

UDAAP Update:
**Recent Cases and the Future of State AG
& Consumer Advocate Activity**

May 16, 2017

Adam D. Maarec (moderator) – Davis Wright Tremaine LLP

Andrew T. Dougherty – Office of the Illinois Attorney General

Daniel A. Edelman – Edelman Combs Lattuner & Goodwin LLC

Joseph R. Rodriguez – Davis Wright Tremaine LLP

2016 Survey of Activities Identified as Unfair, Deceptive or Abusive under the Dodd-Frank Act, Part One

By Adam D. Maarec and John C. Morton



Adam D. Maarec is a member of Davis Wright Tremaine LLP's Payments Team located in Washington, D.C. He concentrates his practice on consumer financial services, primarily advising financial institutions on regulatory compliance matters involving payment product structures, marketing, and servicing. Adam has experience with a broad range of financial services laws, including the Dodd-Frank Act, the Truth in Lending Act, the CARD Act, the Gramm-Leach-Bliley Act, the Fair Credit Reporting Act, and the Real Estate Settlement Procedures Act, as well as state-based insurance regulations. His regulatory practice involves helping companies comply with various laws and regulations, drafting rulemaking comment letters, meeting with government agencies, and responding to regulatory investigations.



John C. Morton is a Member in the Financial Services Practice Group of Gordon Feinblatt LLC, in Baltimore, Md. He provides legal advice to an extensive range of financial institutions, including: nationwide, regional and community banks; credit unions; consumer lending companies; sales finance companies; mortgage lenders and brokers; investment advisers; and other regulated businesses. He provides counsel regarding multi-jurisdictional compliance issues, including: advising clients on federal and state credit statutes and regulations; UDAAP and the CFPB; interaction with state and federal regulators; licensing and registration matters; due diligence and transactional matters; and general corporate governance issues.

Mr. Morton is a graduate of Gettysburg College and the University of Baltimore School of Law. He writes and speaks frequently on consumer finance issues and is the co-author of *A SURVEY OF MARYLAND LAWS RELATING TO EXTENDING CREDIT & CONSUMER FINANCIAL SERVICES AND MARYLAND SECURED TRANSACTIONS UNDER REVISED ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE* (Data Trace Publishing 2d ed. 2014). Mr. Morton also is Chair of the Committee on Consumer Credit and Financial Institutions, Maryland State Bar Association, Business Law Section, and Vice Chair of the Compliance Management Subcommittee of the American Bar Association Consumer Financial Services Committee.

I. Introduction

This is the latest in a series of articles that surveys activities identified as unfair, deceptive or abusive acts or practices (UDAAPs) by the Bureau of Consumer Financial Protection (CFPB), and state attorneys general and consumer financial services regulators, using federal UDAAP powers created by the Dodd-Frank Act.¹ This article covers relevant UDAAP activity between January 1, 2016 and June 30, 2016, including enforcement actions and other statements by the CFPB in reports that discuss UDAAP violations.² These activities provide insight into the specific types of practices that could be considered UDAAP violations in the future.³

1. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. §§ 5301 *et seq.*) [the Dodd-Frank Act]; *see, e.g.*, 12 U.S.C. § 5552 (2016). Previous articles in this series include: Adam D. Maarec & John C. Morton, *2015 Survey of Activities Identified as Unfair, Deceptive or Abusive under the Dodd-Frank Act, Part Two*, in this issue; Adam D. Maarec & John C. Morton, *2015 Survey of Activities Identified as Unfair, Deceptive or Abusive under the Dodd-Frank Act, Part One*, 69 Consumer Fin. L.Q. Rep. 20 (2015); Adam D. Maarec & John C. Morton, *Survey of Activities Identified as Unfair, Deceptive or Abusive under the Dodd-Frank Act, July 1, 2014 Through December 31, 2014*, 68 Consumer Fin. L.Q. Rep. 421 (2014); and Adam D. Maarec & John C. Morton, *A Survey of Activities Identified as Unfair, Deceptive or Abusive by the CFPB*, 68 Consumer Fin. L.Q. Rep. 19 (2014).

2. Your authors have attempted to make this survey as comprehensive as possible; however, it is not exhaustive and there may be other relevant actions that are not discussed in this article. Also, it must be noted that this area of law is rapidly evolving and new actions are arising regularly.

