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The Extra A in UDAAP: An Analysis of the CFPB's Abusiveness Claims

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Consumer Financial Services Alert

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Introduction

Since 1938, the Federal Trade Commission Act has rendered it unlawful to engage in Unfair or Deceptive Acts or Practices as a matter of federal law. The scope and meaning of that "UDAP" prohibition has been fleshed out in agency pronouncements and case law over the years, and has an accepted, if still somewhat amorphous, meaning. Then in 2010 along came the Dodd-Frank Act, which created the Consumer Financial Protection Bureau (CFPB) and gave it authority to implement and enforce a prohibition on Unfair, Deceptive, or Abusive Acts or Practices. The age-old UDAP thus became UDAAP, and the $64,000 question (or, given the scope of CFPB penalties and remedies, the $64 million question) became what to make of the extra "A." What does abusive mean? And more specifically, what conduct would be deemed abusive that wouldn't already be deemed unfair or deceptive under the familiar UDAP prohibition?

Nearly five years after the CFPB gained its authorities, the answer to those questions is not yet clear, although certain patterns have begun to emerge. In its existence, the CFPB has brought nearly 125 enforcement actions. In over 80 of those, it has alleged or found UDAAP violations.[1] In only 16 cases has the CFPB alleged abusive conduct, but fully half of those cases, were filed in 2015 and 2016, suggesting an increased willingness to rely on this authority. In this paper, we provide an analysis of how the CFPB has used its abusiveness authority to date and what we might expect in the future.[2]

Background

Under the Dodd-Frank Act, it is unlawful for any "covered person" or "service provider" "to engage in any unfair, deceptive, or abusive act or practice."[3] A covered person is generally "any person that engages in offering or providing a consumer financial product or service," while a service provider is generally "any person that provides a material service to a

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[1] The CFPB *alleges* a UDAAP violation when it files a complaint in federal district court, and such an allegation is not a finding of a violation. It *finds* a UDAAP violation when it issues an administrative consent order based on such findings. For ease of reference, we refer to both complaints and consent orders as containing "allegations." In entering a settlement with the CFPB, companies generally do not admit the allegations (or findings) contained in the complaint or consent order.

[2] At least four state attorneys general have used their authority under the Dodd-Frank Act to bring separate actions alleging abusive acts or practices. *See* 12 U.S.C. § 5552. Those cases are not discussed herein, as they do not shed much light on how the CFPB intends to use this authority.

[3] 12 U.S.C. § 5536(a)(1)(B).

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covered person in connection with the offering or provision by such covered person of a consumer financial product or service…."[4]

As noted above, the terms "unfair" and "deceptive" have long-standing definitions. An "unfair" act or practice is one that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers," where "such substantial injury is not outweighed by countervailing benefits to consumers or to competition."[5] A "deceptive" act or practice is a representation, omission, act, or practice that is likely to materially mislead a consumer whose interpretation is reasonable under the circumstances.[6]

The Dodd-Frank Act's definition of an "abusive" act or practice consists of four prongs, any one of which is sufficient to constitute abusiveness:

- Prong (1) - "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service."
- Prong (2)(A) - "takes unreasonable advantage of … a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service."
- Prong (2)(B) - "takes unreasonable advantage of … the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service."
- Prong (2)(C) - "takes unreasonable advantage of … the reasonable reliance by the consumer on a covered person to act in the interests of the consumer."[7]

Thus, while there is single test for unfairness and a single test for deception, there are four separate tests for abusiveness.

The prohibition on abusiveness is generally enforceable by the CFPB or, with respect to banks and credit unions having total assets of $10 billion or less, by federal prudential regulators.[8] Additionally, states generally have authority to bring abusiveness claims against covered persons and service providers that are not national banks or federal savings associations.[9]

The Prongs of Abusiveness in Action

General Patterns

Looking at the statistics, there are some interesting patterns in the CFPB's abusiveness actions to date. The most striking is that the agency relies on two of the abusiveness prongs—prongs (2)(A) and (2)(B)—substantially more frequently than it relies on the others. The 16 CFPB abusiveness cases brought to date contain a total of 23 abusiveness claims,

[4] 12 U.S.C. § 5481.

[5] 12 U.S.C. § 5531(c); *see also* 15 U.S.C. § 45(n).

[6] *See*, *e.g.*, CFPB, Supervision & Examination Manual at UDAAP 5 (Oct. 2012), *available at* http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf; FTC Policy Statement on Deception (Oct. 14, 1983), *appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984).

[7] 12 U.S.C. § 5531(d).

[8] *See* 12 U.S.C. §§ 5516(d)(1), 5531(a).

[9] 12 U.S.C. § 5552(a).

as some cases involve multiple claims or reliance on more than one prong of abusiveness. Of those 23 claims, 18—or nearly 80%—were based on prongs (2)(A) or (2)(B). By contrast, only two claims were based on prong (1) and only three claims were based on prong (2)(C).

In light of the stigma possibly associated with being tagged as having engaged in abusive conduct, one might expect that abusive claims would be more prevalent in litigated than in settled cases. And, indeed, six of the 16 abusiveness cases have involved contested litigation, a ratio (37.5%) that is more than 50% higher than the overall ratio of litigated CFPB enforcement actions (approximately 22%).

All 16 abusiveness cases involve non-depository institutions. Whether that reflects a difference in the kind of conduct the agency is observing, a disparity in bargaining power, or a difference in how the agency treats depository versus non-depository institutions is hard to tell, although as discussed below in some instances similar conduct has been treated differently by the agency when engaged in by non-depositories.

Finally, in virtually all the abusiveness cases, the CFPB has pled that the very same conduct also constituted unfair and/or deceptive practices. That is, the cases generally do not answer the question of what conduct is abusive that wouldn't otherwise be prohibited by the old UDAP prohibition. As discussed further below, in those few cases where the CFPB has alleged conduct to be abusive without at the same time alleging it to be unfair or deceptive, the conduct at issue could just as easily have been pled as unfair and/or deceptive.

