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CONSUMER PROTECTION

This is the second in a series of articles on the Consumer Financial Protection Bureau's initiatives to enforce the ''abusive'' standard established by the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act.

The CFPB's Enforcement of the Prohibition on Abusive Acts and Practices

BY ERIC MOGILNICKI AND EAMONN K. MORAN

In the Dodd-Frank Act, Congress added a prohibition on ''abusive'' conduct to the long-established ban on unfair and deceptive acts and practices (UDAAP) in consumer financial transactions. In our first article, we articulated an approach to interpreting this new standard that is grounded in its text and legislative history, Consumer Financial Protection Bureau Director Richard Cordray's testimony on the subject and kindred legal doctrines. This article reviews the Bureau's enforcement cases to see if the Bureau's use (or non-use) of the ''abusive'' standard provides further clarity. Director Cordray had suggested that the Bureau's early cases would be illuminating, explaining that ''abusive'' has a ''core'' and a ''gray area,'' and that ''there is enough misconduct that occurs in the core areas that we would be well-served to focus on that at the outset, in the first period of the Bureau.''[1]

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Unfortunately, the early ''abusive'' cases seem to draw lines, only to have those lines blurred when the ''abusive'' cases are compared to other enforcement matters involving similar conduct but no ''abusive'' claim. To be sure, each case is different, and each complaint or consent order reflects a whole host of considerations beyond the legal doctrine involved. However, as long as the Bureau is going to continue to rely upon enforcement as its principal public tool for illuminating the new ''abusive'' standard, it should make every effort to make its cases clear and consistent.

The Debt Assistance Cases

The Bureau's cases against debt assistance companies demonstrate the difficulty of distilling the ''abusive'' standard from its enforcement actions. In 2013, the Bureau brought two similar cases against debt assistance companies, but included ''abusive'' charges in only one of them. The same pattern took hold in two cases involving college loan assistance in late 2014.

American Debt Solutions (Subsections (d)(2)(A) and (C))

The Bureau's first ''abusive'' case was a Complaint and Stipulated Final Judgment and Order filed in

[1] House Financial Services Committee hearing of March 29, 2012, at 27.

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Florida federal district court on May 30, 2013, against American Debt Solutions, Inc. (''ADSS''). In *ADSS*, a Bureau investigation found that ADSS and its owner routinely charged consumers illegal upfront fees for debt relief services that rarely, if ever, materialized. The facts also provided the Bureau with straightforward claims of deception, since ADSS allegedly made multiple misrepresentations about whether and how quickly it could help consumers.[2]

However, the facts alleged by the Bureau in *ADSS* provided a strong first case for making an ''abusive claim'' – one that met Director Cordray's criteria for early abusiveness cases where the defendants ''know what they are doing is probably wrong.''[3] ADSS did not merely offer a financial product or service to consumers. ADSS explicitly marketed itself as providing a service that would benefit consumers with debt problems,[4]even though it allegedly knew – based on detailed worksheets consumers completed prior to their enrollment[5]– that these same consumers were highly unlikely to benefit from those services.

The Bureau seized upon this opportunity to allege ''abusive'' conduct. Although the Complaint does not provide citations to the precise portions of Section 5536 involved, it tracks two prongs of the statutory ''abusive'' standard. ADSS's conduct was abusive because it allegedly ''took unreasonable advantage of consumers' lack of understanding of how long it will take ADSS to settle their debts,'' (Complaint ¶ 61, tracking 12 USC § 5531(d)(2)(A))[6] and because it took advantage of consumers who could ''reasonably rely on ADSS to act in their interest.'' (Complaint ¶¶ 61, 62, tracking of § 5531(d)(2)(C)).[7]

For financial institutions seeking to avoid engaging in ''abusive'' conduct, *ADSS* suggests four doctrinal touchstones. *First*, an entity is particularly at risk of engaging in ''abusive'' behavior under Section 5531(d)(2)(A) if it has and hides important facts from the customer. In *ADSS*, the entity – but not consumers – knew that the consumers were ''highly unlikely'' to complete its debt relief program before their money ran out. Complaint at ¶ 58. The Bureau may believe that such a situation eliminates any need to demonstrate ''a consumer's lack of understanding,'' Complaint at ¶ 61, on an individual basis.

Second, an entity is at risk if its product or service is highly unlikely to be of use to the consumer. While the Bureau's Complaint does not draw a bright line for how unlikely a benefit must be for abusiveness to occur, it provides some landmarks. *See* Complaint at ¶ 23 (89 percent of ADSS's customers did not receive benefits); ¶ 25 (ADSS ''only rarely'' succeeded) and ¶ 26 (relief ''nearly impossible'' for debts under $700).

