Pushing the Envelope: Are There Any Limits to the CFPB’s Jurisdiction?

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Your Presenters

Alan S. Kaplinsky

John L. Culhane, Jr.

Christopher J. Willis

Scott M. Pearson
Civil investigations – CFPB is authorized to investigate to determine whether “any person” is violating any federal consumer financial law (§ 1051)

Administrative proceedings – CFPB is authorized to bring an administrative action against any person to enforce compliance with Title 10 of Dodd-Frank and with any other federal law for which it has enforcement authority (§ 1053)

Litigation – CFPB is authorized to bring a civil action against “any person” who violates a federal consumer financial law (§ 1054)
CFPB Enforcement Authority - UDAAP

- UDAAP – CFPB can investigate, bring an administrative proceeding against, or sue to prevent any “covered person” or “service provider” from committing or engaging in an unfair, deceptive, or abusive act or practice (§ 1031)
  - Act or practice can occur in connection with a transaction with a consumer for a consumer financial product or service
  - Act or practice can occur in connection with a transaction with a consumer for the offering of a consumer financial product or service
- Conditional exclusions for certain specified persons and conduct (§§ 1027, 1029)
Small Business

• CFPB Currently May Enforce Federal Consumer Financial Laws Applicable to Small Business/Commercial Credit
  - ECOA/Reg B (nondiscrimination, signature requirements, adverse action notices)
  - FCRA/Reg V (permissible purpose, adverse action notices, furnisher obligations, employment screening)
  - TILA/Reg Z (unsolicited card rules, unauthorized use liability)
Small Business

• CFPB Currently May Recharacterize Transactions Under ECOA and TILA
  - Statement of business purpose not necessarily determinative
  - Reg Z factors: relationship to primary occupation, degree of personal involvement, income ratio, transaction size, statement of purpose; owner occupied or not
  - Payments from consumer rather than business sources (consumer credit/debit card, personal bank account, HELOC, refinanced mortgage)

• CFPB Can Enforce FTC Franchise and Business Opportunity Rules
Collection Attorneys

- Status under Dodd-Frank is mixed
- On one hand, there is a broad exception for the “practice of law,” that ostensibly places any conduct constituting the practice of law outside the CFPB’s jurisdiction
- However, there is a “rule of construction” that the CFPB reads as limiting the exception to only lawyers who represent consumers
- Further, there is a provision in the same section that preserves the applicability of the enumerated consumer laws to lawyers (i.e., FDCPA under Heintz; RESPA applied to closing attorneys)
Telecom and Payment Processors

• In its own version of Operation Chokepoint, CFPB sued Sprint and Verizon, largely based on third party conduct

• Both were alleged to be “covered persons” extending credit and processing third party payments

• Both were alleged to have engaged in four unfair practices, apparently from 2004 through 2013
  - Enrolling customers in third party billing without authorization
  - Failing to implement adequate compliance controls
  - Failing to adequately resolve customer disputes
  - Ignoring warnings from customers, government agencies, and public interest groups
Defenses

• Sprint and Verizon are not “covered persons”
• The challenged practices are not “unfair”
• Dodd Frank does not apply retroactively (conceded by the CFPB in briefing in other cases)
• The conduct of Sprint and Verizon was not the proximate cause of any damages
• Dodd Frank does not provide for vicarious liability for the misconduct of third parties
• The doctrine of primary jurisdiction should apply as the CFPB is really enforcing FCC “Truth in Billing” rules
Usury Restrictions

• “No provision of this title shall be construed as conferring authority on the Bureau to establish a usury limit applicable to an extension of credit offered or made by a covered person to a consumer, unless explicitly authorized by law.”

• 36% “all-in” rate trigger in proposed payday lending rule
  - Restrictions severe, likely will eliminate 90% of the market
  - Proposed rule attempts to avoid the exclusion by including other loan features in the definition of covered loans, and leaving out unsecured “signature” loans payable more than 45 days after origination
Auto Dealers

• Auto dealers (those that routinely assign all of their retail installment contracts) are not subject to the CFPB’s jurisdiction under Dodd-Frank

• However, the CFPB is doing its best to control dealership behavior through the mechanism of holding finance sources liable for alleged dealer conduct

• Most notable current example is ECOA cases based on dealer “discretion” to price retail installment contracts

• Next example is likely to be dealer sales practices with respect to ancillary products

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The Meaning of UDAAP

• Unfair, deceptive, and abusive all have “elements” spelled out in Dodd Frank, and unfair/deceptive borrow heavily from the FTC’s interpretation of the FTC Act.

