

ALERTS

CFPB Obtains \$10 Million Penalty Against Major Bank Using Expansive UDAAP Authority

May 11, 2022

The Consumer Financial Protection Bureau (“CFPB” or the “Bureau”) reached a settlement with Bank of America, N.A. (the “bank”), including a penalty of \$10 million.^[1] This settlement provides a powerful example of the flexibility of the Bureau’s authority to pursue unfair, deceptive or abusive acts and practices (“UDAAPs”). In fact, the entire settlement relates exclusively to UDAAPs, and arises out of alleged conduct that violates state laws rather than other federal consumer financial statutes or regulations.

The Bank of America Settlement

Under a process called garnishment, a creditor can recover the amounts a consumer owes from a third party who holds the consumer’s assets, such as in the consumer’s account at a depository institution. There are several limitations on which assets are subject to garnishment under state law, which vary from state to state, and federal law protects federal benefits from garnishment.

The Bureau found fault with several aspects of the bank’s response to out-of-state garnishment orders, meaning orders issued in a state other than the state where the consumer lived. In the settlement, the Bureau asserts that garnishments against consumers should be governed by the law of their state of residence. Instead, the bank applied the law of the issuing state, and, as a result, failed to apply the protections available in the state of residence but not the issuing state. A few states prohibit out-

of-state garnishment entirely, and, while the bank had policies and training that correctly identified some of these states, the policies overlooked others and the bank's employees did not consistently follow these policies in any event.

Out of this alleged conduct, the CFPB identified five practices it concluded were unfair or deceptive:

1. Most notably, the CFPB considered statements that the bank had made to third parties — rather than to consumers — to be an unfair practice. In the Bureau's view, the bank should have informed the issuing court and the garnishing creditor that the consumer's assets were held out of state.[2] When the bank "failed to disclose" this information, consumers then lost access to funds that became frozen or were delivered to creditors, in addition to overdraft, insufficient funds, account maintenance or similar fees that resulted from taking these assets from the consumer's account, as well as attorney's fees and court costs the bank sometimes passed onto consumers.[3]
2. The CFPB expressed serious concern with waivers in the bank's deposit agreement with consumers. The deposit agreement states that the consumer "directs" the bank not to contest garnishment, including from out of state, and purports to release the bank from all liability for acting on garnishment orders.[4] However, federal law prohibits banks from requiring consumers to waive certain exemption rights over federal benefits.[5] Moreover, this release prevented consumers from challenging the losses they suffered.
3. These statements in the deposit agreement also constituted a deceptive practice that may have dissuaded consumers from taking action to defend their rights.[6]
4. The Bureau labeled the bank's application of the wrong state's law an unfair practice.[7]
5. And finally, it was a separate, deceptive practice for the bank to have "implicitly represented" to consumers that the issuing state's law governed, because that representation likely limited consumers' efforts to identify and assert their rights under the laws of their state of residence.[8]

In justifying its conclusion that these practices were unfair, the Bureau explains that it is "not reasonable to expect consumers to have the

necessary understanding” of their rights under state law or the procedure to assert them within a garnishment proceeding, instead placing the responsibility on the bank to protect the consumer.[9]

Here, the bank was able to resolve this enforcement matter without admitting any of the allegations.[10] The bank agreed to a civil monetary penalty of \$10 million, and committed to refund at least \$592,000 in fees it imposed on consumers after it garnished their accounts.[11] The settlement sets out numerous requirements for the bank to include in its revised procedures, which will govern for the next five years.[12]

UDAAP Enforcement on the Rise

The CFPB has authority to initiate enforcement to stop UDAAPs in the offering or provision of any consumer financial product or service.[13] This authority has figured prominently in enforcement actions and settlements this year and is sure to be a centerpiece of CFPB enforcement to come.

For example, the CFPB and the New York Attorney General filed an enforcement action against MoneyGram that includes allegations of “failing to timely make remittance transfers available to recipients or to timely make refunds available to senders,” which these authorities consider unfair.[14] In another settlement the Bureau reached so far this year, relating to student loan servicing, also identified no violations aside from unfair and deceptive practices.[15]

Further, as the CFPB uses its supervisory authority to conduct exams of companies in the consumer finance industry — including companies it has not previously examined using a recently announced “dormant” authority[16] — exam staff will likely be looking to identify practices that the Bureau believes are unfair, abusive or deceptive.

The CFPB will continue to press its UDAAP authority to put an end to practices it seeks to curb, encouraging payment processors, fintech companies, banks and other financial institutions to carefully consider impacts on consumers.

Schulte Roth & Zabel's lawyers are available to assist you in addressing any questions you may have regarding these developments. Please contact the Schulte Roth & Zabel lawyer with whom you usually work, or any of the following attorneys:

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[1] Consent Order, *In the Matter of Bank of America, N.A.*, No. 2022-CFPB-0002 (May 4, 2022), available here.

[2] *Id.* 30.

[3] *Id.* 31, 34.

[4] *Id.* 49.

[5] *Id.* 24, 50.

[6] *Id.* 58.

[7] *Id.* 38.

[8] *Id.* 46.

[9] *Id.* 35, 40.

[10] *Id.* 2.

[11] *Id.* 69, 76.

[12] *Id.* 106.

[13] 12 U.S.C. § 5531.

[14] 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 [here](#).

[15] Consent Order, *In the Matter of Edfinancial Services, LLC*, No. 2022-CFPB-0001 (March 30, 2022), available [here](#).

[16] *CFPB Invokes "Dormant" Authority to Conduct Exams of Fintech Companies*, *SRZ Client Alert* (April 27, 2022), available [here](#).

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