Consumer Finance Monitor (Season 6, Episode 45): A Deep Dive Into the Consumer Financial Protection Bureau's Policy Statement on Abusive Acts and Practices Under the Consumer Financial Protection Act

Speakers: Alan Kaplinsky, Brian Turetsky, Michael Gordon, and Mike Guerrero

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm, and I'm your host, Alan Kaplinsky, the former practice group leader for 25 years, and now Senior Council of the Consumer Financial Services Group at Ballard Spahr. And I will be moderating today's program.

For those of you who want even more information, don't forget about our blog, consumerfinancemonitor.com. It goes by the same name as our podcast show. We've hosted our blog since July 21, 2011 when the CFPB became operational. So there's a lot of relevant industry content on our blog. We also regularly host webinars on subjects of interest to those in the industry. So to subscribe to our blog or to get on the list for our webinars, please visit us at ballardspahr.com. And if you like our podcast show, please let us know about it. Leave us a review on Apple Podcast, Google, or whatever platform you use to access your podcast shows. Also, please let us know if you have ideas for other topics that we should consider covering or speakers that we should consider as guests on our show. This is a repurposed webinar that we held on September 14th of this year entitled Abusive Acts and Practices under the CFPA, the CFPB's new policy statement.

So let me tell you just a little bit as all of you, I'm sure, know, CFPB recently issued a policy statement in which it purportedly relies on statutory analysis and passed enforcement actions to provide a framework for determining what constitutes abusive action or abusive conduct under the Dodd-Frank Act or the CFPA. And we're going to explore in detail this policy statement and the conduct of the CFPB generally finds to be abusive. One of the things that we will focus on toward the end of our webinar is this concept of dark patterns. That's become a very popular phrase that the Fellow Trade Commission and the CFPB like. You'll hear more about that later. And you'll also see at that time that we're not a newcomer to dark patterns. We've already done one webinar and three other podcasts about it, including a podcast show we did a while ago with Malini Mithal of the Federal Trade Commission. So let me very briefly introduce our speakers and we're going to then, at that point, I'm going to turn the program over to Mike Guerrero and we're going to jump into this very interesting topic.

So first, Mike Guerrero, Mike is an expert in just about anything in the consumer financial services industry that you can think of. And this is something that's top of mind for sure in his practice. Well, let me go to Mike Gordon. Mike, at one time for several years, served at the CFPB and his direct report at that time was director of Richard Cordray. And so he follows everything, anything at all that has to do with the CFPB, Mike is on top of it. And then last but not least, Brian Turetsky, who is one of the newer people to join our consumer financial services group. And Brian, along with both Mikes, have been involved in numerous projects for clients, explained to clients as best we can because this isn't an easy thing to do, what abuse of conduct is and how it might differ from unfair conduct, which is one of the other prongs of the UDAAP that is used by CFPB. And it's now my pleasure to turn the program over to Mike Guerrero.

Mike Guerrero:

Yeah, thank you, Alan. So I think perfect segue, it's absolutely fair to say that we have all struggled with this definition of abusiveness over the past decade plus. Questions like how does it differ from unfair and deception or the unfairness and deception prohibitions? How is it going to be enforced? How should my CMS system contemplate this new standard? They're all fair questions. They're fair questions we get asked, they're fair questions we think about and they're questions for which there's been relatively little or perhaps even confusing guidance. And I appreciate that there's a policy statement, but I still think there's going to be some questions after.

So due to this ambiguity and this ambiguity has significant impacts, right? It has impacts on supervisory enforcement compliance considerations. I find it helpful to take a step back before jumping directly into this most recent policy guidance and think about how we got there. And this is going to be a very big step back because we're going all the way back to 1914, but in 1914, the FTC act was enacted and that created the FTC and created the unfairness standard. You jump forward about 20 more years and then we get the standard that we've been more used to, which was a prohibition on unfairness and deception.

These standards were created so that they could be flexible and that they can kind of grow incrementally over time as the market grows. And they did that. In 1964 though, the FTC in the rulemaking related to cigarette advertising, they tried to create more bright line type rules and in doing so, they created a standard under the unfairness prong that said unethical or unscrupulous conduct would be unfair. Even the Supreme Court of about a decade later even kind of mentioned it and kind of gave it blessing in passing, but it created a lot of ambiguity because that standard, which is an interesting standard, unethical or unscrupulous conduct. It was ambiguous and it's, in some ways, kind of similar to where we find ourselves today. In 1980, the FTC issued two policy statements. The first or in the 1980s, the first was on unfairness. And in both of these policy statements, they recognized that there is ambiguity in the market and part of that is by design, but it has to be some reasonableness to the ambiguity, otherwise, it will stifle the market compliance consideration's innovation.

