CFPB Symposium: Abusive Acts or Practices

Statement of Eric J. Mogilnicki
Covington & Burling LLP
June 25, 2019

Introduction

One of the many innovations in the Dodd-Frank Act was the inclusion of a prohibition on "abusive" conduct. This new standard provided the Consumer Financial Protection Bureau (the "Bureau" or "CFPB") with an important new tool, but little guidance on how and when it should be used. Accordingly, the Bureau has both over-used and under-used this tool in the years since it became law. The Bureau's current effort to extend our understanding of "abusive" beyond the bare statutory language is a critical step to deploying the "abusive" standard effectively and consistently.

No one benefits from the current lack of clarity around the "abusive" standard. Consumers are not receiving the full benefit of the new legal regime; financial institutions are not on fair notice of what conduct may violate the law; the Bureau cannot be certain it is applying the same standards consistently; and Congress is not able to review -- and revise, if needed -- the Bureau's interpretation of the new standard.

This paper is a continuation of a series of articles that sought to explicate the "abusive" standard as written by Congress and applied by the Bureau.[1] It reviews the contradictory ways in which the Bureau has enforced the "abusive" standard, and then proposes a way forward that would help define the set of tasks that the Bureau can and should perform with this new tool.

---

[1] Eric Mogilnicki and Eamonn K. Moran, *Understanding and Applying Dodd-Frank's 'Abusive' Standard*, 104 Banking Rep. (BNA) 161 (Jan. 27, 2015); Eric Mogilnicki and Eamonn K. Moran, *The CFPB's Enforcement of the Prohibition on Abusive Acts and Practices*, 104 Banking Rep. (BNA) 236 (Feb. 3, 2015); Eric Mogilnicki and D. Jean Veta, *Defining 'Abusive' Acts and Practices*, 108 Banking Rep. (BNA) 269 (Feb. 13, 2017).

The “Abusive” Standard Is Not Well Defined

The abusive standard has never been well defined. The Obama Administration included the idea in its 2009 proposal to create a “new Consumer Financial Protection Agency to protect consumers across the financial sector from unfair, deceptive, and abusive practices.”[2] However, the Treasury Department provided no additional details, and there was almost no discussion of what “abusive” meant in the year between the proposal and when the Dodd-Frank Act enacted the new standard into law.[3] While the statutory language sets forth four ways in which an act or practice may be “abusive,”[4] Senator Christopher Dodd himself remarked on the Senate floor in May 2010 that “the word ‘abusive’ does need to be defined.”[5]

The CFPB has not provided additional details on what it considers to be “abusive.” This is true even though the Bureau has used the term to support its supervision, regulations, and enforcement activity. For example, the UDAAP Section of the Bureau’s Supervisory Manual provides seven pages of detailed descriptions and examples of “unfair” and “deceptive” conduct. However the Manual’s half page on “abusive” consists of repeating the statutory language.[6]

In particular, the Bureau’s efforts to enforce the “abusive” standard have confused, rather than clarified, the new standard. Time and again, the Bureau has brought an “abusive” claim in one

---

[2] Dept. of the Treasury, *Financial Regulatory Reform: A New Foundation* 1, 3, 67-68 (June 2009).

[3] *See Understanding and Applying Dodd-Frank’s ‘Abusive’ Standard*, *supra* n. 1.

[4] *See* 12 U.S.C. §5531(d).

[5] Congressional Record (May 6, 2010; page S 3311). Senator Dodd discussed either “striking that word or defining it better,” explaining that “(d)eceptive and fraudulent cover the ground pretty well, but I thought abusive was a pretty good explanation point. Because it was abusive, in common language.”

[6] *See CFPB Supervision and Examination Manual* (v.2 October 2012), UDAAP at 1-9.

case, but failed to bring an "abusive" claim in a highly similar case -- without providing a shred of explanation for its decision.[7]

- In 2013, the Bureau sued two debt assistance firms for falsely promising to help debtors, but charged only one with "abusive" conduct – despite calling the conduct of both "abusive."[8]

- In 2014, the Bureau sued two companies on the same day for false marketing that induced consumers to seek their help repaying student loans. The Bureau charged only one of them with "abusive" conduct – despite a press release that referred to them both as "scams that illegally tricked borrowers."[9]

- In 2015, the Bureau alleged that creating "an artificial sense of urgency" to encourage a consumer to take out a loan was deceptive despite having alleged a year earlier that creating "an artificial sense of urgency" to encourage a consumer to take out a loan was "abusive."[10]

- In September 2016, the Bureau brought two cases alleging improper sales practices that focused consumers on the size of their monthly payments in order to hide the true costs of a loan. This conduct was alleged to be deceptive (but not "abusive") in one case and "abusive" (but not deceptive) in the other.[11]

---

[7] *See generally The CFPB's Enforcement of the Prohibition on Abusive Acts and Practices*, and *Defining 'Abusive' Acts and Practices*, *supra* n. 1.

