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

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I. Introduction

This is our latest article in a series that surveys activities identified as unfair, deceptive or abusive acts or practices (UDAAPs) by the Consumer Financial Protection Bureau (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, 2016 and December 31, 2016, and surveys enforcement actions and other statements by the CFPB in reports that discuss UDAAP violations.² These activities provide insight into the specific types of practices that could be considered UDAAP violations in the future.³

We intend to publish periodic updates to this article cataloging new UDAAP activity based upon the federal UDAAP powers contained in the Dodd-Frank Act.

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 arise regularly.
³ The term “unfair” is defined in the Dodd-Frank Act as an act or practice that “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers [and the] injury is not outweighed by countervailing benefits to consumers or to competition.” 12 USC § 5531(c)(1). The term “deceptive” is not statutorily defined, but it is defined in the CFPB’s examination manual as “a material representation, omission, act or practice that misleads or is likely to mislead a consumer, provided the consumer’s interpretation is reasonable under the circumstances.” CFPB Examination Manual V.2, UDAAP 5 (October 2012), available at http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf. The Dodd-Frank Act introduced the term “abusive” and defined it as an act or practice that either:
   [1] materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
   [2] takes unreasonable advantage of [either]:
      (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
      (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
      (C) the reasonable reliance by the consumer on a covered person [such as a bank or other financial institution] to act in the interests of the consumer. 12 USC § 5531(d).
II. Overview: Identification of Unfair, Deceptive, or Abusive Acts or Practices

Between July 1, 2016, and December 31, 2016, the CFPB engaged in 11 public enforcement actions involving alleged UDAAP violations. Past UDAAP actions can provide a road map for industry participants to identify and better understand acts or practices that are considered problematic by law enforcement authorities. UDAAP enforcement actions during the period of this summary involved marketing, servicing, debt collection, debt sales and debt settlement. The CFPB highlighted other UDAAP issues involving production incentives in a bulletin, and debt collection, student loan servicing, and automobile loan servicing in its Supervisory Highlights report. During this period there were no enforcement actions filed independently by state regulators or attorneys general alleging violations of the federal UDAAP prohibition. We provide an update on two litigated cases that were resolved within the period.

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 Enforcement Actions


Santander Bank, N.A., entered into a consent order with the CFPB related to allegedly deceptive practices when asking consumers to opt-in to deposit account overdraft services for ATM and one-time debit transactions. The CFPB alleged that the company engaged in the following deceptive practices:

- With respect to the cost of overdraft services, misrepresenting in telemarketing calls that consumers would:
  - Not have to pay for the overdraft service when the service carried fees;
  - Only be charged one overdraft fee, either at the time of an overdraft or on the sixth day after, when charges would be imposed in connection with both events;
  - Not be charged any fees if the overdraft amount was repaid in five days, when charges were incurred at the time of an overdraft;
  - Only have to pay a fee in emergency situations when fees were applied in all situations; and
  - Be charged overdraft and other fees if they did not opt-in to the overdraft service when such fees would not be charged absent an opt-in;
- Misrepresenting the nature of telemarketing sales calls by claiming the calls were to inform consumers of their “opt-in status” and an attempt to “reenroll” consumers in the overdraft service; and
- Misrepresenting that the overdraft services would apply to all transactions when the solicited services only applied to ATM and one-time debit transactions.

Pursuant to the consent order, the company agreed to pay a $10 million civil money penalty to resolve the above allegations of deceptive conduct, along with alleged violations of Regulation E.
b. **First National Bank of Omaha – August 2016 (Marketing and Servicing)**

First National Bank of Omaha entered into a consent order with the CFPB to resolve allegations of unfair and deceptive practices in connection with the marketing, sales, and administration of credit card add-on products, namely debt cancellation and credit monitoring products.

Specifically, the CFPB alleged that the company engaged in the following deceptive enrollment practices:

- Implying that cardholders calling to activate a credit card were required to listen to a sales pitch;
- Misrepresenting the nature of a telemarketing call by stating that the call was about an important feature of the consumer’s account and that the product was being offered “as our way of saying thanks”;
- Enrolling consumers in debt cancellation products without conveying the existence of a purchase by:
  - Representing that a welcome kit would be sent for the consumer to review the product; and
  - Construing consumers’ verification of their city of birth as approval to enroll;
- Misrepresenting the debt cancellation products terms, exclusions, and benefits by:
  - Not disclosing eligibility limitations to consumers that disclosed their ineligibility for certain product benefits;
  - Claiming that consumers were “eligible” for the product without information to make such an assessment; and
  - Not properly stating (or perhaps omitting) limitations on product benefits; and
- Misrepresenting that consumers could cancel a debt protection product “anytime”, “immediately”, and with “no questions asked” when call center representatives were paid a bounty to prevent consumers from cancelling, often rebutted cancellation requests several times before agreeing to cancel, and permitted cancellations only if consumers demanded it “multiple times in succession.”