With that background, we turn to an analysis of how the CFPB has applied the different prongs of abusiveness.

Prong (1) - Material Interference: Rarely Used and Never Alone

As noted above, the CFPB has relied on prong (1) of the abusiveness definition only twice. Prong (1) prohibits "materially interfer[ing]" with a consumer's ability "to understand a term or condition" of the consumer financial product or service at issue. It is thus similar to prong (2)(A), which also looks to a consumer's understanding. But unlike prong (2)(A), in which the operative prohibition is on "taking unreasonable advantage" of a consumer's lack of understanding, prong (1) prohibits "materially interfering" with a consumer's ability to understand. Perhaps believing that establishing such material interference requires greater affirmative action on the part of respondents, the CFPB has shied away from prong (1). The only two cases in which it has made a prong (1) allegation both involved contested litigation and both included allegations that the same conduct at issue violated prong (2)(A).

The first case to assert a prong (1) violation was an action against an online payday lender.[10] The complaint in that case alleged that the defendants' efforts to collect on loans that were allegedly void as a matter of state law, because they were either usurious or made by unlicensed lenders, constituted abusive conduct. In a single abusiveness claim, the CFPB relied on both prong (1) and prong (2)(A). The CFPB had brought similar abusiveness claims in two other cases, but in those cases the agency had relied solely on prong (2)(A). It is not clear whether some factual difference in the defendants' conduct or loan documents led to this pleading change, whether it was inadvertent, or whether it reflects a more aggressive use of the abusiveness authority by the CFPB. In any event, not only did the

[10] Amended Complaint at 51-52, *CFPB v. NDG Fin. Corp.*, No. 1:15-cv-05211 (S.D. N.Y. Dec. 11, 2015).

CFPB allege prong (2)(A), but it also alleged that the same conduct was also unfair and deceptive.

The other prong (1) case likewise relied on prong (1) in conjunction with other prongs of abusiveness and other elements of UDAAP. In a case against two so-called "pension advance" companies and their managers, the CFPB alleged that by denying their product was a loan and obscuring the true nature of the credit transaction, and by failing to disclose or denying the existence of an interest rate or fees associated with the pension advance, the defendants violated prongs (1), (2)(A), and (2)(B).[11] At the same time, the CFPB also alleged that essentially the same conduct was unfair and deceptive.

These two cases – which both contain a single claim of abusive conduct relying on multiple prongs of the definition of abusive conduct – are emblematic of a "kitchen sink" or "belt and suspenders" approach to pleading abusiveness. As a result, they shed little light on what the CFPB considers to be "material interference" under prong (1). As discussed below, in both cases the CFPB alleged that defendants made misrepresentations that prevented consumers from understanding a term or condition of the financial product or service at issue. Presumably, it was these misrepresentations that constituted—at least in part—the "material interference" with consumers' "ability to understand" that is necessary to plead a prong (1) claim. Why these misrepresentations rose above simple deceptive conduct, however, is not clear, nor is it clear why the agency chose to plead prong (1) in addition to prong (2)(A).

Prongs (2)(A) and (2)(B) - Taking Unreasonable Advantage: The Workhorses

The vast majority of the CFPB's abusiveness claims have been brought under prongs (2)(A) or (2)(B) (or both). Prong (2)(A) prohibits an act or practice that "takes unreasonable advantage of … a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service," while prong (2)(B) prohibits an act or practice that "takes unreasonable advantage of … the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service."

Prong (2)(A): Deception Plus?

Eight of the 23 abusiveness claims asserted by the CFPB to date have been based on prong (2)(A). In all of these cases, the "lack of understanding" that the defendants allegedly took unreasonable advantage of was caused by alleged misrepresentations or omissions of the defendants or those acting in concert with them. Thus, most of the (2)(A) abusiveness claims pled by the CFPB include an allegation of misrepresentation as part of framing the abusiveness claim: the complaints and consent orders talk about how "contrary to representations" consumers were steered to high-cost loans;[12] how defendants "obscured the true nature" of their pension advance product by "fail[ing] to disclose" certain information;[13] how defendants "guarantee[d]" savings in a mortgage payment plan that they knew wouldn't materialize for a substantial number of consumers;[14] how defendants "did not

[11] Complaint at 17-18, *CFPB v. Pension Funding, LLC*, No. 8:15-cv-01329 (C.D. Cal. Aug. 20, 2015).

[12] Complaint at 9-11, *CFPB v. D & D Marketing, Inc.*, No. 2:15-cv-09692 (C.D. Cal. Dec. 17, 2015).

[13] Complaint at 17-18, *CFPB v. Pension Funding, LLC*, No. 8:15-cv-01329 (C.D. Cal. Aug. 20, 2015).

[14] Complaint at 9-10, *CFPB v. Nationwide Biweekly Admin., Inc.*, No. 3:15-cv-02106 (N.D. Cal. May 11, 2015).

adequately disclose" fees related to the use of allotments;[15] and how defendant's conduct in operating a debt relief program was not "as it represents to consumers."[16] All of these allegations formed the basis for the consumers' "lack of understanding" for purposes of prong (2)(A) in these cases. Such allegations, of course, sound in deception, and not surprisingly the CFPB also alleged that the conduct at issue was deceptive in four of the five cases. (The CFPB alleged unfairness in the fifth.)

The three other prong (2)(A) cases involved allegations that collecting on loans that state law allegedly renders void or voidable constitutes abusive conduct.[17] In these cases, the CFPB simply alleged that "consumers likely were unaware" of, "lacked an understanding" of, or "generally do not know or understand" the impact of state law on the validity of their debt, without relying on underlying deception as part of the abusiveness claim. On their face, these cases appear to be based on consumers' "lack of understanding" not caused by the defendant's conduct. But all three cases also included a deception claim based on the theory that by seeking to collect on these loans the defendants misrepresented that consumers had a legal obligation to pay them. Whether the prong (2)(A) abusiveness claims would stand alone absent that deception theory is unclear.