[8] *Compare* Complaint, *CFPB v. American Debt Solutions Inc.*, Case No. 9:13-cv-80548-DMM (S.D. Fl. May 30, 2013) *with* Complaint, *Consumer Financial Protection Bureau v. Morgan Drexen*, Case No. SACV-13-10267-JST (C.D. Cal. August 20, 2013).

[9] *See* CFPB Press Release, *CFPB Takes Action to End Student 'Debt Relief' Scams* (Dec. 11, 2014).

[10] *Compare* Complaint, *CFPB v. Global Financial Support et al.*, Case No. 15-cv-2440-GPC-WVG (S.D. Cal. Oct. 29, 2015) *with* Consent Order, *In the Matter of: CFPB v. ACE Cash Express, Inc.*, 2014-CFPB-0008 (July 10, 2014).

[11] *Compare* Consent Order, *In The Matter of: Bridgepoint Education, Inc.*, 2016-CFPB-0016 (Sept. 12, 2016) *with* Consent Order, *In The Matter of: TMX Finance LLC*, 2016-CFPB-0022 (Sept. 26, 2016).

To be sure, each case is different, and there may be fine distinctions between these comparable cases that fully explain why the Bureau chose to include "abusive" allegations in some cases and not others. But if the Bureau is indeed parsing the "abusive" standard as part of its enforcement regime, it should be transparent enough to share its logic with consumers, Congress, and regulated entities.

Unfortunately, the absence of any such an explanation raises concern that the Bureau's "abusive" precedents reflect a host of other considerations, such as the identity of the defendant, the perspectives of the specific Staff involved, and/or the parties' bargaining power. In particular, the use of Consent Orders to shape "abusive" doctrine means that public policy is being set in private, two-party negotiations and without any role for the courts. The Bureau's enforcement docket should reflect a predetermined set of core principles about the meaning of "abusive," rather than providing piecemeal glimpses of the Bureau's approach to the statutory language.

Further Defining "Abusive"

As Senator Dodd remarked almost ten years ago, the word "abusive" does need to be better defined. A more robust understanding of the statutory language would benefit all who have a stake in the effective use of the legal standard to police conduct. In particular, consumers have a strong interest in a clear legal standard that encourages compliance. Given the vast scope of consumer financial services in the United States, the Bureau's influence over most consumer transactions is found not in its direct supervision or enforcement, but in the Bureau's clear instructions to financial institutions on how to comply with the law. Leaving each participant in the financial services industry to interpret "abusive" for itself risks higher levels of non-compliance, and a playing field in which companies with lower standards can compete unfairly.

The Bureau itself would also benefit from a more detailed definition of "abusive." While an infinitely flexible standard may seem like an ideal prosecutorial tool, it opens up each "abusive" case to claims that the Bureau is engaging in regulation through enforcement rather than enforcing the law. Similarly, an *ad hoc* articulation of the “abusive” standard is at best a shaky foundation for Bureau rulemaking. Finally, clarity may be needed to preserve the standard altogether. One key argument made by advocates for repeal of the Bureau’s authority to police “abusive” is that the Bureau had failed to define its scope.[12]

Of course, fully articulating the “abusive” standard will prove difficult. The concepts of unfairness and deception both have long track records that provide substantial wisdom on how they should be interpreted. However, the language, logic, and history of the “abusive” standard suggest that the starting point in defining “abusive” is not the relevant practice or product, but the consumer. The prohibition on “abusive” conduct is designed to provide additional protection to the most vulnerable consumers of financial products and services. Companies that take unreasonable advantage of such consumers’ lack of information, sophistication, or alternatives may be charged with “abusive” practices even if their acts and practices do not reach the legal standards for unfair or deceptive practices.

Protecting the Vulnerable

The language of the “abusive” standard protects a consumer who lacks defenses that are generally available to others in the marketplace. In contrast to the “unfairness” standard, which applies to undifferentiated “consumers,” the ‘abusive” standard singles out for protection a consumer who:

- has a “lack of understanding . . . of the material risks costs or conditions of the product or service;”
- has an “inability . . to protect [their] interests in selecting or using a consumer financial product or service;” and
- reasonably relies on another “to act in the interests of the consumer.”

[12] *See* House Financial Services Committee, *Comprehensive Summary of Financial CHOICE* Act, page 50 (June 23, 2016) (explaining effort to repeal “the CFPB’s standard-less authority to deny consumers access to any financial product and service it declares ‘abusive’”).

