GORDON·FEINBLATT LLC
ATTORNEYS AT LAW

Davis Wright Tremaine LLP
DEFINING SUCCESS TOGETHER

A Survey of Activities Identified as Unfair, Deceptive, or Abusive Under the Dodd-Frank Act

by
Adam D. Maarec, Davis Wright Tremaine LLP
John C. Morton, Gordon Feinblatt LLC

American Bar Association Consumer Financial Services Young Lawyers Subcommittee

January 2, 2015

I. Introduction

This is our latest article in a series that surveys activities identified as unfair, deceptive or abusive (UDAAP) by the CFPB, and state attorneys general and consumer financial services regulators, using federal UDAAP powers created by the Dodd-Frank Act.[1] This article covers relevant UDAAP activity that occurred between July 1, 2014 and December 31, 2014. We have expanded this survey beyond enforcement actions to also cover statements by the CFPB in reports and bulletins that discuss UDAAP violations.[2] These activities provide insight into the specific types of practices that could be considered UDAAP violations in the future.

We intend to publish periodic updates to this article cataloging new CFPB UDAAP activity and related state enforcement actions using federal UDAAP powers.

II. Overview: Identification of Unfair, Deceptive, and Abusive Practices by the CFPB and by the States

Between July 1, 2014 and December 31, 2014, the CFPB engaged in 20 public enforcement actions based on alleged UDAAP practices. In 3 of those actions, the CFPB teamed with state attorneys general to jointly allege violations of the law. The New York Department of Financial Services was the only state to independently exercise its new federal UDAAP authority during this period.

Past UDAAP actions can provide a road map for industry participants to identify and better understand acts and practices that are considered problematic by law enforcement authorities. UDAAP enforcement actions during the period of this summary involved marketing, debt collection / settlement, credit reporting, and mortgage servicing. The CFPB highlighted other UDAAP issues in reports and guidance involving sales of credit card debt, marketing of credit card promotional offers, and student loan servicing.

---

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5301 *et seq.* (the "Dodd-Frank Act"); *see, e.g.*, 12 U.S.C. § 5552 (2014).
[2] We have attempted to make this survey as comprehensive as possible, however, it is not exhaustive and there may be other relevant actions that are not discussed in this paper. Also, it must be noted that this area of law is rapidly evolving and new actions are arising monthly.

The summaries of each UDAAP action below appear in chronological order and are intended to provide a straightforward identification of the specific acts or practices that were alleged to be unfair, deceptive, or abusive by the CFPB, state attorneys general and/or state regulators.

III. CFPB Actions

a. Ace Cash Express, Inc.[3] – July 2014 (Debt Collection / Settlement)

Ace Cash Express, Inc. provided payday loans over the internet and through brick and mortar stores. Ace entered into a consent order with the CFPB concerning its debt collection activities.

The CFPB alleged that the company engaged in the following unfair practices:

- Making an excessive number of calls to consumers' home, work, and cell phone numbers;
- Disclosing the existence of consumers' debts to non-liable third parties;
- Continuing to call consumers at work after being told that such calls were prohibited;
- Continuing to call consumers directly after being told that they were represented by counsel; and
- Continuing to call consumers with no relation to the debt after being told that it had the wrong person.

The CFPB alleged that the company engaged in the following deceptive practices:

- Misrepresenting the acts that would be taken by third-party debt collectors if the debt were transferred;
- Misrepresenting its ability to prevent a debt from being transferred to a third-party collector;
- Falsely threatening litigation;
- Falsely threatening to report non-payment to credit bureaus;
- Falsely threatening to refer non-payment for criminal prosecution; and
- Falsely threatening to add collection fees.

The CFPB alleged that the company engaged in the following abusive practices:

- Creating and leveraging an artificial sense of urgency to induce delinquent borrowers with a demonstrated inability to repay their existing loan to take out a new loan with accompanying fees.

The CFPB took issue with alleged practices of both the company's in-house debt collectors and its third-party debt collectors. The CFPB alleged that the company's compliance monitoring, vendor management and quality assurance did not prevent, identify, or correct the above alleged instances of misconduct by some third-party debt collectors.

---

[3] *See In re Ace Cash Express, Inc.*, Consent Order, available at http://files.consumerfinance.gov/f/201407_cfpb_consent-order_ace-cash-express.pdf (last visited January 2, 2015).

The company was ordered to pay $5 million in restitution and a $5 million civil money penalty.

b. Frederick J. Hanna & Associates, P.C.[4] – July 2014 (Debt Collection / Settlement)

The CFPB filed a complaint against the law firm Frederick J. Hanna & Associates, P.C. and its three principal partners alleging that the firm operated as a debt collection "lawsuit mill" engaging in deceptive acts and practices in the course of its debt collection activities. In addition to allegations of violations of the Fair Debt Collection Practices Act, the CFPB alleged the following deceptive acts in violation of the Dodd-Frank Act:

- Preparing and filing complaints "without meaningful attorney involvement" because such complaints were inherently "false or misleading"; and
- Filing affidavits in support of the law firm's collection lawsuits where the affiants "represented that they had personal knowledge of the validity and ownership of debts" when many of the affidavits were executed by persons who lacked personal knowledge of the facts contained in them.

