussed above, the CFPB alleged that the same conduct that violated Prong 1 (unauthorized account and credit card opening in the first case; unauthorized account, credit card and line of credit opening and unauthorized enrollment in online banking, overdraft protection and other products or services in the second case) also violated Prong 2(B). In addition, however, the CFPB found or alleged that additional sales practices-related conduct, which it did not allege violated Prong 1, violated Prong 2(B)—unauthorized issuance of debit cards and enrollment in online banking in the first case; and general sales practices and the failure to identify and remediate affected consumers in the second case (i.e., the same conduct found to violate Prong 2(A) in the second case).

Finally, the CFPB also asserted that the alleged general sales practices and the alleged failure to identify and remediate affected consumers in the second case also violated Prong 2(C). In this regard, the amended complaint in that case alleges that the bank told consumers it was acting in their best interest and trained its employees to tell consumers that the bank was “acting in your best interest.”

The second of these two cases is in litigation and judicial decisions in that matter may shed additional light on the abusiveness standard. Short of that, however, it is difficult to draw many conclusions from the unique circumstances of these two matters.

F. OBSERVATIONS ON ENFORCEMENT’S USE OF ABUSIVENESS

i. Contested vs. Settled Cases

In our prior analysis, we noted that abusiveness claims were more likely to be made in contested as opposed to settled enforcement cases.⁴⁰ At that time, approximately 22 percent of all CFPB enforcement cases had been contested, but 38 percent of cases involving abusiveness claims had been contested. A similar pattern holds true for enforcement cases filed during our current review period. From March of 2016 (the beginning of our review period) through July of 2021 (the CFPB’s 10-year anniversary and the end of our review period), the CFPB brought 166 enforcement actions. Of those, 35 percent (58 cases) were contested at the time of filing, and the remaining 65 percent of cases were settled at the time they were brought (via consent order or consent judgment). As noted above, 18 of these cases (or just over 10 percent of all enforcement actions brought during this time period) involved abusiveness claims. Of those 18 cases with abusiveness claims, over 60 percent (11 cases) were contested. It thus remains the case that abusiveness claims are more likely to be made in contested rather than settled enforcement actions.

ii. Abusiveness Prongs

The most frequently relied upon Prong of abusiveness in the non-sales-practices cases discussed above was Prong 2(A), which accounted for nine of the 21 claims at issue. In our prior analysis, Prong 2(A) was also one of the most used Prongs, then accounting for eight of 23 claims. Similarly, reliance on Prong 2(C) remained fairly consistent, accounting for three of the 23 claims in our original analysis and three of the 21 non-sales-practices claims in this analysis. The big change in the Bureau’s use of abusiveness came with respect to Prongs 1 and 2(B). Whereas the CFPB had only brought two Prong 1 claims as of March 2016, they brought six such claims (not counting sales-practices-related claims) since then. And while Prong 2(B) had been the most frequently relied upon Prong as of March 2016 (accounting for 10 of the 23 claims), it has been used only twice since then in non-sales-practices cases.

Of the 16 cases involving non-sales-practices allegations of abusiveness, only three involved more than one abusiveness claim against a single party (and all were filed before 2018). No discernable pattern emerges from this type of pleading. As noted above, one theory posits that any Prong 2(A) claim (which relies on a lack of consumer understanding) could also be pled as a Prong 2(B) claim (because the lack of understanding would render the consumer unable to protect her interests).⁴¹ Similarly, one could imagine Prong 1 claims, which are based on materially interfering with a consumer’s understanding of a term or condition of a product or service, being pled in conjunction with Prong 2(A) claims, which turn on taking unreasonable advantage of a consumer’s lack of understanding. And, indeed, in one case the CFPB pled that the same conduct violated Prongs 1, 2(A), and 2(B), essentially for the reasons listed above.⁴² But the other two non-sales-practices cases

pleading multiple abusiveness claims did not match this paradigm: one case alleged that the same conduct violated both Prongs 2(A) and 2(C),⁴³ and the third case alleged that different conduct of the same defendant violated Prongs 1 and 2(B), respectively.⁴⁴

iii. Stand-Alone Abusiveness Claims

Seven of the 21 non-sales-practices abusiveness claims discussed above were “stand-alone” abusiveness claims—meaning that the CFPB did not also plead that the same alleged conduct was unfair or deceptive in addition to being abusive. These claims involved a variety of conduct, and no clear pattern emerges as to when and why the CFPB chooses not to plead unfairness or deception along with abusiveness.⁴⁵ The stand-alone claims involved the following conduct:

- Using a sales pitch and sales materials that emphasize the monthly payment amount but obscure the actual terms and total cost of a credit transaction.⁴⁶ The CFPB did not make a finding that the same conduct was deceptive, although the same rationale—that the company was obscuring material information from consumers—could presumably support a deception claim.
- Using predominantly English-language documents with non-English speaking consumers, coupled with a rushed enrollment process that omitted or misrepresented material terms.⁴⁷ The same conduct could have been alleged to be unfair on the theory that consumers could not avoid harm due to their inability to understand the transaction, though pleading abusiveness as opposed to unfairness eliminated the need to allege consumer harm; it could also have been alleged to be deceptive to the extent that the claim was based on misrepresentations made to consumers.
- Selling payday and installment loan applications to lenders the respondent knew were likely to make loans that the lenders had no legal right to collect based on state usury and licensing requirements.⁴⁸ The same conduct could have been alleged to be unfair, as consumers did not know about, and could not prevent, the sale of their applications to such lenders, though pleading abusiveness as opposed to unfairness eliminated the need to allege consumer harm.
- Misrepresenting to consumers who received advances from a company purchasing settlement streams that the consumers were obligated to complete the contemplated transaction with the company.⁴⁹ The same conduct could have been alleged to be deceptive, as the claim was based on alleged misrepresentations by the defendant.
- Failing to inform consumers of a check-cashing company’s practice of withholding funds during check-cashing transactions to satisfy outstanding amounts on prior loans made by the company.⁵⁰ The same conduct could have been alleged to be deceptive, as the claims were based on an alleged material omission.
- Funding and purchasing student loans made to for-profit students that the company knew were likely to default.⁵¹ The same conduct could have been alleged to be unfair, as consumers did not know that the loans were likely to default and thus could not avoid the attendant harm of default.
- Failing to tell consumers that a debt settlement company had a financial connection to entities with which it negotiated on behalf of consumers.⁵² The same conduct could have been alleged to be deceptive, as the claims were based on an alleged material omission.

It is not apparent on the face of these pleadings why the CFPB chose to plead abusiveness, and only abusiveness, as opposed to also (or in the alternative) pleading unfairness or deception. Nor do the cases suggest any particular course of conduct that the Bureau believes to be abusive. In our prior analysis, we noted that the stand-alone abusiveness claims we identified at that time included claims of “suitability” based on selling consumers products or services from which they would not benefit

and improper “steering” of consumers to less favorable products or services. We do not discern any similar pattern in the “stand-alone” claims described above.

IV. The Payday Rulemaking

In its 10-year history, the CFPB has relied on the abusiveness prohibition in only one rulemaking, regarding payday lending. In 2017, the Bureau issued a final rule finding that two practices related to specified loans constituted abusive practices under both Prongs 2(A) and 2(B): (i) making such loans without reasonably assessing that the borrower will have the ability to repay the loan according to its terms (the “ability-to-repay provisions”) and (ii) attempting to withdraw payment from a consumer’s account in connection with such loans after two successive withdrawal attempts failed due to a lack of sufficient funds (the “payment provisions”). In 2020, the CFPB repealed the ability-to-repay provisions, finding that both the factual basis and legal analysis supporting the 2017 rule did not support a finding of abusiveness. Thus, only the payment provisions of the 2017 rule remain in force, and it is only the analysis of abusiveness supporting the payment provisions that remains the agency’s official position with respect to Prongs 2(A) and 2(B).⁵³