• However, in our experience, the CFPB does not pay much attention to analysis of these elements. They are frequently simply assumed to exist, or not even mentioned, when the CFPB makes a UDAAP claim.

• It appears the CFPB predominantly views UDAAP as requiring only one element – “consumer harm” – since all consumers are incapable of protecting their interests and necessarily rely on the industry to do so.
Where Will the CFPB Go Next?

- ECOA claims with respect to small business lending and marketplace lending?
- Claims against manufactured home and modular home retailers similar to those against auto dealers
- More claims against non-financial entities that can be viewed as payment processors (similar to telecom actions)
- Claims against accountants and tax preparers involved in refund anticipation loans and similar products
- Rulemaking with respect to legal collections activity
- Retirement savings accounts and benefit plan loans

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Thank you for joining us!

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Moderator – Alan S. Kaplinsky

• Practice Leader of the Consumer Financial Services Group at Ballard Spahr
• Devotes his practice to counseling financial institutions with respect to bank regulatory and transactional matters and defending them in individual and class action lawsuits (including CFPB investigations and government enforcement matters)
• First President of the American College of Consumer Financial Services Lawyers
• Former Chair of the American Bar Association Committee on Consumer Financial Services of the Business Law Section
• Co-Chair of the Practising Law Institute's Annual Consumer Financial Services Institute, now on its 20th year
• Has been named as a tier one banking and consumer financial services lawyer in the 2006 through 2015 editions of *Chambers USA*
• Has been named in *The Best Lawyers in America* under financial services regulation law and banking and finance litigation from 2007 to 2015
• Member of the Bloomberg BNA Banking Report Advisory Board
Panelist – John L. Culhane, Jr.

- Partner at Ballard Spahr and a member of the firm’s Consumer Financial Services, Mortgage Banking, Bank Regulation and Supervision, and Higher Education Groups as well as its Fair Lending Task Force and Collection Documentation Task Force

- Compliance practice emphasizes counseling clients on the development and implementation of innovative loan, leasing, and payment programs, and includes counseling on fair lending, servicing and collection issues

- Regulatory practice includes preparing clients for banking agency and CFPB targeted and full spectrum compliance examinations as well as assisting in the defense of consumer class actions, attorney general investigations, and agency enforcement actions

- Charter member of the American College of Consumer Financial Services Lawyers

- Former Chair of the Subcommittee on Fair Lending of the ABA Committee on Consumer Financial Services
Panelist – Scott M. Pearson

- Litigation Partner at Ballard Spahr and a member of the Consumer Financial Services and Mortgage Banking Groups
- Concentrates his practice on complex business litigation and regulatory enforcement matters with an emphasis on the financial services industry
- Exceptionally well-versed in consumer lending, including the statutes and regulations governing mortgages, credit cards, student loans, auto finance, debt collection, and credit reporting
- Has defeated or favorably settled more than 75 class actions for clients that include, national banks and other financial institutions, Internet companies, apparel and cosmetics manufacturers, sports and entertainment companies, and other firms that deal regularly with consumers or small businesses
- Regularly defends high-profile regulatory enforcement proceedings brought by the Consumer Financial Protection Bureau and others, and advises some of the world's largest financial institutions on a variety of compliance issues
Panelist – Christopher J. Willis

- Partner at Ballard Spahr and a member of the firm’s Consumer Financial Services and Mortgage Banking Groups

- Counsels financial institutions on regulatory matters, advises them on compliance with consumer financial services laws, and defends them in both individual and class action lawsuits, as well as governmental enforcement actions (including CFPB investigations)

- Chairs the firm’s Fair Lending Task Force and Collection Documentation Task Force

- Fellow of the American College of Consumer Financial Services Lawyers

- Recognized by Chambers USA for financial services regulation: consumer finance (litigation) nationwide for 2014 & 2015

- Named in The Best Lawyers in America for banking and finance litigation and commercial litigation for 2013-2015

- Frequent author and speaker on issues relating to consumer financial services regulation and litigation