This case was not resolved at the time of publication.

c. Clausen & Cobb Management Company and Siringoringo Law Firm; The Mortgage Law Group, LLP and the Consumer First Legal Group, LLC; and Hoffman Law Group -- July 2014[5] (Debt Collection / Settlement)

The CFPB filed three lawsuits against a group of foreclosure relief companies. In addition to allegations that the defendants violated Regulation O, the lawsuits included allegations of deceptive marketing tactics in violation of the Dodd-Frank Act's UDAAP provisions, including misrepresentations concerning:

- Consumers' eligibility for a mortgage modification;
- The likelihood of success and the savings that could be obtained by a mortgage modification;
- Charging and collection of illegal upfront fees for promised mortgage modification; and
- The provision of actual legal representation when many consumers never spoke with an attorney or even had their case reviewed by a lawyer.

---

[4] *See Complaint, Consumer Financial Protection Bureau v. Frederick J. Hanna & Associates, P.C.*, Case No. 1:14-cv-02211-AT-WEJ (N.D. GA, July 14, 2014), *available at* http://files.consumerfinance.gov/f/201407_cfpb_complaint_hanna.pdf (last visited January 2, 2015).

[5] *See Complaint, Consumer Financial Protection Bureau v. Clausen & Cobb Management Company, Inc.*, Case No. 2:14-cv-05681 (C.D. CA, July 22, 2014), available at http://files.consumerfinance.gov/f/201407_cfpb_complaint_clausen-cobb.pdf; *Complaint*, *Consumer Financial Protection Bureau v. The Mortgage Law Group*, Case No. 3:14-cv-00513 (W.D. WI, July 22, 2014), available at http://files.consumerfinance.gov/f/201407_cfpb_complaint_cfpb-v-tmlg-et-al.pdf; *Complaint*, *Consumer Financial Protection Bureau v. The Hoffman Law Group*, Case No. 14 CV80931 (S.D. FL, July 14, 2014), available at http://files.consumerfinance.gov/f/201407_cfpb_complaint_hoffman-law-group-et-al.pdf (last visited January 2, 2015). (Each case included individual owners).

In connection with these actions, the CFPB issued a consumer advisory[6] identifying potential red flags in connection with foreclosure relief scams.

These cases were not resolved at the time of publication.

d. Rome Finance[7] – July 2014 (Marketing & Debt Collection / Settlement)

Colfax Capital Corporation, formerly known as Rome Finance Co., Inc., offered indirect open-end credit to finance purchases of consumer goods, including computers, cameras, and cell phones, from third-party retailers that catered to servicemembers. The CFPB, along with 13 state attorneys general,[8] alleged in a joint consent order that finance charges were hidden in the inflated prices of retail goods. Although the pricing of goods appears to have been set by the retailer, the consent order alleged that the finance company was involved in disclosing the pricing of the consumer goods and the cost of financing. The hidden finance charges resulted in allegedly unfair, deceptive, and abusive practices, along with violations of Regulation Z's open-end credit disclosure requirements related to the finance charge and annual percentage rate (APR).

Permitting artificially inflated pricing of retail goods, resulting in disclosures that understated the actual finance charge and APR, was considered deceptive.

The CFPB's consent order also alleged that the actual finance charge, after accounting for the artificially inflated price of goods, would violate usury caps in several states, including New York and North Carolina, and thus the debt would be considered void under certain state laws. Servicing and collecting on these allegedly void loans was considered unfair, deceptive and abusive.

The company, facing bankruptcy, was ordered to stop collecting on all $92 million of its outstanding loans and ordered to pay a $1.00 civil money penalty, given its inability to pay greater fines.

e. Amerisave[9] – August 2014 (Marketing)

Amerisave Mortgage Corporation offered mortgage origination services online and advertised its mortgage rates through rate tables and other advertisements published on third-party websites. The CFPB alleged that the company, along with its individual owner and an affiliate, engaged in

---

[6] *See* Consumer Advisory: Don't Fall For a Foreclosure Relief Scam or Bogus Legal Help, CFPB, http://www.consumerfinance.gov/blog/consumer-advisory-dont-fall-for-a-foreclosure-relief-scam-or-bogus-legal-help/ (last visited January 2, 2015).

[7] *See In re Colfax Capital Corporation, et al.*, Consent Order, available at http://files.consumerfinance.gov/f/201407_cfpb_consent-order_rome-finance.pdf (last visited January 2, 2015).

[8] The joint settlement with Attorneys General for the States of Colorado, Delaware, Florida, Georgia, Kentucky, Indiana, Iowa, Massachusetts, Michigan, New York, North Carolina, Tennessee, and Vermont, and the CFPB, is available at http://www.attorneygeneral.delaware.gov/documents/RomeFinance-ExecutedSettlementAgreement.pdf (last visited January 2, 2015).

[9] *See In re Amerisave Mortgage Corporation, et al.*, Consent Order, available at http://files.consumerfinance.gov/f/201408_cfpb_consent-order_amerisave.pdf (last visited January 2, 2015).

unfair and deceptive acts or practices in connection with their advertising of rates and offering of services by an affiliate.