What is clear is that the prong (2)(A) has been used to date as a sort of "deception plus" claim, relying on alleged deceptive conduct as the basis for the consumers' "lack of understanding," and alleging that consummating the transaction that was the subject of the alleged deception somehow constitutes "taking unreasonable advantage" of the lack of understanding the defendants created. And in all instances, the CFPB has pled a parallel deception or unfairness claim, or both. Such an approach to prong (2)(A) does little to distinguish it from general deception, and the CFPB's actions to date do not provide a clear sense of when deceptive conduct will also be alleged to be abusive under prong (2)(A).

Prong (2)(B): Unfairness Plus?

Prong (2)(B) is the most commonly pled prong of abusiveness, accounting for 10 of the 23 abusiveness claims to date. The prong (2)(B) cases are more difficult to categorize.

Half of the cases seem very much like the prong (2)(A) cases, in that the CFPB alleges that the "inability of the consumer to protect her interests" was based on a lack of information caused by defendants. Not surprisingly, in many (though not all) of these cases, the CFPB pled violations of prong (2)(A) in addition to (2)(B). Thus, for example, the CFPB alleged that a car dealership that misrepresented the annual percentage rate on its loans (which constituted a separate deception claim) and did not include sticker prices on its cars engaged in abusive conduct because "these actions left consumers unable to protect their interests."[18] In another case, the CFPB alleged that defendants engaged in abusive conduct under prong (2)(B) (in addition to prong (2)(A)) by "failing to disclose" and "misrepresenting" key aspects of their pension advance product.[19] And in yet another case, the CFPB pled

[15] Consent Order at 8, *In the Matter of Fort Knox Nat'l* Co., File No. 2015-CFPB-0008 (Apr. 20, 2015).

[16] Complaint at 13-15, *CFPB v. Am. Debt Settlement Solutions, Inc.*, No. 9:13-cv-80548 (S.D. Fla. May 30, 2013).

[17] Amended Complaint at 26-27, *CFPB v. CashCall, Inc.,* No. 1:13-cv-13167 (D. Mass. Mar. 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).

[18] Consent Order at 14-15, *In the Matter of Y King S Corp.*, File No. 2016-CFPB-0001 (Jan. 21, 2016).

[19] Complaint at 17-18, *CFPB v. Pension Funding, LLC*, No. 8:15-cv-01329 (C.D. Cal. Aug. 20, 2015).

that a defendant's failure to disclose the existence and charging of fees caused the consumers' "inability to protect their interest" and violated prong (2)(B) in addition to prong (2)(A).[20] Lastly, the CFPB alleged that "[b]y failing to disclose" the defendant's affiliation with a lender to whom consumers were referred for tax refund anticipation loans, and by withholding crucial information regarding the receipt of consumers' tax refunds, defendant violated prong (2)(B) (two separate counts).[21] In all these instances, it is not clear why the CFPB chose to plead prong (2)(B) as opposed to prong (2)(A), or why it chose to plead both prongs. In each case, the consumers' alleged inability to protect their interests was caused by alleged deceptive statements or omissions, rendering these prong (2)(B) cases very similar to the prong (2)(A) cases discussed above.

The remaining prong (2)(B) cases are different, focusing more on the nature of the conduct at issue, without regard to whether consumers had sufficient information to avoid it. This is most evident in two cases in which the CFPB alleged that conduct expressly authorized by contracts of adhesion that consumers had signed was abusive under prong (2)(B). In one case, the CFPB alleged that a retail store that sold goods on credit to military servicemembers violated prong (2)(B) by filing all collections litigation in Virginia, notwithstanding the forum-selection clause in the consumer credit contract that arguably informed consumers that litigation would be filed in Virginia.[22] In pleading its abusiveness claim, the CFPB asserted that: "*Even if consumers read and understood* the venue-selection clause, there was no opportunity to bargain for its removal because the clause was non-negotiable."[23] Similarly, in a case against an auto-finance company, the CFPB alleged that threatened and actual contact with a military consumer's commanding officer in connection with the lender's debt-collection activities was abusive under prong (2)(B), notwithstanding the contractual language authorizing such conduct, because "*[e]ven if [consumers] had been aware of the provision*, they had no opportunity to bargain for its removal."[24] In both of these cases, some consumers presumably did understand the contract clauses at issues, so arguably a claim that the defendant took unreasonable advantage of those consumers' "lack of understanding" under prong (2)(A) would not have been a viable theory. Relying on prong (2)(B), however, the CFPB asserted that there was nevertheless an "inability of the consumer to protect the interests of the consumer" due to the fact that the clauses were allegedly non-negotiable.

Not surprisingly, the CFPB also alleged in these two cases that the same conduct was unfair. In these cases, at least, prong (2)(B) abusiveness appears to be very similar to unfairness. While prong (2)(B) focuses on a consumer's "inability" to protect her interests and unfairness requires substantial injury "not reasonably avoidable" by consumers, they both turn on a perceived market failure in which consumers are deemed excused from the usual rules of *caveat emptor* due to the nature of the transaction at issue. While the overlap of prong (2)(B) and unfairness makes sense given the similarity in the required elements for each claim, these cases do not provide insight into what conduct is abusive that is not also unfair, or when the CFPB will decide to allege abusiveness in addition to unfairness.

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[20] Consent Order at 8, *In the Matter of Fort Knox Nat'l* Co., File No. 2015-CFPB-0008 (Apr. 20, 2015).

[21] Complaint at 13-15, 17-18, *CFPB v. S/W Tax Loans, Inc.,* No. 1:15-cv-00299 (D. N.M. Apr. 14, 2015).

[22] Complaint at 15-16, *CFPB v. Freedom Stores, Inc.,* 2:14-cv-00643 (E.D. Va. Dec. 18, 2014).

[23] *Id.* (emphasis added).

[24] Complaint at 7, *CFPB v. Security Nat'l Automotive Acceptance Co., LLC*, No. 1:15-cv-00401 (S.D. Ohio June 17, 2015) (emphasis added).

