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EXPERT ANALYSIS

WHEN THE BUREAU BITES: CONTESTED LITIGATION WITH THE CFPB

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While much has been written about litigation involving the CFPB where the constitutionality of the CFPB's structure is being contested — primarily *PHH* and *Big Spring* (*See PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir.); *State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48 (D.C. Cir. 2016) — there's no been much coverage of the now significant volume of direct litigation brought by the CFPB against regulated entities or parties.

How often does the CFPB decide to file a lawsuit under circumstances where a pre-negotiated consent order is not agreed to? What types of regulated entities or parties are fighting back against the CFPB in litigation? What statutes and issues are being contested? What defenses are being raised? When does the CFPB include as a plaintiff some state AG or other regulator? Is the constitutionality of the CFPB being challenged in some cases? Which cases and issues are near a trial date? What are the lessons to be learned from the CFPB's contested cases?

The CFPB is currently involved in about a dozen lawsuits across the country. These lawsuits target all sectors of the industry, from payday lenders, to debt collectors, to large banks. Each complaint alleges violations of the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act for unfair, deceptive, and/or abusive practices. Many of the suits, however, allege violations of at least one other federal statute such as Truth in Lending Act, Fair Credit Reporting Act, Fair Debt Collection Practices Act, Electronic Funds Transfer Act, or the Telemarketing Sales Rule.

The bureau has involved the state of New York in two of the suits and asserted various violations of New York state laws. In one lawsuit, Anthony Albanese, the acting superintendent of financial services of the State of New York, is a named plaintiff; in another the State of New York is represented by the attorney general as plaintiff.

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Most of the lawsuits are still in the beginning stages and have not yet proceeded through discovery. A couple of the defendants have argued that the CFPB's structure is not constitutional (Intercept and TCF Bank). In addition, defendants have raised a wide variety of other defenses, including the statute of limitations, collateral estoppel, and lack of jurisdiction. As most of the cases are still awaiting rulings on the defendants' motions to dismiss, we do not know at this point how successful those defenses will be.

Payday lender pugnacity

CFPA/Check cashing/Payday lending. *CFPB v. All American Check Cashing, Inc. et al.*, No. 3:16-cv-0035 (S.D. Miss., *complaint filed* 05/11/16). The CFPB sued All American Check Cashing Inc. in U.S. District Court, Southern District of Mississippi in May 2016 for its practices in connection with check cashing and payday lending. The CFPB alleges that All American violated the Consumer Financial Protection Act when it deliberately tried to keep its customers from learning the fee which the company would be charging them to cash a check and employed deceptive tactics to prevent consumers from backing out of transactions.

The CFPB also alleges the company misrepresented to consumers that its multiple loan program was cheaper than its competitors' 30-day loan program. Defendants did not challenge the legal sufficiency of the complaint. Discovery is set to close in April 2017, with dispositive motions due in May. Trial is set for November 2, 2017.

Stephanie Benowitz, Emily Mintz, and Michael Favretto of the bureau and Gregory K. Davis of the Southern District of Mississippi's U.S. Attorney's office represent the CFPB. Peter Baskind, Megan Ross, and Robin Rasmussen of Dinkelspiel Rasmussen & Mink in Memphis, Tenn.; Bentley Conner of Canton, Miss.; and Dale Danks of Danks Miller & Coryin Jackson, Miss., represent the defendants.

Payment processing prosecution

CFPA/Transaction processing. *CFPB v. Intercept Corp., et al.*, No. 3:16-cv-00144 (D.N.D. 03/17/17). The CFPB brought suit against Intercept Corp. and its two executives in U.S. District Court, District of North Dakota in June 2016, alleging that Intercept violated the CFPA by processing transactions for clients they knew, or should have known, engaged in illegal or fraudulent activities. Defendants filed a motion to dismiss the complaint arguing that the statute of limitations bars the CFPB's claims and that they are not governed by the CFPA because they do not provide services or products to consumers.

