

**A Survey of Activities Identified as Unfair, Deceptive, or
Abusive by the CFPB**

by

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January 3, 2014

A hallmark creation of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act is the Consumer Financial Protection Bureau (CFPB). Chief among the new agency's powers is its ability to prohibit "unfair, deceptive, and abusive" acts or practices (UDAAP) that occur in connection with consumer financial products or services.¹ While the terms unfair, deceptive, and abusive each are specifically defined terms, in practice they are malleable concepts that come to life when applied to real world facts and circumstances.

The CFPB first used its authority to bring enforcement actions for UDAAP violations in July 2012 and has brought a total of 16 such actions in its short existence. A review of the actions taken by the agency using its UDAAP authority, and the particular facts and circumstances involved in each action leading to the specific UDAAP violations, is helpful in elucidating how the CFPB will apply the technical definitions of "unfair, deceptive, and abusive" in the future. This article summarizes that information, providing background on the agency's UDAAP powers and a survey of the CFPB's UDAAP actions in 2012 and 2013.

Background on the CFPB's UDAAP Powers

The term **unfair** is defined by statute 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."² 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.³ Moreover, these terms have existed under the Federal Trade Commission's (FTC) jurisdiction for decades and there is a well-developed body of case law and FTC guidance concerning their meanings and application.⁴

¹ 12 U.S.C. §§ 5531(a); 5536(a)(1).

² 12 USC § 5531(c)(1).

³ CFPB Examination Manual V.2, UDAAP 5 (October 2012).

⁴ See, e.g., FTC Policy Statement on Unfairness (December 17, 1980); FTC Policy Statement on Deception (October 14, 1983).

The Dodd-Frank Act introduced the new 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.⁵

As evidenced by these definitions, and by their varied application (discussed below), the CFPB is imbued with broad, subjective UDAAP authority that permits discretion in the agency's enforcement efforts, particularly with respect to the marketing of financial products and services.

CFPB's Identification of Unfair, Deceptive, and Abusive Practices

The CFPB has entered 16 enforcement actions based on allegations of unfair, deceptive or abusive acts or practices. Taken together, these actions provide a road map from which industry participants can identify past practices that have been problematic and avoid engaging in those same practices in the future. These UDAAP enforcement actions generally are split between the following types of activities: 1) marketing; 2) debt collection and debt settlement; and 3) mortgage loan servicing.

The summaries of each UDAAP action below are intended to provide a straightforward identification of the specific acts or practices that were targeted by the CFPB.

1) Marketing Activities

The CFPB's enforcement actions targeting unfair and deceptive marketing practices have covered various products, including credit cards reward programs, debt protection products, identity theft protection, credit score tracking, vehicle service contracts, and GAP insurance. Problematic marketing practices have involved misrepresentations made at the time of sale, either via telemarketing, in-person solicitations, or written brochures and inadequate disclosure of what the agency believes are material terms and conditions. The enforcement actions centered on unfair or deceptive marketing practices are summarized below.

⁵ 12 USC § 5531(d).

Capital One Bank – July 2012 (Marketing)

Capital One Bank was fined for making representations, through its call center representatives, that were either false or misleading with respect to its debt protection and credit monitoring products.

Deceptive representations in telemarketing solicitations were made by directly or indirectly stating or implying that:

- The product was not optional but was a normal benefit associated with the consumer's credit card, when in fact the product was optional;
- The product was free or that consumers could avoid fees by making timely payments, when in fact consumers making timely payments were still assessed a fee for the product; and
- Representing that there were no eligibility requirements for payment protection products, when in fact the consumers must have been employed and able to work at the time of purchase to be eligible for all of the product's benefits, and must not have been disabled or unemployed at the time of purchase.

Specific improper sales practices, due to deviations from telemarketing scripts by call center representatives, included:

- False statements that the products would improve credit scores and assist in obtaining credit limit increases;
- Implying that the benefits of a payment protection product would automatically kick in without action from the consumer, when in fact consumer action was required;
- Misrepresentations of cost by: implying the product was a free feature of a credit card; suggesting the product would not be billed if the consumer kept a "good payment history"; and confirming that the product "only costs 99 cents" when it actually costs 99 cents per \$100 of monthly outstanding balance;
- Statements that complete terms and conditions are only available after purchase;
- Failure to make eligibility determinations with respect to employment, which implied that the consumer could be eligible for all benefits;
- Using unsubstantiated statistics, such as "identity theft is the number one crime";
- Failing to indicate that the products were optional, and describing them as features of a credit card; and
- Failing to obtain affirmative consent to enroll before processing an enrollment.