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The other prong (2)(B) cases also involve conduct that could have been alleged to be unfair, although the CFPB did not plead unfairness. In two of the cases, the CFPB alleged that aggressively pushing consumers to take out loans they allegedly could not afford was abusive. One case involved a payday lender who allegedly created a sense of "artificial urgency" in the collection process to get consumers to roll over their loans;[25] the other involved a for-profit school that allegedly pushed students into high-cost loans that defendant knew were likely to default.[26] In both cases, the conduct could easily have been alleged to be unfair as opposed to abusive, for the very same facts that might lead one to conclude that consumers were unable to protect their interests under prong (2)(B) could similarly have been used to allege that consumers could not reasonably avoid the injury alleged under the unfairness doctrine.

The final prong (2)(B) case involved deferred-interest promotions in connection with online purchases. The CFPB asserted that the company's conduct in allegedly providing little information explaining its practices of allocating payments proportionally across most, if not all, balances, coupled with consumers' alleged inability to effectively change that allocation, was abusive.[27] Again, the same conduct arguably could have been alleged to be unfair and, as discussed below, similar payment-allocation conduct has been described by the CFPB as unfair in other contexts.

Comparing Prongs (2)(A) and (2)(B)

In the above analysis, prong (2)(A) is akin to deception, and prong (2)(B) is akin to unfairness. And just as deceptive conduct can be the cause of a consumer's inability to reasonably avoid certain harm (thus rendering the conduct unfair), so too deceptive conduct can cause not only the consumer's "lack of understanding" under prong (2)(A), but also her "inability to protect her interests" under prong (2)(B). In that respect, every prong (2)(A) case could be recast as a prong (2)(B) case (in the same way that deception is sometimes considered a subset of unfairness).[28]

There are, however, two ways in which prong (2)(B) may be a slightly easier standard to satisfy than prong (2)(A). First, prong (2)(B) does not require a misrepresentation by the defendant, or another factual basis, to conclude that a consumer lacks understanding. Second, prong (2)(A) relates to "material risks, costs, or conditions" of the product or service, while prong (2)(B) relates to "selecting or using" the product or service. The latter may be a less demanding standard, because there is no express materiality threshold, nor is there an express requirement that the abusive practice directly relate to the characteristics of the product or service. For example, in a complaint against tax preparers who allegedly marketed tax refund anticipation loans offered by an affiliated lender, the CFPB alleged that

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[25] Consent Order at 10-11, *In the Matter of Ace Cash Express, Inc.*, File No. 2014-CFPB-0008 (July 10, 2014).

[26] Complaint at 30-31, *CFPB v. ITT Educ. Servs., Inc.*, No. 1:14-cv-00292 (S.D. Ind. Feb. 26, 2014).

[27] Complaint at 14-15, *CFPB v. PayPal, Inc.*, No. 1:15-cv-01426 (D. Md. May 19, 2015).

[28] *See, e.g.*, J. Howard Beales, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection* (May 30, 2003) ("Commission precedent incorporated in the statutory codification makes clear that deception is properly viewed as a subset of unfairness…. Material misleading claims prohibited by the Commission's deception authority almost invariably cause consumer injury because consumer choices are frustrated and their preferences are not satisfied. That injury is substantial as long as enough consumers are affected. Moreover, consumers cannot reasonably avoid the injury precisely because the seller misled them about the consequences of the choice."), *available at* https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection.

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the tax preparers failed to disclose their financial interests in the lender to consumers and so allegedly violated prong (2)(B).[29] Arguably, this undisclosed financial relationship was not a "risk, cost, or condition" of the loans themselves, and so even though the claim turned on defendants' material omission of that information, a theory under (2)(A) may not have been viable. But evidently the CFPB considered the relationship to be relevant to "selecting or using" the loans under (2)(B).

We expect to continue to see the CFPB rely primarily on these two prongs when it alleges abusiveness, given its apparent reluctance to allege "material interference" under prong (1) and the unique nature of prong (2)(C), discussed below.

Prong (2)(C) - Focus on Reliance and Lack of Benefit

Prong (2)(C) makes it unlawful to take "unreasonable advantage" of a consumer's "reasonable reliance" on a provider of consumer financial services to act in the consumer's interest. With the exception of the agency's first abusiveness case, which was brought against a debt relief firm and which appeared to rely on prong (2)(C) in addition to prong (2)(A), the CFPB's reliance on prong (2)(C) has focused on college students and circumstances in which defendants allegedly took affirmative steps to induce the students' reliance on the defendants' acting in their interests. Thus, in its complaint against a for-profit college, the CFPB alleged that the school's staff solicited students' reliance and trust, rendering the students' reliance on the school to act in their interests reasonable.[30] The complaint further alleged that the school's practice of aggressively pushing students into expensive, high-risk loans that the school knew were likely to default took unreasonable advantage of the reliance the school had induced.[31] Similarly, in its case against a debt relief provider focused on student loans, the CFPB alleged that the defendant's telemarketers held themselves out as loan counselors and advisors and created the illusion of expertise and individualized advice to induce consumers to reasonably rely on the company to act in the consumer's interest.[32] The complaint then alleges that the company took advantage of this reasonable reliance by enrolling and taking fees from consumers who did not qualify for the relief the company promised.[33]

These cases provide the clearest articulation of a pattern in the CFPB's limited abusiveness jurisprudence. They suggest that the agency believes prong (2)(C) is appropriate in instances where companies take affirmative action to induce consumer reliance, particularly in instances where the target population or other circumstances suggest such reliance is reasonable.

The CFPB's first prong (2)(C) case – against a debt relief provider – does not fit this pattern.[34] But that case was the first in which the agency alleged abusiveness, and, as noted above, the single abusiveness claim in that case appears to be based on prong (2)(A) in addition to prong (2)(C). There is nothing in that complaint alleging that the defendant

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[29] Complaint at 13-15, *CFPB v. S/W Tax Loans, Inc.*, No. 1:15-cv-00299 (D. N.M. Apr. 14, 2015).

[30] Complaint at 31-32, *CFPB v. ITT Educ. Servs., Inc.*, No. 1:14-cv-00292 (S.D. Ind. Feb. 26, 2014).