Third, an entity is particularly at risk of engaging in ''abusive'' behavior under Section 5531(d)(2)(C) if its marketing suggests that its relationship with the entity and the consumer is not at arm's length. ADSS promised to help consumers pay off their debts, enrolled them in a program and directed their activities.[8] These facts appear to offer the basis on which the Bureau concluded that it was reasonable for ADSS's customers to rely upon ADSS to act in their interests.[9]

Fourth, the Bureau appears to signal that it will not automatically heap a claim of abusiveness on top of a claim of deception. Here and in other cases alleging deception, it would be easy for the Bureau to supplement its deception claim with an abusive claim under (d)(1), as the deceptive conduct alleged almost certainly ''materially interfere[d] with the ability of a consumer to understand a term or condition of a financial product or service.'' The omission of a (d)(1) claim in *ADSS* may have been inadvertent; but for those seeking to understand the Bureau's thinking, this detail seems to signal that the Bureau will not cite a violation of (d)(1) where a deceptive claim is made for the same conduct. To date, the Bureau has never alleged a violation of (d)(1).[10]

Morgan Drexen (no abusive claim)

After suggesting one approach to ''abusive'' in ADSS, the Bureau appeared to abandon that approach a few months later in its Aug. 20, 2013, Complaint against Morgan Drexen, Inc. Like ADSS, Morgan Drexen promised to help consumers renegotiate their debts, Complaint at ¶ 17, but helped ''[o]nly a tiny fraction'' of those who enrolled. Complaint at ¶¶ 59, 60. However, the Bureau did not invoke the ''abusive'' prong of the UDAAP statute, relying instead on two claims of ''deception.'' Complaint at ¶¶ 91-97 (Counts III and IV). Confusing matters further, the Complaint actually calls Morgan Drexen's conduct ''abusive.''[11] However, the Bureau confines its claim to one of ''abusive acts or practices in telemarketing'' under the Telemarketing Sales Rule Complaint at ¶¶ 74-79 (Counts I and II).

College Education Services (Subsection (d)(2)(C))

The Bureau returned to these issues in a December 2014 complaint and proposed consent order against student debt relief company College Education Services

[2] ADSS Complaint ¶¶ 38-54.

[3] House Financial Services Committee Hearing, March 29, 2012, at 27.

[4] *See* ADSS Complaint at ¶¶ 22-24.

[5] Final Judgment at ¶ 13 ''ADSS knowingly enrolled in its debt-relief programs consumers whose financial conditions make it highly unlikely that they can complete the program, and ADSS has nonetheless collected fees from consumers who had inadequate income to complete their debt-settlement program.''

[6] The ADSS complaint alleges that ''[t]his practice takes unreasonable advantage of consumers' lack of understanding of how long it will take ADSS to settle their debts and therefore how much money they will spend before realizing any benefits from enrolling in ADSS's debt-relief program.'' It is notable that the Bureau does not allege directly that ADSS's customers did not understand these facts, as Director Cordray had testified that such an allegation would have to be established ''consumer by consumer.'' *See supra* at ___. The Bureau may have reasoned that such a requirement did not apply here, where the lack of understanding applied to a fact known only to ADSS – that ADSS will not negotiate debts with creditors during the first three to six months of a customer's enrollment. Complaint ¶ 60.

[7] The latter of these two claims is not reflected in the Stipulated Order, which does not include a finding that consumers reasonably relied upon ADSS.

[8] ADSS Complaint at ¶¶ 8-16.

[9] ADSS Complaint at ¶ 62.

[10] *See* discussion *supra* at ___ (the relationship between (d)(1) and deception); discussion *infra at* __ (cases where deception is alleged without a (d)(a) allegation).

[11] *Consumer Financial Protection Bureau v. Morgan Drexen, Inc.*, Complaint at ¶¶ 76, 79.

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(''CES''). CES ''targeted financially distressed consumers by using sophisticated and expensive Internet-marketing campaigns aimed at attracting consumers whose student loans were in default or garnishment.'' Complaint ¶ 56. For these vulnerable consumers, ''CES created the illusion of expertise and individualized advice to induce consumers to reasonably rely on the company to act in their interests in seeking and selecting student loan debt-relief plans.'' Complaint ¶ 57.

As it did in *ADSS*, the Bureau found that the failure to provide the promised services was ''abusive.'' After it promised to provide assistance — and accepted fees for doing so — CES allegedly did little to help consumers. For example, CES accepted fees for enrolling consumers in repayment and forgiveness plans for which they were not eligible. Complaint ¶ 60. In doing so, CES engaged in an act or practice that ''takes unreasonable advantage of . . . the reasonable reliance by the consumer on a covered person to act in the interests of the consumer'' in violation of 12 U.S.C. § 5531(d)(2)(C).

Student Loan Processing.US (no abusive claim)

On the same day that the Bureau announced the *CES* consent order, it also brought a complaint against Student Loan Processing.US, the business name of Irvine Web Works, Inc. The Bureau accuses the company and its owner of marketing services to assist borrowers applying for Department of Education federal student loan repayment programs while falsely representing an affiliation with the U.S. Department of Education; charging illegal advance fees; and deceiving borrowers about the costs and terms of its services.

The allegations in *CES* and *Student Loan Processing.US* are quite similar: both allegedly took advance fees and engaged in ''abusive telemarketing acts or practices'' under the Telemarketing Sales Rule. *See* CES Complaint, Count I; Student Loan Processing.US, Count I. Indeed, the CFPB lumps the two cases together in a single press release, with the explanation that the Bureau had taken action ''to put an end to two student 'debt relief' scams that illegally tricked borrowers into paying upfront fees for federal loan benefits.''[12] However, CES is charged with ''abusive'' conduct under the Dodd-Frank Act, and Student Loan Processing.US is not. The Bureau does not explain this decision, which only increases the difficulty in identifying what the Bureau considers ''abusive.''

The Payday Lending Cases

As in the debt settlement service cases, the Bureau's payday lending cases provide conflicting guidance on what the Bureau considers ''abusive.''

