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

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American Bar Association Consumer Financial Services Committee
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September 13, 2017 – ABA CFSC Meeting Edition

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 January 1, 2017 and June 30, 2017, 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.

[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 (2017).

[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 January 1, 2017 and June 30, 2017 the CFPB engaged in 14 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, and credit reporting. The CFPB highlighted other UDAAP issues involving student loan servicing and mortgage loan servicing in its Supervisory Highlights report. During this period there was one joint enforcement action between the CFPB and a state attorney general and 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 described in previous surveys.

Summaries of the UDAAP actions 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 under the Dodd-Frank Act.

III. CFPB Enforcement Actions

a. Equifax Inc. and Equifax Consumer Services LLC – January 2017 (Marketing)[4]

Equifax Inc. and Equifax Consumer Services LLC (collectively the "company") entered into a consent order with the CFPB related to allegedly deceptive practices in connection with the sale of credit scores and credit-related subscription services. The CFPB alleged that the company engaged in the following deceptive practices:

- Representing that the company's proprietary "Equifax Credit Score" was the same score that lenders would use to make credit decisions when the score was actually an "educational score" rarely used in credit decisions and providing disclaimers regarding the nature of the credit score in fine print, far removed from the claims they were intended to modify, and thus in a manner that was not clear and conspicuous; and

- Stating that credit scores and credit score products were "free" without adequately disclosing the negative option billing structure of the offers, where consumers were automatically enrolled into a subscription plan with recurring fees unless the consumer cancelled during the free trial period, and the free trial terms were provided in fine print, in low contrast, and in a less prominent location at the bottom of a webpage, grouped with other disclosures.

Pursuant to the consent order, the company agreed to pay a $2.5 million civil money penalty and $3,795,643 in consumer redress to resolve the above allegations of deceptive conduct, along with alleged violations of Regulation V.

[4] *In the Matter of: Equifax Inc. and Equifax Consumer Services LLC*, File No. 2017-CFPB-0001, Consent Order (January 3, 2017).

b. <u>TransUnion Interactive Inc., TransUnion, LLC, and TransUnion – January 2017 (Marketing)</u>[5]

TransUnion Interactive Inc., TransUnion, LLC, and TransUnion (collectively "the company") provide credit scores and credit reports to consumers, among other things. The CFPB entered into a consent order with the company in connection with allegedly deceptive claims regarding a proprietary credit score, based on a model from VantageScore Solutions, LLC, referred to as a TransUnion "VantageScore". Although this score has been marketed to lenders, the CFPB alleged that the "vast majority of credit decisions made by lenders… are not based on VantageScore credit scores" and that there are significant differences between the VantageScore and other scores typically used by lenders.

The CFPB alleged that the following conduct was deceptive:

- Representing that the credit score provided was the same score typically used by lenders or other commercial users for credit decisions, including the use of:
    - Ads urging consumers to "Make sure you know your Credit Score when looking for a car. Lenders typically will check your credit before buying and financing a car;" and
    - Landing pages with additional claims, such as "With a good credit score, you may pay less with lower interest rates on mortgages, auto loans, and credit cards" and disclosures about the nature of these scores only appearing at the bottom of the landing page, "buried at the bottom of the advertisement in fine print, far removed from the claims", or in some cases the disclosure wouldn't appear "until the first or second step of the order pages."
- Representing that consumers could obtain their credit score or credit report for free or for $1 when in-fact the consumer was enrolling in a negative option subscription plan based on a recurring monthly fee unless the consumer cancelled during the trial period.

Pursuant to the consent order, the company agreed to pay $13.93 million in consumer redress and a $3 million civil money penalty.

c. <u>TCF National Bank – January 2017 (Marketing)</u>[6]

The CFPB filed a lawsuit in federal district court against TCF National Bank in connection with the company's overdraft "opt-in" practices. Regulation E requires specific disclosures and an affirmative opt-in by consumers before they may be assessed an overdraft fee in connection with the payment of ATM and one-time debit card purchases.[7]

[5] *In the Matter of: TransUnion Interactive, Inc., TransUnion, LLC, and TransUnion*, File No. 2017-CFPB-0002, Consent Order (January 3, 2017).
[6] *Consumer Financial Protection Bureau v. TCF National Bank*, Case 0:17-cv-00166 (Dist. MN Jan. 19, 2017)
[7] 12 U.S.C. 1005.17 (2017).