So they recognize this. And one thing that they did that I thought was interesting was that they struck the unethical and unscrupulous standard because they felt that it was largely duplicative. They said, "If you look at the factual basis for the standard, we're going to capture it in all of our other standards." And we will talk about that similar concerns or considerations as we progress through this webinar. But I found that to be interesting. The main difference though is that was a rule-based standard, and we're in a different environment now. We're dealing with a statutory standard. So it's not so easy as to have the regulator say, "Hey, we're done with this. But it just shows that not so much is new. The industry continued to deal with different types of ambiguity. Jump forward from the '80s to 2010, and in that interim period, you did have some rules and statutes come out that articulated some form of an abusive standard.

The telemarketing sales rule, for example, it's very specific as to what types of practices might be abusive, not disclosing all the key terms of a deal, the FDCPA making threats or continually calling consumers. So we have some action during this period, but in 2010, as we all know, the Dodd-Frank Act was passed in response to the financial crisis. And the reason the Abusiveness Standard was added, or at least one reason is because the financial market was viewed to have evolved. There were new products that created different incentives than had existed previously. The incentives were, previously, you get a financial service product, you enter into it with the consumer, you get interest, the consumer pays it off and everyone's happy. Here, you have a product where the ability to repay became a lot less important because the product could be sold and then there were collateralized products on the backend that you could profit from when there was a lack of performance on the product.

So the Congress felt that the existing unfair and deceptive tools weren't sufficient to capture that or they didn't capture that. So we get this new abusive standard and then we have seven, eight years go by and we're trying to grapple with it. We see it kind of pop up here and there. But in 2019, we have a CFPD symposium where there's some panels of industry experts that come together and try to think about what is abusive. And shortly thereafter, we get a policy statement that, I'd say, not incredibly descriptive, but it did have some helpful information.

And it said in part that the Bureau's going to look to how big is the harm relative to the benefit and setting its priority to enforce this standard. And another thing it did, which I thought was helpful, they said, "We're not going to focus on just adding abusive to existing factual patterns that could be unfair or deceptive. So it's not unfair plus, deceptive plus, but we want to really focus on is this truly abusive in and of itself and that's where our efforts are going to be and that will help cater along this jurisprudence of abusiveness."

Unfortunately, a year after that, the policy statement was rescinded. Move two years forward, and that's where we are today with a brand new policy that takes the place of that existing policy. And as we'll hear from Mike Gordon, the kind of jumping around and rescission and issuance of guidance, that impacts the market. But we will hear about that from Mike. So what is the abusive standard? Essentially, it's capturing two buckets of prohibitions or acts and practices and four specific types of acts and practices. So the first one, the first bucket would be material interference. It's an act of practice that materially interferes with the ability of the consumer to understand the terms or conditions of the product.

The other bucket relates to taking unreasonable advantage of the consumer and that unreasonable advantage has to take one of three forms. The first would be taking advantage of a gap in understanding between the provider and the consumer or the consumer's lack of understanding of the risk or the conditions of the product. The second would be taking advantage of the unequal bargaining power or the consumer's inability to protect their interest in choosing to use that financial product or service. And then the final one would be taking advantage of the consumer's reasonable reliance on the provider to protect the interest of the consumer. And that's an interesting one. That seems to think sometimes there may be more of a relationship there, whether that be based on advertising or the nature of the product. I get that settlement product. The focus is on the consumer's reliance. So with that, what does the policy say in connection with this first bucket, the material interference?

Well, the policy says intent is not required. So it doesn't matter that the covered provider intended to make something less understandable or interfere with the consumer's ability to understand the product, maybe through UI experiences, placement of disclosures. What matters is whether there is a interference or whether the natural consequence of the act or practice, which would include an omission functions to impede the consumer's ability to understand. However, if there is evidence of an intent, then the Bureau will infer materiality relating to the interference. So unpack that a little bit and I think an example might be it's common to have AB testing when you're rolling out a new product, right? You have a set of screens and a user experience that you want to see is more likely to lead to conversion perhaps or consumer understanding. When you do that testing and if you have results that indicate that the consumer might be less likely to understand a term or see a term that could be something that the Bureau could use against you.