The bank's compliance monitoring, service provider management and quality assurance resulted in ineffective oversight which failed to prevent, identify, or correct the improper sales practices.

Discover Bank – September 2012 (Marketing)

Discover Bank was fined for engaging in deceptive practices when telemarketing payment protection, identity theft protection, and credit score tracking products.

Misrepresentations and omissions contained in the telemarketing scripts included statements that:

- Disguised the purpose of outbound sales calls as courtesy calls;
- Implied that the products were free “benefits” rather than products sold for a fee;
- Disguised a purchase as an agreement to “be enrolled” or “become a member”;
- Obtained consumers’ interest in “enrolling” before providing price or other material terms and conditions;
- Indicated that consumers would receive a letter with written terms and conditions before being required to pay and implying that the consumers had not purchased the product before receipt of the letter, when the letter was actually only sent after enrollment; and
- Failed to disclose material terms and conditions, including eligibility information related to employment and pre-existing medical conditions.

American Express – October 2012 (Marketing & Debt Collection / Settlement)

American Express Bank and two of its affiliates were fined for engaging in deceptive debt collection practices and deceptive marketing practices in connection with a credit card reward program promotional benefit.

Deceptive debt collection practices included:

- Misrepresentations that the settlement of an unreported debt would be reflected on the consumer’s credit report and improve the consumer’s credit score; and
- Misleading statements that, after the consumer settled the debt, any remaining debt would be waived without prominently disclosing that payment of the full balance was required for future card applications.

Deceptive solicitations of a credit card rewards program promotional benefit included:

- A confusing description of the benefits of the rewards program, the first being a “\$300 Bonus Offer,” and a second that stated “22,500 bonus points – receive a bonus \$300” when consumers only received points and did not receive the cash bonus as advertised.

US Bank and Dealers Financial Services – June 2013 (Marketing & Debt Collection / Settlement)

US Bank and its service provider, Dealers Financial Services, were fined for making deceptive statements in the sale of optional vehicle service contracts and GAP insurance in connection with vehicle installment loans.

When marketing the vehicle service contracts and GAP insurance as add-on products, the following marketing practices were considered unfair or deceptive:

- A statement in a brochure that the vehicle service contract would add “just a few dollars to your monthly payment” when the monthly average cost was actually over \$40;
- Off-script statements made when telemarketing GAP insurance that it cost “only a few pennies a day” or would “add just a few cents to your car payment” when the monthly average cost was \$12.55 or 40 cents a day;
- Statement of benefits in the telemarketing scripts (i.e. coverage of mechanical breakdowns) did not prominently disclose parts excluded from coverage;
- Statement of benefits in the brochure (i.e. coverage of mechanical breakdowns) did not prominently disclose parts excluded from coverage beyond statements that the product covers “most major components of the vehicle” and “almost every part of your vehicle,” and a disclaimer in 6-point font referring consumers to the vehicle service contract “for full coverages and exclusions”; and
- Violations of Reg. Z related to improper disclosure of the finance charge, annual percentage rate, payment schedule, and total of payments.

Though the marketing of add-on products here was done by Dealers Financial Services, US Bank was also held responsible for the marketing practices given the overall structure and operation of the loan and add-on product program.

GE CareCredit – December 2013 (Marketing)

GE Capital Retail Bank and its subsidiary, CareCredit, were fined for deceptive practices related to retail credit card enrollments at the offices of health care providers. The deceptive practices were largely related to confusing descriptions of a deferred-interest promotional feature of the card.

The CFPB identified the following unfair and deceptive practices in connection with the credit card offering:

- Oral descriptions of the deferred-interest feature as “interest free”;
- Failure to adequately train the third party health care providers’ staff on delivering material information to consumers;
- Failure to provide disclosures required by Reg. Z;

- Failure to provide materials (*i.e.*, brochures) that would adequately counteract any potentially erroneous information disseminated by the third party health care providers' staff; and
- Failure to adequately monitor the health care providers' compliance with the issuer's policies and the law.

