“Abusive” Acts or Practices Under the CFPA’s UDAAP Prohibition

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INTRODUCTION

This survey reviews the Bureau of Consumer Financial Protection’s (CFPB’s) enforcement actions involving allegations of abusive conduct taken under the authority of the Consumer Financial Protection Act of 20101 (“CFPA”), which, among other things, prohibits unfair, deceptive, and abusive acts or practices (“UDAAP”).2 The Federal Trade Commission (“FTC”) has long had the power to prohibit unfair and deceptive acts or practices,3 and there is a well-developed body of precedent defining those terms.4 The CFPA added “abusive” to the statutory list of prohibited acts and practices and vested independent enforcement authority in the CFPB.5 The CFPA also granted UDAAP enforcement powers to state attorneys general and state regulators.6 The CFPB has engaged in a significant number of UDAAP-based enforcement actions and several of those actions have alleged “abusive” practices. While this survey primarily focuses on actions alleging abusive acts and practices, such actions cannot be divorced from the collective UDAAP doctrine. Most enforcement actions that involve claims of abusive acts or practices are based on facts that also serve as the basis for allegations of unfair or deceptive acts or practices. When relevant, allegations of unfairness or deception are included in the discussion below.

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6. Id. § 5552(a).
The New “A” in UDAAP

Under the CFPA, if an “act or practice ... materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service,” the CFPB has the authority “to declare [that] act or practice [to be] abusive.”7 An act or practice also may be declared abusive if it “takes unreasonable advantage of” a consumer’s “lack of understanding” regarding “the material risks, costs, or conditions” of a consumer financial product or service, a consumer’s “inability” to protect his or her own interests, or a consumer’s “reasonable reliance” on the belief that the “covered person” was acting in “the interests of the consumer.”8 This statutory definition is broad and arguably subjective in nature. As a result, a review of enforcement actions filed by the CFPB is instructive as to how the term “abusive” has been applied in practice and provides insight into the CFPB’s interpretation of the term.

ACE CASH EXPRESS, INC.

In In re ACE Cash Express, Inc.,9 the CFPB entered into a consent order with ACE Cash Express, Inc. (“ACE”) to resolve allegedly unlawful debt collection activities. ACE offered payday loans to consumers through brick-and-mortar retail outlets and the Internet.10 ACE’s loan products typically required repayment within two weeks, but consumers would often “roll over, renew, or refinance their loans,” incurring additional charges.11 If a consumer defaulted, ACE would use either its own in-house collections process or outsource collections to a third-party debt collector.12

The CFPB alleged that ACE’s in-house and third-party debt collectors worked to create a “sense of urgency” on the part of consumers by calling them excessively, disclosed that the debt existed to parties with no liability on the debt, and failed to cease making calls to consumers who were at work, where calls

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7. Id. § 5531(d)(1).
8. Id. § 5531(d)(2)(A)–(C).
10. Id. at 3.
11. Id. at 3–4.
12. Id. at 4. ACE apparently ceased using third-party debt collectors in September 2013. Id. This enforcement action also illustrates how the UDAAP provisions of the CFPA may effectively extend the CFPB’s enforcement authority beyond the scope of existing consumer protection laws like the Fair Debt Collection Practices Act, which is generally not applicable to creditors collecting their own debts. See 15 U.S.C. § 1692a(6)(A)–(F) (2012). UDAAP-based enforcement actions also effectively extend the CFPB’s authority to entities historically not subject to financial regulators (like telecommunications companies) but now arguably covered by the CFPA. See, e.g., Stipulated Final Judgment and Order, CFPB v. Cellco P’ship, No. 3:15-cv-03268-PHS-LHG (D.N.J. May 12, 2015), http://files.consumerfinance.gov/f/201505_cfpb-cfpb-v-verizon-proposed-order.pdf (finding unfair practices against telecommunications company Verizon Wireless for unauthorized charges to consumers’ bills by third parties); Stipulated Final Judgment and Order, CFPB v. Sprint Corp., No. 14-cv-09931 (S.D.N.Y. May 12, 2015), http://files.consumerfinance.gov/f/201505_cfpb-cfpb-v-sprint-corporation-proposed-order.pdf (same against Sprint Corp.).
were prohibited, or were represented by counsel after being informed of the representation.\textsuperscript{13} ACE allegedly engaged in these practices “to induce delinquent borrowers with a demonstrated inability to repay their existing loans” to refinance the loans with new loans and incur the attendant fees.\textsuperscript{14} The allegedly abusive act or practice was the creation of a sense of urgency that allowed ACE to take “unreasonable advantage of the inability of [these] consumers to protect their own interests” when choosing whether to enter into another loan.\textsuperscript{15} The CFPB also alleged that these same acts and practices were unfair under the CFPA.\textsuperscript{16} An act or practice is considered unfair if it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and . . . such substantial injury is not outweighed by countervailing benefits to consumers or to competition.”\textsuperscript{17}

