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### Enforcement

## What Is the Statute of Limitations For a UDAAP Claim Under the Federal Consumer Financial Protection Act?



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In the summer of 2010, the Congress passed and the President signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010<sup>1</sup> (“the Dodd-Frank Act”) in response to perceived abuses in the financial sector. Among other things, the Dodd-Frank Act created a new financial regulatory agency, the Consumer Financial Protection Bureau (“CFPB” or “the Bureau”), and endowed it with broad rule-making and enforcement powers over companies

offering consumer financial products and services.<sup>2</sup> In creating the CFPB, Congress transferred authority to the Bureau with regard to several statutes that were previously administered by other federal agencies.<sup>3</sup>

In addition, the Dodd-Frank Act created a new cause of action to be enforced by the CFPB for “unfair, deceptive, or abusive act[s] or practice[s]” (“UDAAP”) relating to consumer financial products or services.<sup>4</sup> This provision took effect on the “designated transfer date” of July 21, 2011, as set by the Secretary of the Treasury.<sup>5</sup> What statute of limitations governs this newly-created UDAAP claim can, in a given case, be difficult to determine. At the same time, however, determining the applicable limitations period can have a dramatic effect on the monetary exposure faced by a firm caught up in a Bureau investigation.

At first blush, the statute of limitations applicable to a UDAAP claim may seem relatively straightforward. The portion of the Dodd-Frank Act governing the Bureau provides: “Except as otherwise permitted by law or equity, no action may be brought under this title

<sup>1</sup> Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010).

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<sup>2</sup> 12 U.S.C. §§ 5481(6) (defining “covered person”), 5511(c)(4) (defining the “primary functions” of the Bureau to supervise and bring enforcement actions against covered persons).

<sup>3</sup> 12 U.S.C. § 5581.

<sup>4</sup> 12 U.S.C. § 5531(a).

<sup>5</sup> Pub. L. No. 111-203, title X, § 1037, 124 Stat. 1376 (July 21, 2010); 12 U.S.C. §§ 5481(9), 5582; Designated Transfer Date, 75 Fed. Reg. 57252, 57253 (Sept. 20, 2010).

more than 3 years after the date of discovery of the violation to which an action relates.”<sup>6</sup> Despite the seeming clarity of this provision, determining the limitations period applicable to a UDAAP claim in a given case can prove difficult for at least five reasons.

## Examining UDAAP’s Statute of Limitations Period

### First

Apart from uncertainty about the applicable statute of limitations, the scope of UDAAP liability is complicated by the Bureau’s effort to apply the statute to misconduct that occurred prior to the designated transfer date. As the Supreme Court has explained, absent an expression of contrary congressional intent, a statute presumptively does not apply retroactively if it would “increase a party’s liability for past conduct.”<sup>7</sup> There can be no doubt that the Dodd-Frank Act’s UDAAP provision would, if applied retroactively, expand legal liability for past conduct.<sup>8</sup> Accordingly, it would seem that the presumption against retroactive application of that provision would apply. The CFPB apparently recognizes the force of this argument, having recently declined to litigate whether the UDAAP statute reaches allegedly unfair and deceptive conduct occurring before July 21, 2011.<sup>9</sup>

### Second

Turning more directly to the statute of limitations question, application of the discovery-based limitations provision in the Dodd-Frank Act will raise difficult factual questions. As noted above, the Dodd-Frank Act provides that a UDAAP violation is subject to a three-year statute of limitations running from the date of “discovery” of the violation.<sup>10</sup> The Supreme Court recently

explained some of the challenges posed by such a discovery-based limitations period:

“Determining when the Government, as opposed to an individual, knew or reasonably should have known of a fraud presents particular challenges for the courts. Agencies often have hundreds of employees, dozens of offices, and several levels of leadership. In such a case, when does “the Government” know of a violation? Who is the relevant actor? Different agencies often have overlapping responsibilities; is the knowledge of one attributed to all?”<sup>11</sup>

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**Read together, these two provisions require that the CFPB bring any action within three years of discovery, but in no instance may penalties be sought based on violations occurring more than five years prior to the action.**

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While Congress has expressly mandated the application of a discovery rule with regard to the UDAAP provision, the unanswered questions flagged by the Supreme Court preview the difficulties that application of that discovery rule will pose for both courts and litigants.

### Third

There is a question about whether the Dodd-Frank Act’s statute of limitations applies in administrative enforcement proceedings, or instead only to enforcement actions brought in federal district court. The CFPB will likely argue that the three-year statute of limitations in the Dodd-Frank Act applies only to UDAAP “actions” brought in federal district court, not to administrative proceedings. At least one administrative law judge has, in dicta, endorsed this view, citing various Supreme Court and federal appellate court precedents.<sup>12</sup> Under this view, the CFPB could avoid the three-year statute of limitations found in the Dodd-Frank Act by the simple expedient of bringing its enforcement action administratively, rather than in federal district court. On the other hand (and as discussed immediately below), this argument would have the effect of confirming the application in administrative actions of another limitations period specified in federal law.