Intercept also argued the CFPB failed to state a claim by omitting critical allegations, such as on whose behalf Intercept is allegedly processing payments without adequate due diligence, whether their clients' products were offered to consumers for "personal, family, or household purposes," and how their clients' products or services were illegal or fraudulent. Lastly, the motion challenged the constitutionality of the CFPB as an agency.

Last week, the court granted Intercept's motion. It rejected Intercept's statute-of-limitations and statutory interpretation arguments but agreed that the allegations were insufficient to state a claim. In particular, the court found the complaint failed to allege facts indicating Intercept violated industry standards or that consumers were injured or likely to be injured by the alleged conduct.

The court also found the complaint lacked allegations identifying particular clients whose actions provided "red flags" to Intercept or how Intercept's failure to act upon those "red flags" caused harm to any identifiable customers. The court declined to rule on the constitutional issue.

Jenelle Dennis, Kristen Ivery-Colson, Richa S. Dasgupta, and Kevin Friedl of the bureau represented the CFPB. Jessica S. Russell, Richard Zack, and Jay Dubrow of Pepper Hamilton in Philadelphia; and Michael T. Andrews of Anderson Bottrell Sanden & Thompson in Fargo, N.D., represented Intercept.

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Credit repair rumpus

CFPA/TCFAPA/Credit repair. *CFPB v. Prime Marketing Holdings, LLC, et al.*, No. 2:16-cv-07111 (C.D. Cal, *SAC answered* 02/24/17); *complaint filed* 09/22/16). The CFPB in September 2016 filed an action against credit-repair company Prime Marketing Holdings LLC in U.S. District Court, Central District of California, alleging the company charged illegal advance fees and misled consumers regarding the cost and efficacy of its services. Specifically, the CFPB claims the company misled consumers about the actual cost of its services, failed to disclose limits on its "money-back guarantee," and misled consumers about the benefits of its services. The CFPB sued under both the CFPA and the Telemarketing and Consumer Fraud and Abuse Prevention Act.

PMH countered and argued the explicit application of the Credit Repair Organizations Act governs its actions rather than the more general TSR. After two rounds of motion to dismiss briefing, the defendants answered the CFPB's second amended complaint in February. PMH had been successful in obtaining a dismissal of one of the CFPB's claims, and did convince the court that the CFPB's claims against it under the TSR must meet Federal Rule of Civil Procedure 9(b)'s heightened pleading requirement.

Sarah Preis, Benjamin Clark, Colin Reardon, Kent Kawakami, Patrick Gushue, and R. Gabriel O'Malley of the bureau represent the CFPB. Allyson Baker (in Washington, D.C.) and Witt Chang (in Pasadena, Calif.) of Venable, and Steve Baghoomian in Pasadena, Calif., represented PMH.

Pawnbrokers' polemic

CFPA/TILA/Pawnbrokers. *CFPB v. A to Z Pawn, Inc., et al.*, No. 1:2016cv01567; *CFPB v. Fredericksburg Gold & Pawn, Inc.*, No. 3:2016cv00987; *CFPB v. Pawn U.S.A., Inc.*, No. 1:2016cv01566 ; *CFPB v. Spotsylvania Gold & Pawn, Inc.*, No. 3:2016cv00988 (E.D. Va., *complaints filed* 12/19/16). The CFPB separately sued four Virginia pawnbrokers — Spotsylvania Gold & Pawn, Inc.; Fredericksburg Pawn, Inc.; Pawn U.S.A., Inc.; and A to Z Pawn, Inc. — in U.S. District Court, Eastern District of Virginia in December 2016 for allegedly misleading consumers about the true annual costs of their loans. The pawnbrokers all charged consumers a finance charge on their loans, consisting of several fees, including, for example, "appraisal," "interest," "storage" and "setup" charges.

The CFPB alleges the pawnbrokers misled their customers about the costs of the loans by disclosing inaccurately low annual percentage rates that did not reflect all of the applicable fees and charges. In addition to the CFPA, the CFPB also sued under TILA. None of the pawnbrokers have responded to the complaint.