The CFPB alleged that the following practices were abusive:

- Using a deposit account opening process that interfered with a consumer's ability to read and consider notices required by Regulation E regarding overdraft opt-ins;

- Using misleading deposit account-opening disclosures that characterized overdraft opt-ins as an included account benefit without adequately disclosing other relevant terms (such as fees);

- Presenting the opt-in decision in a way that made consumers believe they were required to provide consent to open a deposit account (and directing employees to withhold information from consumers that would have corrected this misimpression); and

- Offering employee incentives to impermissibly encourage consumer opt-ins for ATM and one-time debit card purchases, including bonuses, and sales and performance goals that indirectly impacted pay and job security, triggered specifically by customer opt-in rates.

The CFPB alleged that the following practices were deceptive:

- Using an account opening process that discouraged consumers from reading and considering required Regulation E notices;

- Using misleading account-opening disclosures that characterized opt-ins as a benefit without adequately disclosing other relevant terms (such as fees); and

- Presenting the opt-in decision in a way that made consumers believe they were required to provide consent to open an account.

The company moved to dismiss all of the CFPB's claims and on September 8, 2017 the district court granted in part and denied in part, the company's motion. The district court held that the CFPB alleged plausible UDAAP claims under the Consumer Financial Protection Act of 2010, but only as to conduct arising on or after its effective date. The district court granted the company's motion to dismiss the CFPB's Regulation E claims. This case was not resolved at the time of publication.

d. CitiFinancial Servicing, LLC -- January 2017 (Servicing/Credit Reporting)[8]

CitiFinancial Servicing, LLC, CitiFinancial Company, CitiFinancial Services, Inc., and CitiFinancial, Inc. (collectively the "company") entered into a consent order with the CFPB involving allegedly deceptive acts or practices related to residential mortgage loan servicing and credit reporting.

[8] *In the Matter of: CitiFinancial Servicing, LLC (DE), CitiFinancial Company (DE), CitiFinancial Services, Inc. (MN), and CitiFinancial, Inc. (WV)*, File No. 2017-CFPB-0004, Consent Order (January 23, 2017).

The CFPB alleged that the following practices were deceptive:

- Failing to disclose the amount of interest that would accrue during a deferment period, when such interest would be collected, that a deferment would significantly reduce the amount of principal reduction (resulting in increased interest over the life of a loan), and how a borrower's next monthly payment would be applied;

- Misrepresenting the impact of receiving a payment deferral by adequately disclosing to impacted borrowers that interest for deferred payments would be due upon collection of the next monthly installment (when related deferral disclosures suggested that deferred interest would be added to the end of a loan); and

- Failing to cancel optional insurance products in accordance with the terms of loan documents (e.g., when past due insurance premiums equaled or exceeded four (4) times the amount of the first monthly insurance premium) and improperly cancelling some optional insurance policies prematurely, and denying subsequent insurance claims.

The company agreed to provide $4.4 million in consumer redress and pay a $4.4 million civil money penalty to resolve these allegations along with alleged violations of the Real Estate Settlement Procedures Act and Regulation X and the Fair Credit Reporting Act and Regulation V.

e. <u>CitiMortgage, Inc. – January 2017 (Servicing)</u>[9]

CitiMortgage, Inc. services consumer residential mortgage loans. The company entered into a consent order with the CFPB involving allegedly deceptive mortgage loan servicing practices.

The Company allegedly sent borrowers a notice of incomplete information letter ("NOII letter") as a standard response to most borrower inquiries concerning loss mitigation. The NOII letters stated that borrowers were required to provide a long list of documents before it would process a borrower's loss mitigation application but the letters allegedly failed to inform borrowers which of the documents applied to each borrower's individual situation.

The CFPB alleged that the following practices were deceptive:

- Directing borrowers to submit documents that were not required when borrowers contacted the Company concerning loss mitigation applications; and

- Requesting documents that borrowers had already provided to the Company when borrowers contacted the Company concerning loss mitigation applications.

The Company agreed to provide $17 million in consumer redress and pay a $3 million civil money penalty to resolve these allegations, along with alleged violation of Real Estate Settlement Procedures Act and Regulation X.