Finally, the CFPB also claimed that other acts and practices engaged in by ACE were deceptive.\textsuperscript{18} While not defined in the CFPA, the CFPB has indicated that acts or practices may be considered deceptive if they “are likely to mislead consumers acting reasonably under the circumstances and [such acts or practices] are material.”\textsuperscript{19} The CFPB’s allegations of deceptive acts or practices asserted against ACE and its third-party debt collectors included misrepresentations made to consumers about ACE’s ability to prevent the transfer of their debts to third-party debt collectors or what might happen once their debts were transferred; ACE also falsely threatened to sue consumers, to report their debts to credit bureaus, to refer their debts for criminal prosecution, and to add various collection fees to their debts.\textsuperscript{20} Among other things, ACE was ordered to pay $5 million in restitution and $5 million in civil money penalties.\textsuperscript{21}

\textit{College Education Services LLC}

In \textit{CFPB v. College Education Services LLC},\textsuperscript{22} the CFPB made allegations of abusive acts or practices against Coll. Education Services LLC, its owner, and an employee (“CES”). CES was charged with numerous violations of law stemming from CES’s allegedly deceptive telemarketing of student loan debt-relief services...
to consumers.\textsuperscript{23} In addition, many of the same practices the CFPB alleged to be abusive also were alleged to be deceptive.\textsuperscript{24}

The CFPB’s allegations included charges that CES “targeted” consumers who were “financially distressed” through “sophisticated and expensive Internet-marketing campaigns,” which directed consumers’ searches to CES.\textsuperscript{25} Consumers who called a toll-free number or gave contact information on a website were then contacted “within five minutes . . . and twice a day for up to 10 days” until a CES representative made contact with the consumer.\textsuperscript{26} CES’s telemarketers contacting these consumers referred to themselves as “counselors and advisors,” followed a script without regard to the consumers’ individual financial situation, and “promised that the result [was] . . . 100% guaranteed,”\textsuperscript{27} all while charging advance fees ranging “between $195 and $2,500 . . . with the average fee being about $500.”\textsuperscript{28} Despite CES’s guarantees, CES allegedly failed to provide consumers with an individual assessment of their loans and to properly advise them of their options for loan consolidation.\textsuperscript{29} In addition, the CFPB alleged that CES misled these consumers about options related to loan forgiveness and made unsubstantiated claims that CES’s services would improve the consumers’ credit scores.\textsuperscript{30} The CFPB further claimed that some consumers’ loan payments actually increased as a result of the services.\textsuperscript{31}

The CFPB alleged that these actions were abusive because they resulted in CES taking “unreasonable advantage” of these consumers’ “reasonable reliance” on representations that CES was acting in the consumers’ “interests.”\textsuperscript{32} Specifically, the CFPB claimed that CES worked to create an “illusion of expertise and individualized advice” in order to “induce consumers to reasonably rely on the company to act in their interests in seeking and selecting student loan debt-relief

\begin{itemize}
  \item \textsuperscript{23} Id. at 5.
  \item \textsuperscript{24} Id. at 14–16.
  \item \textsuperscript{25} Id. at 15.
  \item \textsuperscript{26} Id. at 6.
  \item \textsuperscript{27} Id. at 8 (alleging that CES guaranteed “lower monthly payments, relief from garnishment, loan forgiveness, or improved credit scores . . . in less than six or eight weeks” (internal quotations omitted)).
  \item \textsuperscript{28} Id. at 7.
  \item \textsuperscript{29} Id. at 7–8.
  \item \textsuperscript{30} Id. at 9.
  \item \textsuperscript{31} Id. at 10, 16.
  \item \textsuperscript{32} Id. at 15 (citing 15 U.S.C. § 5531(d)(2)(C)). For another example of a student lender allegedly failing to act in student borrowers’ interests, see Complaint at 30–32, CFPB v. ITT Educ. Servs., Inc., No. 1:14-cv-292 (S.D. Ind. Feb. 26, 2014), http://files.consumerfinance.gov/f/201402_cfpb_complaint_ITT.pdf (alleging abusive acts or practices meant to take unreasonable advantage of students’ inability to protect their interests and unreasonable advantage of students’ reasonable reliance on ITT to act in their interests). The CFPB alleged that ITT “coerced” students into taking out “[t]emporary [c]redit” to cover tuition gaps with threats of expulsion and “aggressive tactics” like “pulling students from class or withholding course materials and transcripts.” Id. at 2. The CFPB also alleged that ITT “knew about these vulnerabilities and exploited them.” Id. at 31–32; see also CFPB v. ITT Educ. Servs., Inc., No. 1:14-cv-292, 2015 U.S. Dist. LEXIS 28254, at *59–60 (S.D. Ind. Mar. 6, 2015) (denying a motion to dismiss and specifically rejecting a claim that statutory language defining the prohibition on “abusive acts or practices” is unconstitutionally vague and holding that the statute “provides at least the minimal level of clarity that the due process clause demands of non-criminal economic regulation”).
\end{itemize}
The CFPB further asserted that many of the same acts and practices alleged to be abusive also were deceptive, including CES’s unsubstantiated claims about improvements in consumers’ credit scores and their financial situation and CES’s guarantee that it could quickly achieve results. The company, its owner, and one of its employees were banned from offering any debt-relief services, were ordered to pay the CFPB $25,000, and were ordered to pay the Florida Attorney General $10,000 in civil penalties and $15,000 for investigative and attorney’s fees.