The following alleged practices were considered deceptive with respect to mortgage interest rates:

- Publishing rates that the company was not willing or was not likely to honor;
- Publishing rates based on an 800 credit score when:
    - The majority the company's customers had credit scores below 800;
    - The reliance on an 800 credit score was not disclosed;
- Publishing rates that were dependent on the consumer paying discount points of up to $10,000 and not disclosing that fact; and
- Failing to provide accurate rates for consumers with credit scores under 800 before beginning the application process.

The CFPB also alleged that the company failed to perform systematic due diligence or quality control to ensure the accuracy of its advertised rates, though it is unclear whether that failure might constitute a deceptive practice in isolation.

Furthermore, the CFPB also alleged that the company misrepresented that third-party appraisal review fees were not paid to the company, were not marked up, and were based on a "special deal" since such fees were actually paid to an affiliate of the company, were marked up by almost 900%, and were not based on a special deal.

Because the individual owner of the company and its affiliates "materially participated" in these allegedly deceptive acts, he too was held liable for deceptive acts or practices.

Finally, the marked up fees of the affiliates' appraisal review service were considered unfair because:

- The company misrepresented that the fees were not marked up; and
- Consumers were only notified of the affiliate relationship after an appraisal had been scheduled, the consumer's credit card had been charged, and a cancellation fee would apply in some circumstances.

Other violations in connection with Regulations X and Z were alleged. The consent order imposed $14.9 million in consumer relief and imposed civil money penalties of $4.5 million against the company and its affiliate, and $1.5 million against the company's individual owner and CEO.

f. USA Discounters[10] – August 2014 (Marketing)

USA Discounters, Ltd. is a chain of retailers that offered consumer goods on credit, including furniture, electronics, and appliances, through the issuance of retail installment loans. Its retail

[10] *See In re USA Discounters, Ltd.*, Consent Order, available at http://files.consumerfinance.gov/f/201408_cfpb_consent-order_usa-discounters.pdf (last visited January 2, 2015).

stores were often located near military installations and it employed a special version of its loan agreement for servicemembers that required the use of an independent company, for a fee, to verify the military status of consumer borrowers and to "represent and assist" servicemembers with respect to certain Servicemember Civil Relief Act (SCRA) matters.

The following alleged practices were considered both unfair and deceptive in connection with the SCRA-related fee:

- Misrepresenting that the fee was charged for a third-party to verify military status, since the company frequently performed this status verification on its own; and
- Creating a false impression that the independent company could receive service on the servicemember's behalf when the company was not actually able to receive service and never actually received service for any servicemember.

The CFPB also alleged that is was unfair to charge a fee for which no ascertainable services were actually provided and deceptive to mislead consumers that the SCRA-related services were actually being provided and being provided by an independent third-party.

The company was ordered to refund $350,000 in SCRA-related service fees and pay a $50,000 civil money penalty.

g. First Investors Financial Services Group Inc.[11] – August 2014 (Credit Reporting)

First Investors, an auto finance company lending primarily to subprime borrowers, entered into a consent order with the CFPB to address allegations that First Investors failed to report accurate information about consumers to consumer reporting agencies ("CRAs"). The CFPB alleged that the company systematically furnished inaccurate information to CRAs involving numerous data points[12] about how its customers were performing on their accounts and, that upon learning of the inaccuracies, the company did not suspend its furnishing of information but continued to furnish inaccurate information. Finally, the company allegedly failed to require its service provider to correct the issues causing inaccuracies within a reasonable time.

The consent order points to one specific misrepresentation made by the company concerning the accuracy of customer information furnished by First Investors to the CRAs that resulted in a deceptive practice. In a statement on its website about how a customer can dispute information appearing on his or her credit report, First Investors stated that it only furnishes accurate information to CRAs and that it will promptly correct any inaccurate information. The CFPB alleged violations of the Fair Credit Reporting Act and Dodd-Frank Act, stating that the information furnished was not accurate, the company did not promptly correct information it knew to be inaccurate, and therefore, the statement on its website was a material misrepresentation and a deceptive act or practice.

---

[11] *See In re First Investors Financial Services Group, Inc.*, Consent Order, available at http://files.consumerfinance.gov/f/201408_cfpb_consent-order_first-investors.pdf (last visited January 2, 2015).
[12] E.g., the date of customers' first delinquencies, overstating to CRAs the dollar amount past due on customer accounts, understating to CRAs the dollar amount paid by customers every month, failing to distinguish between voluntary surrenders of auto collateral and involuntary repossessions, and reporting all repos as "involuntary".

The CFPB's consent order required the company to:

- Correct all errors and inaccuracies on all consumer accounts;
- Help all affected consumers obtain free copies of their credit reports;
- Establish safeguards to ensure that it reports accurate information to CRAs, including an audit system to identify any systemic inaccuracies; and
- Pay a civil money penalty of $2.75 million.

h. Hydra Group[13] – September 2014 (Marketing)

The Hydra Group, its individual owners, and a web of related companies offered online payday loans. The group was sued in a civil action by the CFPB for allegedly originating loans, dispersing funds, and repeatedly withdrawing funds without consumer consent.

The following alleged practices were considered deceptive by the CFPB:

- Asserting that a borrower was obligated to repay an online payday loan when the consumer had not actually consented to the loan; and
- Disclosing that the total of payments will be equal to the amount financed plus a stated finance charge, when the actual total of payments was actually greater due to multiple refinancings of the loan and multiple finance charges.