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[9] *In the Matter of: CitiMortgage, Inc.*, File No. 2017-CFPB-0005, Consent Order (January 23, 2017).

f. Navient Corporation, Navient Solutions, Inc., and Pioneer Credit Recovery, Inc. – January 2017 (Servicing)[10]

Navient Corporation and Navient Solutions, Inc. (formerly Sallie Mae, Inc.) (collectively the "servicer") is the largest student loan servicer in the U.S. and Pioneer Credit Recovery, Inc. (the "debt collector") is a large federal student loan debt collector collectively the "companies." The CFPB filed a complaint against the companies alleging a host of loan servicing failures.

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

- Steering borrowers experiencing long-term hardships into forbearance programs without providing any or adequate information about alternative repayment plans, which caused or was likely to cause a drastic increase in the total cost of borrowers' loans;

- For borrowers that provided consent to receive electronic disclosures, inadequately providing notice that an income-driven repayment renewal notice was available (via an email notice that that did not include information about the purpose or contents of the renewal notice in the subject line or body) in a manner that caused or was likely to cause income-based repayment plans to inadvertently expire and result in additional costs to borrowers; and

- Misallocating and misapplying payments in a manner that caused or was likely to cause injury through late fees, interest charges, and negative credit reporting.

The CFPB alleged that the servicer and the debt collector engaged in the following deceptive practices:

- Sending income-driven repayment renewal notices claiming that any incomplete or inaccurate information would delay the renewal process but failing to identify other severe consequences that could occur, including increased monthly payments, the addition of unpaid interest to principal, and the loss of interest subsidies (servicer only);

- Representing that a co-signer release would be available if a certain number of "consecutive, on-time principal and interest payments" were made without disclosing that payments had to be made even in billing periods where no payment was due to be eligible (servicer only);

- Representing that completed loan rehabilitation programs would result in the removal of all adverse information regarding the student loan from the borrower's credit report when certain late payment and delinquency information would remain in the borrower's credit report (servicer and debt collector); and

- Representing that *all* collection fees would be forgiven by the U.S. Department of Education upon completion of a rehabilitation program when approximately 20% of each

[10] *Consumer Financial Protection Bureau v. Navient Corporation; Navient Solutions, Inc.; and Pioneer Credit Recovery, Inc.*, 3:17-cv-00101-RDM (Dist. PA January 18, 2017).

payment made under the rehabilitation program was allocated toward collection fees (servicer and debt collector).

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

- Taking unreasonable advantage of borrowers' reliance on the servicer to act in their interests by encouraging borrowers to rely on the servicer to provide advice but steering borrowers experiencing long-term hardships into forbearance programs (which were less expensive for the servicer to administer than other programs), rather than income-based repayment programs that would have been more financially beneficial to the borrower.

This case was not resolved at the time of publication.

g. RD Legal Funding, LLC et al – February 2017 (Marketing/Servicing)[11]

RD Legal Funding, LLC, RD Legal Finance, LLC, and RD Legal Funding Partners, LP (collectively "the company") offered advances to consumers that are entitled to receive compensation from a settlement fund or court ordered judgment, typically paid to a consumer in connection the wrongful onset of a serious illness or disease. The CFPB and the New York Attorney General filed a lawsuit against the company and its owner in his individual capacity arising out of allegations that the advances were improperly characterized as "assignments" and should have been treated as consumer loans.

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

- Representing that its assignment contracts were valid and enforceable when the contracts were not in fact valid and enforceable;

- Representing that it could "cut through red tape" to accelerate the payment of a consumer's compensation when: (1) it didn't actually accelerate such payments; and (2) consumers could not be expected to have information about the compensation programs sufficient to evaluate such a claim;

- Representing that it would deliver funds to consumers on a certain date but delaying disbursements beyond the specified date; and

- Creating the false impression that its contracts were enforceable by attempting to collect payments when, in fact, customers were not obligated to repay the debts since they were void under state law or in excess of state usury caps.

[11] *Consumer Financial Protection Bureau and the People of the State of New York, by Eric T. Schneiderman, Attorney General for the State of New York v. RD Legal Funding, LLC, RD Legal Finance, LLC, RD Legal Funding Partners, LP, and Roni Dersovitz*, 1:17-cv-00890 (S.D. N.Y. February 7, 2017).

The CFPB and New York Attorney General alleged that the company engaged in the following abusive practices:

- Misrepresenting the nature of the transaction and its validity in a manner that undermined consumers' understanding of the offer, thereby preventing consumers from understanding and evaluating the offer (including the ability to compare costs), materially interfering with consumers' ability to understand the terms of credit, and ultimately rendering consumers unable to protect their own interests.