Think about complaints. It's all, again, rooted in ambiguity because I don't think the policy statement ... it gives a lot of examples, but not a lot of guidance. But all of this, just to me, flags issues that we have to look out for and have to think about a little bit more than we used to. As it relates to the natural consequence of the act, I think here looking at where are your terms? Are they underneath the call to action? There's been cases where, particularly in the TCPA context, where putting those terms underneath the call to action has been problematic, and I think you might see that expand here. And then finally, the actual impediment to understanding it doesn't have to be this quantitative analysis, it can be qualitative, it could be based on complaints, it could be based on what the consumer is saying they experienced. So again, not a ton of solid footing here.

A couple examples of really specific items that the Bureau pointed out, key terms. So if you have terms such as pricing, cost, limitations on the ability to use a product or contractually specified consequences of default, think an acceleration provision for example, those are expected to be prominently and clearly disclosed to the consumer. If they're not, that means that there could be an abusive act based on the material interference with the consumer's understanding. So think about how your terms are presented to the consumer. What do your disclosures look like? Are they behind hyperlinks? What does that user experience look like? Does the consumer have to click a hyperlink? Is there a checkbox? All of that, I think, becomes more important. It always was. But now we have the Bureau telling us it's important.

The other items that the Bureau specifically pointed out are, is the product itself inherently abusive? Is it so complicated that you can't even disclose the product to the consumer in a meaningful manner? Another term, and this one, I think, touches a little closer to home, is the product functioning inconsistently with the way it's described or really the contract? And we're all in the business of consumer financial services, which is essentially contractual relationships. Our contract with the consumer is the product. One document is governing our entire relationship, the profitability, essentially, of the company. So it's really, really important to spend time with that document and make sure it's accurately reflecting what you're doing, what all these processes you've established and you spend your day-to-day operations working on, is that contemplated in your agreement? It's easy to kind of move past your agreement, so periodically revisiting it.

And this one, we don't need to spend time on it, but again, we talked about it, material interference, look out for buried disclosures, overshadowing, having these nice sales-like terms and then fine prints at the bottom, all stuff like that. So let's jump over to the second bucket, unreasonable advantage. And in this one, as we were talking about, there's three items inside of this bucket. There has to be unreasonable advantage of a gap in understanding.

And what's interesting here is that gap in understanding doesn't even have to be reasonable and it can be entirely based on what the consumer has done, not based on what you've done. At least that's what the Bureau is saying. So in my view, that's hard to control for, absent having these incredibly robust, informative user experiences. There might be risks there. So if the consumer does not understand the risk or consequence of default, for example, there could be an abusive practice and a kicker here, I think, is that the policy says even if there's an awareness evidenced by the consumer, if the consumer is just aware that this could happen, it's in the realm of possibility, they say, that might not be enough.

It seems as though the Bureau is really wanting the consumer to appreciate the likelihood of a default or appreciate the concepts. And how do you control for that as a company? I think that's hard. And to me, I think statements like this, when I read it, remind me of the 2015 TCPA order where the FCC came out and said, "Look, anything can be an auto dialer, but a rotary phone isn't." Even a rotary phone theoretically could be. Here, these are just very, very broad statements without giving much guidance. But our other panelists, which we'll get to very shortly, can help color that a little bit more for us. The other ones are taking advantage of unequal bargaining power. So this is going to arise in situations where the consumer can't really choose their service providers, credit reporting, loan servicers, debt collection, all of these situations are going to ... they're not defacto abusive, but they will come with an increased degree of scrutiny.

Inability for the consumer to seek more favorable terms, contracts of adhesion, that one, they call it out, but it's again an interesting one because look at buy now, pay later industry for example. Tons and tons of transactions, you need a uniform contract. So they say it's not defacto abusive, but again, it will be what that, with increased scrutiny. So your kind of fairness sensor should be really peaked when you're working in any type of contract of adhesion. And then finally, if the consumer just has an inability or it's hard for the consumer to make decisions, so onerous processes, timely processes, all of that needs to be approached more carefully. The last circumstance would be consumer reliance. Touched on this earlier, but if you have marketing materials, for example, that might lead a consumer to think you're acting in their best interest and look, we all are. We're not in the business of being predatory, but this is creating or looking for a fiduciary type of relationship.