CashCall (Subsection (d)(2)(A))

The Bureau's Dec. 16, 2013, Complaint against CashCall, Inc. centers on CashCall's efforts to collect on loans made by Western Sky Financial, LLC (''Western Sky''). The Bureau does not claim that the loans themselves were abusive, or that collectors engaged in any of the tactics that the Bureau has indicated may violate UDAAP standards.[13] Instead, the Bureau's case is premised on the assertion that Western Sky is incorrect in asserting that it is a tribal lender.[14]

From that premise – which is hotly contested by CashCall[15]– the Bureau asserts that Western Sky is bound by state licensing and usury laws. However, the Bureau does not seek to enforce those state laws directly. Instead, the Bureau claims that various state laws make the Western Sky loans invalid, and that CashCall engaged in unfair and deceptive practices by seeking to collect on invalid loans.[16]

The Bureau's ''abusive'' claim requires further bootstrapping. The Bureau claims that CashCall's collection efforts are ''abusive'' because CashCall took unreasonable advantage of ''a lack of understanding on the part of the consumer,'' who did not know that state usury and licensing laws made the consumers' loans unenforceable. Complaint ¶ 61, citing (d)(2)(A). No evidence is cited: the Bureau's Complaint simply asserts that ''[c]onsumers generally do not know or understand the impact'' of state usury and licensing laws in the validity of their loans. Complaint ¶ 62.

While the Complaint in *CashCall*, like the Consent Order in *ADSS*, relies upon the ''lack of understanding'' prong of the abusive standard in Subsection (d)(2)(A), it lacks the same limiting principles. In *ADSS*, the Bureau alleged that the defendant knew that the debtors would not benefit from its debt-relief program. *ADSS* Consent Order at ¶ 58. However, the Bureau does not allege that CashCall knew that the relevant loans were void. Indeed, CashCall continues to argue that the loans were not void. In *ADSS*, the Bureau claimed that consumers had no way of knowing that ADSS would not help them. However, the Bureau does not (and could not) allege that consumers had no way of knowing that CashCall loans violated state law.

Thus, if the *CashCall* Complaint reflects the Bureau's current view of the ''lack of understanding'' prong of the abusiveness standard, it is a very broad one. Under

[12] *CFPB Takes Action to End Student ''Debt Relief'' Scams*, http://www.consumerfinance.gov/newsroom/cfpb-takes-action-to-end-student-debt-relief-scams/ (Dec. 11, 2014).

[13] Indeed, while the Complaint refers to ''the full array of collection activity,'' Complaint ¶ 35, it appears to rely upon events as straightforward as the transmission of billing statements that identified the dates and amounts of automated debits made pursuant to the loan documents. *See* Complaint at ¶¶ 35, a, b.

[14] Complaint at ¶ 18.

[15] CashCall's counsel – former Troubled Asset Relief Program (TARP) Special Inspector General Neil Barofsky – has called the Bureau's lawsuit an ''affront to Indian tribes' sovereign right to regulate their own economic affairs.'' *Federal Consumer Agency Sues Las Vegas Collection Firm, Two Online Lenders*, Las Vegas Review-Journal, Dec. 16, 2013. http://www.reviewjournal.com/business/federal-consumer-agency-sues-las-vegas-collection-firm-two-online-lenders. Barofsky has also argued that ''[t]he CFPB's charges today against CashCall fly in the face of Congress' clear intent when it plainly and simply declared out of bounds any effort by the CFPB to impose rate caps.'' *Id.* Pursuant to Dodd-Frank Section 1027(o), the Bureau has no authority to ''establish a usury limit applicable to an extension of credit offered or made by a covered person, unless explicitly authorized by law.'' 12 U.S.C. § 5517(o).

[16] CashCall's collection activities were on behalf of WS Funding LLC, which purchases the loans from Western Sky. The Bureau's Complaint acknowledges that some of these state laws do not explicitly extend to a purchaser or assignee of the loan, but states that such a purchaser stands in the shoes of the lender. Complaint at ¶ 16.

the logic of *CashCall*, once the Bureau has alleged a violation of law by a covered person, it may assert that the consumer lacked understanding of the law, and that the covered person took ''unreasonable advantage'' of that lack of understanding. Under this view, abusive conduct can be as benign as a billing statement, and wholly unintentional.

The relief sought in *CashCall* is also notable, as it includes repayment ''of all interest, fees and principal collected from consumers.'' *CashCall* Demand for Relief 4. The demand that CashCall remit repayments of the principal loaned to all consumers is a departure from the logic of unconscionability, which does not require a windfall to the injured party. *See supra* at __.

It also exceeds the relief that resolved state Attorney General actions against CashCall. For example, the Bureau's December 2013 Complaint asserts that New York state law makes the loans void. Complaint at ¶¶ 14e, 24. However, one month later, New York Attorney General Eric Schneiderman reached a settlement with Western Sky that requires the return of interest payments above the cap set by New York law, but did not declare the loans themselves void, nor prohibit efforts to collect on the principal of the loans.[17]

Cash America (no abusive claim)

The Bureau's expansive approach to ''abusive'' in *CashCall* is made more extraordinary by its contrast with the Bureau's approach, a month earlier, in its settlement with Cash America, Inc. The CFPB alleged that Cash America charged servicemembers and dependents interest rates above the 36 percent permitted by federal law. Cash America Consent Order at ¶¶ 32-36, citing the Military Lending Act, 10 U.S.C. § 987. In addition, Cash America allegedly had its legal assistants:

- manually stamp the Collections Department manager's signature on balance-due and military-status affidavits;
- manually stamp or sign the in-house collections attorney's signature on state court pleadings without the attorney's prior review; and
- notarize documents without following the procedures required by applicable notary law.