American Express – December 2013 (Marketing)

American Express and its subsidiaries were fined for engaging in unfair and deceptive marketing and billing practices in connection with their credit card debt protection and identity theft monitoring services.

The following billing practices, which were limited to the identity theft protection product, were considered unfair:

- Accepting payment for identity theft protection products that monitored consumers' credit reports at three credit bureaus when the issuer could not provide some or all of the services, either because the customer's authorization for the issuer to access the credit reports was never obtained or was not authenticated by the credit bureau; and
- Failing to disclose that a free credit report was available under Regulation V.

The following telemarketing practices, which were limited to the debt protection product, were considered deceptive:

- Misrepresenting that the benefit would cover the minimum monthly payment when the benefit would frequently be capped at an amount less than the minimum payment due;
- Implying that benefits would last up to 24 months, when only 2 of 13 qualifying events had benefit periods of 24 months;
- Stating that there would be no fee if the product was paid in full without disclosing that the balance had to be paid in full before the billing cycle ended to avoid a fee;
- Falsely stating there would be no fee if the balance was under \$100;
- Failing to disclose, at the outset of the call, that the product was optional;
- Misrepresenting that the product would improve or maintain a consumer's credit score; and
- Implying that the benefits of a payment protection product would automatically kick in without action from the consumer, when in fact consumer action was required.

2) Debt Collection and Debt Settlement

The CFPB's enforcement actions involving debt collection and debt settlement providers and their related activities have addressed numerous unfair, deceptive and abusive acts and practices. Acts and practices found to be unfair and deceptive have included the

charging of advance fees (per se unfair and deceptive under the FTC’s Telemarketing Sales Rule (TSR))⁶ and misleading statements about: government affiliation; expertise in the subject matter; the existence and structure of fees involved; and the timing and length of the service to be provided, among others. In connection with these enforcement actions, the CFPB has also found certain practices to be *abusive* for the first time. The enforcement actions centered on unfair, deceptive or abusive debt collection and debt settlement practices are summarized below.

Gordon Law Firm – July 2012 (Debt Collection / Settlement)

National Legal Help Center – December 2012 (Debt Collection / Settlement)

Gordon Law Firm and National Legal Help Center, two unrelated parties, were both charged with engaging in unlawful mortgage relief schemes that preyed on financially distressed homeowners by falsely promising loan modifications in exchange for advance fees.

Specific deceptive practices included:

- Misleading statements that led consumers to believe the involved entities were affiliated with or sponsored by the government;
- Claiming special expertise in loan modifications and prior success in obtaining modifications from specific lenders;
- Promising rate reductions to 2%;
- Claiming an ability to prevent foreclosures;
- Discouraging consumers from communicating directly with lenders, claiming that the involved entities would handle such communications;
- Encouraging consumers to stop making mortgage payments, claiming that delinquency would demonstrate hardship to the consumers’ lenders and failing to disclose that such actions could cause consumers to lose their homes and incur damage to their credit ratings;
- Misleading consumers to believe they would be provided with legal services; and
- Charging advance fees for “forensic audits” prior to providing mortgage relief services.

Payday Loan Debt Solution, Inc. – December 2012 (Debt Collection / Settlement)

Payday Loan Debt Solution, Inc., and related parties, (“PLDS”) marketed and provided debt-relief services related to the settlement of payday loans. PLDS’s practice of charging advance fees for its services was a violation of the TSR, which constituted an unfair act and practice.

⁶ 16 C.F.R. § 310.4(a)(5)(i).

Mission Settlement Agency – May 2013 (Debt Collection / Settlement)

Mission Settlement Agency, and related parties, (“Mission”) marketed and provided debt-relief services to consumers.

Mission engaged in the following unfair and deceptive practices:

- Charging advance fees for debt-relief services in violation of the TSR;
- Impersonating a government agency by disseminating a written statement to consumers in an envelope bearing an image of the Great Seal of the United States for what Mission called the “Office of Disbursement”;
- False statements that there were no “upfront fees”;
- Promising consumers that debts would be settled for approximately 55% of their outstanding balances, when Mission often (i) concealed that creditors would not be paid when consumers expected, or at all; (ii) charged exorbitant debt-relief services fees often without settling any debts; and (iii) left consumers in a worse financial position than before they enrolled in the debt relief program; and
- Failing to disclose, before consumers consented to pay, the amount of money or percent of debt that the consumer would have to accumulate before the debt-relief service provider would initiate attempts to settle debts or before it would make a bona fide settlement offer, and the time by which the provider would make a bona fide settlement offer to the consumer’s creditors or debt collectors.

