

## Harsh 11th Circ. Rebuke Should Inspire Changes At CFPB

By **Eric Mogilnicki** (July 21, 2023, 5:20 PM EDT)

Some appeals are a bad idea. In 2017, the U.S. District Court for the Northern District of Georgia dismissed five defendants from a Consumer Financial Protection Bureau enforcement action because the CFPB "willfully violated the Court's repeated instruction to identify for Defendants the factual basis for its claims."

That kerfuffle was old news until the bureau appealed the order to the U.S. Court of Appeals for the Eleventh Circuit in *Consumer Financial Protection Bureau v. Brown et al.*[1]

In an unusually harsh rebuke, the appeals court in June not only upheld the district court's sanctions but found that the conduct of the CFPB had been egregious, shocking, "nowhere near proper" and contumacious.

In other words, the bureau's appeal only served to deepen the injury to the CFPB's reputation and pave the way for similar disputes going forward.

The sanctions related to the bureau's obligations under Federal Rule of Civil Procedure 30(b)(6), which allows a party noticing a deposition to "name as the deponent ... a governmental agency ... [and] describe with reasonable particularity the matters for examination."

The named organization "must designate one or more ... persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify." The designated person(s) "must testify about information known or reasonably available to the organization."

Five defendants in *CFPB v. Brown*, all accused of providing substantial assistance to a fraudulent debt collection scheme, sought a Rule 30(b)(6) deposition of the CFPB regarding the factual underpinnings of the bureau's allegations.

When the bureau resisted being deposed, the district court ordered it to designate a witness to speak on its behalf. However, the first such deposition ground to a halt in response to three CFPB tactics.

First, the CFPB objected, on work product grounds, to answering questions such as: "Are you aware of any facts that [co-defendant] Global Payments knew that the debt collector defendants ... were collecting phantom debt?"



Eric Mogilnicki

Second, when a question survived an objection, the CFPB witness responded by reading, verbatim and at length, from hundreds of pages of scripted memory aids supplied by the CFPB's lawyers.

Third, the CFPB witness took the position that the CFPB had not identified, in its entire investigation, any exculpatory facts.

When the defendants' counsel took these issues to the district court, the court instructed the CFPB to answer questions about the facts on which it relied, to not rely exclusively on memory aids, and to supply any exculpatory facts.

However, the CFPB engaged in the same tactics in subsequent depositions. For example, the CFPB lodged a work product objection to the question: "Does the CFPB rely on any facts to demonstrate that [co-defendant] Frontline's practices were unfair?"

In addition, the CFPB witness continued to respond to questions exclusively by reading dozens of pages from the memory aids, and refused to acknowledge the existence of any exculpatory facts.

In response, the district court found that the bureau's "unwillingness to comply with the Court's instructions" was a "bad faith attempt to frustrate the purpose of Defendant's depositions" and imposed the sanction of dismissal.

The CFPB then lodged an appeal.

In its briefs, the bureau justified its objections by making the startling admission that in bringing the case, and preparing for the deposition — including preparing hundreds of pages of memory aids — it still hadn't identified which facts supported which legal claims.

The CFPB also argued that the district court had not been sufficiently clear about the limits on the use of memory aids, and insisted that there wasn't any exculpatory evidence to disclose. In its oral argument before the Eleventh Circuit, the bureau argued that it deserved clearer guidance and another chance to follow that guidance before such sanctions were imposed.

The Eleventh Circuit had no patience with these excuses. The court declared that the CFPB had lodged "a shocking number of improper objections," that its use of memory aids was an effort to "game the system," and that the bureau's position that it had found no exculpatory facts was "incredible."

The court further explained that "district courts are not required to hold a litigant's hand and guide him through the basics of discovery."

This public scolding of the CFPB points to the difficulty that the CFPB can have when it pivots from its investigation to litigation, and encounters a set of rules it does not make or control.

Indeed, the Eleventh Circuit begins its opinion with the pointed reminder that the "Consumer Financial Protection Bureau is not exempt from the rules of discovery."

A similar judicial concern was raised in the CFPB's pending lawsuit against Fifth Third Bank in the U.S. District Court for the Northern District of Illinois. In that case, the CFPB sent an email to thousands of Fifth Third customers inviting consumers to be critical of the bank.

When Fifth Third sought a court order to stop the outreach, the court characterized the CFPB's response as "we're the CFPB, so essentially we can do whatever we want," and ordered an end to the emails.

The Eleventh Circuit's decision will make it more likely that defendants in CFPB enforcement litigation will seek depositions from the CFPB regarding the factual underpinnings of the bureau's allegations, and actively seek any exculpatory information.

Although the bureau insisted that the order permitting a deposition was itself inappropriate, the Eleventh Circuit appears to have taken for granted that a district court may order such discovery.