[31] *Id*.

[32] Complaint at 14-16, *CFPB v. College Educ. Servs. LLC*, No. 8:14-cv-03078 (M.D. Fla. Dec. 11, 2014).

[33] *Id*.

[34] *See* Complaint at 13-15, *CFPB v. Am. Debt Settlement Solutions, Inc.*, No. 9:13-cv-80548 (S.D. Fla. May 30, 2013).

took specific actions to induce consumers' reliance or explaining why such reliance would be reasonable. As such, it appears to be an aberrational use of prong (2)(C).

There is, however, one similarity between all three prong (2)(C) cases: in all three, the CFPB alleged that the abusive conduct entailed providing consumers a financial product or service from which they were unlikely to benefit – debt relief services the consumers allegedly couldn't afford or didn't qualify for or expensive student loans that the defendant allegedly knew were likely to default. Although those facts don't align with the statutory criterion of reasonable reliance on an institution to act in the consumer's best interest under prong (2)(C), they do suggest that this is the kind of conduct that the CFPB is concerned about and likely to tag as abusive.

Examples of Abusiveness Without Unfairness or Deception

As discussed above, in most cases the CFPB has alleged that the same conduct that it considers abusive is also unfair and/or deceptive. But in five cases, the CFPB pled "stand-alone" abusive claims – i.e., it alleged that certain conduct was abusive without also alleging that it violated the old UDAP standard.[35] These cases might provide some insight into what conduct might be abusive that was not already proscribed as unfair or deceptive.

The first two stand-alone abusiveness claims involved factual scenarios in which the defendant was alleged to have knowledge that the product being sold to the consumer was not suitable to the consumer. The first such claim involved a debt relief provider and an allegation that enrolling consumers in a debt relief program that defendant knew consumers were unlikely to complete (based on financial information gathered from consumers) was abusive under prongs (2)(A) and (2)(C).[36] The second such claim involved a payday lender alleged to have created and leveraged an "artificial sense of urgency" to induce delinquent payday loan borrowers with a "demonstrated inability to repay their existing loan" to take out new loans. The CFPB alleged that was abusive under prong (2)(B).[37] As in the debt relief case, this claim was predicated on the defendant's knowledge that the product being sold to the consumer is not in the consumer's interest – in this case, because of the consumer's inability to repay their existing loan. As with the prong (2)(C) cases discussed above, these "suitability"-type claims appear to be a common theme of the CFPB's abusiveness cases. The agency may believe that, in certain circumstances, companies have an obligation to not sell products and services that will not benefit the consumers to whom they are sold.

Two other stand-alone abusiveness claims focus on a different concept, "steering." First, in its complaint against a tax preparer, the CFPB alleged that the defendants' alleged practice of steering consumers into high-cost tax refund anticipation loans provided by one of the defendants, when cheaper alternatives were available, constituted "abusive steering" in violation of prong (2)(B).[38] And in a recent complaint against an online lead generator, the

[35] Determining whether an abusiveness claim is merely duplicative of unfairness or deception claims based on the same conduct or a "stand-alone" claim that is based on a different aspect of that conduct necessarily involves the exercise of some judgment. The summary below is based on our consideration of the nature of the facts alleged and the claims pled by the CFPB, but we recognize that others might reach different conclusions with respect to some of the cases we have included or excluded from the "stand-alone" category.

[36] Complaint at 13-15, *CFPB v. Am. Debt Settlement Solutions, Inc.*, No. 9:13-cv-80548 (S.D. Fla. May 30, 2013).

[37] Consent Order at 10-11, *In the Matter of Ace Cash Express, Inc.*, File No. 2014-CFPB-0008 (July 10, 2014).

[38] Complaint at 13-15, *CFPB v. S/W Tax Loans, Inc.*, No. 1:15-cv-00299 (D. N.M. Apr. 14, 2015).

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CFPB alleged that the company's practice of purchasing leads from lead generators who made representations to consumers that they (the original lead generators) would find consumers the best rate or the lowest fees, and then selling those leads to tribal or offshore payday lenders who "typically charge higher interest rates than lenders adhering to state laws" was abusive under prong (2)(A). The CFPB referred to this conduct as "steering" consumers to lenders "offering less-favorable terms than may otherwise be available to them."[39] Although the tax preparer case was pled as a prong (2)(B) case and the lead generator case pled as a prong (2)(A) case, the underlying conduct the CFPB found problematic was similar – directing consumers to loan products containing less-favorable terms than might be available and of which defendants were presumably aware. Such alleged "steering"—which has echoes of the suitability claims discussed above—also seems to be a focus of the CFPB's.

The two abusiveness claims involving prong (2)(C) already discussed above, in which the CFPB alleged that the defendants induced consumers' reasonable reliance on the defendants to act in the consumers best interest, are also "stand-alone" abusiveness claim to the extent that they rely on the alleged acts of inducement. That is, while the CFPB alleged other UDAP claims in those cases, neither deception nor unfairness involve questions of reasonable reliance and the facts relevant to such reliance are therefore not necessary aspects of those claims.

The final "stand-alone" abusiveness case involved a company's alleged payment allocation practices with respect to consumers who had multiple deferred-interest balances on their account. The CFPB asserted that the company's alleged practice of allocating payments proportionally across most, or all, account balances without regard to the expiration date of the deferred-interest promotion for each balance, coupled with the company's alleged failure to provide adequate information about how it allocated payments and the difficulty consumers allegedly encountered when seeking to direct the allocation of payments, was abusive under prong (2)(B).[40] It is not clear why the CFPB chose to plead these facts as abusive, as opposed to unfair, which, as discussed below, is how they have addressed similar payment allocation issues in the student loan context.

Indeed, with the exception of the prong (2)(C) claims involving inducement of reliance, all of the "stand-alone" abusiveness claims may well have been pled as unfairness and/or deception claims. All of the claims could arguably be alleged to constitute conduct likely to cause substantial harm to consumers not reasonably avoidable by the consumers and not outweighed by countervailing benefits to consumers or competition (the test for unfairness). And several of the claims were also based on alleged material misrepresentations or omissions of the defendant. These cases, therefore, do not necessarily shed light on the unique nature of abusive conduct. But they do suggest that suitability and steering are issues that the CFPB views as potentially abusive.