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

- Preventing debt cancellation product holders from obtaining promised benefits by:
  - Imposing exclusions to deny benefits, such as a “pre-existing condition” exclusion that refused coverage for conditions occurring before or up to six months after the product was purchased;
  - Imposing onerous administrative requirements, such as a 15-day window to apply for unemployment benefits, between the 30th and 45th day of unemployment, and monthly “continuation forms” proving continued illness, disability, or unemployment; and
  - Failing to disclose these exclusions and requirements prior to enrollment, and approving only 9% of all claims for benefits; and
- Billing the full fee for credit monitoring products when the credit monitoring services were not actually provided.

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Pursuant to the consent order, the company agreed to provide $27.75 million in consumer redress and pay a $4.5 million civil money penalty to the CFPB to resolve the above allegations of unfair and deceptive conduct. In a parallel enforcement action focused on the company’s allegedly unfair credit monitoring billing practices, the Office of the Comptroller of the Currency imposed a $3 million civil money penalty.\(^6\)

c. Wells Fargo Bank, N.A. – September 2016 (Servicing)\(^7\)

Wells Fargo Bank, N.A., entered into a consent order with the CFPB involving allegedly unfair and abusive conduct in connection with a series of unauthorized activities, including the opening of deposit and credit card accounts, transferring funds, ordering and activation of debit cards, and enrolling consumers in online account access.

The CFPB alleged that the company engaged in unfair conduct by opening unauthorized credit card accounts and deposit accounts (with simulated funding by transferring funds from other accounts) without consumers’ knowledge. The CFPB also alleged that this conduct was abusive since it interfered with consumers’ ability to understand the terms and conditions of the accounts that were opened, and it took unreasonable advantage of consumers’ inability to protect their interests in selecting consumer financial products or services.

The CFPB also alleged that the following conduct was abusive (without including an unfairness claim):

- Enrolling consumers in online banking without their knowledge, because the company took unreasonable advantage of consumers’ interests in having these services activated: 1) after affirmative agreement; and 2) after having the opportunity to protect themselves from security and other risks; and
- Issuing debit cards without consumers’ consent, because the company took unreasonable advantage of consumers’ inability to protect their interests in selecting or using a consumer financial product or service.

The company agreed to provide $5 million in consumer redress and pay a $100 million civil money penalty to the CFPB. In related settlements, the company agreed to pay a $35 million penalty to the Office of the Comptroller of the Currency\(^8\) in connection with alleged safety and soundness deficiencies (not unfairness claims) and a $50 million penalty to the City and County of Los Angeles\(^9\) in connection with allegedly unlawful, unfair, and fraudulent sales and related business acts and practices in violation of California’s Unfair Competition Law.

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\(^7\) In the Matter of: Wells Fargo Bank, N.A., File No. 2016-CFPB-0015, Consent Order (September 8, 2016).

\(^8\) In the Matter of: Wells Fargo Bank, N.A., File No. AA-EC-2016-67, Consent Order (September 8, 2016).

Specifically, the CFPB alleged that the following practice was deceptive:

- Misrepresenting to borrowers that paying less than the full amount due in a billing cycle would not satisfy any obligation on an account when, in reality, if a consumer made a partial payment on an account with multiple loans that was sufficient to cover at least one of the payments due in full for a loan in the account, then such partial payment would advance the next payment due for that loan.

The CFPB also alleged that the following practices were unfair:

- Failing to disclose its payment allocation methodology to consumers and failing to disclose to consumers the ability to provide payment instructions on how to allocate payments, while allocating payments in a manner that maximized late fees;
- Failing to aggregate multiple partial payments submitted within the same billing cycle that would have satisfied the total amount due if aggregated;
- Charging late fees to consumers who paid on the last day of their grace period, and charging late fees to consumers who paid multiple partial payments instead of one single payment; and
- Failing to update and correct inaccurate information reported to credit reporting companies.