As to those customers, financial institutions are commanded not to take "unreasonable advantage."[13]

Focus on the Consumer

This focus in the statutory text on characteristics of customers necessarily makes the "abusive" standard sensitive to individual facts and circumstances. Indeed, the standard refers to "a consumer" and "the consumer" in analyzing whether an act or practice was abusive. This formulation contrasts to the "unfairness" standard, which not only asks if "consumers" are injured but also if "consumers" enjoy countervailing benefits. The "abusive" standard asks if particular consumers were particularly vulnerable.

This focus on the vulnerable was purposeful. Former House Financial Services Committee Chair Barney Frank explained in 2011 that the "abusive" standard:

> says you should not take unreasonable advantage of a lack of understanding. [For example], there are mortgage products that are not suitable for an 89-year old woman who has never had her own experience in economic affairs.[14]

The next year, Chairman Frank noted again that the applicability of the "abusive" standard "may depend upon the consumer."[15] He provided the example of refinancing a mortgage, explaining that it

---

[13] *See* 12 U.S.C. § 5531(d). The Bureau has primarily relied upon the three prongs of subsection 5531(d)(2), which are describe above and are the focus of this analysis. In addition, 12 U.S.C. § 5531(d)(1) relates to an act or practice that "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service."

[14] House Financial Services Committee, Subcommittee on Financial Institutions and Consumer Credit Hearing, *The Consumer Financial Protection Bureau: the First 100 Days*, 112th Con. (Nov. 2, 2011).

[15] Transcript, House Committee on Financial Services, *The Semi-Annual Report of the Consumer Financial Protection Bureau*, 112th Cong. (March 29, 2012) at 10.

"might be a good idea" for some consumers, but "abusive" as to an 80 year old "when she had nearly paid off her mortgage."[16]

Then-CFPB Director Richard Cordray agreed, testifying before the House Financial Services Committee that enforcing the "abusive" standard involves the "facts and circumstances" of individual situations, is "unavoidably situational," and can require that the Bureau investigate the facts "consumer by consumer."[17]

Explaining the Cases

A focus on the vulnerable also explains many of the "abusive" cases brought by the Bureau to date. These cases accused companies of "preying on servicemembers" who shopped near military bases; [18] targeting "financially distressed consumers . . . whose student loans were in default or garnishment;"[19] and victimizing "[c]onsumers struggling to pay off a debt." [20] Where the Bureau identified consumers who are "among the most at risk,"[21] it added "abusive" claims to the more common unfairness and deception claims.

In other cases, the consumer's vulnerability to "abusive" conduct was created by a lender who induced the consumer to rely upon them. For example, when a for-profit college allegedly told potential borrowers that it "would work in the interests of its students to better their lives," and helped them complete their applications for financial aid, the Bureau alleged it was "abusive" as well as unfair for them to

---

[16] *Id.*

[17] *Id.* at 14-18.

[18] Holly Petraeus, *Closing the Book on Colfax,* CFPB blog post of July 29, 2014. *See also* Complaint, *CFPB v. Freedom Stores Inc. et. al,* Case No. 2:14-CV-643 (E.D. Va., Dec. 18, 2014); *CFPB v. Security National Automotive Acceptance Corp.*, Case No. 1:15-cv-00401 (W.D. Ohio, June 17, 2015).

[19] Complaint, *CFPB v. College Educational Services LLC et. al.*, Civil Action No. 8:14-cv-3078 (M.D. Fl., December 11, 2014), ¶56

[20] CFPB Press Release, *CFPB Takes Action to Stop Florida Company from Engaging in Illegal Debt-Relief Practices* (May 30, 2013).

[21] *Id.*

push students into high cost loans.[22] Similarly a lender that "created the illusion of expertise and individualized advice to induce consumers to reasonably rely on the company to act in their interests" was charged with "abusive" conduct in addition to more common unfairness and deception claims.[23]

Not all of the Bureau's "abusive" enforcement actions appeared to follow Director Cordray's dictum that an "abusive" claim required "consumer by consumer" analysis. Indeed, many cases provide scant details about the consumers themselves, and focused instead on flaws on the product or service involved. One way to understand those cases is to recognize that they often focused on a product, service, cost, or fee that was essentially worthless. In such cases, the Bureau implicitly assumed that a consumer who engaged in an activity with no economic value must have either lacked understanding or the ability to protect themselves.[24] This logic explains the "abusive" counts in a host of cases. The debt relief program in *American Debt Settlement Solutions* was "highly unlikely" to benefit any consumer.[25] College Education Services "took advance fees to consolidate private loans that were not eligible for consolidation."[26] Nationwide Biweekly Administration, Inc. sold an "Interest Minimizer" product that was useless to "a substantial number of consumers."[27]

In each of these cases, the Bureau apparently concluded that worthless products allowed it to allege "abusive" conduct without further analysis or description of the vulnerability of individual consumers. One task for a Bureau seeking to define "abusive" conduct would be to evaluate whether this logic is sufficient to satisfy a standard that requires evidence about the consumer as well as the product.