The New York Attorney General also filed independent claims for alleged violations of New York law. This case was not resolved at the time of publication.

h. UniRush LLC – February 2017 (Servicing)[12]

UniRush LLC (the "company") and Mastercard International Incorporated (the "processor") entered into a consent order with the CFPB involving allegedly unfair acts or practices related to a system conversion of the company's pre-paid cards. The company markets and administers pre-paid cards that allow consumers to load funds (including wages and government benefit payments) onto the cards by ACH direct deposit; add funds at certain retail locations; make bill payments using the cards; and make card-to-card transfers.

When the Company elected to switch to the processor's card processing system for its ongoing card processing needs, the company and the Processor allegedly failed to adequately plan for the card conversion process and perform system tests to ensure that the card conversion would allow consumer cards to function properly. Following the conversion to the processor, the CFPB alleged that the company failed to adequately service consumers' prepaid accounts, including failing to take sufficient actions to remedy conversion problems that left consumers without access to their funds.

The CFPB alleged that the following actions by the company and the processor constituted unfair practices:

- Mock testing conducted by the company and the processor did not accurately simulate the actual conversion conditions and the parties failed to complete sufficient mock testing of the conversion conditions, resulting in inaccurate and/or incomplete data transfer during the conversion;

- The parties ended the "blackout" period (the period during which consumers could not use their cards) before all necessary data concerning card account activity had been accurately transferred to the new processing system, resulting in the transfer of incorrect data and the incorrect configuration of data on the processor's processing system;

- The company failed to establish a contingency plan to enable it to properly staff its customer service needs during the conversion process;

[12] *In the Matter of: UniRush LLC and Mastercard International Incorporated*, File No. 2017-CFPB-0010, Consent Order (February 1, 2017).

- Post-conversion, the company did not credit certain direct deposits (including the deposit of government benefit payments) for some consumers within the time periods represented to consumers during certain pre-conversion communications;

- The company incorrectly processed or rejected incoming direct deposits for some consumers;

- The company failed to timely process transactions initiated by consumers near the time of conversion;

- Without prior notice to consumers, the company used subsequently loaded funds to offset negative balances caused by direct deposits that the Company had incorrectly processed; and

- Because of the company's post-conversion failures and administrative actions, some consumers: (a) could not access funds; (b) obtained incorrect card balance and transaction information through the company's consumer-facing card portal (and therefore either did not attempt transactions that they wished to initiate or initiated transactions that were in excess of their actual card balances); (c) were unable to process requested transactions; (d) received inadequate customer service; and (e) were improperly assessed maintenance fees.

Pursuant to the consent order, the company and the processor jointly and severally agreed to provide $10 million in consumer redress and pay a $3 million civil money penalty to resolve these allegations.

i. Experian Holdings, Inc. Experian Information Solutions, Inc., and ConsumerInfo.com, Inc.– March 2017 (Marketing)[13]

Experian Holdings Inc., Experian Information Solutions, Inc., and ConsumerInfo.com, Inc., dba Experian Consumer Services (collectively the "company") offer credit scores, credit reports, and other credit-related products to consumers. The company entered into a consent order with the CFPB to resolve allegedly deceptive practices in connection with the sale of its proprietary credit score, referred to as the "PLUS Score", which is an "educational" credit score not used by lenders.

The CFPB alleged that the following practices were deceptive:

- Representing that the score was used by lenders or other commercial users to make credit decisions when the score was not in fact typically used by lenders or other commercial users, including the use of:

[13] *In the Matter of: Experian Holdings, Inc., Experian Information Solutions, Inc., and ConsumerInfo.com, Inc., dba Experian Consumer Services*, 2017-CFPB-0012, Consent Order (March 23, 2017).

- o Ads stating: "Lenders review your credit information and so should you. Check your credit score to know what to expect"; and
- o Disclosures indicating that the score was "not the same score used by lenders" but presenting the disclosure in an inconspicuous manner and "in many instances, far removed from the claims the disclosure was intended to modify."

Pursuant to the consent order, the company agreed to pay a $3 million civil money penalty to resolve these allegations and alleged violations of the Fair Credit Reporting Act and Regulation V.

j. Weltman, Weinberg & Reis Co., L.P.A. – April 2017 (Debt Collection)[14]

The CFPB filed a complaint against Weltman, Weinberg & Reis, L.P.A., an Ohio law firm primarily engaged in debt collection. The company collects consumer credit card, installment loan, mortgage loan, and student loan debts on behalf of original creditors and debt buyers.