[39] Complaint at 9-11, *CFPB v. D & D Marketing, Inc.*, No. 2:15-cv-09692 (C.D. Cal. Dec. 17, 2015).

[40] Complaint at 14-15, *CFPB v. PayPal, Inc.*, No. 1:15-cv-01426 (D. Md. May 19, 2015).

The Extra A in UDAAP: An Analysis of the CFPB's Abusiveness Claims

Pleading Abusiveness

Stating a Claim: A Higher Burden?

It is common for an abusiveness claim to recite the same allegations as an unfairness or deception claim that is also being asserted in the same case, but with alterations to fit the prongs of abusiveness. Sometimes, likening abusiveness too closely to unfairness or deception seems to lead drafters of CFPB complaints and consent orders into trouble. For example, when the CFPB makes an unfairness or deception claim, it is adequate to assert that the act or practice is likely to cause substantial injury or is likely to materially mislead. But none of the prongs of abusiveness contain this kind of probabilistic assessment. As a federal district court noted in connection with prong (2)(B), "the Bureau's burden here is to show that [consumers] were, in fact, unable to protect their own interests."[41] In that case, the court held that the Bureau had met its burden. But on some other occasions, the Bureau has framed its complaints and consent orders in probabilistic terms. For example: "Consumers are *unlikely* to understand that during the first several years of enrollment in the [product], they will pay more in fees to [the defendant] than they will save."[42] Or: "Servicemembers *may have been unaware* that Respondents were deducting [certain] fees from [their accounts]."[43] Arguably, these are just assertions that abusiveness is probable or possible and so do not properly state a claim.

Consistency (or the lack thereof)

The CFPB's pleading of abusiveness has been less than consistent in several respects. First, there appears to be no set format for how the agency pleads UDAAP claims in general or abusiveness claims in particular. While Emerson famously said that "a foolish consistency is the hobgoblin of little minds," consistency in pleading would serve several important purposes here. It would allow the public to better compare and thus understand what the agency thinks constitutes abusive conduct, and it would help ensure the CFPB was applying its new powers with analytical rigor. And, indeed, an examination of the CFPB's abusiveness jurisprudence to date suggests some uncertainty as to what the different prongs of abusiveness mean, how they differ from each other, or when an abusiveness claim is appropriate.

In some cases, this inconsistency is reflected in how similar claims are pled. Thus, for example, the steering claim in the case against a lead generator was based on prong (2)(A), whereas the steering claim in the case against a tax preparer was based on prong (2)(B). In both cases, defendants allegedly misrepresented or omitted material information from consumers about the loans they were being offered, suggesting that a prong (2)(A) claim may have been appropriate. At the same time, in both cases the consumers were allegedly incapable of protecting their interests in light of these misrepresentations or omissions, rendering a prong (2)(B) claim seemingly appropriate. It thus seems equally plausible that

[41] *CFPB v. ITT Educ. Servs., Inc.*, 2015 WL 1013508, at *30 (S.D. Ind. Mar. 6, 2015) (emphasis added), *appeal docketed*, No. 15-1761 (7th Cir. Apr. 8, 2015).

[42] Complaint at 10, *CFPB v. Nationwide Biweekly Admin., Inc.*, No. 3:15-cv-02106 (N.D. Cal. May 11, 2015) (emphasis added).

[43] Consent Order at 8, *In the Matter of Fort Knox Nat'l* Co., File No. 2015-CFPB-0008 (Apr. 20, 2015) (emphasis added).

the pleading in these cases would have been reversed, or that both cases would have relied on the same prong or both prongs. Absent additional information from the CFPB, it is difficult to ascertain whether this apparent inconsistency is intended to reflect the agency's understanding of these different prongs, and if so,what that understanding is.

Similarly, as we've [discussed before](), the claim that attempting to collect on loans that are allegedly void or voidable under state law (due to usury or licensing issues) is abusive was pled under prong (2)(A) in the first two of these cases the CFPB brought, but was pled under both prongs (2)(A) and (2)(B) in the third case.

It may be that factual differences underpinned the CFPB's choice of prongs in all these cases, but that is not readily apparent from the pleadings themselves and the lack of consistency in pleading format further makes a comparison difficult; that in turn makes it difficult for industry to gain an understanding of what the CFPB thinks these prongs mean.

In addition to these substantive pleading differences, the CFPB also lacks a consistent approach to the structure of its pleadings. Thus, in some cases it will allege separate abusiveness claims for separate prongs of the statute, providing greater insight into what conduct it believes violates each prong. In other cases, it will plead a single claim and assert that the conduct at issue violates multiple prongs of the abusiveness definition, making it difficult to discern the agency's views. More precise pleading would translate into greater transparency.

More troublingly, apparently similar conduct has been deemed abusive in one case, but not another, on multiple occasions:

- In a complaint against an auto finance company, the CFPB alleged that threatening to contact and contacting servicemembers' commanding officers about their debt constituted abusive conduct under prong (2)(B), notwithstanding the contractual provision authorizing such contact. But in a complaint against a retailer who was similarly alleged to have contacted servicemembers' commanding officers about the consumers' debt—pursuant to a contractual authorization that the CFPB characterized as "buried" in the credit contracts, not explained to consumers, and that "many consumers did not know" was included in the contract—the CFPB only alleged the conduct to be unfair, and not abusive.[44]
- In a complaint against a retailer who filed all of its collections actions in Virginia pursuant to a venue-selection clause in its consumer credit contracts, the CFPB alleged that conduct to be abusive. But in a consent order against another retailer who also sold goods to servicemembers, the CFPB did not bring such a claim, notwithstanding press reports of similar practices.[45]
- Perhaps reflecting a hesitation to use its abusiveness authority with respect to depository institutions, the CFPB has not alleged that the sale of credit card add-on products by banks to consumers allegedly ineligible to reap their benefits is abusive, although it made

[44] *Compare* Complaint, *CFPB v. Security Nat'l Automotive Acceptance Co., LLC*, 1:15-cv-401 (S.D. Ohio June 17, 2015), *with* Complaint, *CFPB v. Freedom Stores, Inc.,* 2:14-cv-643 (E.D. Va. Dec. 18, 2014).