The payment provisions provide that it is an abusive (and unfair) practice for a lender to make attempts to withdraw payment from a consumer’s accounts in connection with a covered loan after the lender’s second consecutive attempt to withdraw payments from the account have failed due to a lack of sufficient funds, unless the lender obtains the consumer’s new and specific authorization to make further withdrawals from the accounts.⁵⁴ As noted, the CFPB found this practice to take unreasonable advantage of consumers’ lack of understanding of the material risks, costs, or conditions of a product or service (Prong 2(A)) and of the inability of the consumer to protect her interests in selecting or using a consumer financial product or service (Prong 2(B)). In reaching this determination, the CFPB opined on the meaning of a “lack of understanding,” the “inability of the consumer to protect [her] interests” and taking “unreasonable advantage.”

A. LACK OF UNDERSTANDING

With respect to a consumer’s lack of understanding of the material risks or costs of a product or service (Prong 2(A)), the CFPB noted that the phrase refers not to a consumer’s general understanding of the risks or costs of a product, but rather to a consumer’s understanding of the likelihood or extent of the risk or cost occurring or being incurred. In the case of the payment provisions, the CFPB found that although consumers understand as a general matter that they may incur NSF or returned item fees from failed payment attempts, they do not understand that the risk is very likely to happen or that the impact of the risk is severe. Thus, the CFPB concluded that because lenders in many other markets do not initiate multiple payment attempts and in light of the complexity of payment presentment practices, it is likely that a significant number of borrowers lack a sufficient understanding of the specific practices and their likely effects. (This same distinction between generalized understanding of risks and costs and a more nuanced understanding of the likelihood and magnitude of the risks and costs faced by consumers animated the Bureau’s repealed findings regarding the ability-to-repay provisions).

B. INABILITY TO PROTECT THE CONSUMER’S INTEREST

With respect to a consumer’s inability to protect her interests (Prong 2(B)), the CFPB rejected the notion that the standard can be met “only when it is literally impossible for consumers to take action to protect their interest.”⁵⁵ Instead, the CFPB interprets the term to mean that “it is impracticable for

[consumers] to do so in light of the circumstances.⁵⁶ The CFPB also analogized a consumer's "inability to protect the consumer's interests" to the assessment of whether consumer harm is "not reasonably avoidable by the consumer" as part of the unfairness analysis.⁵⁷ With respect to the payment provisions, the CFPB found that it is often too late to take effective action to avoid the harms at issue once consumers learn that a lender is making repeated withdrawal attempts. In this regard, the CFPB relied on (i) the fact that closing the account at issue is likely not practical as the consumer is likely to rely on the account for living expenses and (ii) the considerable challenges with both stop payment orders and the revocation of the payment authorization.

C. TAKING UNREASONABLE ADVANTAGE

The CFPB concluded that the repeat payment withdrawals proscribed by the payment provisions take unreasonable advantage of both the consumer's lack of understanding of the material risks and costs of covered loans and of consumers' inability to protect their interest.

In explaining what constitutes taking "unreasonable advantage," the CFPB first noted that "in any transaction involving a consumer financial product or service, there is likely to be some information asymmetry between the consumer and the financial institution" (a fact relevant to consumer understanding) and that "[o]ften, the institution will have superior bargaining power as well" (a fact relevant to a consumer's ability to protect her interests).⁵⁸ The Bureau then expressly noted that the abusiveness standard "does not prohibit financial institutions from taking advantage of their superior knowledge or bargaining power to maximize profit," noting that in market economies participants generally pursue their self-interests.⁵⁹ "At some point," however, "a financial institution's conduct in leveraging a consumer's lack of understanding or inability to protect their interests becomes unreasonable advantage-taking that is abusive."⁶⁰ The CFPB then noted that determining when that line is crossed is based on "all the facts and circumstances."

The CFPB's analysis then turned to a cost-benefit analysis. The CFPB noted that successive withdrawal attempts after two prior attempts have failed "generate relatively small amounts of revenue for lenders as compared with the significant harms that consumers incur as a result of the practice."⁶¹ The Bureau went on to cite statistical evidence to support this conclusion. In light of the "low expected value of these presentments" as compared to the financial harm to consumers, the Bureau concluded that the practice was abusive. The CFPB's analysis in this regard is strikingly similar to that aspect of unfairness that requires that any consumer harm resulting from a challenged practice not be outweighed by benefits to consumers or competition. Essentially, the CFPB has incorporated this same test into its articulation of what it means to take "unreasonable advantage."