The alleged debiting of a consumer's bank account without consumers' express, informed consent was also considered unfair. Numerous other violations of Regulations Z and E were also alleged.

This case was not resolved at the time of publication

i. Corinthian Colleges[14] – September 2014 (Marketing)

Corinthian Colleges, Inc., a for-profit college, offered private student loans to fund the gap between federal student loans obtained by a student and their total tuition amount. The college was sued in a civil action by the CFPB for allegedly unfair and deceptive inducement, including high-pressure sales tactics, and alleged violations of the Fair Debt Collection Practices Act.

The following alleged practices were considered deceptive by the CFPB:

- Making material misrepresentations and omissions regarding the services it would provide, including graduates' career opportunities, the college's career services, and the likelihood of finding lasting employment, to induce students to obtain private student loans.

---

[13] *See Complaint, Consumer Financial Protection Bureau v. Richard F. Moseley, Sr. et al.*, Case No. 4:14-cv-00789-DW (W.D. MO, September 8, 2014), available at http://files.consumerfinance.gov/f/201409_cfpb_complaint_hydra-group.pdf (last visited January 2, 2015).

[14] *See Complaint, Consumer Financial Protection Bureau v. Corinthian Colleges, Inc.*, Case No. 1:14-cv-07194 (N.D. IL, September 16, 2014), available at http://files.consumerfinance.gov/f/201409_cfpb_complaint_corinthian.pdf (last visited January 2, 2015).

The following alleged practices were considered unfair by the CFPB:

- Preventing students from attending class, denying access to computers, and otherwise preventing students from completing classes in order to collect past-due loans in a manner that denied them access to programs for which they had already paid; and
- Publicly disclosing debts causing reputational harm and emotional distress.

This case was not resolved at the time of publication

j. US Bank, N.A.[15] – September 2014 (Marketing & Debt Collection / Settlement)

U.S. Bank entered into a consent order with the CFPB in connection with its marketing of identity theft protection products. The bank referred interested customers to a service provider that offered for sale, sold, and administered the product. The product promised to monitor three credit bureau reports for identity theft but the bank, through its service provider, allegedly failed to actually conduct that monitoring, and despite that failure, continued to charge consumers the full price of the monitoring.

The CFPB alleged that billing customers for the full fee of the identity protection product when consumers did not receive all of the products' benefits was unfair since customers were unable to know that the bank was not actually performing the complete monitoring services. The CFPB also alleged that the bank's compliance monitoring, service provider management, and quality assurance failed to prevent, identify, or correct these improper billing practices.

The bank was ordered to pay $48 million for consumer relief and a $5 million civil money penalty to the CFPB.

In a separate consent order issued on the same day, the Office of the Comptroller of the Currency imposed overlapping consumer relief and an additional $4 million civil money penalty for the same violations.

k. Flagstar Bank[16] – September 2014 (Mortgage Servicing)

Flagstar Bank, F.S.B. engaged in mortgage servicing activities. A significant number of loans that it serviced were delinquent and holders of such delinquent loans were entitled to certain loss mitigation (foreclosure prevention) consumer protections. The bank outsourced the servicing of these delinquent loans to an undisclosed service provider, and at least some of the alleged violations appear to stem from the bank's inadequate staffing and the service provider's actions.

The CFPB alleged that the following mortgage servicing practices were unfair:

- Failing to review loss mitigation applications in a reasonable amount of time;

[15] *See In re U.S. Bank National Association*, Consent Order, available at http://files.consumerfinance.gov/f/201409_cfpb_consent-order_us-bank.pdf (last visited January 2, 2015).
[16] *See In re Flagstar Bank, F.S.B.*, Consent Order, available at http://files.consumerfinance.gov/f/201409_cfpb_consent-order_flagstar.pdf (last visited January 2, 2015).

- Withholding information that borrowers needed to complete their loss mitigation applications;
- Improperly denying loan modification requests based on a failure to accurately calculate borrowers' income; and
- Prolonging modification trial periods that prevented borrowers from obtaining a permanent modification, increased borrowers' loan amounts, and/or left borrowers with fewer options to cure their delinquency.

Additionally, the CFPB alleged that the bank engaged in a deceptive act or practice by expressly or impliedly stating that borrowers could only appeal a loan modification denial if they resided in certain states when such an appeal was actually available in every state under the CFPB's Mortgage Servicing Rule.

The bank was ordered to pay $27.5 million to the CFPB for consumer relief and a $10 million civil money penalty.

l. M&T Bank[17] – October 2014 (Marketing)

M&T Bank entered into a consent order with the CFPB to settle allegations that it deceptively marketed "no strings attached" free checking accounts without disclosing key eligibility requirements to consumers.

The CFPB alleged that the bank's free checking account advertisements were deceptive because they:

- Failed to adequately disclose the minimum activity requirement necessary to maintain free checking; and
- Failed to adequately disclose that the free checking accounts would automatically convert from a free checking account to an account with a monthly maintenance fee if the customer failed to maintain eligibility requirements or if the account remained inactive for 90 days.