The CFPB certainly anticipates needing to provide such testimony going forward, as it disclosed during the Eleventh Circuit oral argument that it has designated an assistant litigation deputy to serve as the agency's Rule 30(b)(6) witness when needed.

The Eleventh Circuit's decision also shifts the balance of power within such depositions. In light of the court's criticism, the CFPB will have to be more cautious in making attorney work product objections to questions about the facts underlying an allegation.

Similarly, the bureau would be well advised to limit the use of memory aids by witnesses designated to answer questions under Rule 30(b)(6). Ignoring such cautions may give rise to further motions for sanctions.

After all, as the bureau has made clear to the institutions it regulates, an alleged recidivist should expect special attention, and more comprehensive punishment, if they appear to have violated the same rules twice.

The Eleventh Circuit decision also suggests that the CFPB may want to conduct its own root cause analysis. Such an analysis would identify if there are common causes for the bureau's occasional missteps in litigation.

For example, the policies and practices that led to the bureau's actions and appeal in the Eleventh Circuit may be related to the policies and practices that led to a similar result in the CFPB enforcement action against PHH Corp., a mortgage originator and servicer, in 2014.

In the PHH case, the U.S. Court of Appeals for the D.C. Circuit — in an opinion written by Justice Brett Kavanaugh before his appointment to the Supreme Court — thoroughly rejected the bureau's interpretation of the Real Estate Settlement Procedures Act in 2016.[2]

Like the recent Eleventh Circuit decision, the court's language was unusually harsh: The court found that the bureau had engaged in "gamesmanship," made "deeply unsettling" arguments and had gotten the law "flatly wrong."

When the circuit court, sitting en banc, heard the case, it overruled the constitutional analysis in the PHH opinion, but reinstated the statutory analysis quoted here.[3]

The repetition of this kind of appellate court criticism suggests that the bureau should take steps to ensure that its legal positions are the product of more robust processes that include lawyers with relevant expertise and diverse viewpoints.

More generally, the Eleventh Circuit's decision should encourage some reflection at the bureau regarding its level of attention to the reasonable due process concerns of regulated institutions.

Throughout its history, the bureau has resisted measures that would build confidence in the fairness of the CFPB's decision-making.

For example, the CFPB has ignored calls for it to issue a civil monetary penalty matrix to help inform and discipline its decisions about appropriate penalties. The Office of the Comptroller of the Currency, Federal Deposit Insurance Corp. and Federal Reserve Board all deploy such matrices, which as the OCC explains, are designed "to help ensure that CMPs are imposed consistently and equitably."

Where mechanisms to provide due process exist, the bureau has limited their utility. For example, the CFPB has a process by which an entity can petition the CFPB director to modify or quash a civil investigative demand, but a bureau director has not ruled in favor of such a motion in more than four years.

The bureau's 17-0 winning streak during that time, and the bureau's practice of making such petitions public — thereby disclosing an otherwise confidential investigation — has chilled the use of that process.

The bureau has also sought to block its enforcement targets from exercising rights afforded to other defendants. For example, the CFPB has argued that statutes of limitations do not apply in CFPB administrative proceedings, and proposed a rule to forbid companies under investigation from disclosing the bureau's activities.

The former argument was handily rejected by the D.C. Circuit, and the bureau withdrew the latter proposal under a chorus of criticism that united the U.S. Chamber of Commerce and the American Civil Liberties Union.

Finally, bureau leadership has recently warned regulated institutions that it would seek to hold individuals liable for corporate wrongdoing. And, in litigation, the CFPB has taken the position that reliance upon the advice of counsel should not serve as a defense.

In deciding when to take these extraordinary steps, the bureau may want to reflect upon the Eleventh Circuit's decision that the bureau itself, represented by counsel, mistakenly engaged in conduct that was egregious, shocking and nowhere near proper.

After the Eleventh Circuit's determination, the CFPB proposed that severe sanctions be replaced by clearer guidance and a chance to try again. The judicial rebukes of the CFPB will serve a broader purpose if they help the bureau recognize, when the roles are reversed, that not all bad decisions reflect willful efforts to break the law, and that not all cases call for the severest of sanctions.

---

*Eric Mogilnicki is a partner at Covington & Burling LLP. He previously served as chief of staff to Sen. Edward M. Kennedy.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] Case 21-14468 (11th Cir. June 12, 2023) <https://media.ca11.uscourts.gov/opinions/pub/files/202114468.pdf>.

[2] [https://www.cadc.uscourts.gov/internet/opinions.nsf/AAC6BFFC4C42614C852580490053C38B/\\$file/15-1177-1640101.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/AAC6BFFC4C42614C852580490053C38B/$file/15-1177-1640101.pdf).

[3] [https://www.cadc.uscourts.gov/internet/opinions.nsf/B7623651686D60D585258226005405AC/\\$file/15-1177.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/B7623651686D60D585258226005405AC/$file/15-1177.pdf).