V. Supervisory Highlights

When we reviewed the CFPB's implementation of its abusiveness authority in early 2016, we noted that the CFPB seldom mentioned abusiveness in its *Supervisory Highlights* newsletter. Since then, the CFPB has made at least three findings of abusiveness in the course of its supervisory work, but the use of abusiveness appears to still remain primarily an enforcement tool.

In June 2016, the CFPB disclosed that it cited a mortgage servicer for abusive practices under Prongs 2(A) and 2(B) when the servicer's offer of a proprietary loan modification option made it impossible for borrowers to understand the true nature of how and when outstanding fees, charges and advances would be assessed.⁶²

The CFPB did not discuss abusive acts or practices in the Supervisory Highlights again for almost three years. In Winter 2019, the CFPB described its settlement with a small-dollar lender over allegations that included abusive acts or practices.⁶³ As discussed above, the CFPB found that the lender engaged in an abusive practice under Prong 2(A) by withholding funds during check-cashing transactions to satisfy outstanding amounts on prior loans, without disclosing this practice to the consumer during the initiation of the transaction. Later in 2019, the CFPB noted that at least one examination conducted in 2018 found that an auto lender engaged in an abusive act or practice under Prong 2(A) by selling guaranteed asset protection (“GAP”) products to consumers whose low loan-to-value ratio meant that they would not benefit from the product.⁶⁴ The CFPB considered the very fact that these consumers purchased a product they would not benefit from as sufficient to demonstrate that the consumers lacked an understanding of material terms of the product and considered the lender’s sale of the product, knowing that consumers would not benefit from it, as taking unreasonable advantage of that lack of knowledge.

VI. Conclusion

Much has been made of the CFPB’s abusiveness authority over the past decade. Yet 10 years into the agency’s existence, it is clear that abusiveness does not play a major role in its regulatory activities. Only about 10 percent of enforcement cases involve an allegation of abusiveness, and in almost all cases, the same conduct is alleged to be unfair or deceptive (or could be). The CFPB has only relied on abusiveness in one rulemaking, and there it found the same conduct it proscribed to also be unfair. And the CFPB rarely cites abusive conduct in the course of its supervisory activities. On the whole, therefore, the attention paid to abusiveness seems entirely disproportionate to the role it plays in the CFPB’s broad regulatory arsenal. That may change as new, more aggressive leadership comes to the Bureau with the recent confirmation of Rohit Chopra as director. But even so, companies that have robust compliance systems to prevent and detect potentially unfair and deceptive acts and practices should be well positioned to prevent allegations of abusiveness as well.

For more information about the topics raised in this Legal Update, please contact any of the following lawyers.

Ori Lev

+1 202 263 3270

olev@mayerbrown.com

Brian J. Stief

+1 202 263 3050

bstief@mayerbrown.com

Kerri E. Webb

+1 202 263 3252

kwebb@mayerbrown.com

Endnotes

¹ Indeed, the first enforcement action under Mr. Chopra included an allegation of abusiveness based on a company's alleged misuse of market dominance, suggesting an antitrust-informed approach to abusiveness. That action, which was filed after July 21, 2021, is outside the scope of this Legal Update, but our analysis can be found at <https://www.cfrsreview.com/2021/10/chopra-makes-a-statement-about-markets-both-literally-and-figuratively/>.

² 12 U.S.C. § 5531(d) (emphasis added).

³ See Ori Lev and Chris Shelton, *An Analysis of the CFPB's Abusiveness Claims: Parts 1 and 2* (March 2016) (available at <https://www.mayerbrown.com/-/media/files/news/2016/03/an-analysis-of-the-cfpbs-abusiveness-claims-part-1/files/ananalysisofthecfpbsabusivenessclaimspart1/fileattachment/ananalysisofthecfpbsabusivenessclaimspart1.pdf> and <https://www.mayerbrown.com/-/media/files/news/2016/03/an-analysis-of-the-cfpbs-abusiveness-claims-part-2/files/ananalysisofthecfpbsabusivenessclaimspart2/fileattachment/ananalysisofthecfpbsabusivenessclaimspart2.pdf>).