Cash America Consent Order at ¶ 22. These false signatures ''could potentially cause consumers to pay incorrect debts or legal costs and court fees to defend against invalid or excessive claims,'' Cash America Consent Order at ¶ 27, because they ''were likely to mislead consumers . . . into believing that the affidavits were reviewed, executed, and notarized in compliance with applicable law.'' *Id.* at ¶ 30.

In short, the CFPB alleged that both Cash America and CashCall made loans at interest rates that exceeded applicable law. The CFPB also alleged that both Cash America and CashCall sought to fool consumers into paying their debts. Accordingly, it is difficult to understand why the Bureau chose to characterize CashCall – and not Cash America – as ''abusive.''

One potential explanation – that Cash America reaped the benefits of settling with the Bureau – is unpersuasive here. To be sure, Cash America settled, while CashCall is litigating. But in the debt assistance cases, the situation was reversed, with the Bureau alleging that the settling company was ''abusive,'' and making no such claim against the litigating company. *See supra* at __-__. Moreover, Cash America seems an unlikely candidate to benefit from enforcement discretion, as the Bureau alleged that Cash America engaged in misconduct during a Bureau exam by shredding documents and directing call center employees ''to de-emphasize the marketing and sales aspect of the call center employee's duties.'' Consent Order at ¶¶ 13-14. Indeed, Director Cordray said that the Bureau's action was ''sending a clear message today to all companies under our watch that impeding a CFPB exam . . . is unacceptable.''[18] In sum, a comparison of the CashCall and Cash America cases strongly suggests that the Bureau was not focused on the need to provide guidance on the new ''abusive'' standard as it decided how to proceed in these two similar matters.

Ace Cash Express (Subsection (d)(2)(B))

This failure to define ''abusive'' in the payday context continued with the Bureau's July 10, 2014, Consent Order against Ace Cash Express. In that order, the Bureau alleges that some ACE debt collectors engaged in a number of improper practices, including excessive calls, calls to third parties and misrepresentations regarding the consequences of nonpayment. ACE Consent Order at ¶¶ 12-14. However, the Bureau did not claim that any of these practices were themselves ''abusive.''

In short, the CFPB alleged that both Cash America and CashCall made loans at interest rates that exceeded applicable law. The CFPB also alleged that both Cash America and CashCall sought to fool consumers into paying their debts. Accordingly, it is difficult to understand why the Bureau chose to characterize CashCall – and not Cash America – as ''abusive.''

Instead, the Bureau's ''abusive'' claim is that some ACE collectors using these practices ''created and leveraged an artificial sense of urgency to induce delinquent borrowers with a demonstrated inability to repay their existing loan to take out a new ACE loan, with ac-

[17] http://www.ag.ny.gov/press-release/ag-schneiderman-announces-settlement-western-sky-financial-and-cashcall-illegal-loans. Connecticut reached a similar settlement with Western Sky and CashCall, which required the repayment of excess interest, but not principal nor permissible interest http://op.bna.com/bar.nsf/r?Open=jtin-9tcn88 .

[18] Consumer Financial Protection Bureau Takes Action Against Payday Lender for Robo-Signing, Nov. 20, 2013, *available at* http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-takes-action-against-payday-lender-for-robo-signing/.

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companying fees.'' Consent Order ¶ 29. Doing so ''took unreasonable advantage of the inability of consumers to protect their own interests in selecting or using a consumer financial product or service,'' and thereby violated subsection (a)(1)(B). Consent Order ¶ 30. While unstated, the relevant ''consumer financial product'' must have been a new loan with ACE, as collection efforts always postdate the original loan.

At first blush, the ACE Consent Order suggests a bright line test: unfair and deceptive collection acts or practices become ''abusive'' if used to induce a consumer into a new transaction. However, this bright line fades under closer analysis, and it appears that little separates ACE from any other debt collection case.

First, the Bureau does not provide any indication of how often the offending debt collection practices took place. Without admitting or denying the Bureau's allegations, ACE disclosed that an independent review by Deloitte Financial Advisory Services LLP found that inappropriate calls were limited to about 4 percent of the relevant calls.[19] Not only is this a low error rate, but if relatively few customers received inappropriate calls, fewer still could have been ''induced'' by such calls to take out new loans. Indeed, ACE also reported that more than 99 percent of borrowers with a loan in collections for more than 90 days did not take out a new loan from ACE within two weeks of paying off an existing loan.[20] Such data suggest that it takes very little to transform unfair and deceptive collection practices into ''abusive'' conduct. At the very least, these figures suggest a sea change from *ADDS*, where the Bureau's abusive claim relied on the fact that the vast majority of consumers were affected by the practices. *See supra* at ___.

Second, the theory that the collection calls forced consumers to take out new loans relies upon a summary conclusion that ''a demonstrated inability to repay,'' Consent Order at ¶ 29, left these consumers with no other option. However, the Bureau's factual findings establish only that these consumers were not paying. Because all debt collection is based on the premise that delinquent borrowers are able to make payments, the theory behind the ACE Consent Order would seem to support an allegation of ''abuse'' any time a borrower rolls over a loan.

Third, the Bureau does not explain why the pressure to pay prevented the borrower from selecting a new loan from a different lender to pay off the ACE loan. ACE ''does not permit customers to take out a new loan while there is an outstanding balance on their existing loan.'' Consent Order at ¶ 32. Accordingly, it appears that each borrower was free of any obligation to ACE at the time he or she took out a new loan. This fact blurs any distinction between the allegations in ACE and allegations that could be made against other types of recurring transactions.