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

- Sending collection letters that indicated the meaningful involvement of collection attorneys, when loan files were not reviewed by attorneys of the firm and the collection process was largely automated; and
- Sending demand and similar collection letters that threatened legal action, improperly influencing consumers to pay debts in situations where the consumers may not otherwise have agreed to make payment.

The CFPB's complaint also alleged violations of the Fair Debt Collection Practices Act. This case was not resolved at the time of publication.

k. Ocwen Financial Corporation, Ocwen Mortgage Servicing, Inc., and Ocwen Loan Servicing, LLC – April 2017 (Servicing)[15]

The CFPB filed a complaint against Ocwen Financial Corporation, Ocwen Mortgage Servicing, Inc., and Ocwen Loan Servicing, LLC (collectively the "company") alleging a series of UDAAP violations in connection with its mortgage servicing practices, along with alleged violations of the Fair Debt Collection Practices Act, the Real Estate Settlement Procedures Act and Regulation X, the Truth in Lending Act and Regulation Z, and the Homeowners Protection Act.

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

- Incorporating inaccurate and/or incomplete information about borrowers' loans in its system of record, thereby generating inaccurate information about borrowers' loans

[14] *Consumer Financial Protection Bureau v. Weltman, Weinberg & Reis Co., L.P.A.*, Case No. 1:17-cv-00817 (N. Dist. OH April 17, 2017).
[15] *Consumer Financial Protection Bureau v. Ocwen Financial Corporation, Ocwen Mortgage Servicing, Inc., and Ocwen Loan Servicing, LLC,* 9:17-CV-80495 (Dist. FL April 20, 2017).

(including loan terms, balloon payments, maturity dates, amounts received and owed, escrow balances/disbursements, insurance coverage/disbursements/amounts due, and loss mitigation/foreclosure information); resulting in the "unlawful commencement of foreclosures, improper handling of loss mitigation applications, misapplication of borrowers' payments, collection and billing of inaccurate and incorrect amounts, the imposition of inappropriate fees and charges, inaccurate delinquency statuses, inaccurate negative credit reporting, and/or emotional distress."

- Foreclosing on consumers that were in compliance with the terms of loss mitigation agreements, resulting in unilateral breaches of contract; and
- Billing, collecting and processing payments for add-on products that consumers did not consent to purchase.

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

- Making inaccurate representations to borrowers regarding various aspects of borrowers' loans based on inaccurate information from prior loan servicers when the company had "knowledge or reason to believe" that the information it received from prior servicers and its system of record was inaccurate or incomplete, and borrowers had disputed the information;
- Misrepresenting to borrowers that they had 30 days to respond to requests for additional information in connection with a loss mitigation application but commencing foreclosure before the 30 days expired; and
- Offering consumers a cash voucher or refund check without adequately disclosing that in order to receive either offer the consumer had to enroll in an add-on product with a monthly fee, and with respect to the voucher, that the borrower had to be enrolled in the product for a year and pay the monthly fee that entire time to receive the full value of the voucher offered over quarterly installments.

This case was not resolved at the time of publication.

l. Golden Valley Lending, Inc. – April 2017 (Debt Collection)[16]

The CFPB filed a complaint against Golden Valley Lending, Inc., Silver Cloud Financial, Inc., Mountain Summit Financial, Inc., and Majestic Lake Financial, Inc. (collectively the "online lending entities"), related entities all allegedly owned or controlled by the Habematolel Pomo of Upper Lake Indian Tribe (the "tribe"). The CFPB's complaint alleges that the online lending entities operated various internet websites promoting small dollar consumer installment loans on a nationwide basis with annual percentage rates ranging from 440% to 950%. The CFPB's complaint alleges UDAAP violations along with violations of the Truth in Lending Act and its implementing regulation, Regulation Z (based on improper annual percentage rate disclosures).

[16] *Consumer Financial Protection Bureau v. Golden Valley Lending, Inc., Silver Cloud Financial, Inc., Mountain Summit Financial, Inc., and Majestic Lake Financial, Inc.,* Case No. 1:17-cv-03155 (N. Dist. IL E.D. April 27, 2017).