⁴ The CFPB subsequently made this point more clearly in promulgating the since-repealed provisions of its 2017 payday rule: "Consumers who lack an understanding of the material risks and costs of a consumer financial product or service often will lack the ability to protect their interests in selecting or using that product." Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54472, 54618 (Nov. 17, 2017).

⁵ The CFPB makes "findings" when it issues a consent order against a respondent. The CFPB makes "allegations" when it files a complaint against a defendant in federal court. For ease of reference, we refer to both as "allegations" in this Legal Update.

⁶ In some cases, the CFPB alleged that a course of conduct violated more than one prong of the abusiveness standard in a single count of a complaint. We treat such allegations as separate claims, one for each prong that is alleged to have been violated.

⁷ First Amended Complaint at 25-27, *CFPB v. TCF National Bank*, No. 17-cv-00166 (D. Minn. Mar. 1, 2017). In ruling on a motion to dismiss, the district court held that the bank's compliance with Regulation E in obtaining consumer opt-ins to overdraft services did not insulate it from the CFPB's abusiveness claim, but the court did not separately analyze the elements of that claim. *CFPB v. TCF Nat'l Bank*, 2017 WL 6211033, at *2-3 (D. Minn. Sept. 8, 2017).

⁸ Consent Order at 16-20, *In the Matter of TD Bank, N.A.*, File No. 2020-BCFP-0007 (Aug. 20, 2020).

⁹ Complaint at 18-19, *CFPB v. All American Check Cash, Inc.*, No. 3:16-cv-00356 (S.D. Miss. May 11, 2016). The CFPB separately alleged that additional conduct by the defendant constituted a violation of Prong 2(B), as discussed below.

¹⁰ Consent Order at 3-7, *In the Matter of TMX Finance LLC*, File No. 2016-CFPB-0022 (Sept. 26, 2016).

¹¹ Complaint at 13-14, *CFPB v. RD Legal Funding, LLC*, No. 1:17-cv-00890 (S.D.N.Y. Feb. 7, 2017).

¹² As discussed below, the CFPB also alleged that this conduct violated Prongs 2(A) and 2(B).

¹³ *CFPB v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 778 (S.D.N.Y. 2018). The district court did not clarify whether its analysis was under Prong 1, Prong 2(A), or Prong 2(B).

¹⁴ Complaint at 32, *CFPB v. Nexus Services, Inc.*, No. 5:21-cv-00016 (W.D. Va. Feb. 22, 2021).

¹⁵ See Amended Complaint at 26-27, *CFPB v. CashCall, Inc.*, No. 1:13-cv-13167 (D. Mass. March 21, 2014); Consent Order at 10-12, *In the Matter of Colfax Capital Corp. (f/k/a Rome Finance Co., Inc.)*, File No. 2014-CFPB-0009 (July 29, 2014); Amended Complaint at 51-52, *CFPB v. NDG Fin. Corp.*, No. 1:15-cv-05211 (S.D.N.Y. Dec. 11, 2015). As we discussed in 2016, all three of these cases relied on Prong 2(A), and the case against NDG also relied on Prong 1, for reasons that are not clear.

¹⁶ Complaint at 25, *CFPB v. Golden Valley Lending, Inc.*, No. 1:17-cv-03155 (N.D. Ill. Apr. 27, 2017); Amended Complaint at 40-41, *CFPB v. Think Finance, LLC*, No. 4:17-cv-00127 (D. Mont. March 28, 2018).

¹⁷ Consent Order at 5-6, *In the Matter of Zero Parallel, LLC*, File No. 2017-CFPB-0017 (Sep. 6, 2017).