American Debt Settlement Solutions, Inc. – June 2013 (Debt Collection / Settlement)

American Debt Settlement Solutions, Inc., and related parties, (“ADSS”) marketed and provided debt-relief services to consumers.

ADSS engaged in the following unfair and deceptive practices:

- Charging advance fees for debt-relief services in violation of the TSR;
- Enrolling consumers in its services with debts of \$700 or less and failing to disclose that it is nearly impossible to settle debts under \$700;
- Misrepresenting that debt could be settled within 3 to 6 months of enrollment, when no likelihood of settlement in that timeframe existed; and
- Misrepresenting that debt could be settled at all, when in fact ADSS failed to settle any debts for approximately 89% of consumers who enrolled in its services.

ADSS also was found to have engaged in the following *abusive* practice (the first instance in which the CFPB claimed a practice to be abusive):

- Knowing enrollment of consumers in debt settlement programs whose financial conditions made it highly unlikely that they could complete the program.

Morgan Drexen, Inc. – August 2013 (Debt Collection / Settlement)

Morgan Drexen, Inc., and related parties, marketed and provided debt-relief and bankruptcy services to consumers.

Morgan Drexen allegedly engaged in the following unfair and deceptive practices:

- Misrepresenting that consumers are not charged an advance fee;
- Charging advance fees for debt-relief services in violation of the TSR;
- Requiring consumers to place advance fees in an account and failing to allow consumers to withdraw such funds without penalty; and
- Representing that consumers who enrolled in the program would be debt free in months, i.e., less than a year, when, in fact, consumers did not become debt free in that time frame.

JPMorgan Chase – September 2013 (Debt Collection / Settlement)

JPMorgan Chase was fined for the following unfair practices in connection with its billing and administration of identity theft protection add-on products:

- Accepting payment for identity theft protection products that monitored consumers' credit reports at three credit bureaus when it could not provide some or all of the services, either because the customer's authorization to access the credit reports was never obtained or was not authenticated by the credit bureau; and
- Using inadequate compliance monitoring, service provider management, and quality assurance systems that failed to prevent, identify or correct the improper billing for services that were not provided.

Cash America – November 2013 (Debt Collection / Settlement & Robo-Signing)

Cash America, a payday lender, was fined for unfair or deceptive acts or practices in its collections efforts.

When preparing, executing, and notarizing documents filed in debt collection litigation in Ohio, the following were considered unfair or deceptive practices:

- Legal assistants manually stamping a collection department manager's signature on legal affidavits without the manager's prior review;
- In-house counsel directing collections department staff and legal assistants to stamp or sign their name on pleadings without in-house counsel's prior review;
- Legal assistants notarizing documents without following procedures required by notary law; and
- Failing to conduct internal compliance audits to prevent or timely detect the above unfair or deceptive practices.

CashCall, Inc. – December 2013 (Debt Collection / Settlement)

CashCall, Inc. and related parties (“CashCall”) purchased, serviced, and collected consumer installment loans that state usury and/or licensing laws rendered void or limited the consumer’s obligation to repay.

The CFPB’s complaint alleged that CashCall engaged in the following unfair and deceptive practices:

- Servicing, initiating ACH debits for payment, and collecting on loans that laws in the state of the consumers’ residency render void or limit the consumers’ obligation to repay;
- Sending billing notices and other notices informing consumers of the company’s collection rights to loans, initiating ACH debits for payment from consumers’ accounts, and sending dunning letters to consumers that represented, expressly and impliedly, that the loans were legal and that the consumers had a legal obligation to repay the loans at the rates imposed; and
- Failing to disclose that the loans (or some part of them) were void or not subject to a repayment obligation under the laws applicable in each consumer’s respective state.

The CFPB’s complaint also identified the following *abusive* practice:

- Collecting or attempting to collect on the full outstanding balance of loans by taking “unreasonable advantage of consumers’ lack of understanding about the impact of applicable state laws on the parties’ rights and obligations” under the loans.