[45] *Compare* Complaint, *CFPB v. Freedom Stores, Inc.,* 2:14-cv-643 (E.D. Va. Dec. 18, 2014), *with* Consent Order, *In the Matter of USA Discounters, Ltd.*, File No. 2014-CFPB-0011 (Aug. 14, 2014). *See also* ProPublica, *Thank You for Your Service: How One Company Sues Soldiers Worldwide* (July 25, 2014), *available at* http://www.propublica.org/article/thank-you-for-your-service-how-one-company-sues-soldiers-worldwide (describing similar forum-selection practices by USA Discounters).

abusiveness claims based on the ineligibility of consumers in cases against debt-relief companies and a for-profit school.[46]

- The CFPB's complaint against one company that provided mortgage payment services alleged that the company's promise of savings to consumers who enrolled in its bi-monthly mortgage payment program was abusive because the defendants knew that most consumers would leave the program prior to saving money. But the CFPB's consent order against another company providing similar services, which contained similar factual allegations about the company's marketing of savings that only a small number of consumers realize, did not contain an abusiveness claim.[47]
- Finally, the CFPB alleged that a company's payment allocation practices, which allegedly presented challenges to consumers effectively allocating payments to specific deferred-interest balances on most, or all, of their accounts, constituted abusive conduct. But similar conduct allegedly engaged in by student loan servicers has been described by the CFPB in its Supervisory Highlights newsletter as the "unfair"—but not abusive—"practice of depriving consumers of an effective choice as to how to allocate these partial payments."[48] This last example is particularly troubling, as it suggests that how a practice is characterized may depend on whether the institution at issue is subject to a CFPB investigation (conducted by its Office of Enforcement) or examination (conducted by its Office of Supervision Examinations).

The above comparisons are necessarily simplistic, based on the limited facially-similar facts available in the public record. But they do suggest a possible lack of consistency in the agency's approach to this important issue. Such a lack of consistency is perhaps understandable given the newness of the abusiveness authority and the challenge in identifying what conduct is abusive. But as the agency matures and develops a body of abusiveness cases, greater consistency and providing more information about why certain conduct is deemed abusive would help the CFPB achieve its presumed goal of educating industry as to the meaning of this new prohibition.

Tool Choice and the Use of Enforcement

To date, abusiveness is almost exclusively a phenomenon of CFPB enforcement actions and, to some extent, state attorney general enforcement actions. Although the CFPB has authority to define abusive practices by regulation,[49] it has not yet done so. The Bureau has referred to abusiveness as one of several possible bases for rulemakings concerning debt collection and payday lending, but it is unknown whether the final rules will rely on this

[46] *Compare* Consent Order at 9-10, *In the Matter of Synchrony Bank f/k/a GE Capital Retail Bank*, File No. 2014-CFPB-0007 (June 19, 2014), *with* Complaint at 13-15, *CFPB v. Am. Debt Settlement Solutions, Inc.*, No. 9:13-cv-80548 (S.D. Fla. May 30, 2013), *and* Complaint at 14-16, *CFPB v. College Educ. Servs. LLC*, No. 8:14-cv-03078 (M.D. Fla. Dec. 11, 2014), *and* Complaint at 30-31, *CFPB v. ITT Educ. Servs., Inc.*, No. 1:14-cv-292 (S.D. Ind. Feb. 26, 2014).

[47] *Compare* Complaint at 10, *CFPB v. Nationwide Biweekly Admin., Inc.*, No. 3:15-cv-02106 (N.D. Cal. May 11, 2015) (emphasis added), *with* Consent Order, *In the Matter of Paymap, Inc.*, File No. 2015-CFPB-0017 (July 28, 2015).

[48] *Compare* Complaint at 14-15, *CFPB v. PayPal, Inc.*, No. 1:15-cv-01426 (D. Md. May 19, 2015), *with* CFPB, Supervisory Highlights, Issue 9, Fall 2015, at 22, *available at* http://files.consumerfinance.gov/f/201510_cfpb_supervisory-highlights.pdf.

[49] 12 U.S.C. § 5531.

authority.[50] And there is little on the public record that suggests that CFPB examiners cite abusiveness violations outside the enforcement context. The CFPB's Supervisory Highlights newsletter alludes to the fact that the CFPB's exam work eventually led to a public enforcement action against a single payday lender for abusive practices.[51] But otherwise there is little sign of the abusiveness doctrine in the hundreds of pages of Supervisory Highlights published so far.

The four federal prudential regulators all have authority to bring abusiveness claims against banks and credit unions with total assets of $10 billion or less, to the exclusion of the CFPB. But none of these agencies' public examination manuals or regulatory compliance handbooks appear to refer to the abusiveness doctrine. Instead, these sources refer to unfairness and deception only. Federal prudential regulators routinely cite unfair and deceptive acts or practices in their public enforcement actions, but have never cited abusive acts or practices.

Determining what constitutes abusiveness, therefore, has been almost wholly confined to CFPB enforcement actions. There is nothing inherently wrong with that so long as the legal standard is applied fairly and consistently to similar conduct. Over time, the federal courts will have their say. But until then, it is the CFPB's pleadings in enforcement actions that will continue to define the scope of what constitutes abusive conduct.

Takeaways about Abusiveness

So what does it all mean and what can we learn from how the CFPB has handled its abusiveness authority to date? For the most part, the abusive conduct alleged by the CFPB has also been alleged to be unfair and/or deceptive, or could have been. With the possible exception of the prong (2)(C) cases, therefore, there is still no clear answer to the question of what might constitute abusive conduct that wasn't already proscribed by the traditional UDAP prohibition. That said, some insights can be gleaned from these cases.