So in my view, look at the marketing materials and the documents you have that are going to interface with the consumers so that you can understand if the consumer might be relying on you to act in the best interest of the consumer. Where does this come up? Again, I think like a debt settlement, financial literacy, potentially, those offerings, all of that could just invite a higher degree of scrutiny. And this is all based on kind ambiguity in the policy. These are takeaways. But the last thing I would say is the unreasonable advantage doesn't just need to be monetary, it could be reputational, operational, increased market share, so broad, broad standard. And finally, we touched on it before, but unreasonable, that also isn't viewed through a purely quantitative perspective. It can be a qualitative unreasonableness and the Bureau says even a relatively small advantage could be abusive if it's unreasonable. So with that, let me turn it over to my colleague, Brian Turetsky, who will give us a rundown of kind of where this abusive standard has taken us since it was enacted.

Brian Turetsky:

Thanks, Mike. We thought it would be helpful to walk through examples of acts and practices that the CFPB has determined to be abusive in the past. The Bureau maintains the policy statement isn't intended to break any new ground or set a new standard and their position is it summarizes past actions with the goal of providing an analytical framework to identify violative acts and practices. So with that in mind, we thought it would be helpful to take a few minutes to look at enforcement actions and some recent exam findings where abusiveness was alleged.

As an initial matter, it's worth noting that abusiveness is the most infrequently used of the UDAAP categories. These are rough numbers, but since the creation of the CPB, only about 20 consent orders or so have alleged abusive acts versus almost 70 involving unfair acts and approximately 125 involving deceptive acts. It's also exceedingly rare to see abusiveness as a standalone claim. It's almost always alleged alongside another UDAAP and the numbers are similar when it comes to exam findings. We reviewed published supervisory highlights and identified approximately 10 abusive acts versus about 90 unfair acts and a hundred deceptive acts that the Bureau published in their supervisory highlights.

The next few slides have a list of enforcement actions from the past five years where the Bureau alleged abuse of conduct. These are a matter of public records, so we've included them on the slide, but unlike the Bureau, I don't like to name and shame. So we're going to talk about them at a very general and high level and not discuss specific actions, but they are on the slide if you want to take a look. There are a variety of acts involving a range of financial services and products involved in these abusiveness actions in the past. And I'm going to talk about them in terms of the two categories that Mike mentioned starting with material interference. Terms and conditions at account opening have been a major focus in enforcement actions.

In one bank consent order, the Bureau found providing forms at the end of the account opening process or providing pre-check forms.

It was abusive as it materially interfered with consumer's understanding of the terms of a debit card advance feature. In another consent order, the Bureau found material interference where a bank had an account opening process that presented consumers with the choice to select overdraft services at a time in the opening process when they weren't looking at the explanatory notice relating to their opt-in rights. That was found to interfere with the consumer's ability to consider the contents of the notice when they made that opt-in decision. In another account opening case, a third party registration and payment processing vendor was alleged to have used dark patterns to get consumers to enroll in a discount club when they clicked accept on the screen where they thought they were registering for an event like a charity race. So instead of clicking the accept button to register for what they thought they were registering for, it enrolled them in a trial membership for a discount club, which was free for the initial 30 days and then converted to a paid subscription with a high annual fee if you didn't cancel within the 30 days.

The Bureau has also found high pressure sales tactics to be abusive. So in an action against a nationwide non-bank installment lender, they alleged aggressive sales tactics interfered with the consumer's ability to understand that optional add-on products marketed with a loan like credit insurance or ID theft were in fact optional. The CFPB also found that the lender materially interfered with consumer's understanding of the cancellation and refund process and similar accusations have been found in many other consent orders. And then finally just last year, the Bureau found abusive acts where a payday lender concealed a free repayment plan option that was in the contract for consumers who couldn't repay their loans and instead steered them towards new loans with additional costs and fees. This was considered material interference with the consumer's ability to understand and opt for their contractual rights to that repayment plan and also took unreasonable advantage of their lack of understanding of their options.

In terms of unreasonable advantage, and you can see some of those cases we just discussed have both prongs. Focusing now on unreasonable advantage, a consent order with a payday lender found abusive behavior where their collection agents created an artificial sense of urgency to induce borrowers who could not pay existing debts to take out new loans that they also would be unlikely to be able to repay, taking unreasonable advantage of their inability to protect their interests and negotiate when they were stressed by the sense of urgency that was conveyed by the collections. There, the threats of litigation and criminal prosecution were also considered unfair since in many cases they were false. Failure to disclose fees has been found to take unreasonable advantage of consumers where the consumer doesn't understand how or when a fee may be charged and therefore, can't avoid it to protect their own interests.