¹⁸ *CFPB v. NDG Fin. Corp.*, 2016 WL 7188792, at *15 (S.D.N.Y. 2016). A court in one of the other early state-law-voidness cases upheld the CFPB's claims under a deception theory and therefore did not address the agency's abusiveness claim. *CFPB v. CashCall, Inc.*, 2016 WL 4820635, at *10-11 (N.D. Cal. Aug. 31, 2016).

¹⁹ *Pennsylvania v. Think Finance, Inc.*, 2016 WL 183289, at *26 (E.D. Pa. Jan. 14, 2016); *Pennsylvania v. Think Finance, Inc.*, 2019 WL 6217376, at *7 (E.D. Pa. Nov. 20, 2019). The Dodd-Frank Act authorizes state attorneys general and state regulators to enforce the statute's prohibition on abusive practices against certain parties. 12 U.S.C. § 5552.

²⁰ Complaint at 13-14, *CFPB v. RD Legal Funding, LLC*, No. 1:17-cv-00890 (S.D.N.Y. Feb. 7, 2017). The CFPB's complaint is not a model of clarity. While the body of the complaint states that the alleged conduct "takes unreasonable advantage of consumers lack of understanding of material costs or conditions of [defendants'] offers of credit," the complaint only cites to section 5531(d)(1) (Prong 1) and 5531(d)(2)(B) (Prong 2(B)). Based on the text of the complaint, it appears that the CFPB intended to assert a Prong 2(A) claim as well.

²¹ First Amended Complaint at 12-15, *CFPB v. Freedom Debt Relief, LLC*, No. 3:17-cv-06484 (N.D. Cal. June 1, 2018).

²² Amended Complaint at 15-16, *CFPB v. Certified Forensic Loan Auditors, LLC*, No. 2:19-cv-07722 (N.D. Cal. Nov. 13, 2019).

²³ Amended Complaint at 13-15, *CFPB v. Access Funding, LLC*, No. 1:16-cv-03759 (D. Md. Dec. 13, 2017).

²⁴ *Id.* at 16-17. The district court recently denied cross-motions for summary judgment on the Bureau's abusiveness claim against the company, finding that "there remain disputes of material fact as to whether consumers misunderstood the implications of their advances" and that, "given the conflicting evidence, whether the Access Funding Defendants and Borkowski took advantage of the consumers' lack of understanding is a matter upon which reasonable minds may differ." *CFPB v. Access Funding, LLC*, 2021 WL 2915118, at *26-*28 (D. Md. July 12, 2021).

²⁵ Consent Order at 8-10, *In the Matter of Cash Express, LLC*, File No. 2018-BCFP-0007 (Oct. 24, 2018).

²⁶ *CFPB v. Nationwide Biweekly Administration, Inc.*, 2017 WL 3948396, at *10 n.24 (N.D. Cal. Sept. 8, 2017). For further discussion of this case, see our contemporaneous analysis at https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2017/10/you-cant-always-get-what-you-want-recent-district/files/update_you_cant_always_get_what_you_want-100417_v3/fileattachment/update_you_cant_always_get_what_you_want-100417_v3.pdf

²⁷ Complaint at 13-14, *CFPB v. RD Legal Funding, LLC*, No. 1:17-cv-00890 (S.D.N.Y. Feb. 7, 2017). As noted above, the district court held that the CFPB had pled sufficient allegations of abusiveness to survive a motion to dismiss but did not specify which prong of abusiveness it was analyzing in reaching that conclusion.

²⁸ Complaint at 19, *CFPB v. All American Check Cash, Inc.*, No. 3:16-cv-00356 (S.D. Miss. May 11, 2016).

²⁹ Complaint at 26-29, *CFPB v. Aequitas Capital Management, Inc.*, No. 3:17-cv-01278 (D. Or. Aug. 17, 2017).

³⁰ Complaint at 50-51, *CFPB v. Navient Corporation*, No. 3:17-cv-00101 (M.D. Pa. January 18, 2017).