Finally, the relief in the ACE Consent Order included restitution to ''all individuals who were subject to collections . . . and who made a payment.'' Consent Order at ¶ 3j. This language is broad enough to require repayment to consumers who never did ''take out a new ACE loan, with accompanying fees.'' ACE Consent Order ¶ 29. Thus, the Bureau's use of the ''abusive'' standard to require broad restitution reflects not only a concern for those consumers who took out new loans, but for delinquent borrowers who received inappropriate calls.

Seen from these perspectives, it becomes very difficult to discern what facts will distinguish an ''abusive'' debt collection case from one that alleges only unfair and deceptive practices.

The Hydra Group (no abusive claim)

The CFPB's position on what constitutes ''abusive'' conduct in the CashCall and ACE Cash Express cases was made even more puzzling by the absence of such a claim in the CFPB's September 2014 enforcement action against an online payday lender, the Hydra Group. The lawsuit alleges that the Hydra Group bought information from online lead generators, accessed those consumers' checking accounts, deposited payday loans into the accounts, and then made regular, unauthorized withdrawals from those accounts. Complaint ¶¶ 31-34. For many customers, these activities were wholly unauthorized. Complaint ¶¶ 32, 37. When caught, the Hydra Group falsified loan documents. Complaint ¶¶ 34, 43-45. When blocked from accessing the accounts, the Hydra Group sold the bogus debt to third-party debt collectors, who then pursued repayment of these unauthorized loans. ¶¶ 48-49.

In sum, it is difficult to discern any pattern in the Bureau's decisions on whether to include an ''abusive'' claim in its payday lending cases. This may reflect the vagaries of each case, but it certainly belies the notion that enforcement alone will foster a full understanding of how the Bureau views the ''abusive'' standard.

These allegations provided ample basis for a claim of abusive conduct. Hydra took ''unreasonable advantage'' of ''a lack of understanding on the part of the consumer,'' 12 U.S.C. § 5531(d)(1), as many consumers did not know the loan had been made, and others received only information that was late and/or contradictory. Complaint ¶¶ 39, 50-61. Similarly, Hydra's alleged conduct clearly took advantage of ''the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service,'' 12 U.S.C. § 5531(d)(1), when it embroiled the consumers in sham transactions.

Hydra's unwitting customers were far less able to avoid doing business with Hydra than the customers in ACE who, the Bureau alleged were ''induced'' to take out new loans. Furthermore, unlike the CashCall and ACE cases, the facts alleged in Hydra would have allowed the Bureau to lump together large groups of con-

[19] *'Appalling' Predatory Lending Practices Cost Ace Cash Express $10M in Settlement with Feds*, Dallas Morning News, July 11, 2014. http://www.dallasnews.com/business/headlines/20140710-ace-cash-express-agrees-to-pay-10-million-to-settle-allegations.ece

[20] *CFPB Reaches $10M Settlement with Texas Payday Lender*, July 10, 2014. http://www.law360.com/articles/556236/cfpb-reaches-10m-settlement-with-texas-payday-lender.

sumers without any concern that some of them had the requisite knowledge or ability to decide for themselves whether to enter into a loan with Hydra.

Finally, Director Cordray describes the Bureau's allegations in a way that makes clear they meet his test that the defendants ''know what they are doing is wrong.''[21]

As he explained, ''[t]he Hydra Group has been running a brazen and illegal cash-grab scam, taking money from consumers' bank accounts without their consent,'' and he went on to note that this is ''grave misconduct'' and that ''the utter disregard for the law shown by the Hydra Group . . . is shocking.''[22]

In sum, it is difficult to discern any pattern in the Bureau's decisions on whether to include an ''abusive'' claim in its payday lending cases. This may reflect the vagaries of each case, but it certainly belies the notion that enforcement alone will foster a full understanding of how the Bureau views the ''abusive'' standard.

The For-Profit College Cases

The Bureau has brought two recent cases against for-profit colleges that allegedly fooled their students into taking out loans that the students could not pay. The factual allegations in the two cases parallel each other, but here again similar cases did not generate the same approach to whether the conduct was ''abusive.''

ITT Educational Services (Subsections (d)(2)(B) and (C))

The Bureau's complaint against ITT Educational Services (''ITT''), filed in federal court in Indiana in February 2014, marked its first public enforcement action against a company in the for-profit college industry. In short, the CFPB accused ITT of using high-pressure tactics to push students into expensive private student loans on which they were likely to default. The complaint alleges unfair acts or practices, abusive acts or practices and violation of the Truth in Lending Act.

The complaint traces ITT's relationship to students through three phases. *First*, ITT recruits students by persuading them to enroll and to take out the loans necessary to pay tuition. Complaint at ¶¶ 22-28. This persuasion involved claims that ITT ''would work in the interests of its students to better their lives,'' Complaint at ¶ 29, and misleading claims about placement rates of ITT graduates. Complaint at ¶¶ 31-49. *Second*, ITT personnel were actively involved in completing students' applications for financial aid, Complaint at ¶¶ 63-87, and encouraged students to believe that ITT was doing so in the student's best interests. Complaint at ¶¶ 88-96. *Third,* these practices had dire consequences for students, saddling them with loans they did not understand, *id*. at 97, and could not afford. *Id*. at 152-54. According to Director Cordray, ''ITT marketed itself as improving consumers' lives but it was really just improving its bottom line.''[23]

The Bureau alleges these practices were not only unfair (Count One), but brings two counts under the ''abusive'' standard. In Count Two, the Bureau alleges that ITT took unreasonable advantage of the inability of students to protect their interests ''in selecting or using a consumer financial product'' in violation of 12 U.S.C. § 5531(d)(2)(B). This charge reflects ITT's practice of providing a ''Temporary Credit'' with no interest at the beginning of the school year, but requiring its full repayment in a lump sum at the end of the year. Complaint at ¶¶ 99-113. At that point, the CFPB alleges, most students had no choice but to select a high-cost ITT Private Loan to cover their debt. Complaint at ¶ 171.