The bank was ordered to pay $2.045 million in consumer relief to the approximately 59,000 consumers who were allegedly deceived when paying the checking account fees and to pay a $200,000 civil money penalty.

m. DriveTime Automotive Group, Inc. and DT Acceptance Corp.[18] – November 2014 (Debt Collection / Settlement & Credit Reporting)

Drive Time Automotive Group, Inc., a "buy-here, pay-here" used car dealership,[19] and its finance company, DT Acceptance Corp., entered into a consent order with the CFPB to settle

[17] *See In re Manufacturers and Traders Trust Company*, Consent Order, available at http://files.consumerfinance.gov/f/201410_cfpb_consent-order_m-t.pdf (last visited January 2, 2015).
[18] *See In re DriveTime Automotive Group, Inc. and DT Acceptance Corp.*, Consent Order, available at http://files.consumerfinance.gov/f/201411_cfpb_consent-order_drivetime.pdf (last visited January 2., 2015).

allegations that they engaged in unfair debt collection practices and provided inaccurate credit information to credit reporting agencies.

The CFPB alleged that the companies violated the Fair Credit Reporting Act and engaged in the following unfair practices:

- Harassing borrowers at work with collection calls after consumers requested that such calls stop;
- Harassing borrowers' third-party references after the references requested that such calls stop;
- Making excessive, repeated calls to wrong numbers even after consumers requested that such calls stop;
- Providing inaccurate repossession information to consumer reporting agencies when the companies had reason to believe the information was inaccurate;
- Failing to properly handle credit information furnishing disputes, including failing to correct or delete inaccurate information within a reasonable time after learning of the inaccuracies; and
- Failing to implement reasonable procedures to ensure the accuracy of consumers' credit information.

The companies were ordered to reform their debt collection and credit information furnishing practices and to pay an $8 million civil money penalty.

n. Student Loan Processing.US[20] – December 2014 (Debt Collection / Settlement)

Student Loan Processing.US offered for-cost student loan debt relief services through direct mail and outbound telemarketing solicitations. The CFPB alleged in a civil action against Student Loan Processing.US that the company engaged in deceptive telemarketing practices that violated the Telemarketing Sales Rule, namely the collection of fees for debt relief services before renegotiating, settling, reducing, or otherwise altering any debts and before a consumer makes a payment under an altered debt.

The CFPB also alleged that the following acts or practices were violations of both the Dodd-Frank Act's UDAAP provisions and the Telemarketing Sales Rule:

- Misrepresenting the company's affiliation with the government by:
    - Placing the following on the envelope of its direct mail solicitations: the words "official business"; a citation to 18 U.S.C. §§1702 et seq (regarding imprisonment for tampering with mail); a bald eagle stamp; and a logo that resembled the Department of Education's logo; and

---

[19] A "buy-here, pay-here" dealership is one in which the dealership sells the car, as well as originates and services the auto loan. "Buy-here, pay-here" dealerships typically service subprime borrowers.

[20] *See Complaint for Permanent Injunction and Other Relief, Consumer Financial Protection Bureau v. IrvineWebWorks, Inc. et al.*, Case No. 8:14-cv-1967, available at http://files.consumerfinance.gov/f/201412_cfpb_complaint_student-loan-processing.pdf (last visited January 2, 2015).

- Stating that it "works with the Department of Education to consolidate" existing loans without a disclaimer that they were not affiliated with the Department of Education; and

- Misrepresenting the total cost of the service by including a monthly fee in the new monthly payment amount and downplaying the existence and duration of those fees in telemarketing.

This case was not resolved at the time of publication.

o. <u>College Education Services, LLC[21] – December 2014 (Marketing & Debt Collection / Settlement)</u>

College Education Services, LLC offered student loan debt-relief services to financially distressed student loan borrowers. The CFPB and the Florida Attorney General entered a joint settlement agreement with the company, its owner, and an employee for allegedly deceptive and abusive acts or practices in connection with claims made while telemarketing its services. Violations of other laws, including the Telemarketing Sales Rule and the Florida Deceptive and Unfair Trade Practices Act, were also alleged.

The CFPB and Florida Attorney General alleged that the company's telemarketers presented themselves as "counselors" or "advisors" with the knowledge necessary to achieve student loan modifications, including consolidating multiple loans, lowering monthly payments, eliminating garnishments, and improving credit scores. The company allegedly charged upfront fees before providing any of these services, in violation of the Telemarketing Sales Rule, and did not actually perform the promised services in many cases.

The CFPB (without the Florida Attorney General) alleged deception with respect to false, misleading, and unsubstantiated statements by telemarketers that the company would lower monthly payments, help consumers improve their credit scores, and achieve results in less than 8 weeks.

The CFPB (without the Florida Attorney General) also alleged that the company's acts were abusive because they:

- Targeted financially distressed consumers whose loans were in default, who were subject to garnishments, or were unable to afford their monthly payments;
- Held themselves out as experts to induce consumers' reliance on the company to act in their best interest in selecting a student loan debt-relief plan; and

[21] *See Complaint for Permanent Injunction, Civil Money Penalties, and Other Relief, Consumer Financial Protection Bureau et al. v. Freedom Stores, Inc. et al.*, Case No. 2:14 CV 643, available at http://files.consumerfinance.gov/f/201412_cfpb_complaint_the-college-education-services.pdf (last visited January 2, 2015). *See also Stipulated Final Judgment and Order for Permanent Injunction, Civil Money Penalties, and Other Relief, Consumer Financial Protection Bureau et al. v. Freedom Stores, Inc. et al.*, Case No. 2:14 CV 643, available at http://files.consumerfinance.gov/f/201412_cfpb_consent-order_the-college-education-services.pdf (last visited January 2, 2015).