This has happened in a number of actions including a consent order with a payroll processing vendor, the process military allotments for creditors where the enrollment form and statements provided to the customer didn't disclose the allotment fees to the service members who were enrolled. Memberships not allowing customers to cancel memberships in an installment loan program and charging monthly fees until all unpaid membership fees and the loan had been repaid was considered taking unreasonable advantage of consumers because they couldn't protect their interests and exit the program. That was also considered unfair as it wasn't reasonably avoidable and deceptive because of the fact that you couldn't just cancel wasn't disclosed. And when Mike Gordon speaks after me, you're going to hear a lot about how the line is very vague sometimes between which UDAAP is at play.

Just another couple of examples, underwriting controversially has been challenged as abusive. There's a current case against NATO finance lender where the Bureau is alleging that the lender is scored loans based on default risk and therefore, auto dealers hid part of the cost of the credit risk when they factored that into their pricing. And according to the CFPB, this takes unreasonable advantage of consumers who may not have taken out loans if they understood the actual costs. That's a very tenuous allegation in the first place, but the CFPB is alleging it's abusive. And in a very recent case filed last month, the Bureau alleged that an installment lender was churning refinance loans also in their credit scoring model where they identified and prioritized borrowers with a propensity to refinance, taking unreasonable advantage of those consumers, lack of understanding of the risks of doing so at a time when they were stressed to make a payment.

The next couple of slides discuss exam findings. A review of supervisory highlights over the past few years shows abusive findings by the Bureau, again, across a variety of practices and products. On these slides, you see in mortgage charging fees for phone payments when consumers were unaware of the fees because the customer service rep didn't disclose them and student loans withholding official transcripts of students who were delinquent in their tuition when their tuition was funded through an extension of credit, the teacher loan forgiveness program from the Department of Education.

Some applications were denied because the applicant used the wrong date format even though the Department of Education had warned that that would be considered a practice that should not result in the denial of an application. In credit cards, marketing promotional APRs that didn't adequately inform consumers that acceptance of the offer and use of the card for new purchases might lead to the loss of a grace period if the consumer didn't pay the entire balance was considered abusive. And then finally, in auto, charging payment processing fees that exceeded the servicer's actual cost for processing payments. Importantly, this one, the servicer received over half the amount of the fee from its third party payment processor and 90% of its customers used this pay to pay method instead of mailing in payment or utilizing another free method. And then also in auto, selling gap products where there was no discernible benefit to the consumer, like consumers with low LTVs has been found to be abusive.

Before we move on to the next slide, I just want to briefly go back to enforcement actions and then I'm going to hand off to Mike Gordon. But in a consent order with a bank last year, authorized positive settled negative overdraft fees, which are overdraft fees that are charged when consumer's enough funds in the account to cover the transaction when it's made, but not when it's settled, were found to be unfair as not reasonably avoidable and also abusive on the basis that they took unreasonable advantage of consumer's lack of understanding.

However, in another consent order with a different bank, three months later, the exact same fee was found to be unfair and not abusive. And this inconsistency in applying the Abusiveness Standard and the fact that other UDAAPs will usually apply, usually you don't see abusiveness as a standalone, is really apparent when you look back at enforcement actions. Another example, sales practices cases were deposit accounts and credit cards were open without consumer consent. The CFPB found this to be both unfair and abusive using the unreasonable prong against a bank last year, but has otherwise, not described the exact same practice as abusive in multiple consent orders with other banks. So with that, I'm going to turn it over to Mike Gordon. I was going to talk a little bit more about the application of the standard and the distinction with the other UDAAPs.

Michael Gordon:

Thanks, Brian. So in the time we have left, I want to do a few things. I'm going to quickly talk about some of the origin stories about the notion of abusiveness and how that might inform the Bureau's thinking and talk a bit about the overlap between abusiveness and the other parts of UDAAP, deception and unfairness and how companies should think about that. I want to give some takeaways that we have as we think about the specific prongs to the extent it's helpful of the Abusiveness Standard.

And then finally, I want to spend a few minutes on kind of an emerging topic and area of focus, which is dark patterns, which is a particular flavor or could be a particular flavor of abusiveness claims that I personally believe may be on the rise in the near term. So first, as was alluded to by Mike earlier and was mentioned in the policy statement, abusiveness arises after the mortgage crisis and this notion that existing UDAAP prohibitions don't get at the kind of conduct that Congress was concerned had led and contributed to the crisis and really think about it as sort of a suitability concern.