Pursuant to the consent order, the company agreed to pay $410,000 in redress to consumers and a civil money penalty of $3.6 million.

e. Prime Marketing Holdings, LLC (d/b/a Park View Credit, National Credit Advisors, and Credit Experts) – September 2016 (Debt Sales/Debt Collection)\(^{11}\)

The CFPB filed a lawsuit in federal district court against Prime Marketing Holdings, LLC, a credit repair company that has operated under various names, including Park View Credit, National Credit Advisors, and Credit Experts (together “the company”). Since 2014, the company has marketed, offered, and provided credit repair services to consumers across the country. In addition to alleged violations of the federal Telemarketing Sales Rule, the CFPB’s complaint alleges that the company engaged in deceptive acts and practices.

Specifically, the CFPB alleged that the following practices were deceptive:

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\(^{11}\) Consumer Financial Protection Bureau v. Prime Marketing Holdings, LLC (d/b/a Park View Credit, National Credit Advisors, and Credit Experts), Case No. 16-cv-7111 (C.D. Cal. September 22, 2016).
Misleading consumers about the costs of its services. The company charged consumers an automatic monthly fee but often failed to disclose such fee or stated that such fees were incurred only if consumers elected to continue services beyond the initial 60 days.

Failing to disclose limits on the company’s “money-back guarantee.” The company represented that it offered a “money-back guarantee” but failed to disclose certain restrictions. For example, consumers had to pay for at least six months of services to be eligible for the “money-back guarantee.”

Misleading consumers about the benefits of its services. The company misrepresented that its credit repair services would, or likely would, result in the removal of negative entries on consumers’ credit reports, and would, or likely would, result in a substantial increase to consumers’ credit scores.

This case was not resolved at the time of publication.

f. **Flurish, Inc., d/b/a LendUp – September 2016 (Marketing and Servicing)**

LendUp is an online lending company that offers single-payment loans and installments loans. The company markets its loans as a way for consumers to build credit and improve their credit score, and as consumers make progress, they are able to obtain more favorable loan terms. The CFPB alleged that the company engaged in deceptive and unfair practices.

Specifically, the CFPB alleged that the following practices were deceptive:

- Advertising that consumers could graduate to lower-priced loans when, in reality, such loans were not available outside of California for most of the company’s existence;
- Failing to disclose the annual percentage rate of its various loans in ads, as required by the Truth in Lending Act and Regulation Z;
- Understating the annual percentage rate. First, the company retained a portion of the expedited processing fee charged for processing certain loans more quickly. These fees should have been included in the annual percentage rate calculation, and, because they were not, the disclosed finance charges were inaccurate. Second, on certain loans issued in California, APRs were inaccurate and understated; and
- Failing to report loan information to credit reporting companies and failing to have any written policies and procedures about the accuracy and integrity of information actually furnished to consumer reporting agencies.

The CFPB also alleged that the following practice was deceptive and unfair:

- Reversing origination fee discounts when consumers extended repayment dates. These discounts were given when borrowers selected an earlier repayment date, but the discount would be reversed if the consumer subsequently extended the repayment date. The CFPB alleged that such discount reversals were not properly disclosed in applicable loan agreements.

Pursuant to the consent order, the company agreed to provide approximately $1.83 million in consumer redress and pay a $1.8 million civil money penalty.

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12 *In the Matter of: Flurish, Inc., d.b.a. LendUp, File No. 2016-CFPB-0023, Consent Order (September 27, 2016).*
Bridgepoint Education, Inc. – September 2016 (Marketing)\textsuperscript{13}

Bridgepoint Education, Inc. offered students at its for-profit colleges private student loans to pay for tuition. The CFPB alleged in a consent order that the company engaged in deceptive practices when, in connection with the marketing of its private student loans, its representatives made oral statements that students could repay those loans with monthly payments as low as $25 when “in many instances” a typical monthly payment was more.

Pursuant to the consent order, the company agreed to provide $23.5 million in consumer redress through loan forgiveness and refunds and pay an $8 million civil money penalty.

TMX Finance LLC – September 2016 (Marketing and Debt Collection)\textsuperscript{14}

TMX Finance LLC offers short-term automobile title loans through a subsidiary in various states, some of which allow for multiple loan renewals or extensions. The company used a “Payback Guide” in its sales pitches that contemplated multiple title loan renewals or extensions but only showed the finance charge and principal paid in each individual 30-day period, without disclosing the total cost of the transaction.

The CFPB alleged in a consent order that the company’s “Payback Guide” and sales pitch resulted in an abusive practice because it materially interfered with consumers’ ability to understand the terms and cost of credit, including:

- That the title loan was a 30-day transaction;
- That the “Payback Guide” was not an actual repayment plan;
- That renewals or extensions would affect the total cost of the transaction;
- That renewals or extensions caused the loan to be more expensive; and
- Whether the consumer should pay off the loan over a longer period.