ITT provides a stronger ''abusive'' claim under 12 U.S.C. § 5531(d)(2)(B) than did ACE Cash Express, its sole predecessor under the (d)(2)(B) prong. In ITT, the Bureau alleges that ITT: 1) pushed students into the initial Temporary Credit; 2) that the students did not understand; and that 3) ITT knew they could not afford to repay. In ACE, there is no allegation that ACE pushed borrowers into their initial loan, nor that ACE's customers did not understand the terms of that loan. However, both cases reinforce a theme present from the Bureau's first ''abusive'' case, which is that the new standard is most likely to be invoked on behalf of low-income, low-information consumers.

In Count Three, the Bureau alleges that ITT took unreasonable advantage of the reasonable reliance by students on ITT to act in their interests, in violation of 12 U.S.C. § 5531(d)(2)(C). This charge reflects ITT's practice of holding itself out as a school that would help students better their lives, and holding out its Financial Aid staff as advisors to the students. Complaint at ¶¶ 178-180. ITT was abusive when it took advantage of the students' reasonable reliance to push them into expensive, high-risk loans. Complaint at ¶ 181. This claim is consistent with the only other invocation of (d)(2)(C) by the Bureau, in the *ADSS* matter, *supra* at __-__, because in both cases, the defendant knew substantially more than its customers about the likely results of the transaction.[24]

Corinthian Colleges (no abusive claim)

More recently, the CFPB sued for-profit college chain Corinthian Colleges, Inc. (''Corinthian'') for engaging in an allegedly predatory lending scheme. In its complaint, the Bureau alleges that Corinthian induced nearly 130,000 students to take out private student loans to pay tuition and fees. Those loans have a total outstanding balance of $568.7 million. The Bureau seeks restitution, damages, disgorgement and civil money penalties, as well as rescission of certain private loans offered to Corinthian students since July 21, 2011.

The Bureau's factual allegations against Corinthian trace the same three phases identified in the Bureau's ITT Complaint. Like ITT, Corinthian recruits students by persuading them to enroll, and to take out the loans necessary to pay tuition. Complaint at ¶¶ 1-2. This persuasion involved ''cultivating relationships of trust with these prospective students,'' Complaint at ¶ 4, and misleading claims about placement rates of Corinthian graduates. Complaint at ¶¶ 58-71. Like ITT, Corinthian

[21] *See* note __, *supra.*

[22] CFPB Sues Online Payday Lender for Cash-Grab Scam http://www.consumerfinance.gov/newsroom/cfpb-sues-online-payday-lender-for-cash-grab-scam/ (Sept. 17, 2014).

[23] Consumer Financial Protection Bureau, ''CFPB Sues For-Profit College Chain ITT For Predatory Lending,'' (Feb. 26, 2014), *available at* http://www.consumerfinance.gov/newsroom/cfpb-sues-for-profit-college-chain-itt-for-predatory-lending/.

[24] ITT ''knew few students would be able to'' pay off an initial, zero-interest loan. Complaint ¶ 8. ADSS knew that it would help only a small fraction of its customers. ADSS Complaint at 22-23.

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personnel were actively involved in completing students' applications for financial aid, Complaint at ¶ 108, and encouraged students to believe that it was doing so in the students' best interests. Complaint at ¶ 106. As in *ITT*, these practices had dire consequences for students, saddling them with loans they did not understand, *id*. at 111, and could not afford. *Id*. at 146-149. According to Director Cordray, ''For too many students, Corinthian has turned the American dream of higher education into an ongoing nightmare of debt and despair.''[25]

In light of these parallels, it is difficult to explain why ITT is facing two ''abusive'' claims and Corinthian was not charged with abusive conduct at all. The Bureau may have excellent reasons for its distinct approaches to these two matters. But as long as those reasons are not clear to the larger community, the abusive standard itself will remain unclear.

These two suits also raise interesting questions about the extent of the Bureau's power to pursue UDAAP claims that are based on misrepresentations about the ultimate, nonfinancial goods or services to be purchased using a consumer financial product. In both cases, the misrepresentations are about the quality of the education offered, Corinthian Complaint at ¶ 2; ITT Complaint at ¶¶ 50-55 and the prospects for employment after graduation, Corinthian Complaint at ¶¶ 3, 42-88; ITT Complaint at ¶¶ 29-49. Neither case appears to involve a misrepresentation regarding the terms and conditions of a consumer financial product or service. Thus, these cases suggest the Bureau may take the broad view that its UDAAP authority extends beyond consumer financial products and services.

The Servicemember Cases

The Bureau's UDAAP cases involving servicemembers also raise questions about how and why the Bureau decides to bring a claim of ''abusive'' conduct.