### Fourth

No court or administrative law judge has addressed how the three-year discovery-based limitations period found in the Dodd-Frank Act interacts with the five-year limitations period for penalty claims that is codified in 28 U.S.C. § 2462. That provision states that any “action” or “proceeding” for civil penalties is subject to a five-year limitations period running from “accrual” of the claim. Last summer, the Supreme Court interpreted

<sup>6</sup> 12 U.S.C. § 5564(g)(1).

<sup>7</sup> *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994).

<sup>8</sup> While the Federal Trade Commission (“FTC”) Act has long forbidden “unfair or deceptive acts or practices,” 15 U.S.C. § 45(a)(1), before the Dodd-Frank Act there was no general federal prohibition against “abusive” acts or practices. What is more, the new UDAAP claim carries with it remedies not previously available under the FTC Act for unfair or deceptive conduct. Specifically, a UDAAP violation can result in the legal remedy of damages, 12 U.S.C. § 5565(a)(2)(E), while violations of the FTC Act could result only in an injunction and monetary equitable relief, *FTC v. Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d 202, 217 (D. Mass. 2009) (“[A]ny monetary award must be capable of being classified as an equitable, as opposed to a legal, remedy.”). The civil money penalties available for UDAAP violations are also dramatically larger than those available under the FTC Act. Compare 12 U.S.C. § 5565(c)(2)(C) (authorizing penalties of up to \$1,000,000 for each day of a violation), with 15 U.S.C. § 45(m) (authorizing civil penalties of up to \$16,000 for each day of a violation); 16 C.F.R. § 1.98(d).

<sup>9</sup> In one litigated matter, the CFPB expressly limited its complaint to unfair and deceptive conduct occurring on or after July 21, 2011. *CFPB v. Corinthian Colleges, Inc.*, Docket No. 1:14-cv-07194 (N.D. Ill.) (Complaint, dated Sept. 16, 2014, ¶¶ 154, 160), available at [http://files.consumerfinance.gov/f/201409\\_cfpb\\_complaint\\_corinthian.pdf](http://files.consumerfinance.gov/f/201409_cfpb_complaint_corinthian.pdf). In another litigated matter, the CFPB responded to a motion to dismiss by disclaiming any effort to apply the UDAAP provision to conduct occurring prior to July 21, 2011. *CFPB v. Hanna, et al.*, Docket No. 1:14-cv-02211-AT (N.D. Ga.) (Plaintiff’s Response to Defendants’ Motion to Dismiss, dated Oct. 3, 2014, at 38 n.102).

<sup>10</sup> 12 U.S.C. § 5564(g)(1).

<sup>11</sup> *Gabelli v. SEC*, 133 S. Ct. 1216, 1223 (2013).

<sup>12</sup> See *In the Matter of PHH Corp.* (Order Denying Respondents’ Motion to Dismiss dated March 13, 2014, at 8-9), available at [http://files.consumerfinance.gov/f/201304\\_cfpb\\_order\\_denying-motion-dismiss-alternative-summary-disposition.pdf](http://files.consumerfinance.gov/f/201304_cfpb_order_denying-motion-dismiss-alternative-summary-disposition.pdf).

Section 2462, explaining that its five-year limitations period runs from the date “when the plaintiff has a complete and present cause of action” regardless of when that cause of action is discovered by the plaintiff.<sup>13</sup>

The question posed in the UDAAP context is how Section 2462 interacts with the three-year discovery-based limitations period found in the Dodd-Frank Act. The likely answer is that both provisions apply to a CFPB enforcement action for a UDAAP violation. There is no need to choose between the two provisions, as their language is not inconsistent. The Dodd-Frank Act provides that “no action may be brought” more than three years after “discovery” of the violation. In other words, the Dodd-Frank Act’s limitations provision governs whether an action may be brought at all. Section 2462, by contrast, speaks to a more specific issue, namely whether in such an action civil penalties may be sought. Section 2462 requires that an action seeking penalties be brought within five years of accrual. Read together, these two provisions require that the CFPB bring any action within three years of discovery, but in no instance may penalties be sought based on violations occurring more than five years prior to the action.<sup>14</sup> This reading of these two provisions is consistent with the oft-stated maxim that, in matters of statutory interpretation, the specific (*i.e.*, when penalties may be sought) controls over the general (*i.e.*, when an action seeking any remedy may be brought).<sup>15</sup> What is more, the Supreme Court has recognized that this type of two-part limitations period is common in the civil enforcement context and provides a defendant with repose from the “utterly repugnant” notion that he could be subject to a penalty for an “uncertain period into the future.”<sup>16</sup>