And interestingly, they didn't include an explicit suitability requirement in Dodd-Frank, but the notion that people are being sold loans that won't work for them and that there's an imbalance of information there where the company can know more about what's likely to happen, what's likely to default than the consumer. And that led to problems of basically inappropriate loans being sold. That suitability notion animates the abusiveness notion from the beginning, but it has grown as Brian explained quite significantly since that. It's not limited to the suitability notion.

Another key concept that I always think about when I think about abusiveness that runs through it is the Bureau's underlying concern with an imbalance of power, an imbalance of information and a leverage that can exist that gives opportunity for companies to potentially take advantage of consumers. And there's never perfect information in markets as we learned in econ class, but the Bureau is constantly struggling against that reality and trying to push on the weights and the scale there in favor of consumers to even it out and abusive I see as a tool that the Bureau wants to and likes to use in order to effectuate that goal. Of course, that imbalance of power, and is not limited to consumer finance markets, it's true of many consumer products markets generally, but I think the Abusiveness Standard provides some mechanism for the Bureau to try to meet that preexisting goal.

And finally, another thing that runs through a lot of the Bureau's work that frustrates those of us in industry and advising those in industry is that we often get the sense that the Bureau just doesn't like certain practices or products, even if they're perfectly legal and it finds ways to attack them either on the front end through how they're sold or on the backend on how collections work is done. But it's animated by, again, a notion that there's a suitability or a concern that this product or practice just shouldn't exist in the form that it does, but that's not, of course, on its own an actionable notion. And so does abusiveness help the Bureau in that cause? So we've seen, for example, on the suitability notion, one case that I think was mentioned earlier where the Bureau used abusiveness to attack a product they didn't think was suitable.

Essentially, it was a debt relief program in that case where there was this imbalance in information. The Bureau thought the company knew that they were selling a debt relief product that consumers were really unlikely to be able to take advantage of. It was a program they knew they were unlikely to complete. And the sales practices around that were deemed to be thus an abusive practice. And I will say this, that I'm going to spend some time talking about abusiveness as compared to or overlapping with deception and unfairness, I think there's some value in that, but I think actually the value is somewhat limited in that it's sort of an artificial exercise to try to tease apart abusiveness from deception and unfairness without more guidance from the Bureau. And as Brian noted, there's just been very little guidance in the way of a case is brought or other written guidance documents on how the Bureau really teases those notions apart.

So we can try to do it in theory, but in practice, we see great overlap between these concepts and that's a blessing and a curse in the sense that in large measure abusiveness is not reaching conduct that we haven't all been aware in the past could become problematic to regulators. It's a curse because you do have a new standard, it can be stretched. The Bureau has done some of that, but it's a blessing in that if you are adequately guarding against unfair and deceptive practices through your existing compliance program, you're probably capturing abusive as well. And while we can try to tease these notions apart, like in practical terms, sometimes it's more important to bolster your existing UDAAP programs than it is to spend extra time thinking about the additional increment that abusive might provide.

So with that said, as Brian pointed out, it's difficult to tease these notions apart. The Bureau rarely brings standalone abusiveness claims that would show you what it considers abusive conduct to be that wouldn't fit into the other buckets. And even when it does that, there's typically a pretty strong argument it could fit into a deceptive or unfair bucket as well as an abusive bucket. And the way they plead cases further complicates and confuses the matter because, as Brian alluded to, sometimes the same conduct gets pled one way in one case, including as an abusiveness claim, and in another case, the same conduct or seemingly very similar conduct gets pled as a unfair or deceptive conduct. So the cases around sales practices and unauthorized openings of accounts are a good example of that. One case might have it as abusive and another as unfair or deceptive.

Also, even within the definition of abusiveness, we see inconsistencies with how the Bureau pleads these matters, like take unreasonable advantage prongs, A, B and C there, we have the same similar conduct. For example, in the cases about how it's abusive to collect on what the Bureau says as void or voidable loan because it violates some state law or state registration requirement. We see those cases sometimes pled as the prong A here, which are taking advantage of a lack of understanding and sometimes pled as B, which is taking unreasonable advantage of the inability to protect your own interests. And so the Bureau's own history here doesn't help and often muddles this analysis. But that said a couple takeaways I think that are useful on the different prongs of the standard. The first prong here about material interfere with the ability of the consumer to understand term or condition, that obviously, echoes of deception are very strong there.