³¹ Pennsylvania separately brought a lawsuit against the same loan servicer alleging a similar abusiveness claim under Prong 2(C) based in part on the company's representations to students that the company would "help" borrowers make the "right decision for [their] situation." Complaint at 50-52, *Commonwealth of Pa. v. Navient Corp.*, No. 3:17-cv-01814-RDM (M.D. Pa. Oct. 5, 2017). The district court in that action held that the state had properly pled a Prong 2(C) claim sufficient to survive a motion to dismiss because the state had alleged that the company "actively 'steered' borrowers into forbearance and misrepresented the suitability of loan repayment options *after representing to borrowers that it would help them select the lowest cost repayment plan.*" *Pa. v. Navient Corp.*, 354 F. Supp. 3d 529, 562-63 (M.D. Pa. 2018) (emphasis added).

³² Amended Complaint at 13-15, *CFPB v. Access Funding, LLC*, No. 1:16-cv-03759 (D. Md. Dec. 13, 2017).

³³ Complaint at 9-10, *CFPB v. SettleIT, Inc.*, No. 8:21-cv-00674 (C.D. Cal. April 13, 2021). In another example of a garbled pleading, the CFPB alleged that a practice is abusive if it takes unreasonable advantage of "[1] the reasonable reliance by a consumer on the [covered] person to [2] protect the consumer's interests in selecting or using a consumer-financial product or service." As we've discussed elsewhere, "the CFPB has taken part of Prong 2(C) ('the reasonable reliance by the consumer') and part of Prong 2(B) ('protect[ing] the interests of the consumer in selecting or using a consumer financial product or service') and mashed them together to articulate an abusiveness standard that does not actually exist." Ori Lev, *Abusiveness: Muddying the Waters* (April 14, 2021) (available at <https://www.mayerbrown.com/en/perspectives-events/blogs/2021/04/abusiveness-muddying-the-waters>). As the Complaint cites to Prong 2(C), we presume that is the claim that the CFPB intended to assert.

³⁴ Consent Order at 5-8, *In the Matter of Wells Fargo Bank, N.A.*, File No. 2016-CFPB-0015 (Sept. 8, 2016); Amended Complaint at 26-34, *CFPB v. Fifth Third Bank, N.A.*, No. 1:21-cv-262 (S.D. Ohio June 16, 2021).

³⁵ As discussed below, the CFPB also found this conduct—as well as the unauthorized enrollment of consumers in online banking services and the unauthorized issuance of debit cards to consumers—to violate Prong 2(B).

³⁶ As in the first case, the CFPB also alleged that all of the conduct that it believed violated Prong 1 also violated Prong 2(B).

³⁷ As discussed below, the CFPB also alleged that the sales practices as a whole violated Prongs 2(B) and 2(C), in addition to Prong 2(A).

³⁸ The heading of the CFPB's claim in this regard is captioned "Failure to Identify and Remediate Affected Consumers" (emphasis added), but the text of the actual legal claim only speaks of a failure to identify such consumers (with the exception of the language asserting a violation of Prong 2(C)). The CFPB has moved for judgment on the pleadings on this claim, describing it as "address[ing] [the bank's] failures to timely identify and remediate" (emphasis added) certain accounts, "despite possessing the information to do so."

³⁹ The CFPB also asserted that this alleged conduct violated Prongs 2(B) and 2(C), as discussed below.

⁴⁰ We referred to contested cases as "litigated" in our prior analysis, but as the reference is to cases that were not settled at the time they were brought, "contested" is a more accurate description.

⁴¹ See *supra* note [3].

⁴² Complaint at 13-14, *CFPB v. RD Legal Funding, LLC*, No. 1:17-cv-00890 (S.D.N.Y. Feb. 7, 2017) ("Through this conduct, RD undermines consumers' understanding of the offer of credit, and in particular prevents consumers from understanding the terms, costs, and conditions of RD's offer of credit. RD's conduct also prevents consumers from meaningfully evaluating the cost of RD's offer of credit, from comparing the cost of the offer of credit to other alternatives that may be available to the consumers, and from determining whether RD's offers of credit are in their interest. Because consumers are misled concerning the validity of significant terms of the transactions and the nature of the transactions, they are not able to protect their interests in entering into them.").