- Took unreasonable advantage of consumers by taking fees from consumers whose loans could not be consolidated or did not otherwise qualify for any of the relief offered by the company.

The company, its owner, and one of its employees were banned from offering any debt-relief services and ordered to pay civil money penalties of $25,000 to the CFPB and $10,000 to the Florida Attorney General, in addition to $15,000 for investigative and attorney's fees to the Florida Attorney General.[22]

p. Sprint Corporation[23] – December 2014 (Marketing & Debt Collection / Settlement)

Sprint Corporation provides wireless telephone services. The CFPB filed a complaint against Sprint alleging that the company outsourced certain compliance and billing practices to a third-party billing aggregator that allowed fees for premium text messaging services to be unfairly placed on customers' wireless telephone service bills. Although Sprint is a telecommunications firm, the CFPB alleged that the company is a "covered person" under the Dodd-Frank Act because it "extends credit to, and processes payments for, consumers in connection with goods and services that Sprint does not directly sell or that consumers do not directly purchase from Sprint."

The CFPB alleged that Sprint engaged in the following unfair practices:

- Placing charges for third-party goods and services on their customers' telephone bills:
    - When customers never received the communications or products promised by the third-party; and
    - Despite a significant volume of complaints; and
- Billing customers for unauthorized charges by:
    - Automatically enrolling customers in a third-party billing system without their consent;
    - Giving third parties access to its billing system and customers without adequate compliance controls, including:
        - Failing to directly require that merchants obtain customer authorization for purchases or comply with industry guidelines,
        - Failing to compile third-party billing data; and
        - Failing to properly oversee the billing firm's compliance with laws (despite the existence of available breach-of-contract remedies for such failures); and
    - Failing to adequately respond customer complaints by:
        - Refusing to provide refunds and only stopping future charges; and
        - Giving partial refunds; and
    - Ignoring warnings from:

[22] Note that the sums paid to the Florida Attorney General were authorized by the Florida Deceptive and Unfair Trade Practices Acts.
[23] *See Complaint, Consumer Financial Protection Bureau v. Sprint Corporation*, Case No. 14 CV 9931, available at http://files.consumerfinance.gov/f/201412_cfpb_cfpb-v-sprint-complaint.pdf (last visited January 2, 2015).

- Government agencies through past enforcement actions with the attorneys general in New York and Nevada; and
- Public interest groups, such as the Better Business Bureau.

This case was not resolved at the time of publication.

q. Union Workers Credit Services, Inc.[24] – December 2014 (Marketing)

Union Workers offers consumers buying-club membership cards. The CFPB alleged in its complaint that the company falsely advertised its cards as general use credit cards, when in fact the cards could only be used to access closed-end, purchase-specific credit from the company. The CFPB alleged that the following acts were deceptive and therefore violations of the Dodd-Frank Act:

- Falsely advertising closed-end, purchase-specific credit as a general-use credit card through direct-mail advertisements and on its website;
- Falsely advertising affiliations with unions through photos and applications available on its website; and
- Failing to provide federally mandated opt-out rights to consumers with respect to certain targeted advertisements utilizing consumer credit reports.

This case was not resolved at the time of publication.

r. Freedom Stores, Inc.[25] – December 2014 (Debt Collection / Settlement)

Freedom Stores, Inc. operates a chain of retail stores that target servicemembers for the sale of consumer goods and provide retail installment contracts to finance purchases. The CFPB alleged in a joint consent order with the attorneys general of North Carolina and Virginia that a related company, Freedom Acceptance Corporation (FAC), would purchase and service the extensions of credit made by the retail stores. Many servicemembers allegedly opted to repay their installment contracts through the military allotment system, which allows a servicemember to direct a portion of their regular paycheck directly to a creditor. Indeed, the complaint alleges that the companies facilitated the military allotment enrollment process for servicemembers. The loan servicer would allegedly use a look-ahead reporting process to determine whether sufficient funds existed for a servicemembers' military allotment to be processed in the days before the payment was actually made, and in the event there were insufficient funds, would charge a credit card or debit a bank account that the company had on file.

---

[24] *See Consumer Financial Protection Bureau v. Union Workers Credit Services, Inc.*, Case No. 3:14-cv-04410-L (N.D. TX, December 17, 2014), available at http://files.consumerfinance.gov/f/201412_cfpb_complaint_union-workers-credit-services.pdf (last visited January 2, 2015).

[25] *See Complaint for Injunctive Relief and Damages, Consumer Financial Protection Bureau et al. v. Freedom Stores, Inc. et al.*, Case No. 2:14 CV 643, available at http://files.consumerfinance.gov/f/201412_cfpb_complaint_freedom-stores_va-nc.pdf (last visited January 2, 2015). *See also Stipulated Final Judgment and Order, Consumer Financial Protection Bureau et al. v. Freedom Stores, Inc. et al.*, Case No. 2:14 CV 643, available at http://files.consumerfinance.gov/f/201412_cfpb_proposed-order_freedom-stores_va-nc.pdf (last visited January 2, 2015).