The CFPB also alleged that the company engaged in unfair debt collection practices when it authorized in-person visits to a consumer’s home or place of employment and visits to a consumer’s references, exposing the existence of a debt to third parties and causing or likely causing substantial injury in the process.

Pursuant to a consent order, the company agreed to pay a $9 million civil money penalty.

Navy Federal Credit Union – October 2016 (Debt Collection)\textsuperscript{15}

Navy Federal Credit Union is a federal credit union that offers a wide range of consumer financial products and services, including deposit accounts and loans. The CFPB alleged that the company engaged in deceptive and unfair debt collection practices.

Specifically, the CFPB alleged that the following practices were deceptive:

\textsuperscript{13} In the Matter of: Bridgepoint Education, Inc., File No. 2016-CFPB-0016, Consent Order (September 16, 2016).
\textsuperscript{14} In the Matter of: TMX Finance LLC, File No. 2016-CFPB-0022, Consent Order (September 26, 2016).
\textsuperscript{15} In the Matter of: Navy Federal Credit Union, File No. 2016-CFPB-0024, Consent Order (October 11, 2016).
• Falsely threatening to take legal action and garnish wages unless consumers made a payment when the company rarely took legal action and had no intention or authority to garnish wages;
• Falsely threatening to contact commanding officers to pressure servicemembers to repay when the company had no intention of ever actually doing so and was not authorized to do so even if it did have such an intention; and
• Misrepresenting to consumers the credit consequences of falling behind on a loan by telling consumers that obtaining additional credit would be “difficult, if not impossible” and implying that Navy Federal Credit Union could raise or lower a consumer’s credit rating.

The CFPB also alleged that the following practice was unfair:

• Illegally freezing members’ access to their deposit accounts when they became delinquent on a Navy Federal Credit Union credit product. By freezing members’ access to their deposit accounts, the company was, in turn, shutting down consumers’ debit cards, ATMs, and online banking access.

Pursuant to the consent order, the company agreed to provide $23 million in consumer redress and pay a $5.5 million civil money penalty.

j. **Douglas MacKinnon, Mark Gray, Northern Resolution Group, LLC, Enhanced Acquisitions, LLC, and Delray Capital, LLC – November 2016 (Debt Collection)**

Douglas MacKinnon and Mark Gray operate a network of debt collection companies, including Northern Resolution Group, Enhanced Acquisitions, and Delray Capital (together “the company”). In a joint complaint, the CFPB and New York Attorney General alleged that the company engaged in unfair and deceptive debt collection practices.

Specifically, the CFPB and New York Attorney General alleged that the company engaged in both unfair and deceptive practices by adding a $200 fee to each consumer debt acquired when state law prohibited the fee and implying in collection efforts that consumers were obligated to repay the fee.

The CFPB and New York Attorney General also alleged that the company engaged in deceptive practices by:

• Threatening consumers with arrest, imprisonment, or other legal action when the companies had no intention of ever taking such action; and
• Impersonating law-enforcement officials, court officials, and other entities.

This case was not resolved at the time of publication.

k. **Moneytree, Inc. – December 2016 (Marketing and Debt Collection)**

Moneytree, Inc. offers payday loans and check-cashing services. The CFPB alleged that the company engaged in the following deceptive practices:

- Running an online advertising campaign that advertised tax-refund check-cashing services for “1.99”, either expressly or impliedly represented that the fee for these services was “1.99 dollars” when in fact the fee was “1.99 percent” of the tax refund.
- Threatening repossession of consumers’ vehicles if consumers did not make past due payments on their installment loans, even though the loans were unsecured.

The CFPB also alleged that the company violated the Electronic Fund Transfer Act when it failed to obtain written authorization for preauthorized electronic-fund transfers. Pursuant to the consent order, the company agreed to provide $255,000 in consumer redress and pay a $250,000 civil money penalty.

**IV. CFPB Guidance**

a. **Detecting and Preventing Consumer Harm from Production Incentives – November 2016 (Marketing)**

Programs to incentivize the sale of consumer financial products and services by employees and service providers were identified as a potential source of UDAAP violations. Specific practices that were considered to encourage deceptive conduct include:

- Sales benchmarks that encourage the marketing of products to consumers that may not benefit from or be eligible for the product; and
- Unrealistic sales quotas.