3. The term "unfair" is defined in the Dodd-Frank Act 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." 12 U.S.C. § 5531(c)(1). 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." CFPB Examination Manual V.2, UDAAP 5 (October 2012), available at http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf. The Dodd-Frank Act introduced

(Continued on next page)

II. Overview: Identification of Unfair, Deceptive, or Abusive Acts or Practices

Between January 1, 2016 and June 30, 2016, the CFPB engaged in thirteen public enforcement actions involving alleged UDAAP violations. Past UDAAP actions can provide a road map for industry participants to identify and better understand acts or practices that are considered problematic by law enforcement authorities. UDAAP enforcement actions during the period of this summary involved: marketing; debt collection/settlement; data security; payment processing; and information brokering. The CFPB highlighted other UDAAP issues involving student-loan servicing and mortgage servicing in its Supervisory Highlights reports. During this period there was one enforcement action filed independently by state regulators or attorneys general alleging violations of the federal UDAAP prohibition.

The summaries of each UDAAP action appear below in chronological order and are intended to provide a straightforward identification of the specific acts or practices that were alleged to be unfair, deceptive, or abusive by the CFPB, state attorneys general and/or state regulators.

3. (Continued from previous page)

the new term “abusive” and defines 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:
 - (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.

12 U.S.C. § 5531(d).

III. CFPB Enforcement Actions

A. Y King S Corp d/b/a Herbies Auto Sales – January 2016 (Marketing)⁴

Herbies Auto Sales is a buy-here pay-here used car dealer. The CFPB consent order alleges, in addition to violations of the Truth in Lending Act (TILA),⁵ that the company engaged in deceptive and abusive acts or practices.

Specifically, the CFPB alleged that the following practices were deceptive:

- misrepresenting credit information by requiring the purchase of an automobile repair policy and GPS payment reminder device but not including the cost of those items in the disclosed finance charge, and advertising lower Annual Percentage Rates (APRs) than consumers actually received; and
- failing to disclose the cost of paying by credit. The company allegedly would negotiate prices with customers paying with cash but would refuse to negotiate the price with customers using credit. The incremental costs of the credit price were not included as part of the finance charge in disclosures, allegedly making the promoted APR inaccurate.

The CFPB also alleged that the company’s financing scheme was abusive because the company:

- advertised inaccurately low APRs in marketing materials;
- failed to post sticker prices or otherwise reveal the asking

prices of cars offered to consumers until after consumers indicated that they would purchase a car;

- failed to disclose complete and accurate credit terms when providing payment figures and before offering a car for sale; and
- failed to disclose accurate finance charges and APRs in the TILA disclosures.

Pursuant to the consent order, the company agreed to pay \$700,000 in redress to consumers and a suspended civil money penalty of \$100,000.

B. Citibank, N.A. – February 2016 (Debt Sales/Debt Collection)⁶

Citibank, N.A., entered into a consent order with the CFPB relating to the sale of charged-off consumer debts to debt buyers, that addressed allegedly deceptive and unfair acts or practices. The CFPB claimed that the company provided substantial assistance to debt buyers (covered persons) and engaged in deceptive acts or practices by overstating the APR for accounts it sold to the debt buyers. The CFPB also alleged that the company engaged in unfair acts or practices by: (1) overstating the APR for accounts sold to debt buyers; (2) failing to identify and remit to debt buyers post-sale payments made by consumers to the company; and (3) delaying sending to debt buyers such post-sale payments. Pursuant to the consent order, the company agreed to pay \$4.89 million in restitution to consumers and a \$3 million civil money penalty.

4. *In the Matter of Y King S Corp.*, also doing business as Herbies Auto Sales, File No. 2016-CFPB-0001, Consent Order (Jan. 21, 2016).

5. 15 U.S.C. §§ 1601 *et seq.* and its implementing regulation, Regulation Z, 12 CFR pt. 1026.

6. *In the Matter of Citibank, N.A.*, File No. 2016-CFPB-0003, Consent Order (Feb. 23, 2016).

C. Citibank, N.A., Department Stores National Bank (DSNB), and CitiFinancial Servicing, LLC – February 2016 (Debt Sales/Debt Collection)⁷

Citibank, N.A., two of Citibank, N.A.'s affiliates, DSNB and CitiFinancial Servicing, LLC, and two debt collection law firms retained by Citibank, N.A., entered into a consent order with the CFPB to resolve allegations that affidavits filed in debt collection lawsuits by its lawyers were altered. The law firms (which were subject to independent enforcement actions, discussed below) allegedly altered the dates and/or the amount of the debts on the affidavits, which violated the Fair Debt Collection Practices Act, and such false representations constituted deceptive acts or practices.