That was a prong that was used less frequently in the early years of the Bureau. Its use has grown in recent years. Perhaps one of the reason it's one of the lesser used prongs of the abusive standard is that this notion of materially interfering seems to imply a lot of action, like some showing of affirmative action, intentional action perhaps to confuse the consumer. And maybe it's a concern of that kind of implied showing it would be necessary that makes that less used in the past. I do think, though, and I'll get to this in a moment, that this prong could be revived and see more use as the Bureau attacks what it considers to be dark patterns, which I'll get to in a moment. The taking unreasonable advantage part of the abusiveness standards, we see that A and B here on the standards are used much more commonly than C. 2A because it talks about understanding of material risks and costs seems very close to deception.

And in fact, in the vast majority of the cases brought under that prong, we see they involve material misrepresentations or omissions and thus are parallel to, if not also including deception claims. 2B seems to me closer to an unfairness. You don't need to have a misrepresentation or omission here. So even if the consumer agreed to it and there wasn't a misrepresentation, it could still form the basis of an abusive misallegation under this prong. And the one thing that jumps out at me, and I remember from my time at the Bureau being a focus is these disfavored, not just disfavored products but disfavored clauses and provisions and contracts. And I won't review the long and sorted history with the Bureau going after arbitration clauses, but it's not just arbitration. There are other clauses that the Bureau of views as suspect because they waive or could waive certain rights consumers are entitled to.

And in the context of contracts that, for practical business reasons as Mike suggested, are not negotiated and need to be form contracts, the Bureau is very suspicious of these kinds of provisions and the consumer's ability to avoid these kinds of waivers. And we've seen the Bureau use abusiveness to go after those kinds of things. For example, the form selection clause was the case that was ... I think Brian mentioned. And it was a case where the consumer agreed and it was in the contract and it was clear that for collections actions the form would be Virginia. And yet, despite that clarity and consent, the Bureau stated that since the consumer really couldn't bargain for removal of that provision, it was abusive when they then brought all their cases there, notwithstanding the difficulties that may present for consumers, and not surprisingly, they alleged unfairness as well for the same conduct.

But I do think that this notion that there could be what the company believes to be a meeting of the minds in the contract, but with the Bureau views the same contract as abusive, that's a notion that I think is attractive to the Bureau, frankly, because they ... and the abusiveness may provide ways for them to, in the future, find more cases like that where there's not a deception case because it was clearly disclosed. I mean, unfairness may be difficult to prove because an injury requirement and there's not a corresponding injury requirement, for example, for the clause B of the taking unreasonable advantage. And so it may be a slightly lower bar for the Bureau to use in attacking these kinds of provisions that are disfavored. And I would note as a background fact here that the Bureau has announced its intention to create a contract term registry.

And if that ever materializes, that's going to provide the Bureau with a lot of information about provisions it doesn't like and who's using them. And we could see abusiveness become a more useful tool for the Bureau in attacking those kinds of provisions that are listed in the registry. Prong 2C, the C here about consumer's reasonable reliance, I'm not going to dwell much on that one except for that it's used less often and it's used often but not always where the provider is taken some kind of affirmative acts to induce reliance by the consumer. So there's reasonable reliance, but the cases that jump out and where the Bureau seems to go is when that reliance is sort of induced by some overt acts of the provider. Not all the cases fit that, but that seems to be the predominant type of fact pattern you get with the cases under that prong.

The final point I wanted to make about abusiveness is one Mike alluded to, which is that interpretations are going to swing. The pendulum is going to continue to swing on abusiveness interpretations by the Bureau because of politics. Now that it's clear the director's removable by the president and we're going to get a new director with a new administration, this notion that a policy on abusiveness or anything else could be put in place and then rescinded a year or two later, we're going to have to get comfortable with that. I think that's going to continue to happen for the foreseeable future. And that's, of course, very unfortunate. Regulation is most effective when regulatory expectations are clearly and consistently articulated. And so it's going to create an ongoing challenge for industry. But that is the reality we live in with this agency. As practitioners, we've become accustomed to this challenge and how to advise our clients in light of this kind of reality and steps you can take with those kinds of things in mind.