**V. CFPB Supervisory Highlights**

The CFPB periodically issues Supervisory Highlights reports that summarize its supervisory activity over a period of time and identify, among other things, allegedly unfair, deceptive or abusive conduct that may not have otherwise been publicly disclosed in enforcement actions.

a. **Fall 2016 Supervisory Highlights (published in October 2016)**

The CFPB’s Fall 2016 Supervisory Highlights report identified UDAAPs in connection with automobile loan servicing, debt collection, and student loan servicing.

With respect to automobile loan servicing, the following practices were considered unfair:

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18 CFPB Compliance Bulletin 2016-03, Detecting and Preventing Consumer Harm from Production Incentives (November 28, 2016).
- Detaining or refusing to return personal property found in a repossessed vehicle until a consumer paid a fee, even if the fee was permitted by contract; and
- Charging an undisclosed fee to store personal property found in a repossessed vehicle.

With respect to debt collection, the following practices were considered deceptive:

- Impersonating consumers when calling a creditor’s consumer-facing automated telephone system to obtain information about a debt; and
- Falsely claiming that the ability to settle a debt would be revoked or would expire.

With respect to student loan servicing:

- The following practices were considered unfair:
  - Improperly denying or not approving requests for income-driven repayment plans;
  - Not allowing consumers to allocate their payments among multiple outstanding student loans, where the inability to allocate payments could cause a financial detriment to consumers; and
  - Due to a systems error, causing the last payment to be smaller than the payment identified in the borrower’s repayment plan.
- The following practices were considered deceptive:
  - Where consumers had paid ahead, providing billing statements that misled consumers to believe that additional payments before or after the paid-ahead period would be applied to principal; regarding how much interest would accrue or had accrued; and as to how payments would be applied after the paid-ahead period.

**VI. Updates on Past Cases**

a. **Pension Funding, LLC – July 2016 (Marketing)**

In August 2015, the CFPB and the New York Department of Financial Services (NYDFS) jointly filed a civil complaint against Pension Funding, LLC, along with a related company and related individuals, in connection with the offering of lump sum “pension advances”. The company claimed in its marketing materials that the products were not loans but were purchases of the right to future pension payments. The CFPB and NYDFS alleged that the pension advances were actually loans, that the company’s marketing claims were deceptive, that the company engaged in abusive practices, and that the loan’s undisclosed effective interest rate exceeded New York’s usury cap.

In February 2016, all but one defendant entered a stipulated judgment to resolve these allegations. In July 2016, a default judgment was entered against the one remaining defendant in which the court agreed with the CFPB’s and NYDFS’s allegations that the pension advances were loans. The court found that the company’s marketing claims indicating that the advances

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20 Consumer Financial Protection Bureau et al. v. Pension Funding, LLC et al., Case No. CV-01329-JLS-JCG (C.D. Cal. July 11, 2016)
did not have an interest rate and that the interest rate was lower than the effective interest rate of the advances were unfair, deceptive, and abusive practices. The defendant was ordered to disgorge $578,182 in profits.

b. **CashCall, Inc. – August 2016 (Loan Servicing)**

We previously reported that the CFPB had filed a civil complaint in December 2013 against CashCall, Inc., alleging that the company purchased, serviced, and collected consumer installment loans that state usury and/or licensing laws rendered void or limited the consumer’s obligation to repay. The CFPB’s UDAAP allegations were based on the company’s actions in servicing and collecting debts that were void under state law.

The company filed a motion for judgment on the pleadings in November 2015, arguing that the CFPB’s UDAAP allegations should be dismissed because they were predicated solely upon violations of state law and that the agency was attempting to establish a usury limit, which is prohibited by statute. The court denied the company’s motion, finding that the company’s alleged conduct in collecting payments on debt that consumers did not actually owe fell within the broad range of conduct covered by the federal UDAAP prohibition and that prohibiting such conduct did not amount to the establishment of a usury limit.

On June 30, 2016, the CFPB filed a motion for partial summary judgment, which the court granted. The court found that: (1) the laws of the borrowers’ home states apply to the loan agreements and, as a result, (2) CashCall violated the Consumer Financial Protection Act when it engaged in the deceptive practice of creating the impression that the loans were enforceable and that borrowers were obligated to repay when the loan agreements were void under state law and/or the borrowers were not obligated to pay.

According to a Joint Status Report filed on November 14, 2016, CashCall intends to file a motion for stay and request to certify interlocutory appeal. If CashCall’s motion for stay and request for certification are denied, a trial will be set for damages.

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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.