Despite little factual discussion of the retail installment contract's venue selection clause or the credit application process, the CFPB alleged that Freedom Stores', and its affiliates and principals, filing of debt collection lawsuits in Virginia pursuant to a venue selection clause was unfair because consumers:

- Had signed retail installment contracts far away from, and resided far away from, that venue;
- Were unaware that the retail installment contracts contained a venue selection clause and had little opportunity to review the agreement when it was signed; and
- Even if they had read the venue selection clause, had no chance to bargain for its removal since it was a non-negotiable agreement.

Debt collection lawsuits pursuant to the venue selection clause were also considered abusive because they allegedly took unreasonable advantage of consumers' inability to protect their interests by appearing in the venue, and as a result, default judgments leading to the garnishment of wages were nearly certain.[26]

In addition, the CFPB alleged that Freedom Stores', and its affiliates and principals, engaged in the following unfair practices:

- Contacting third parties about a delinquent debt, including servicemembers' military chain-of-command, despite the inclusion of a third-party contacts clause since many consumers were unaware of the clause and, even if they were aware of it, had little time to review it at the time of signing and no opportunity to bargain for its removal;
- Withdrawing recurring payment amounts from credit cards and bank accounts, which the companies were given access to only for one-time payments, and thus without proper authorization, notice, or opportunity to prevent the withdrawal; and
- Concurrently withdrawing payments from credit cards and bank accounts in addition to military allotments, resulting in the withdrawal of funds in excess of the payment owed.

Violations of the Electronic Funds Act and the Truth in Lending Act were also alleged.

The companies were ordered to reform their debt collection practices and pay $2.596 million in consumer relief and a $100,000 civil money penalty.

---

[26] The collection of consumer debts by a debt collector is regulated by the Fair Debt Collection Practices Act (FDCPA). That statute specifically requires that legal actions *by debt collectors* be conducted where the consumer signed the contract or in the consumer's state of residence. *See* 15 U.S. Code § 1692i. Perhaps FDCPA violations were not alleged here since no party was a debt collector. Regardless, it is notable that a potential violation of the FDCPA as it applies to a debt collector could be considered an unfair or abusive act or practice if it were applied to a creditor's collection of its own debts.

IV. State Enforcement Activity

a. New York v. Condor Capital[27] – December 2014 (Update)

In our September 10, 2014 survey we reported on the New York Department of Financial Services' (NYDFS) lawsuit against Condor Capital Corporation, a subprime automobile finance company, and its individual owner for alleged UDAAP violations. The specific allegations involved claims that the company wrongfully retained over-payments on loan accounts and maintained inadequate information security systems. On December 22, 2014, a Final Consent Judgment was entered settling the NYDFS' lawsuit against Condor Capital and its individual owner. [28]

Under the terms of the Final Consent Judgment, Condor Capital and its individual owner are required to make full restitution to all affected consumers nationwide (estimated at $8-9 million), pay a $3 million penalty, and admit violations of New York and federal law. Condor Capital also is required to dispose of all of its remaining loans through a sale and to surrender its licenses in all states where it is engaged in business.

b. Joint Enforcement Actions

The CFPB brought three enforcement actions in conjunction with state attorneys general: Rome Finance, College Education Services LLC, and Freedom Stores, Inc. Each case is described in Section III above.

V. CFPB Supervisory Highlights[29]

The CFPB periodically issues a Supervisory Highlights report that summarizes its supervisory activity over a period of time. Its latest release identified the following UDAAP issues that were not otherwise addressed in public enforcement actions:

a. Sales of Credit Card Debt

The CFPB is investigating whether unfairness occurred in one or more credit card debt sale transaction where: 1) the APRs for which consumers were liable under their credit agreements were overstated; and 2) payments received by the creditor after the debt sale were not forwarded to the debt buyer in a timely manner, ranging from two months to two years.

b. Student Loan Servicing

i. *Proportional Payment Allocation.* Student loan servicers often service multiple student loans and bill for each loan separately. But when

[27] *See New York v. Condor Capital Corporation and Stephen Baron*, Case No. 14-CV2863 (S.D. NY, April 23, 2014).
[28] Final Consent Judgment documents available at http://www.dfs.ny.gov/about/ea/ea141218b.pdf and http://www.dfs.ny.gov/about/ea/ea141218a.pdf (last visited January 2, 2015).
[29] *See* Supervisory Highlights, Consumer Financial Protection Bureau (Fall 2014), available at http://files.consumerfinance.gov/f/201410_cfpb_supervisory-highlights_fall-2014.pdf (last visited January 2, 2015).

consumers made a single payment for all the loans that is less than the minimum amount due, student loan servicers would allocate the payment proportionally to each loan, causing all loans to become delinquent. Since examiners could not identify a means for borrowers to avoid this result, the CFPB considered this to be an unfair fee maximizing practice.

ii. *Inaccurate Minimum Payments*. One student loan servicer identified the minimum payment due on a student loan to include accrued interest on loans still in deferment in periodic statements and online accounts statements. Since accrued interest is not due while a loan is in deferment, the CFPB found this to be a deceptive practice.