3) Mortgage Loan Servicing

Ocwen Loan Servicing – December 2013 (Mortgage Loan Servicing and Robo-Signing)

Ocwen Financial Corporation and Ocwen Loan Servicing (collectively, “Ocwen”) settled allegations that Ocwen engaged in unfair and deceptive mortgage servicing practices. Many of the allegations, along with the remedies, follow terms reached in the February 2012 National Mortgage Settlement.⁷

The following were considered unfair or deceptive loan servicing practices:

- Failing to timely and accurately apply payments and maintain accurate account statements;

⁷ “In February 2012, 49 state attorneys general and the federal government announced a historic joint state-federal settlement with the country’s five largest mortgage servicers [to] provide as much as \$25 billion in: [1] Relief to distressed borrowers in the states who signed on to the settlement; and [2] Direct payments to signing states and the federal government.” National Mortgage Settlement, available at <http://www.nationalmortgagesettlement.com/about>.

- Charging unauthorized fees for default-related services, including unnecessary insurance;
- Providing false or misleading information in response to borrowers' complaints and regarding loans that had been transferred from other servicers;
- Failing to provide accurate and timely information to borrowers seeking information about loss mitigation services and loan modifications;
- Falsely advising borrowers that they must be at least 60 days delinquent in loan payments to qualify for a loan modification;
- Misrepresenting that loss mitigation programs would provide relief from the initiation of foreclosure or further foreclosure efforts;
- Improperly denying loan modification relief to eligible borrowers;
- Providing false or misleading reasons for denial of loan modifications, and false or misleading information regarding the status of loss mitigation review (while referring loans to foreclosure);
- Failing to honor in-process trial modifications agreed to by prior servicers;
- Failing to properly calculate and process borrowers' eligibility for loan modification programs and improperly denying loan modification relief to eligible borrowers; and
- Deceptively seeking to collect payment from consumers with in-process trial and permanent modifications under the original terms of the mortgage.

The following were considered unfair or deceptive foreclosure practices:

- Providing false or misleading information regarding the status of foreclosure proceedings;
- Preparing, filing, or otherwise using false and misleading documents with courts and government agencies as part of the foreclosure process; and
- Robo-signing affidavits in foreclosure proceedings.

UNFAIR, DECEPTIVE, AND ABUSIVE ACTS OR PRACTICES ACCORDING TO THE CFPB

BASED ON ENFORCEMENT ACTIONS IN 2012 AND 2013

DEBT COLLECTION AND DEBT SETTLEMENT

- Misrepresenting effect of a debt settlement arrangement on a consumer's credit score
- Failing to provide some or all of the benefits of a product and still collecting a fee
- Claiming special expertise in loan modifications, promising rate reductions, and stating an ability to prevent foreclosure
- Charging advance fees for debt collection services in violation of the Telemarketing Sales Rule
- Misrepresentations of debt relief success rates or timeframes
- Enrolling consumers with \$700 or less in debt in a debt-relief program
- Enrolling consumers in a debt-settlement plan that they cannot afford
- Collecting debts on loans that are void or impaired under state law

MARKETING

- Confusing solicitations
- Lack of clarity in benefit descriptions
- False or inaccurate statements regarding optionality, cost, benefit activations
- Inadequate disclosure of eligibility restrictions or other limitations
- Not making eligibility determinations
- Not making terms and conditions available before purchase
- Using unsubstantiated statistics
- Enrollment without consent or before key terms are disclosed
- Disguised telemarketing
- Inadequate training of third party sales staff
- Failing to provide written materials that effectively counteract misstatements made by sales staff
- Violations of Regulations V and Z and the Telemarketing Sales Rule

MORTGAGE LOAN SERVICING

- Failing to timely and accurately apply payments
- Failing to maintain accurate account statements
- Charging unauthorized fees for default-related services
- Providing false or misleading information to borrowers regarding transferred loans
- Failing to provide information about loss mitigation
- Dual tracking loss mitigation efforts and foreclosure
- Improperly denying loan modifications and providing false or misleading reasons

ROBO-SIGNING

- Allowing legal documents to be signed by others, including affidavits in foreclosure proceedings
- Allowing pleadings to be signed and filed in court without review by an attorney

COMPLIANCE MANAGEMENT

Failure to implement internal compliance management systems that would identify and limit these risky practices, including third party management