Colfax Capital Corporation (Subsection (d)(2)(A))

In July 2014, the CFPB and 13 state attorneys general obtained approximately $92 million in debt relief from Colfax Capital Corporation and Culver Capital, LLC (collectively known as ''Rome Finance''), for about 17,000 U.S. servicemembers and other consumers. These companies offered credit to consumers purchasing computers, videogame consoles, televisions, or other products. These products were typically sold at mall kiosks near military bases with the promise of instant financing with no money down. In some cases, Rome Finance was the initial creditor, and in other cases, Rome Finance provided indirect financing by agreeing to buy the financing contracts from merchants who sold the goods.

The CFPB found that Rome Finance engaged in the following UDAAP violations:

- Hid finance charges when marketing products, which meant that consumers received inaccurately low finance charges and annual percentage rates;
- Withheld required financial information from billing statements, such as the annual percentage rate; the balance that was subject to that interest rate; how that balance was determined; the closing date of the billing cycle, and the account balance on the closing date; and
- Collected debt that was not owed.

The Bureau found that the last of these constituted an ''abusive'' practice similar to the allegations in the Bureau's December 2013 complaint against CashCall. In Colfax and CashCall alike, the Bureau asserts it was abusive for an entity to seek to collect on a debt that the Bureau believes was void. In both cases, the loan was void because the lending entity was not appropriately licensed and/or charged annual percentage rates higher than the relevant state allowed. Such actions ''take unreasonable advantage'' of the consumer's ignorance of state law. ¶¶ 41-43.

USA Discounters, Ltd. (no abusive claim)

Shortly after the Colfax settlement, the Bureau obtained more than $350,000 in refunds for servicemembers, along with an additional $50,000 civil money penalty, in a Consent Order with USA Discounters, Ltd. Like Colfax, USA Discounters offered financing for purchases at retail stores near military bases. To obtain such financing, active duty servicemembers had to agree in a contract with USA Discounters to pay a $5 fee for a company called SCRA Specialists LLC to be their representative with respect to their rights under the Servicemembers Civil Relief Act (''SCRA'').[26]

Such definition is needed now more than ever, as the Bureau's early enforcement cases do not provide clear guidance on what conduct the Bureau considers ''abusive.'' Indeed, it is difficult to reconcile the cases to date with each other – much less distill principles from them that could guide covered persons in their efforts to avoid abusive conduct.

USA Discounters allegedly portrayed SCRA Specialists as an independent representative that would be available to receive notices of lawsuits filed by USA Dis-

[25] http://www.consumerfinance.gov/newsroom/cfpb-sues-for-profit-corinthian-colleges-for-predatory-lending-scheme/

[26] The SCRA provides certain legal protections to active duty servicemembers. Among other rights granted by the SCRA, a court may delay debt collection lawsuits filed against a servicemember if the court finds that the servicemember's military duty requirements hinder his or her ability to defend himself or herself. Similarly, a court may delay a creditor's attempts to collect on a judgment after it has been entered against a servicemember if the servicemember's military service hampers his or her ability to comply with the judgment. *See* 50 U.S.C. App. § § 501-597b. While the Bureau does not have direct enforcement authority with respect to the SCRA it may refer cases to the Department of Justice and it may (as here) use its UDAAP authority to police activities and conduct.

counters, inform USA Discounters of a change in the servicemember's address, and verify a servicemember's military status to determine whether the servicemember was eligible for protection under the SCRA. In fact, the CFPB found that USA Discounters:

- Deceptively marketed its own legal obligation as a service to servicemembers;
- Misled servicemembers into believing they would have an independent representative; and
- Failing to provide actual services to struggling borrowers. Complaint ¶¶ 4-17.

These claims are similar to those in *ADSS* and *CES*– two of the Bureau's ''abusive'' cases involving debt settlement service providers. *See supra* at __-__. Like ADSS and CES, USA Discounters offered a ''service'' that offered no real benefit to the consumer. *See* Complaint at ¶ 13. Like ADSS and CES, USA Discounters knew important facts about the ''service'' that were impossible for the consumer to know. *See* __, Complaint at ¶ 14-16. And like ADSS and CES – and Colfax — USA Discounters knew that it was selling financial goods and services to a population that was ill-equipped to shop for other options.

However, the Bureau did not bring an ''abusive'' claim against USA Discounters, nor did it explain that decision. It is clear that this reticence was not attributable to any doubt about the gravity of the illegal conduct, as Director Cordray made plain his view that USA Discounters ran a ''fee scam . . . designed to exploit unsuspecting servicemembers'' that was ''unconscionable'' and an ''injustice.''[27] Thus, the early servicemember cases – like the other pairs of cases described above – illustrate the difficulties of discerning the Bureau's interpretation approach of the ''abusive'' standard from its enforcement cases.

Freedom Stores (Subsection (d)(2)(B))

In late December 2014, the Bureau and the Attorneys General of North Carolina and Virginia took action against Freedom Stores, Inc., Freedom Acceptance Corporation and Military Credit Services LLC for debt collection practices relating to servicemembers. Freedom Stores is a Virginia-based furniture and electronics retailer with stores located near military bases nationwide. It offers credit to consumers purchasing its merchandise and then transfers the contracts to an affiliated company, Freedom Acceptance Corporation. Military Credit Services, which shares ownership with Freedom Stores and Freedom Acceptance, provides financing for purchases made at over 300 independent consumer-goods retailers.