The CFPB's complaint contends that the online lending entities are not owned or operated by the tribe, and that loans made by the online lending entities are therefore subject to state law and violate state usury and other laws concerning the terms of small dollar consumer installment loans. The CFPB's complaint asserts that, based on these state law violations, the loans originated by the online lending entities through internet websites operated by the online lending entities and through third party lead generators were void at their inception.

The CFPB alleged that the online lending entities engaged in the following deceptive practices:

- Sending demand letters for payment of, originating ACH debit entries from consumer bank accounts for the payment of, and contacting consumers by telephone to demand repayment of loans that were illegal and unenforceable under applicable state law; and

- Failing to disclose that the online lending entities had no right to collect loan payments because consumers had no legal obligation to repay the related, unenforceable loans.

The CFPB alleged that the online lending entities engaged in the following unfair practices:

- Servicing, extracting payments for, and collecting on loans that were void at inception and unenforceable under applicable state law.

The CFPB alleged that the online lending entities engaged in the following abusive practices:

- Taking unreasonable advantage of a consumer's lack of understanding that its loans were void at inception and unenforceable under applicable state law; and

- Collecting debts to which the online lending entities were not entitled.

This case was not resolved at the time of publication.

m. Commercial Credit Consultants L.L.C. et al.[17] and Park View Law Inc. et al.[18] – June 2017 (Marketing)

Commercial Credit Consultants, IMC Capital L.L.C., and Prime Credit, L.L.C. offered credit repair services to consumers through telemarketing. Park View Law was also engaged in the offering of credit repair services through telemarketing and had a contractual relationship with Prime Credit, L.L.C. to market and perform credit repair services (Commercial Credit Consultants, IMC Capital L.L.C., Prime Credit, L.L.C., and Park View Law, collectively the "companies").

[17] *Consumer Financial Protection Bureau v. Commercial Credit Consultants (d.b.a. Accurise); IMC Capital L.L.C. (a.k.a. Imperial Meridian Capital L.L.C., Imperial Capital, and IMCA Capital L.L.C); Prime Credit, L.L.C. (a.k.a. Prime Marketing, L.L.C.; d.b.a. Prime Credit Consultants); Blake Johnson; and Eric Schlegel*, 2:17-cv-04720 (C. D. CA June 27, 2017).
[18] *Consumer Financial Protection Bureau v. Park View Law, Inc. (f.k.a. Prime Law Experts, Inc.), and Arthur Barens*, 2:17-cv-4721 (C. D. CA June 27, 2017).

The CFPB alleged in nearly identical complaints against the companies that they engaged in the following deceptive practices:

- Representing, without any reasonable basis, that its credit repair services would or would likely:
    - Result in the removal of negative entries on a consumer's credit report, without regard to whether the entries were accurate or obsolete; and
    - Result in a "substantial increase" to the purchaser's credit score;
- Misrepresenting the nature of its "guarantee" by giving the net impression that consumers could obtain a full refund if they were unsatisfied with the credit repair services but only providing refunds under the guarantee if the company failed to remove at least one disputed item from a consumer's credit report within six months *and* the consumer paid for the credit repair services for those six months; and
- Failing to disclose monthly fees associated with the service and thereby misrepresenting the cost of services provided.

Commercial Credit Consultants, IMC Capital L.L.C., and Prime Credit, L.L.C. agreed to resolve the CFPB's allegations of deceptive conduct, in addition to alleged violations of the Telemarketing Sales Rule (TSR), in a stipulated final judgment that required payment of $1.53 million in civil money penalties. Park View Law agreed to resolve the CFPB's allegations of deceptive conduct, in addition to alleged violations of the TSR, in a stipulated final judgment that required the disgorgement of $500,000.

IV. CFPB Guidance

a. Phone Pay Fees[19]

The CFPB published a compliance bulletin to address the payment made by phone, particularly with respect to fees charged for payments made by phone. The bulletin identifies a series of practices that may constitute UDAAPs, including:

- Not disclosing the fees of all materially different phone payment options;
- Misrepresenting the nature of phone payment options and the existence of fees;
- Adding phone payment fees to a consumer's payment in a manner that disguises the fee; and
- Inadequate employee monitoring and service provider oversight to prevent the problems identified above.

[19] CFPB Compliance Bulletin 2017-01, *Phone Pay Fees* (July 31, 2017), available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201707_cfpb_compliance-bulletin-phone-pay-fee.pdf.