Upon learning that one of the firms had altered affidavits, Citibank, N.A., ceased referring accounts to that firm and requested that a New Jersey court dismiss related pending actions. Under the consent order, the companies agreed to comply with a New Jersey state court order requiring refunds of \$11 million and the cessation of collection activities on an additional \$34 million in debts. In light of the companies' remediation efforts, and consistent with the CFPB's Responsible Business Conduct bulletin, the CFPB did not impose civil money penalties.

D. Solomon & Solomon, P.C.⁸ and Faloni & Associates, LLC⁹ – February 2016 (Debt Sales/Collection)

Solomon & Solomon, P.C., is a law firm engaged in debt collection activities in New York. Faloni & Associates, LLC, is a law firm engaged in debt col-

lection activities in New Jersey. Both companies acted as a service provider to a bank in connection with credit card debt collection litigation.¹⁰ In separate but nearly identical consent orders, the CFPB alleged that the law firms engaged in deceptive conduct by altering the amounts owed or dates on hundreds of affidavits which were filed in court.

The alterations allegedly amounted to misrepresentations about the facts to which affiants had attested, including the amount of debt owed. The law firms represented in litigation that the affidavits were "supported by Competent and Reliable Evidence" and that the amount owed was accurate, both of which were allegedly false as a result of the alterations. These activities were also considered a violation of the Fair Debt Collection Practices Act. Solomon & Solomon agreed to pay a \$65,000 civil money penalty, and Faloni & Associates agreed to pay a \$15,000 civil money penalty.

E. Dwolla, Inc. – March, 2016 (Marketing/Data Security)¹¹

Dwolla, Inc., is a digital payment company that operates an online payment system. In its first action involving data security, the CFPB alleged that the company engaged in deceptive marketing by making false claims regarding its data security practices.

Specifically, the CFPB alleged that the company engaged in deceptive practices by:

- falsely claiming its data security practices "exceed" and "surpass" industry security standards when, in fact, the company did not adequately protect consumer data;
- falsely claiming its "information is securely encrypted and

stored," when, in fact, the company did not encrypt all sensitive consumer personal information and failed to test the security of certain applications prior to releasing such applications to the public; and

- failing to:
 - adopt and implement reasonable and appropriate data-security policies and procedures for the organization;
 - use appropriate measures to identify reasonably foreseeable security risks;
 - ensure that employees who have access to or handle consumer information received adequate training and guidance about security risks;
 - use encryption technologies to properly safeguard sensitive consumer information; and
 - practice secure software development, particularly with regard to consumer-facing applications developed at an affiliated website.

Pursuant to the consent order, the company agreed to pay a \$100,000 civil money penalty.

F. Student Aid Institute, Inc. – March 2016 (Debt Relief)¹²

The Student Aid Institute, Inc., offered debt relief services to consumers with student-loans. In a consent order with the company and its CEO,

7. *In the Matter of Citibank, N.A., Department Stores National Bank, and CitiFinancial Servicing, LLC*, File No. 2016-CFPB-0004, Consent Order (Feb. 23, 2016).

8. *In the Matter of Solomon & Solomon, P.C.*, File No. 2016-CFPB-0005, Consent Order (Feb. 23, 2016).

9. *In the Matter of Faloni & Associates, LLC*, File No. 2016-CFPB-0005, Consent Order (Feb. 23, 2016).

10. The bank was also subject to separate consent orders in connection with its debt collection practices. *See supra* notes 6 & 7.

11. *In the Matter of Dwolla, Inc.*, File No. 2016-CFPB-0007, Consent Order (Mar. 2, 2016).

12. *In the Matter of Student Aid Institute, Inc.*, Steven Lamont, File No. 2016-CFPB-0008, Consent Order (Mar. 30, 2016).

the CFPB alleged that the company engaged in deceptive conduct by making the following misrepresentations:

- that consumers were required to pay the company a fee to enroll in federal student-loan repayment programs;
- that consumers would save certain amounts of money without a basis for the savings claims, *e.g.*, “You are eligible to reduce your current payment of \$595 to \$63 which may save you \$63,900 over the term of your loan;”
- that student-loan “forgiveness and forbearance are available on most federal loans” without explaining the conditions applicable to those programs;
- that consumers were preapproved for repayment programs and their loans were eligible for the “Student Loan Reform Act” when preapproval and eligibility determinations were not actually made; and
- implying that the company was “endorsed, sponsored by, or affiliated with the Department of Education.”

The company and its CEO also were held responsible for violations of the Telemarketing Sales Rule’s prohibition on the collection of advanced fees for debt relief services and Regulation P’s requirement to deliver privacy notices.

The company and its CEO agreed to void all of its existing debt relief agreements, stop charging consumers any fees, shut down its operations, and pay a \$50,000 civil money penalty.