FORT KNOX NATIONAL CO.

In In re Fort Knox National Co., Fort Knox National and its subsidiary Military Assistance Company (“Fort Knox”) entered into a consent order with the CFPB to resolve allegedly abusive practices in connection with undisclosed military allotment account fees. Fort Knox managed a program designed to process military payroll deductions, which are referred to as “allotments,” in order to pay servicemembers’ creditors. The CFPB claimed that Fort Knox would routinely charge fees against excess funds in these military allotment accounts that would accumulate after the designated creditors had been paid in full (“residual balances”), and that Fort Knox failed to give adequate disclosure or notification to servicemembers about the practice. The CFPB further claimed that servicemembers did not receive paper or electronic account statements and did not have the capability or option to view charges online when they accessed their accounts. The CFPB alleged that, as a result, Fort Knox’s failure to notify the account holders about the residual balances in their accounts permitted Fort Knox to take “unreasonable advantage of Servicemembers’ inability to protect their interests in selecting or using [Fort Knox’s] allotment product or service.” The CFPB alleged that this practice was abusive and resulted in Fort Knox charging “tens of thousands of Servicemembers [improper] Residual-Balance Fees totaling millions of dollars.”

The CFPB also alleged that these same acts and practices were unfair because they caused “substantial injuries” to account holders without “any countervailing

33. College Education Complaint, supra note 22, at 15.
34. Id.
36. Id. at 6.
37. Id. at 8.
39. Id. at 5.
40. Id. at 5–6.
41. Id. at 6.
42. Id. at 8.
43. Id. at 5.
benefits to Servicemembers or to competition.” Additionally, the CFPB alleged that Fort Knox’s failure to explain the residual balance fees or notify account holders before or after these fees were charged was deceptive because the practices were likely to “mislead consumers acting reasonably under the circumstances” given “that [such] information [was] material to consumers.” Among other relief, Fort Knox was required to cease such practices and pay nearly $3.1 million to the CFPB for consumer redress.

**PayPal, Inc.**

*CFPB v. PayPal, Inc.* provides another example of acts or practices that the CFPB alleged were both abusive and unfair. PayPal offers consumers using its online payment system a convenient way to make secure payments to third-party vendors. Beginning in 2008, PayPal began offering consumers the ability to use PayPal Credit in addition to the consumers’ preexisting preferred method of payment. The CFPB claimed that PayPal enrolled consumers in, and processed payments through, the credit product without consent or authorization; failed to accept, process, or timely post consumers’ payments; and failed to adequately or timely address billing disputes, including disputes about crediting payments, processing refunds, honoring advertised promotions, unauthorized charges, and double billing.

The CFPB alleged that only some of these practices were abusive. PayPal’s marketing promotions indicated that consumers would be able to control how payments were allocated if the consumer had multiple accounts, particularly accounts marketed as “deferred-interest promotions.” Despite representing to consumers that they could receive and request information about the payment allocation process and specify payment allocations to various outstanding balances by contacting PayPal’s customer service, the CFPB alleged that PayPal’s customer service representatives were often unreachable, provided “misinformation” when they were successfully contacted, and “often ignored” consumers’
specific instructions related to their payment preferences. The CFPB asserted that these practices were abusive because they allowed PayPal to take “unreasonable advantage” of the consumers’ ability to select or use PayPal’s products. PayPal was ordered to pay $15 million in redress to consumers affected by such acts and practices, in addition to a $10 million civil money penalty.