Kara K. Miller represents the CFPB, and Christian Schreiber of Venable represented the defendant in the A to Z *case; Donald R. Gordon and K.K. Miller represent the CFPB in both the* Fredericksburg Gold *and the* Spottsylvania Gold *cases, in which there was no appearance for the defendants; and K.K. Miller represents the CFPB in the* Pawn U.S.A. *case, in which there was no appearance for the defendant.*.

A month earlier in November 2016, the CFPB sued a fifth Virginia pawnbroker, B&B Pawnbroker, Inc., in the same court on a similar theory, alleging the company misstated the annual percentage rate. The court entered the parties' stipulated final judgment and order in March 2013 against B&B in the amount of $29,000, plus a civil money penalty of $5,000. (*CFPB v. B&B Pawnbroker, Inc.*, No. 3:16-cv-00887 (E.D. Va., *stipulated final judgment & order filed* 03/01/17; *complaint filed* 11/03/16). *D.R. Gordon and K.K. Miller represented the CFPB, and Robert J. Barlow in Fredericksburg, Va., represented the defendant in the B&B case.*

Structured settlement funders' fracas

CFPA/Structured settlement factoring. *CFPB v. Access Funding, LLC, et al.*, No. 1:16-cv-03759 (D. Md., *complaint filed* 11/21/16). The CFPB sued Access Funding LLC, a Maryland-based structured-settlement-factoring company, in November 2016 in U.S. District Court, District of Maryland. The company's business involves personal injury victims exchanging future long-term settlement payments for significantly lower immediate lump-sum advances. The CFPB alleges the company steered consumers to receive "independent advice" from an attorney who provided virtually no advice and was actually paid directly by Access Funding. In addition, the CFBP alleges the company misled consumers into thinking they were required to continue with the transactions after receiving the advances, even if the consumer decided it was not in his or her best interest.

The CFPB also sued Access Funding's successor company, three of Access Funding's high-ranking officials, and the attorney who purportedly provided the advice. The Maryland Attorney General has separately sued, attacking the same conduct and seeking to rescind the judgments permitting the transactions. In January, the defendants moved to stay the CFPB case in favor of the Maryland AG case. Defendants also argued the complaint should be dismissed based on collateral estoppel, because the Maryland courts, in approving the transactions with Access Funding, already determined that the

company's clients received "independent advice" and that the transactions were fair. The motion to stay or dismiss has not yet been ruled on.

Meghan S. Cater and Christina Coll represents the CFPB. Andrew J. Chiang and Charles Sims of O'Hagan Meyer in Philadelphia; Michael T. Hamilton of Marks O'Neill O'Brien Doherty & Kelly in Philadelphia; and Gregg Viola and Eric Rigatuso of Eccleston and Wolf in Hanover, Md., represent Access.

Tag-teaming with NYAG to duel debt collectors

CPFA/FDCPA/State debt-collection laws. *CFPB v. MacKinnon, et al.*, No. 1:16-cv-00880 (W.D.N.Y., *complaint filed* 11/02/16). The CFPB, in partnership with the N.Y. Attorney General's office, sued managers of three Buffalo-based debt-collection companies and the companies' executives on in November 2016 in U.S. District Court, Western District of New York. The suit alleges Douglas MacKinnon and Mark Gray operated dozens of debt collection shops that employed deceitful and abusive debt collection practices. Specifically, the complaint alleges defendants inflated consumer debts, falsely threatened legal action, and impersonated law-enforcement officials, government agencies, and court officers.

The CFPB sued under the CPFA, the FDCPA, and various New York state laws. The defendants answered the complaint in February 2017, asserting multiple affirmative defenses, including failure to state a claim and lack of jurisdiction. In addition, the defendants counterclaimed that the CFPB's investigation, allegations, and prosecution were not justified and were made in violation of 28 U.S.C. § 2412 — a allowing a prevailing party costs/fees if government action taken which is not substantially justified.