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. Spring 2017 Supervisory Highlights (Published in April 2017)[20]

The CFPB's Spring 2017 Supervisory Highlights report identified confidentially resolved UDAAPs in connection with the servicing of mortgages and student loans.

With respect to mortgage servicing, the CFPB cited a servicer for unfair practices when it improperly disbursed funds from a borrower's escrow account to pay insurance premiums owed by other borrowers, creating unavoidable escrow shortages and increased monthly payments for affected borrowers.

With respect to student loan servicing, the CFPB indicated that:

- One or more servicers' receipt of incorrect information from a third-party enrollment service provider caused it to prematurely terminate loan deferments for certain borrowers, and while the servicer retroactively reinstated the deferment, the servicers' failure to refund late fees and capitalized interest that occurred because of the improper deferment was an unfair practice; and

- One or more servicers' were placing student loan borrowers into successive periods of forbearance or deferment and capitalizing interest after each period rather than waiting to capitalize interest a single time at the end of the successive periods, but that the servicers deceptively misrepresented this practice by stating to consumers that interest would capitalize at the end of the deferment period rather than at the end of each deferment period.

VI. Updates on Past Cases

a. Intercept Corporation – March 2017 (Payment Processing)[21]

We previously reported that the CFPB filed a civil complaint against Intercept Corporation, a third-party payment processor that facilitates the movement of funds through the Automated Clearing House (ACH) network between consumer bank accounts and other providers of consumer financial services, namely payday lenders, debt collectors, and auto title lenders. The CFPB's complaint alleged that the company engaged in unfair practices when it failed to conduct

[20] CFPB Supervisory Highlights, Issue 15 (April 2017), available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201704_cfpb_Supervisory-Highlights_Issue-15.pdf.

[21] *Consumer Financial Protection Bureau v. Intercept Corporation, d/b/a InterceptEFT, Bryan Smith, and Craig Dresser*, Case No. 3:16cv00144-ARS (E.D. ND. March 17, 2017). Note that the CFPB also alleged that company's individual owners and operators were individually liable for the company's conduct.

due diligence on its customers and ignored warning signs that it was processing payments for companies that were engaged in fraudulent conduct.

In a March 17, 2017 order, the district court granted the company's motion to dismiss, finding that the CFPB's complaint failed to plead "facts sufficient to support the legal conclusion [necessary to prove an unfairness claim, namely] that consumers were injured or likely to be injured."

The opinion recites the statutory definition of unfairness and holds that neither the injury nor countervailing benefit to consumer prongs of an unfairness claim were sufficiently pled to survive a motion to dismiss. Specifically, the district court notes that the CFPB's complaint:

- Failed "to sufficiently allege facts tending to show that [payment processing industry] standards were violated";
- Failed to include facts allowing a determination of whether "any potential injury was or was not counterbalanced by benefits to consumers"; and
- Failed to include facts demonstrating that the company interfered with consumers' ability to understand the terms of their arrangements with clients or that the company took unlawful advantage of consumers, both of which are aspects of an abusiveness claim rather than an unfairness claim (though abusiveness was not plead in this case).

The district court concluded that "[a] complaint containing mere conclusory statements without sufficient factual allegations to support the conclusory statements cannot survive a motion to dismiss" and the case was dismissed.

b. NDG Fin. Corp. – December 2016 (Debt Collection)[22]

We previously reported that the CFPB had filed a complaint against NDG Fin. Corp. and related offshore companies (collectively the "company") alleging that, through various internet websites, the company originated and then collected on small dollar consumer installment loans without required state licensing and/or at interest rates that exceeded state usury caps.

The CFPB filed an amended complaint on December 11, 2015 and the company subsequently filed motions to dismiss the CFPB's amended complaint based on: (a) lack of personal jurisdiction; and (b) failure to state a claim upon which relief can be granted because: 1) the claims were time-barred or retroactive; and 2) the CFPB itself was unconstitutional.

On December 2, 2016, the district court denied the motions to dismiss and held that the CFPB had adequately pled, among other things, UDAAP claims under the Consumer Financial Protection Act of 2010.

This case was not resolved at the time of publication.

[22] *Consumer Financial Protection Bureau v. NDG Fin. Corp.*, Case No. 1:15-cv-05211 (S. Dist. N.Y. July 31, 2015).

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