G. Dmitry Fomichev and Davit Gasparyan (T3Leads) – April 2016 (Marketing)¹³

D and D Marketing, Inc., doing business as T3Leads, provided lead aggregator services to payday and installment lenders. The CFPB alleged in a December 2015 civil complaint that the company (and two of its then-current individual owners/operators) engaged in unfair and abusive acts or practices when it failed to perform due diligence on companies it paid to generate leads (lead generators) and on the payday and installment lenders to whom it sold leads (purchasers).¹⁴ The individuals were held responsible for knowingly and recklessly providing substantial assistance to the company’s allegedly unfair and abusive acts or practices.

In April 2016 the CFPB filed separate civil complaints against one of the company’s co-founders who formerly held roles as the chief executive officer and chief technical officer, and against one of the company’s other co-founders who formerly held roles as the chief financial officer and chief marketing officer. The CFPB alleged that these individuals had significant responsibility for establishing T3Leads’ policies and practices that resulted in allegedly unfair and abusive practices and that they had substantial control over the company’s operations. In their respective roles, these individuals allegedly provided substantial assistance to the company’s unfair and abusive acts and practices.

At the time of this writing, these cases had not been resolved.

H. Pressler and Pressler/New Century Financial Services, Inc. – April 2016 (Debt Collection)¹⁵

Pressler & Pressler, LLP, is a New Jersey-based debt collection law firm. New Century Financial Services, Inc., is a debt buyer that buys and collects defaulted consumer debts and passes those accounts to Pressler & Pressler, LLP, which then attempts to collect the debt through lawsuits. The CFPB entered into a consent order with Pressler & Pressler, LLP, its principal partners, and New Century Financial Services, Inc., to resolve allegations of unfair and deceptive acts or practices in connection with the companies’ debt collection practices.

The CFPB alleged that the parties engaged in unfair and deceptive practices by:

- filing lawsuits against consumers without a sufficient basis, including with false or empty allegations and without adequately reviewing the information or documents that supposedly supported the allegations;
- filing debt collection lawsuits based on information that was known to be unreliable or false; and
- harassing consumers with unsubstantiated court filings generated by an automated claim-preparation system.

Pursuant to the consent order, Pressler & Pressler, LLP, and its named partners agreed to pay a \$1 million civil money penalty, and New Century agreed to pay a \$1.5 million civil money penalty.

13. See: Consumer Financial Protection Bureau v. Dmitry Fomichev, Case No. 2:16cv2724 (C.D. Ca. April 21, 2016); and Consumer Financial Protection Bureau v. Davit Gasparyan, a/k/a/ David Gasparyan, Case No. 2:16cv02725 (C.D. Ca. April 21, 2016).

14. For a more extensive summary of the alleged UDAAP violations in the December 2015 T3Leads case, see Adam D. Maarec & John C. Morton, *2015 Survey Activities Identified as Unfair, Deceptive or Abusive under the Dodd-Frank Act*, in this issue, at Part III.S.

15. See: *In the Matter of Pressler & Pressler, LLP, Sheldon H. Pressler, and Gerard J. Felt*, File No. 2016-CFPB-0009, Consent Order (April 25, 2016); *In the Matter of New Century Financial Services, Inc.*, File No. 2016-CFPB-0010, Consent Order (April 25, 2016).

I. All American Check Cashing, Inc. – May 2016 (Check Cashing/Payday Loans)¹⁶

All American Check Cashing, Inc., and Mid-State Finance, Inc., offer check-cashing services and payday loans in Mississippi, Alabama, and Louisiana. The CFPB entered into a consent order with the companies and their individual owner and president in connection with allegations that the companies engaged in unfair, deceptive, and abusive check-cashing and payday loan practices.

The CFPB alleged that the following acts or practices were unfair:

- failing to notify consumers who overpaid on a loan of such overpayment and then failing to return consumers' overpayments. If a consumer did not request a refund, credit balances were deleted from consumers' accounts.

The CFPB alleged that the following acts or practices were deceptive:

- promising lower fees than competitors when such fees were not always lower; and
- misrepresenting that a multiple loan program was financially beneficial to consumers in comparison with obtaining a thirty-day loan from a competitor, when, in fact, the company's multiple loan program was never the financially beneficial option.

The CFPB alleged that the following acts or practices were abusive:

- hiding fees associated with its check-cashing services through policies explicitly designed

to prevent consumers from learning of the fees. And, if consumers attempted to cancel or reverse a check-cashing transaction after learning of the fee, falsely telling consumers that the process of reversing a transaction takes a long time or that the transaction could not be cancelled.