Jade A. Burns and Stefanie I. Goldblatt of the CFPB represent the bureau. Dennis Vacco and Eric Soehnlein of Lippes Mathias Wexler Friedman in Bufflo, N.Y., represent the defendants.

Overdraft protection plan opposition

CFPA/EFTA/Regulation E/Overdrafts. *CFPB v. TCF National Bank*, No. 0:17-cv-00166 (D. Minn., *amended complaint filed* 03/01/17). The CFPB sued TCF National Bank in U.S. District Court, District of Minnesota in January 2017 for allegedly deceiving consumers in consenting to expensive overdraft services. The Electronic Funds Transfer Act and its implementing Regulation E prohibit charging overdraft fees on ATM and one-time debit card transactions unless consumers affirmatively opt in to an overdraft service. The CFPB alleges that TCF's practices in obtaining such consent were designed to obscure the fees and make overdraft services seem mandatory for new customers to open an account.

TCF responded with a motion to dismiss arguing that it has fully complied with federal regulations by providing all required written disclosures prior to obtaining consent from consumers to opt in to its overdraft service. TCF claims the CFPB's complaints regarding the substance or cadence of CFPB's oral descriptions of its opt-in rule fails to state a claim. TCF argues in addition that the CFPB is unconstitutional as structured and cannot retroactively assert claims that pre-date the effective date of the CFPA. In response, the CFPB amended its complaint, although it kept intact its material allegations.

Jack D. Wilson, Michael Favretto, and Owen Martikan of the CFPB and Chad Blumenfield of the U.S. Attorney's Office, District of Minnesota represent the bureau. Edward Bennett; Eric Blakenstein; John Villa; and Ryan Scarborough of Williams & Connolly in Washington, D.C.; Kristina Kaluza and Timothy Kelly of Dykema Gossett in Minneapolis; and Andrea K. Mitchell and Andrew L. Sandler of BuckleySandler in Washington, D.C., represent *TCF*.

Student loan servicing spat

CFPA/FCRA/FDCPA/Student loan servicing. *CFPB v. Navient Corp., et al.*, No. 3:17-cv-00101 (M.D. Pa., *complaint filed* 01/18/17). The CFPB sued Navient Corp., the nation's largest servicer of student loans, in U.S. District Court, Middle District of Pennsylvania in January 2017. The bureau claims that Navient has been misinforming borrowers and incorrectly processing payments for years. The CFPB also alleges Navient steered borrowers facing long-term financial hardship into forbearance instead of a more financially-beneficial repayment program to save in operating costs.

Brandis C. Anderson, Nicholas K. Jabbour, and Ebony S. Johnson of the bureau represent the CFPB. Daniel P. Kearney Jr. of WilmerHale in Washington, D.C. represent Navient.

Mortgage payment processing – Biweekly being choked?

CFPA/Telemarketing Sales Rule/Loan payment administration. *CFPB v. Nationwide Biweekly Administration, Inc., et al.*, No. 3:15-cv-02106 (N.D. Cal., *complaint filed* 05/11/15). Back in May 2015, the CFPB sued Nationwide Biweekly Administration, Inc. in U.S. District Court, Northern District of California for allegedly misleading consumers about its automated biweekly mortgage program, which it represented to consumers would help them pay off their mortgage faster and with less interest.

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The bureau alleges that the company has violated the CFPA and the TCFAPA's TSR.

Biweekly has fought the CFPB every step of the way. It has counterclaimed, alleging that the CFPB acted wrongfully by engaging in extra-judicial "back-room pressure tactics" designed to coerce Biweekly's banking partners to cease doing business with it. Biweekly contends that, as a result, it has effectively lost the ability to provide its program to approximately 130,000 customers.

The counterclaim was initially dismissed for failure to allege sufficient facts. In December, however, the court denied the CFPB's motion to dismiss Biweekly's amended counterclaim. Last month, the court denied the parties' competing motions for summary judgment, and the case is set to proceed to trial on both the CFPB's affirmative claims and Biweekly's counterclaim.