First, given the lack of clear distinction between abusiveness and unfairness or deception, it appears that bringing an abusiveness claim is a way for the agency to make a statement of moral disapproval. Many of the abusiveness cases involve consumers whom the CFPB views as especially vulnerable—students, seniors, members of the military, payday loan borrowers, and those seeking debt relief assistance. None involved instances where the CFPB recognized "responsible business conduct," which is a CFPB policy to reward companies that engage in self-policing, self-reporting, remediation, and cooperation.[52] And none involved depository institutions, which the agency may see as less likely to deliberately seek to harm consumers. It thus appears that non-depository institutions that sell financial products and services to seemingly vulnerable consumers are more likely to be tagged with

[50] *Advance Notice of Proposed Rulemaking, Debt Collection (Regulation F)*, 78 Fed. Reg. 67,848 (Nov. 12, 2013); CFPB, *Small Business Advisory Review Panel for Potential Rulemaking for Payday, Vehicle Title, and Similar Loans: Outline of Proposals under Consideration and Alternatives Considered* (Mar. 26, 2015), *available at* http://files.consumerfinance.gov/f/201503_cfpb_outline-of-the-proposals-from-small-business-review-panel.pdf.

[51] CFPB, *Supervisory Highlights*, Issue 4, Fall 2014, at 22-23, *available at* http://files.consumerfinance.gov/f/201410_cfpb_supervisory-highlights_fall-2014.pdf.

[52] *See* CFPB Bulletin 2013-06 (June 25, 2013), *available at* http://files.consumerfinance.gov/f/201306_cfpb_bulletin_responsible-conduct.pdf.

the "abusive" label. That, of course, provides little by way of clarity as to what conduct might be considered to cross the "abusive" line.

Second, many of the abusiveness claims turn on allegedly deceptive statements (or omissions) that companies made (or failed to make) to consumers. It is those statements that are deemed to constitute the "taking unreasonable advantage" required for the prong (2) abusiveness claims (or, in rarer circumstances, the "material interference" required for a prong (1) claim). But it is not clear if the CFPB has any more of a developed sense today of when such allegedly deceptive conduct crosses the line into abusiveness than it did four-and-a-half years ago, when it first gained this authority, since no discernable pattern has emerged of when an abusiveness count is added to these cases.

Third, it is clear that prongs (2)(A) and (2)(B) are those most frequently relied upon, although the distinction at to which of those prongs should apply to what specific conduct is not at all clear. As discussed above, in many instances it appears that the CFPB could have just as easily selected the other prong. The alleged "lack of understanding" underpinning prong (2)(A) claims can also be alleged to constitute an "inability to protect a consumer's interests" under prong (2)(B). And many of the prong (2)(B) cases in fact rely upon alleged misrepresentations or omissions that could have formed the basis for a prong (2)(A) claim. That said, prong (2)(A) seems to most closely parallel deception claims, while prong (2)(B) seems to most closely parallel unfairness claims.

The one area in which some clarity may be developing is in the CFPB's use of prong (2)(C) in cases where companies allegedly took affirmative action to induce vulnerable consumers to believe that the company will act in the consumer's best interests in order to sell them products or services from which they were unlikely to benefit. While conclusions are difficult to draw from the small number of cases, if the pattern continues, it may provide the clearest indication of what conduct falls within the "abusive" arena.

Insofar as specific conduct is concerned, several themes are apparent. First, the CFPB has repeatedly asserted that attempting to collect on loans that are allegedly void or voidable as a function of state law is abusive conduct. As two of those cases are currently being litigated, they may provide a heretofore rare opportunity for the federal courts to opine on the appropriate reach of the abusiveness authority. Second, steering consumers into high-cost loans may constitute abusiveness, particularly if the company should know that cheaper alternatives exist. Third, in some cases selling consumers financial products or services that they cannot afford or for which they do not qualify may constitute abusive conduct. In this respect, the CFPB appears to be using its abusiveness authority to seek to impose a "suitability"-type requirement on providers of consumer financial products or services. Finally, certain debt collection conduct may constitute abusive conduct, although it is difficult to ascertain what factors drive the CFPB to conclude that certain conduct is abusive but other conduct is not.

For companies seeking to comply with this emerging area of law, a few lessons emerge. First, a compliance program targeted at preventing traditional UDAPs is likely to address potential UDAAPs as well. Because the conduct alleged to be abusive to date could similarly have been alleged to be unfair and/or deceptive (and in most cases was so alleged), focusing on avoiding those better-defined legal prohibitions will go a long way toward preventing an abusiveness claim. Second, companies should take special care if they make statements that could reasonably be understood to induce consumers to rely on the company to act in the consumer's interest. This is especially true with respect to the three specific populations that the CFPB is charged with protecting—students, seniors, and servicemembers. Companies should consider reviewing their marketing materials for such statements and take appropriate steps to either edit the marketing materials or ensure that the company is acting in accordance with them. Third, institutions marketing consumer financial products or services to arguably vulnerable populations should consider reviewing their marketing materials and products and services with an eye to whether the CFPB might allege that the companies steered consumers into more expensive or riskier products or otherwise sold consumers products or services for which the consumers were ineligible or from which they were unlikely to benefit. These seem to be the primary areas of abusiveness concern for the CFPB to date, and companies should consider proactively addressing any risks they face in these areas.

Given the importance of this emerging area of the law, the CFPB should take steps to be consistent and transparent in its use of this new authority. Particularly because few institutions have so far been willing to litigate with the agency, the agency's choice of claims in its complaints and consent orders plays an important role in shaping the contours of abusiveness. With the traditional UDAP arsenal at its disposal, the CFPB can afford to take a more deliberate approach to its implementation of the abusiveness prohibition. Consistency in approach—in terms of what conduct is deemed abusive, what prong of abusiveness applies, and how claims are pled—will serve to both ensure that the agency is exercising its authority in a consistent manner, and allow industry to better understand the CFPB's expectations. Ultimately, the final word will come from the federal courts. But in the intervening years, the CFPB has a special responsibility to carefully develop this new area of law.

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