The argument for applying Section 2462 to a UDAAP claim is even stronger in the context of a CFPB administrative proceeding. Section 2462 expressly applies to administrative “proceedings.” If the Bureau argues that the Dodd-Frank Act’s three-year limitations period applies only to federal court “actions,” and does not apply to administrative proceedings, there would be no need, in the administrative proceeding context, to reconcile Dodd-Frank’s three-year limitations period with the five-year limitations period of Section 2462 because the three-year statute would not apply (according to the Bureau). Thus, it is clear that, at least in the context of ad-

ministrative enforcement proceedings (and most likely in district court actions as well), the CFPB cannot seek penalties for conduct occurring more than five years earlier.<sup>17</sup>

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## Fifth

The Bureau may attempt to avoid the impact of whatever statute of limitations applies by arguing that the alleged violations were continuing in nature.<sup>18</sup> This argument seems unlikely to carry the day in most cases. The continuing violations doctrine requires proof not that the defendant committed multiple successive violations of a statute, but rather that a given violation was continuing.<sup>19</sup> This will be difficult for the Bureau to establish given the way in which the UDAAP violation is defined. The language of the UDAAP provision is focused on an unfair, deceptive, or abusive “act” committed in connection with a “transaction . . . for” or “offering of” a consumer financial product or service<sup>20</sup> – language which seems inconsistent with a continuing course of conduct extending beyond a given transaction.<sup>21</sup> To the extent that the Bureau attempts to rely on the fact that the UDAAP provision also prohibits unfair, deceptive, or abusive “practice[s]” to support its continuing violation argument, the Bureau will open itself up to new challenges in proving that, in fact, the alleged conduct was an ongoing “practice,” as opposed to an isolated violation.<sup>22</sup>

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<sup>17</sup> In addition, there is another statute of limitations provision that, to date, no litigant or court has invoked, but that is also potentially applicable and would act to bar a UDAAP claim in its entirety (not just as to penalties).

<sup>18</sup> *Cf. In the Matter of PHH Corp.* (Order on Dispositive Motions dated May 22, 2014, at 12-13), available at [http://files.consumerfinance.gov/f/201405\\_cfpb\\_order\\_order-on-dispositive-motions\\_152.pdf](http://files.consumerfinance.gov/f/201405_cfpb_order_order-on-dispositive-motions_152.pdf) (unsuccessfully invoking the continuing violations doctrine in an effort to extend the statute of limitations for a RESPA violation).

<sup>19</sup> *See United States v. Motz*, 652 F. Supp. 2d 284, 294 (E.D.N.Y. 2009) (holding that “[t]he fact that [defendant] is charged with repeatedly violating the statute over a period of time pursuant to the same scheme does not transform [securities fraud] into a ‘continuing offense’ for statute of limitations purposes”).

<sup>20</sup> 12 U.S.C. § 5531(a).

<sup>21</sup> *Cf. United States v. Harris*, 919 F. Supp. 2d 702, 709 (E.D. Va. 2013) (holding that, for statute of limitations purposes, fraud “in the offer or sale” of securities is not a continuing offense, but is an offense complete at the time of the offer or sale).

<sup>22</sup> *Cf. Scharp v. Legacy Health Sys.*, D. Or., No. 06-1213-MO, BLAW at \*5, 03/08/07 (“To establish a ‘pattern or practice’ violation [of the Age Discrimination in Employment Act], the plaintiff has ‘to prove more than the mere occurrence of isolated or accidental or sporadic discriminatory acts.’ Rather, the

<sup>13</sup> *Gabelli*, 133 S. Ct. at 1220.

<sup>14</sup> *Cf. Dithardt v. North Ocean Condos, L.P.*, 580 F. Supp. 2d 1288, 1292 (S.D. Fla. 2008) (considering two separate federal statutes of limitations, concluding that “where two statutes of limitations might be read to apply in a particular situation, one general and one more specific, the general rule is that the court must apply the more specific limitations period” (citing cases)). In *Dithardt*, the federal statute at issue (the Land Sales Full Disclosure Act, 15 U.S.C. § 1703) had a general back-stop three-year statute of limitations, and also a specific remedy (rescission) for which a specific statute of limitations was specified (two years). The court concluded that the more specific two-year statute should apply. *Id.* at 1242.

<sup>15</sup> *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (“It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.”); *see also National Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 663 (2007) (same).

<sup>16</sup> *Gabelli*, 133 S. Ct. at 1223-24.

As this brief discussion demonstrates, there are many thorny questions yet to be resolved regarding the stat-

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plaintiff must establish that the discrimination ‘was the company’s standard operating procedure.’ ” (internal citations omitted)); *Newton v. United Cos. Fin. Corp.*, 24 F. Supp. 2d 444, 456 (E.D. Pa. 1998) (“The term ‘pattern or practice’ means much more than the existence of a few isolated examples of a potentially prohibited activity.”).

ute of limitations applicable to a UDAAP claim under the Dodd-Frank Act. How the Bureau – and, ultimately, the judiciary – resolves these issues will have a dramatic impact on the scope of liability under the Dodd-Frank Act. Counsel representing a client facing a UDAAP enforcement action by the Bureau must be aggressive in pressing these arguments in negotiations and careful to preserve these arguments in litigation.