**COLFAX CAPITAL CORP.**

In *In re Colfax Capital Corp.*, the CFPB’s allegations of unfair and deceptive acts or practices again served as the basis for claims of abusive conduct. Colfax Capital offered open-end credit to finance purchases of consumer goods from third-party retailers that marketed to servicemembers. The CFPB alleged that Colfax Capital’s loan agreements unfairly and deceptively included finance charges that were hidden in inflated prices of the retail goods. In addition, the CFPB asserted that when the cost of credit was properly computed, the credit agreements were void under state usury laws and that servicing and collecting these loans was therefore unfair, deceptive, and abusive. Specifically, the CFPB claimed that, since most consumers would be unaware of how state usury and licensing laws might affect their rights, or that their debt obligations were void, Colfax Capital’s collection of the debts was abusive because the practice took “unreasonable advantage of these consumers’ lack of understanding.” Colfax Capital was liquidated in bankruptcy and, according to CFPB Assistant Director Holly Petraeus, “consumers will no longer have to pay on the more than 17,000 outstanding finance agreements, amounting to a total of about $92 million in debt relief for consumers.”

52. Fort Knox Consent Order, supra note 38, at 15. The CFPB alleged that PayPal’s policy was to apply such payments “proportionately to all deferred-interest promotional balances with the same [interest] rate, . . . regardless of expiration date, unless a promotion was expiring within two billing cycles, in which case excess payments would be applied to that promotion.” Id. at 9

53. Id.


55. Id. at 9.


58. Colfax Consent Order, supra note 56, at 1.

59. Id. at 9.

60. Id. at 8–9.

61. Id. at 12.

In Lawsky v. Condor Capital Corp., the New York Department of Financial Services (“NYDFS”) was one of the first state regulators to bring allegations of abusive acts or practices under the federal UDAAP authority. The NYDFS alleged that Condor Capital, an installment lender, failed to notify borrowers when overpayments on accounts had been made and retained credit balances when accounts were closed, rather than refunding the credit balance to the borrower. The NYDFS also alleged that Condor Capital “actively concealed” the existence of these credit balances and “intentionally and deceptively program[ed] its customer-facing web portal” to automatically keep customers from accessing their online accounts immediately after a debt had been paid in full. The NYDFS claimed that this practice was “false and misleading,” as well as abusive, given that the practice resulted in an “abusive theft of funds from customers.”

The NYDFS also alleged that Condor Capital engaged in “serious and abusive wrongdoing . . . [with its] reckless endangerment of customers’ personally identifiable information.” While statements on Condor Capital’s website indicated that the company had adequate information security systems, it “failed to employ reasonable and appropriate measures to protect the private and confidential personal and financial information of its customers.” The NYDFS noted, for example, that Condor Capital “fail[ed] to adhere to the most basic information security policy, known as a ‘clean desk’ policy, which all businesses handling sensitive customer data must follow.” Condor Capital’s failure to maintain basic security measures was abusive, particularly given that borrowers had no way of knowing that the representations about security were false and they therefore would be unable “to protect their own interests.” Other acts that were specifically identified as “abusive” included using “false and inaccurate information” to harass and threaten customers and
others, sending inaccurate information to credit agencies, improperly imposing fees and other charges, and making unauthorized charges.\textsuperscript{74}

In a subsequent settlement, Condor Capital was required to pay restitution of more than $6.5 million and a $3 million civil penalty.\textsuperscript{75} It was also required to admit that it violated state and federal laws,\textsuperscript{76} to sell any loans remaining in its portfolio,\textsuperscript{77} and to surrender all of its state licenses to make or acquire consumer loans.\textsuperscript{78}

**Conclusion**

This survey reviews specific facts and circumstances involved in enforcement actions by the CFPB and other regulators under the UDAAP doctrine, especially the few actions to date involving allegations of abusive acts or practices, which may help practitioners better understand this new and rapidly evolving UDAAP standard. Most of these actions were resolved through settlements, without judicial interpretation, and that fact is noteworthy.\textsuperscript{79} When judicial opinions interpreting the UDAAP standard are eventually issued, they may provide helpful precedent that practitioners should monitor closely.

\textsuperscript{74} Id. at 10.
\textsuperscript{76} Id. at 3–6.
\textsuperscript{77} Id. at 7–10.
\textsuperscript{78} Id. at 13–14.
\textsuperscript{79} But cf. CFPB v. ITT Educ. Servs., Inc., No. 1:14-cv-292, 2015 U.S. Dist. LEXIS 28254, at *59–60 (S.D. Ind. Mar. 6, 2015) (denying motion to dismiss on the merits of the claims and also on argument that statutory language defining abusive acts and practices was vague and therefore unconstitutional); Illinois v. CMK Invs., Inc., No. 14-cv-2783, 2014 WL 6910519, at *6–7 (N.D. Ill. Dec. 9, 2014) (rejecting the defendant’s argument that an “account protection fee,” which was the practice alleged to be abusive as well as unfair and deceptive, should not be counted in the calculation of interest charged, and denying defendant’s motion to dismiss); Illinois v. Alta Colls., Inc., No. 14-cv-3786, 2014 WL 4377579, at *3–4 (N.D. Ill. Sept. 4, 2014) (rejecting defendant’s claim that UDAAP standard is unconstitutionally vague).