

UDAAP and Its Implications

Adapting to New Regulatory Authority

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UDAAP Regulation

- UDAAP Overview and Interpretations
- The Evolution: UDAP  UDAAP
 - Federal Trade Commission
 - Federal Banking Agencies
 - CFPB and Abusiveness
- Enforcement
- Compliance Best Practices



UDAAP Defined

- **“Unfair”**
 - (1) An act or practice that causes or is likely to cause substantial injury to consumers;
 - (2) the injury is not reasonably avoidable by consumers; and
 - (3) the injury is not outweighed by countervailing benefits to consumers or to competition.
- **“Substantial Injury”**
 - Usually involves monetary harm (costs or fees).
 - Can include a small amount of harm to a large number of people.
 - Actual harm not required if there is a significant risk of concrete harm.



UDAAP Defined

- **“Deceptive”**
 - (1) An act or practice that misleads or is likely to mislead the consumer;
 - (2) the consumer’s interpretation is reasonable under the circumstances; and
 - (3) the misleading act or practice is material.
- **“Material” Information**
 - Information that is likely to affect a consumer’s choice of, or conduct regarding, the product or service.
 - Presumed material: costs, benefits, restrictions on use/availability, express claims, implied claims (if intent to imply the claim), knowingly false claims, omissions (if knew or should have known customer needed information)



UDAAP Defined

- **“Abusive”**
 - An act or practice that (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:
 - (A) a consumer’s lack of understanding of the material risks, costs, or conditions of the product or service;
 - (B) a consumer’s inability to protect his or her interests in selecting or using a consumer financial product or service; or
 - (C) a consumer’s reasonable reliance on a covered person to act in his or her interests.



UDAAP: Applied

- Strict Liability
- Can't defend based on value of product actually sold
- Presumption of Consumer Reliance
 - Consumer reliance presumed if:
 - The defendant made material misrepresentations or omissions that “were of a kind usually relied upon by a reasonable prudent person;”
 - The misrepresentations or omissions were widely disseminated; and
 - Consumers actually purchased the defendants' products.
- Covered Products and Services

Source:
FTC v. Kuykendall, 371 F.3d 745, 765(10th Cir. 2004), *quoting* FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312, 1316



FTC UDAP

- In 1938, FTC Act amendment prohibits “unfair or deceptive acts or practices.”
- In 1964, FTC Cigarette Rule Statement of Basis and Purpose
 - “Unfairness” Test - Did practice offend public policy? Immoral/Unethical? Consumer Injury?
- In 1972, “Unfairness” authority expanded based on SCOTUS ruling
 - Prohibition was used to include non-financial products (e.g., weight loss, ban on all marketing to children)
 - “The means the FTC is considering are...a preposterous intervention that would turn the agency into a great national nanny.” -Washington Post (3/1/1978)
- Curtailed in the late 1970s
 - Magnuson-Moss Warranty Act -1975
 - “Substantial evidence” required for regulations against “prevalent” unfair or deceptive acts.
 - FTC Improvements Act -1980
 - Required FTC rules be based on sound economic analysis.
 - FTC must find least burdensome way of achieving goals
 - 1980 Unfairness Policy Statement – FTC unanimously determines “unjustified consumer injury” as focus of Unfairness policy; adopts the current definition of “unfairness.”
- Expansion into privacy and data security



Banking Agency UDAP

- Adopted and enforced the FTC UDAP definitions
- Unfairness Examples
 - Add-On Products
 - De Facto Annual Fees
 - Subprime lending
 - Security deposits on secured credit cards



CFPB UDAAP

- UDAAP as a gap-filler
 - Dodd-Frank mandated CFPB to protect consumers
 - Expansion of existing consumer protection law

- Rulemaking by Enforcement



CFPB Views: Abusiveness

- What gap does “abuse” fill?
 - Concern for exploitation of a consumer who lacks the ability to protect himself/herself
- The vulnerable consumer
 - May not understand the product
 - May not have alternatives to the product
 - May believe the financial institution is acting in the consumers’ best interest when it is not
- CFPB has found such vulnerability
 - Debt assistance products
 - Payday loans
 - Student loans
 - Servicemember financing

Source:

Eric Mogilnicki and Eamonn Moran. *Understanding and Applying Dodd-Frank’s “Abusive” Standard*. BNA’s Banking Report, 104 BBR 161, 1/27/15.