The CFPB alleges that Freedom Stores, Inc., Freedom Acceptance, Military Credit Services and their owners engaged in a host of violations of state and federal law. However, the lone ''abusive'' allegations relate to debt-collection lawsuits filed in Norfolk, Va., courts against consumers who were, at the time of the suit, far from Norfolk. These suits were ''abusive,'' notwithstanding venue-selection clauses in the contracts signed by consumers, because ''many consumers were unaware'' of the clause. Complaint ¶ 75. Consumers also ''had little choice to review the credit contracts at the time of signing,'' *id*., and ''no opportunity to bargain'' for removal of the clause. Complaint ¶ 76. Accordingly, Freedom Stores ''took unreasonable advantage of the inability of consumers to protect their interests while using or choosing credit agreements'' because it ''was almost certain to produce default judgments and lead to garnishments against consumers who were unable to appear and assert a defense.''[28] Complaint ¶ 75.

As we noted in our first article, one approach to ''abusive'' would be to interpret it as similar to state unconscionability doctrine. This appears to be the approach taken in the Freedom Stores Complaint. The Bureau's allegations regarding the inconvenience to consumers of the Virginia courts resonate with substantive unconscionability, and the allegations regarding the consumer's lack of time and bargaining power are similar to the allegations used to support procedural unconscionability. These echoes may reflect the influence of the state Attorneys General who joined in these suits and are accustomed to invoking state unconscionability doctrine. However, the fact that the Bureau apparently regards form contracts that are non-negotiable as a building block for a claim of ''abusive'' behavior may trouble financial institutions that necessarily rely upon such contracts.

Conclusions

In our first article, we proposed an approach to the new abusive standard that is based in the text and legislative history of the ''abusive'' standard, Director Cordray's testimony on the standard and kindred legal doctrines. Our proposed approach further defines the Bureau's new authority and the limitations on that authority. Such definition is needed now more than ever, as the Bureau's early enforcement cases do not provide clear guidance on what conduct the Bureau considers ''abusive.'' Indeed, it is difficult to reconcile the cases to date with each other – much less distill principles from them that could guide covered persons in their efforts to avoid abusive conduct.

However, there are some early lessons that financial institutions may wish to take away from the ''abusive'' cases to date. *First of all*, the Bureau's early ''abusive'' cases demonstrate a special concern for unsophisticated consumers. The *ADSS*, *CES*, *CashCall*, *ITT* and *Colfax* cases all involved consumers with low levels of information about what they were actually purchasing. Accordingly, providers of financial products and services should pay special attention to ensure that their consumers do not lack understanding of their financial services and products. *See* 12 U.S.C. § 1551(d)(2)(A). This may be accomplished through a combination of consumer education, disclosure and product simplifica-

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[27] *CFPB Shuts Down USA Discounters' Servicemember Fee Scam*, http://www.consumerfinance.gov/newsroom/cfpb-shuts-down-usa-discounters-servicemember-fee-scam/ (Aug. 14, 2014).

[28] The Bureau's approach here also builds on its position that actions that would violate the Fair Debt Collection Practices Act (''FDCPA'') if taken by third party collectors violate UDAAP if engaged in by first-party creditors. Here, the FDCPA venue provision in 15 U.S.C. § 1692i(a) prohibits debt collectors from filing suit on non-mortgage consumer debt in any judicial district other than where the consumer signed the contract or where the consumer resides at the time the action is commenced.

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tion. At the same time, such efforts to help consumers must be designed with an eye to preventing a later claim that the consumer reasonably relied upon the covered person to act in their interests. *See ITT, supra* at _____, 12 U.S.C. § 1551(d)(2)(C).

Second, providers of financial products and services should focus on their customer demographics in order to assess where special attention is required. This effort may never duplicate the ''know your customer'' rules for securities transactions, but knowing the overall income and education levels of consumers for particular products will help guide compliance efforts. As former House Financial Services Committee Chairman Barney Frank (D-Mass.) explained, a product that makes sense for one consumer may be ''abusive'' for another. *See supra* at ____. In particular, dealings with consumers with poor credit should be scrutinized, as the Bureau may focus on their inability to protect their own interests. *See ACE, supra* at _____, 12 U.S.C. § 1551 (d)(2)(B). Of course, all such efforts must also be guided by fair lending principles.

Third, providers of financial products and services should review the extent to which they could demonstrate that the consumer made an informed, rational choice to purchase a particular product or service. To date, the Bureau has relied upon broad assertions that large groups of consumers lacked understanding or were unable to protect their interests. General evidence to the contrary, including disclosure materials and/or surveys demonstrating consumer understanding, may be helpful in combatting such assertions. Similarly, individualized evidence (*e.g.*, documentation of interactions with the consumer) will demonstrate that the Bureau cannot draw blanket conclusions about all consumers.

In closing, we note the risk that the Bureau will continue to resist further defining the ''abusive'' standard. This approach would be a missed opportunity, as an infinitely flexible standard provides no guidance to covered persons and no permanent protection to consumers. Indeed, there is a risk that the *CashCall* or other litigation on the ''abusive'' standard will yield a much tighter definition of ''abusive'' than the Bureau could have reasonable asserted.

Fortunately, only a few cases have been brought to date, and there will be opportunities – in the cases being litigated and in future cases – for the Bureau to more fully explain its views on ''abusive'' conduct. Those additional data points may allow us to draw a more complete picture of the shape and size of the conduct that became illegal with the passage of Dodd-Frank. We hope that the Bureau will focus on helping financial institutions and consumers alike to draw that big picture, and so better understand the federal prohibition on ''abusive'' acts and practices.