---

[22] Complaint, *CFPB v. ITT Educational Services, Inc.*, Case No. 1:14-cv-00292-SEB-TAB, (S.D. Ind., Feb. 26, 2014) at ¶¶29, 63-87.

[23] Complaint, *CFPB v. CES*, *supra* n. 18, at ¶57.

[24] *See The CFPB's Enforcement of the Prohibition on Abusive Acts and* Practices, *supra* n. 1 (discussing this point in more detail).

[25] *See* Complaint, *CFPB v. American Debt Settlement Solutions, Inc., et al.,* Case No. 9:13-cv- 80548 (S.D. Fla. May 30, 2013).

[26] *See* Complaint, *CFPB v. CES, supra* n. 18 at ¶ 11.

[27] *See* Complaint, *CFPB v. Nationwide Biweekly Admin., Inc., et al.*, Case No. 3:15-cv-02106, (N.D. Cal., May 11, 2015) at ¶¶ 59-60.

Moving Forward

What would change if the Bureau were to further define the prohibition on "abusive" acts and practices with an emphasis on its role in protecting the most vulnerable consumers?

First, the Bureau would continue and deepen its focus on protecting those groups of consumers that may prove most vulnerable. Appropriately, many of the Bureau's "abusive" cases to date have served protect consumers who may be particularly vulnerable because they are busy serving their country, delinquent on their student loans, or in need of debt assistance. However, there are many other groups of consumers – such as the elderly, or consumers with disabilities or limited English proficiency – where there are similar risks that a company may take unreasonable advantage of a lack of understanding or the inability of a consumer to protect herself. Robust enforcement of the "abusive" standard may require the Bureau to prioritize protecting such vulnerable groups over technical violations of law that touch larger groups of consumers.

Second, such an approach to the "abusive" standard would give the Bureau a different lens through which to view particular acts and practices. Deception claims require an act or practice that "misleads or is likely to mislead" a reasonable consumer.[28] "Abusive" allows the Bureau to also consider whether a company took unreasonable advantage of consumers who "lacked understanding" without reference to whether that misunderstanding was reasonable, or widely shared. To use Chairman Frank's example, it may be "abusive" to sell a product to an elderly person who does not understand it even if no deception is involved.

Similarly, an "abusive" standard that focuses on the vulnerable would fill gaps in the unfairness standard. Unfairness claims may be made only when the alleged harm to consumers is not reasonably avoidable. The rationale for this limitation is that "[n]ormally, the market is self-correcting; it is governed by consumer choice."[29] An "abusive" claim fills the gap where a consumer's choice is undermined by their lack of understanding, or their trust in another to act in their best interests. Moreover, in keeping with its focus on the individual consumer, the

---

[28] *See CFPB Supervision and Examination Manual* (v.2 October 2012) at UDAAP 6.

[29] *Id.* at UDAAP 2.

"abusive" standard provides the Bureau with a response to arguments that an injury should be ignored in light of the overall benefits to consumers or competition generally from an act or practice.

In these and other ways, a deeper look at the "abusive" standard could give the Bureau a fresh perspective on how vulnerable populations encounter financial goods and services. In particular, the Bureau may find it worthwhile to be more granular in evaluating consumers' understanding of financial products and services. At the same time, the Bureau should recognize the critical importance of encouraging financial institutions to provide financial goods and services to vulnerable populations. In that regard, the Bureau should be mindful that an "abusive" claim requires an allegation that "unreasonable advantage" was being taken of a consumer.

Third, a more robust definition of "abusive" will almost surely limit its use in enforcement cases. The Bureau has sometimes deployed "abusive" as an epithet rather than a legal concept, using the term to signal its opprobrium rather than characterize its allegations. A focus on vulnerable customers means that allegations of "abusive" conduct should not be levied in cases where the relevant consumers ranged widely in their understanding, or ability to protect themselves, or reliance on the provider of the financial good or service.

Similarly, the Bureau should allege "abusive" conduct only when it is prepared to make factual allegations regarding the actual consumers involved. Deception claims require only that an act or practice be "likely to mislead," and Bureau allegations of deception routinely center on the language of a representation without reference to any particular consumer's understanding. However, if abusive claims should be assessed "consumer by consumer," and are "unavoidably situational," then the Bureau should be prepared to make more specific allegations before bringing such claims.

Finally, a fuller explanation of how the Bureau approaches the "abusive" standard will reverberate throughout the marketplace. Many market participants are already acutely aware of the need to pay special attention to vulnerable customers. However, a Bureau focus on particular groups will inevitably have a ripple effect in which companies seek to anticipate and solve for the Bureau's concerns. In avoiding "abusive" conduct, consumers, the Bureau and responsible financial institutions share a single goal. Defining that goal is a first step to reaching it.