⁴³ Amended Complaint at 13-15, *CFPB v. Access Funding, LLC*, No. 1:16-cv-03759 (D. Md. Dec. 13, 2017).

⁴⁴ Complaint at 18-19, *CFPB v. All American Check Cash, Inc.*, No. 3:16-cv-00356 (D. Miss. May 11, 2016). The two sales practices cases also involved allegations that a particular course of conduct violated multiple prongs of abusiveness, but it is difficult to discern a pattern from these *sui generis* cases.

⁴⁵ On January 24, 2020, the CFPB announced a Statement of Policy Regarding Prohibition on Abusive Acts or Practices ("Policy Statement"), 85 Fed. Reg. 6733 (Feb. 6, 2020). The Policy Statement provided, *inter alia*, that "the Bureau intends generally to avoid alleging an abusiveness violation that relies on all or nearly all the same facts as an unfairness or deception violation." *Id.* at 6736. That is, the Bureau intended to plead "stand-alone" abusiveness claims. The Policy Statement was rescinded on March 11, 2021. See <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-rescinds-abusiveness-policy-statement-to-better-protect-consumers/>. Only one of the seven "stand-alone" claims was brought while the Policy Statement was in effect (and even that claim was brought just a few weeks before the Policy Statement's rescission and after the change in Administration in January 2021), so the Policy Statement does not explain why these were brought as stand-alone claims. For more on rescission of the Policy Statement, see "CFPB Rescinds Policy Statement on Abusiveness," <https://www.mayerbrown.com/en/perspectives-events/blogs/2021/03/cfpb-rescinds-policy-statement-on-abusiveness>.

⁴⁶ Consent Order at 3-7, *In the Matter of TMX Finance LLC*, File No. 2016-CFPB-0022 (Sept. 26, 2016).

⁴⁷ Complaint at 32, *CFPB v. Nexus Services, Inc.*, No. 5:21-cv-00016 (W.D. Va. Feb. 22, 2021).

⁴⁸ Consent Order at 5-6, *In the Matter of Zero Parallel, LLC*, File No. 2017-CFPB-0017 (Sep. 6, 2017).

⁴⁹ Amended Complaint at 16-17, *CFPB v. Access Funding, LLC*, No. 1:16-cv-03759 (D. Md. Dec. 13, 2017).

⁵⁰ Consent Order at 8-10, *In the Matter of Cash Express, LLC*, File No. 2018-BCFP-0007 (Oct. 24, 2018).

⁵¹ Complaint at 26-29, *CFPB v. Aequitas Capital Management, Inc.*, No. 3:17-cv-01278 (D. Or. Aug. 17, 2017).

⁵² Complaint at 9-10, *CFPB v. SettleIT, Inc.*, No. 8:21-cv-00674 (C.D. Cal. April 13, 2021).

⁵³ New CFPB leadership may well seek to re-instate the ability-to-repay provisions, but whether they will rely on the same interpretations of abusiveness that supported the 2017 rule is not clear.

⁵⁴ 12 C.F.R. 1041.7.

⁵⁵ 82 Fed. Reg. 54,743.

⁵⁶ *Id.*

⁵⁷ *Id.* As discussed above, our 2016 analysis similarly analogized between the reasonable avoidability aspect of the unfairness standard and the inability of a consumer to protect her interest under Prong 2(B).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 54,744.

⁶² CFPB, *Supervisory Highlights*, Issue 11, June 2016, at 10, available at https://files.consumerfinance.gov/f/documents/Mortgage_Servicing_Supervisory_Highlights_11_Final_web.pdf.

⁶³ CFPB, *Supervisory Highlights*, Issue 18, Winter 2019, at 16, available at https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-18_032019.pdf.

⁶⁴ CFPB, *Supervisory Highlights*, Issue 19, Summer 2019, at 3-4, available at https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-19_092019.pdf. GAP covers the difference, or "gap," between the amount the consumer owes on the auto loan and the amount received from the auto insurer in the event a vehicle is stolen, damaged or totaled. This finding is consistent with other abusiveness claims in which suitability appears to have played a role.

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