Jonathan Urban, Edward Keefe, Marisa-Lyn Menna, Patrick B. Gushue, Stephen Jacques, Thomas McCray-Worral, and Melanie Hirsch of the CFPB represent the bureau. Glenn V. Whitaker, Nathan Colvin, and Eric Richardson of Vorys Sater Seymour & Pease in Cincinnati; Christopher D Stock of Markovits Stock DeMarco in Cincinnati; Georgia Z. Schneider and Sean Ponist of Ponist Law in Indianapolis, Ind.; John D. Smith in Springboro, Ohio; and Allyson Baker of the U.S. Department of Justice represent Biweekly.

Observations and insights

While it is still early in many of the contested cases for the CFPB, and no case (yet) has gone to trial, there are some lessons to be learned from the dozen matters contested so far:

- The CFPB will file a lawsuit in any jurisdiction necessary to enforce its authority. The CFPB is currently involved in litigation in more than eight states, including California, Maryland, Minnesota, Mississippi, North Dakota, Pennsylvania, and New York. Relatedly, the CFPB has a phalanx of enforcement attorneys involved in the contested matters — more than twenty-eight different attorneys have appeared in the various cases;
- While several companies have attempted preemptive strikes against the Bureau, none of these have met with success. The most recent attempt by Future Income Payments to enjoin the CFPB from enforcing a CID-subpoena was rejected by the D.C. Circuit on March 8, 2017.
- Statutory interpretation issues run the gamut. CROA, EFTA, FCRA, FDCPA, TILA, TSR and UDAAP enforcement challenges are all being contested. The most likely defendants to litigate are companies in industries which the CFPB would like to eliminate, and thus they have little incentive to agree to Consent Orders, such as payday lenders, structured settlement lenders, litigation settlement funders, debt collectors for payday lenders, and pawnbrokers.
- The recent case against TCF Bank concerning overdraft policies marks a rare instance when a bank has been willing to litigate with the CFPB. The reasons for that might include that the bank had compliant overdraft disclosures and the CFPB appears to be attempting a retroactive application of its interpretations (not too dissimilar from what PHH charges happened in the Bureau's RESPA interpretation and action against it).
- Despite the arrival of the new Trump administration, direct litigation by and with the CFPB appears to have increased. Some 15 separate matters were filed by the CFPB in the first 38 days of 2017 — which would indicate an enforcement pace of more than 60 matters for the year. That compares to just 42 cases in 2016 and 54 in 2015. That said, no new matters have been filed in the last forty-five days.
- The eventual settlement of contested litigation with the CFPB, just as with all other complex federal court litigation, is the expected norm. Several contested cases have already settled and several more appear to be in various stages of settlement negotiation.
- No contested litigation involving the CFPB has yet gone to trial, but the first matter to do so might be the case against Nationwide Biweekly. There, the defendant was forced out of business and has raised as a defense the CFPB's impermissible targeting of the defendant's bank-funding-clients in an "Operation Choke-Point" type of squeeze.
- Some litigant defendants opposing the CFPB may make significant cut-backs in the breadth and reach of the challenged activities based upon the statute of limitations governing the underlying statute in dispute. Quicken was recently successful in cutting back by more than half the relevant time period for alleged FHA underwriting practices being challenged by the DOJ/HUD, and other defendants have raised similar statute of limitations bars to their actions challenged by the CFPB.
- As Vice President Pence's chief economist, Mike Calabria, commented to a DC gathering on March 7, the CFPB might be evolving into an agency which is apt to spend less time on controversial policymaking issues and to focus its enforcement efforts on the worst actors in the financial services space. That would be a welcomed trend by the financial services industry.

In the meantime, when the CFPB bites, it will cause the selected combatants to make some difficult choices about the resources to be spent in litigation versus the costs of a consent order settlement.