Eric Mogilnicki and Eamonn Moran. *The CFPB’s Enforcement of the Prohibition on Abusive Acts and Practices*. BNA’s Banking Report. 104 BNKR 236, 2/3/15.

Abusiveness Counts in Complaints / Orders



Party	Section	Abusive Count(s) (all alleged)
American Debt Settlement Solutions	(d)(2)(A) (d)(2)(C)	<ul style="list-style-type: none"> Enroll consumers in debt relief program where consumers' financial conditions make it highly unlikely that they can complete the program. <i>*(d)(2)(A) and (C) were not specifically cited.</i>
ACE Cash Express	(d)(2)(B)	<ul style="list-style-type: none"> Excessive debt collection calls, calls to third parties, and misrepresentations of consequences of nonpayment allegedly created an "artificial sense of urgency," taking unreasonable advantage of consumer.
Colfax Capital	(d)(2)(A)	<ul style="list-style-type: none"> Collected debt from servicemembers that was not owed.
College Education Services	(d)(2)(C)	<ul style="list-style-type: none"> Targeted student loan borrowers that were in default or garnishment. The CFPB claim said "CES created the illusion of expertise and individualized advice to induce consumers to reasonably rely on the company."
CashCall	(d)(2)(A)	<ul style="list-style-type: none"> Debt collector collected on loans made by Western Sky Financial, LLC. CFPB's "abusive" claim is that CashCall took advantage of "a lack of understanding on the part of the consumer" who did not know that state usury and licensing laws made their loans unenforceable.
ITT Educational Services	(d)(2)(B) (d)(2)(C)	<ul style="list-style-type: none"> ITT provided "Temporary Credit" with no interest at the start of the school year, required full repayment by the end of the year, leading to high-cost private loans (Students were allegedly pushed into program they didn't understand and couldn't repay). Took unreasonable advantage of student's reasonable reliance on ITT.
Freedom Stores	(d)(2)(B)	<ul style="list-style-type: none"> Debt collection lawsuits filed against servicemembers in Norfolk, VA courts against consumers who were far away from Norfolk. Even though venue-selection clause in the contract permitted this, "many consumers were unaware" of the venue-selection clause.
Southwest Tax Loans	(d)(2)(B) (d)(2)(B)	<ul style="list-style-type: none"> Steered low-income consumer toward high-cost tax refund anticipation loans. Failed to disclose the availability of consumers' tax refunds to assist in determination regarding taking out additional loans.
Fort Knox National Co.	(d)(2)(A) (d)(2)(B)	<ul style="list-style-type: none"> Military Allotment Processor for servicemembers payroll allegedly included monthly fees without adequate disclosures before charged, nor notification after charged.
Nationwide Biweekly Admin.	(d)(2)(A)	<ul style="list-style-type: none"> Company guaranteed the consumer would save money by enrolling in program knowing that consumers who leave in the first several years of program will not save money.
PayPal	(d)(2)(B)	<ul style="list-style-type: none"> Company allegedly offered consumers deferred-interest promotions, said to allow consumers to pick how payments would be applied to the promotional balance. However, customers were not able to do this over the phone or were given erroneous information and were charged fees.



CFPB: 2015 UDAAP Enforcement Trends

- 14 out of 18 CFPB Public Consent Orders contain a UDAAP finding.
- Civil Money Penalties have reached as high as \$24,000,000, while Restitution has reached as high as \$49,000,000.
- 3 abusiveness findings/complaints in the last month
 - Fort Knox National Company (4/20/15)
 - Nationwide Biweekly Administration (5/11/15)
 - PayPal (5/19/15)



Compliance Best Practices



Questions?

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