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Consumer Financial Protection Bureau Supports Broad Assertion of State Enforcement Power

By Noah N. Gillespie, Kara A. Kuchar, Douglas I. Koff and Rebecca A. Raskind*

Through the issuance of an interpretive rule, the Consumer Financial Protection Bureau is making clear that it welcomes state action to enforce federal consumer financial law. The authors of this article discuss the interpretive rule and its implications.

When federal enforcement reached a historic lull in the last administration, state enforcement stepped up to fill in the gaps. While federal enforcement is active in the current administration, state enforcement has not slowed down. Now, through the issuance of an interpretive rule,[1] the Consumer Financial Protection Bureau (the "Bureau") is making clear that it welcomes state action to enforce federal consumer financial law.

THE DODD-FRANK LANDSCAPE

According to the Bureau, a significant contributor to the 2008 recession was the inability of state regulators to do more to curb predatory mortgage lending.[2] In the aftermath of the recession, Congress took a new approach by enacting the Consumer Financial Protection Act ("CFPA") as part of the Dodd-Frank Act.[3] The CFPA created the Bureau to be the primary federal regulator over all aspects of consumer finance and transferred to the Bureau power over 18 statutes as well as the consumer authority previously divided among several

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1 Interpretive Rule, Authority of States to Enforce the Consumer Financial Protection Act of 2010 (May 19, 2022) [hereinafter "IR"], available at https://files.consumerfinance.gov/f/documents/cfpb_section-1042_interpretive-rule_2022-05.pdf.

2 *Id.* at 2 (quoting 4 S. Rep. No. 111-176, at 16 (2010)).

3 Dodd-Frank Act, 12 U.S.C. § 5301 et seq.

other federal agencies.[4] Congress also identified a significant role for states in the CFPA; Section 1042 broadly authorizes state attorneys general and state financial regulators to sue "to enforce the provisions of [the CFPA] or regulations issued under [the CFPA] or remedies otherwise provided under other law."[5]

It might appear from the remainder of Section 1042 and the Bureau's existing regulations regarding state actions that the Bureau would zealously guard its primary authority against state interference. Specifically, Section 1042 requires state authorities to notify the Bureau of their lawsuits, and the Bureau has the right to intervene in the case and remove the case to federal court if it so chooses, effectively taking over a case from a state authority.[6]

A STRONG HISTORY OF STATE ACTION

Notwithstanding this trade-off, state authorities have brought some actions under Section 1042 on their own, joined the Bureau in others, and also relied on their state law authority. For example, earlier this year, a coalition of state attorneys general announced a settlement with Navient, a student loan servicer, to resolve allegations of unfair, abusive, and deceptive acts and practices ("UDAAP"). That settlement relied on the states' Section 1042 authority.[7]

Joint actions where state authorities and the Bureau work together are slightly more common. Joint actions have included enforcement measures against brokers of high-interest credit offers,[8] allegations of deceptive marketing and operation of a debt-relief credit-repair firm,[9] and an action against a seller

[4] IR, *supra* note 1, at 2, 9; CFPA § 1002(12) and Subtitles F, H.

[5] CFPA § 1042(a); 12 U.S.C. § 5552(a).

[6] 12 U.S.C. § 5552(b); *see, also,* 12 C.F.R. part 1082.

[7] *See* 39 State Attorneys General Announce $1.85 Billion Settlement with Student Loan Servicer Navient, available at https://navientagsettlement.com/Home/portalid/0; *see, also,* Complaint at 3, *Commonwealth of Pennsylvania v. Navient Corporation & Navient Solutions, LLC*, No. 3:17-cv-01814-RDM (M.D. Pa. Oct. 5, 2017) (stating Section 1042 as the basis on which the complaint was brought).

[8] Press Release, Consumer Financial Protection Bureau, South Carolina, and Arkansas File Suit Against Brokers of High-Interest Credit Offers (Feb. 20, 2020), available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-south-carolina-arkansas-file-suit-against-brokers-of-high-interest-credit-offers/.

[9] Press Release, CFPB Takes Action Against Company and its Owners and Executives for Deceptive Debt-Relief and Credit-Repair Services (Jun. 29, 2021), available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-company-and-its-owners-and-executives-for-deceptive-debt-relief-and-credit-repair-services/; *see, also,* Press Release, Consumer

of home-security and alarm systems for alleged violations of the Fair Credit Reporting Act.[10] The Bureau and the New York Department of Financial Services recently jointly filed a complaint against MoneyGram, alleging that the company has been engaging in unfair practices, among other claims.[11]

THE BUREAU'S EXPANSIVE VIEW OF STATE AUTHORITY

The Bureau's new interpretive rule asserts that there is expansive state authority to enforce federal consumer financial law—in some respects broader than the Bureau's own reach—and encourages state actions even where the Bureau has filed or will file its own suit.