iii. *Not Honoring Grace Period*s. The CFPB found that some student loan servicers were charging late fees when payments were made within the loan's grace period, which it considered an unfair and deceptive practice.

iv. *Statements Regarding Discharge of Student Loans*. The CFPB found that some student loan servicers misrepresented that all student loans could not be discharged in bankruptcy. Since some student loans can be discharged in bankruptcy, this was considered a deceptive practice.

v. *Excessive Documentation Requests for Tax Benefits*. Student loan payments generate a tax benefit for many consumers. To obtain the tax benefit, borrowers must submit a 1098-E form, generated by the student loan servicer, evidencing payment. The CFPB found that some servicers required borrowers to provide a duplicative certification that the loan proceeds were used for qualified higher education. Without receiving the certification, the student loan servicer would not provide the 1098-E tax form and would not identify the payments as tax deductible on their online account statements. The duplicative certification request was considered unfair and the resulting online account statements were considered deceptive.

VI. CFPB Bulletins & Guidance

a. Marketing of Credit Card Promotional APR Offers[30]

The CFPB issued a bulletin that outlines potentially deceptive and abusive acts or practices in connection with promotional credit card APR offers. The CFPB has found that consumer confusion can arise with respect to the cost of a promotional offer when an issuer eliminates the grace period on new purchases because of an outstanding promotional offer balance.

[30] CFPB Bulletin 2014-02 (Sept. 3, 2014), available at: http://files.consumerfinance.gov/f/201409_cfpb_bulletin_marketing-credit-card-promotional-apr-offers.pdf (last visited January 2, 2015).

Failing to prominently disclose this cost of a promotional APR offer – the cost of a lost grace period for consumers that pay their balance in full – is considered a deceptive practice by the CFPB. Moreover, this practice could be considered abusive to the extent failing to disclose the loss of a grace period permits the issuer to take "unreasonable advantage [of consumers] by exploiting their lack of understanding to impose additional costs."

b. Interagency Guidance Regarding Unfair or Deceptive Credit Practices[31]

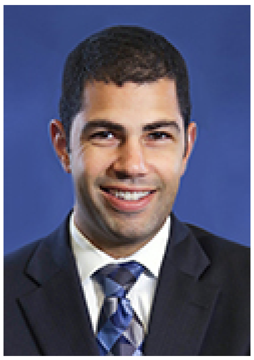
The CFPB, along with the prudential banking regulators, issued guidance indicating that the provisions of the Federal Trade Commission's Credit Practices Rule constitute unfair or deceptive acts or practices when conducted by entities within their respective jurisdictions.[32] The specific acts or practices prohibited by the Credit Practices Rule, and thus considered unfair or deceptive by the CFPB and other prudential regulators, include:

- The use of certain provisions in consumer credit contracts, including:
  - Advance hearing waivers;
  - Waivers of state statutory exemptions that protect debtors' homes and personal necessities from attachment to satisfy a debt, unless they were pledged as collateral for the loan;
  - Clauses that assign consumers' future wages to the creditor in the event of default; and
  - Provisions granting the creditor a security interest in household goods not in the creditor's possession, unless the goods were purchased with the credit;
- Misrepresentation of the nature or extent of cosigner liability; and
- The pyramiding of late fees.

[31] Interagency Guidance Regarding Unfair or Deceptive Credit Practices, available at: http://files.consumerfinance.gov/f/201408_cfpb_guidance_ffiec_credit-card-practices.pdf (last visited January 2, 2015).
[32] The guidance was spurred by the Federal Reserve's proposed repeal of Regulation AA, as required by the Dodd-Frank Act, which currently applies to banks. *See* 79 Fed. Reg. 51115 (August 27, 2014).

About the Authors

Adam Maarec
Davis Wright Tremaine LLP
Washington, District of Columbia
adammaarec@dwt.com | 202-973-4217



Adam Maarec concentrates his practice on financial services. He advises financial institutions on regulatory compliance matters regarding consumer protection, data privacy and information sharing, and joint marketing. Adam has experience with a broad range of financial protection laws, including Dodd-Frank, the Truth in Lending Act, the Gramm-Leach-Bliley Act, the Fair Credit Reporting Act, the Real Estate Settlement Procedures Act, the Telephone Consumer Protection Act, and the CARD Act, as well as state telemarketing and insurance regulations. His regulatory practice includes compliance issue resolution, drafting rulemaking comment letters, meeting with government agencies, and responding to regulatory investigations.

John Morton
Gordon Feinblatt LLC
Baltimore, Maryland
jmorton@gfrlaw.com | 410-576-4176

John Morton is a Member of Gordon Feinblatt's Financial Services Practice Group. He provides legal advice to an extensive range of financial institutions, including: nationwide, regional and community banks; credit unions; consumer lending companies; sales finance companies; mortgage lenders and brokers; investment advisers; and other regulated businesses.

John provides counsel regarding multi-jurisdictional compliance issues, including advising clients on federal and state credit statutes and regulations; UDAAP and the CFPB; interaction with state and federal regulators; licensing and registration matters; due diligence and transactional matters; and general corporate governance issues.