And I'll speak to best practices in a moment, but first I want to briefly touch on dark patterns, which for those who haven't followed, dark patterns is sort of the latest and greatest craze among regulators, federal and state alike, primarily the FTC and the CFPB at the federal level. And it kind of reminds me of the junk fees initiative in the sense that it's a pejorative but very vague term that's in vogue and it means a lot of different things. But the FTC has done a fairly good job in its policy guidance of laying out what some of the examples of it are. And I'll just suffice it here to summarize it as ... First of all, there's no universal definition, but it's a concern that the practices of companies in the online environment will mislead or manipulate consumers into taking actions that don't reflect their true intent or their choices or their consent.

The Bureau talks about this as hidden tricks or trap doors that companies build into their websites to get consumers to inadvertently click and sign up for subscriptions or products. The types of products that are most under attack, I think, in this realm are unauthorized charges, deceptive subscription tactics, unreasonable delays or complications with cancellation efforts when you're trying to cancel product billing that's difficult to cancel or violations of for free trial terms. And here the Bureau, specifically in its guidance, called out the use of the first prong here materially interfering with the ability of a consumer to understand a term or condition as one that it thinks applies to this kind of interference in the digital space with the consumer's understanding. And we've seen a couple cases like that where these kind of digital interfaces and decision architectures are seen as interfering with the ability of the consumer to understand. I actually think 2B might provide the Bureau with opportunities going forward.

And I wouldn't be surprised to see that prong of abusiveness used for dark patterns. Again, one of the reasons is there's no requirement to prove an injury here or even a material omission, but there may be steps in your online signing up or how information is presented on the company's website that the Bureau nonetheless objects to. And this could be something like urgency, which is one of the themes in dark patterns. Creating urgency is one way to get there and a false sense that the time to act to get the deal is going to expire. That's not true if there's some artificial urgency. The Bureau has done that in a payday case from many years ago. It brought a claim under the Section B for this sort of artificial urgency. And that is a theme that we see in dark patterns and I wouldn't be surprised to see more of for companies that engage in tactics like that.

Another example is what the FTC calls confirmed shaming where it's this asymmetrical decision where you're forcing the consumer to say something like, "No, I don't really want to save money," in order to decline an option. Well, there's no misrepresentation there. May not even be consumer harm, but the Bureau and regulators don't like these kinds of, what they call, confirmed shaming and could clause be of abusiveness be a way to attack practices like that. So we're short on time, so I just want to quickly touch on a few best practices here before we close. Because the vast majority of abusive conduct, as we've talked about as alleged, is really overlapping with deception and unfairness, firms that have a strong UDAAP compliance program are likely in a very good position to prevent potentially abusive conduct as well. And we routinely conduct compliance reviews with a focus on UDAAP issues for clients and the importance of a well-designed and implemented CMS or Compliance Management System just cannot be overstated, especially for entities that are subject to CFPB exams.

As we've told countless clients, if the CFPB takes issue with a particular practice, it's much better to have a discussion with them about a reason decision you made when you were applying a sensible UDAAP policy rather than to be in the position of having to explained why you had no policy or decision-making process to begin with. Second, I would say do careful regular reviews of your contracts, as Mike Guerrero mentioned earlier, your practices may involve and you need to ensure that your disclosures and contracts accurately reflect the nature of the relationship and the products and services. Finally, keep an eye on dark practices, and if you want to learn more, there's a webinar that we did recently that gets deeper into some of these questions. Pay particular attention to negative option enrollments, authorization process for payments and fees and any confusing or overly complicated processes like for cancellation.

And just generally speaking, the presentation of material information in your online environment. Don't forget third party risk. The Bureau's policy itself notes that abusiveness risk can arise when you're profiting from the wrongdoing of others. So make sure you have a good process for understanding and managing the consumer protection risk that results from your service providers and partners. And finally, it's always wise to take special care if you're serving special populations or if there's ways to understand how you might be serving those populations. From its inception, the Bureau has been focused on groups of consumers that it considers to be more vulnerable, students, seniors protected classes in fair lending, law, service members, and many abusiveness cases seem to involve these special groups of consumers. And so companies should take special care when serving them.

Alan Kaplinsky:

I want to thank all of our speakers today, Mike Guerrero, Mike Gordon and Brian Turetsky. And I want to thank all of our listeners today who have downloaded our show. To make sure you don't miss our future episodes of the show, subscribe to our show on your favorite podcast platform, Apple Podcasts, Google, Spotify, or wherever you listen. And don't forget to check out our blog, consumerfinancemonitor.com, for daily insights of the consumer finance industry. And if you have any questions or suggestions for our show, please email us at podcast@ballardspahr.com. Stay tuned each Thursday for a new episode of our show. Thank you for listening and have a good day.