States Can Reach Entities the Bureau Cannot Reach

The interpretive rule observes that the CFPA does not modify any enumerated consumer law, meaning that states have enforcement authority even over entities that are not within the Bureau's reach under Section 1036 of the CFPA.[12] The interpretive rule explains how certain provisions of the Fair Credit Reporting Act, the Real Estate Settlements Procedures Act, and the Truth in Lending Act—statutes under the Bureau's enforcement authority—expressly authorize state actions, which the Bureau now interprets as authorizing state action outside the CFPA.[13]

Further, the limits the CFPA places on the Bureau's authority make no mention of the states, which means that the states can take action against the entities the Bureau is not permitted to reach.[14]

Financial Protection Bureau and Commonwealth of Massachusetts File Suit Against Credit-Repair Telemarketers (May 22, 2020), available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-commonwealth-massachusetts-file-suit-against-credit-repair-telemarketers/ (alleging the same).

[10] Press Release, Consumer Financial Protection Bureau and Arkansas Attorney General Settle with Home-Alarm Company for Using Consumers' Credit Scores Without Proper Notice (Dec. 11, 2020), available at https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-arkansas-attorney-general-settle-home-alarm-company-using-consumers-credit-scores-without-proper-notice/.

[11] *See, e.g.*, Complaint 5, 77-82, *CFPB v. MoneyGram Int'l, Inc.*, No. 1:22-cv-3256 (S.D.N.Y. filed April 21, 2022), available at https://files.consumerfinance.gov/f/documents/cfpb_moneygram_complaint_2022-04.pdf.

[12] IR, *supra* note 1, at 5.

[13] *Id.* at 6.

[14] *Id.* at 6–7 (identifying such entities as retailers, motor vehicle dealers, accountants, tax preparers, lawyers, and persons regulated by insurance and financial bodies including the SEC and CFTC).

The interpretive rule also seeks to narrow the limits the CFPA places on state authority. State authorities can only use Section 1042 against national banks and federal savings associations to enforce Bureau regulations.[15] But, in the Bureau's view, state authorities can enforce against these institutions if another statute empowers this.[16]

States Can Police the Full Range of Federal Consumer Financial Law

The interpretive rule argues that state authorities have the power to enforce all the federal consumer financial enumerated statutes, regulations, orders, and UDAAP principles. Section 1042 only mentions "the provisions of [the CFPA] or regulations issued under [the CFPA]." But the Bureau points to another provision of the CFPA that makes it unlawful for a covered person or service provider to violate any federal consumer financial law.[17]

Therefore, because this prohibition is a provision of the CFPA, the Bureau argues that states have the power to enforce all of federal consumer financial law.[18]

States Can Add Federal UDAAP Authority to Their Enforcement Toolbox

Section 1036 also includes the Bureau's frequently used authority to take action against any unfair, abusive, or deceptive act or practice in connection with offering or providing a consumer financial product or service.[19]

The Bureau has been intently focused on using and expanding its UDAAP authority. For example, earlier this month, the Bureau announced a UDAAP-related enforcement action that included a civil money penalty of $10 million. This action came on the heels of another action against Edfinancial Services, a student loan servicer, for allegations relating to deceptive statements to borrowers.[20] In several announcements, the Bureau rescinded an earlier interpretation that imposed limits on what practices could qualify as "abusive,"

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[15] 12 U.S.C. § 5552(a)(2).

[16] IR, *supra* note 1, at 5–6.

[17] 12 U.S.C. § 5536(a)(1)(A).

[18] IR, *supra* note 1, at 5.

[19] 12 U.S.C. § 5536(a)(1)(B).

[20] Press Release, CFPB Sanctions Edfinancial for Lying about Student Loan Cancellation (Mar. 30, 2022), available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-sanctions-edfinancial-for-lying-about-student-loan-cancellation/.

highlighted discrimination as an "unfair" practice, and warned account providers against making "deceptive" statements about FDIC insurance.[21]

Many states have their own UDAAP laws, which state authorities regularly use. For example, California's Department of Financial Protection and Innovation, under its recently-enacted California Consumer Financial Protection Law, announced an uptick in enforcement actions against covered entities in its jurisdiction alleging violations of state UDAAP law.[22]

There Is No Conflict Between States and the CFPB Taking Action Against the Same Conduct

Largely setting aside its statutory right to intervene, remove, and participate in Section 1042 cases, the Bureau assures states in the interpretive rule that they should bring their own actions. The interpretive rule explains that nothing in the CFPA bars concurrent Bureau and state actions.[23]

CONCLUSION

While framed as an illustration of state authority to enforce federal consumer financial law, the interpretive rule also reflects the Bureau's broad view of its own federal authority. The 18 enumerated statutes, the Bureau's regulations, and its UDAAP authority are all well within the Bureau's enforcement power.

The more that comes within the reach of these laws, the more the Bureau can do to influence not only the longstanding industries in the consumer finance sector but also the emerging ones leveraging fintech, crypto, and artificial intelligence to improve or expand the products and services available to consumers.

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[21] Press Release, CFPB Takes Action to Protect Depositors from False Claims About FDIC Insurance (May 17, 2022), available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-protect-depositors-from-false-claims-about-fdic-insurance/.

[22] California Department of Financial Protection and Innovation, Annual Report of Activity Under the California Consumer Financial Protection Law (Mar. 2022), available at https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/03/DFPI-CCFPL-2021-annual-report.pdf at 4.

[23] IR, *supra* note 1, at 8–9 (quoting *Pennsylvania v. Navient Corp.*, 967 F.3d ___, 287 (3d Cir. ___)).