The case was not resolved at the time of this writing.

J. Intercept Corporation – June 2016 (Payment Processing)¹⁷

Intercept Corporation is a third-party payment processor that facilitates the movement of funds through the Automated Clearing House (ACH) network between consumer bank accounts and other providers of consumer financial services, namely payday lenders, debt collectors, and auto title lenders. The CFPB filed a civil complaint against Intercept and its individual owners and operators¹⁸ alleging UDAAP violations.

The following practices were allegedly unfair:

- ignoring warnings from the industry, consumers, and law enforcement officials that the companies for whom it was performing payment processing services were engaged in illegal or fraudulent conduct; and
- failing to conduct reasonable due diligence to detect their customers' unlawful conduct.

By processing payments from consumers' accounts despite the above red

flags, the company allegedly caused, or engaged in conduct that was likely to cause, substantial consumer injury that was not reasonably avoidable and not outweighed by other benefits.

The company's individual owners and operators were also held responsible for knowingly and recklessly providing substantial assistance with respect to the company's UDAAP violations "by establishing, directing, and managing Intercept's operations, including managing client and banking relationships, and exercising substantial control over Intercept's operations on a day-to-day basis."

The case was not resolved at the time of this writing.

IV. CFPB Supervisory Highlights

A. Introduction

The CFPB periodically issues Supervisory Highlights reports that summarize its supervisory activity over a period of time and identify, among other things, allegedly unfair, deceptive or abusive conduct that may not have been otherwise publicly disclosed in enforcement actions.

B. Winter 2016 Supervisory Highlights (published in March 2016)¹⁹

The CFPB's Winter 2016 Supervisory Highlights report identified UDAAPs in connection with remittance payment services,²⁰ namely deceptive statements leaving customers with a false impression regarding the conditions placed on designated recipients in order to access transmitted funds. The report also identified UDAAPs in the student-loan servicing industry as noted below:

- One or more servicers engaged in unfair practices relating

16. Consumer Financial Protection Bureau v. All American Check Cashing, Inc.; Mid-State Finance, Inc.; and Michael E. Gray, Case No. 3:16cv356WHB-JCG (S.D. Miss. May 11, 2016).

17. Consumer Financial Protection Bureau v. Intercept Corporation, d/b/a InterceptEFT, Bryan Smith, and Craig Dresser, Case No. 3:16cv00144-ARS (E.D. N.D. June 6, 2016).

18. The CFPB alleged that the individuals' material participation in the company's operations rendered them "related person[s]" under the Consumer Financial Protection Act, Title X of the Dodd-Frank Act. The CFPB also alleged that each individual directly engaged in providing payment processing services.

19. CFPB Supervisory Highlights, Issue 10 (March 2016), available at http://files.consumerfinance.gov/f/201603_cfpb_supervisory-highlights.pdf [report].

20. See Regulation E, 12 CFR pt. 205. Regulation E implements the Electronic Fund Transfer Act (EFTA), 15 U.S.C. §§ 1693 *et seq.*

to auto-default provisions by auto-defaulting both a borrower and co-signer if either filed for bankruptcy;

- servicers failed to disclose a significant adverse consequence of forbearance; and
- there were servicing conversion errors (in connection with a change in ownership of loans) resulting in inaccurate interest rates that were deemed an unfair act or practice.

C. June 2016 Supervisory Highlights – Mortgage Servicing Special Edition²¹

The CFPB issued a special edition of its Supervisory Highlights that focused on mortgage servicing issues. The following practices were considered unfair:

- sending loss mitigation offer letters with response deadlines that had already passed or were about to pass;
- imposing substantial delays between the successful completion of a loan modification trial period and conversion to a permanent loan modification, imposing additional interest costs, and continuing to report the consumer as delinquent on consumer reports; and
- failing to honor trial loan modifications that were in place at the time of a servicing transfer and imposing substantial delays before honoring loan modifications, causing incremental interest costs.

The following practices were considered deceptive:

- sending loss mitigation acknowledgment notices stating that homes would not be foreclosed on prior to a stated deadline to submit documents, but initiating foreclosures before the stated deadline;
- stating that outstanding fees, charges, and advances could be deferred until the maturity date of the loan, when these charges were assessed after a modification agreement was signed;
- sending loan modification agreements to consumers with inaccurate terms (namely, the payment amount), receiving loan modification agreements signed by the consumer but not executing them and, instead, sending revised loan modification agreements with different terms to the consumer for signatures;
- representing that consumers would receive a permanent loan modification after making three trial modification payments, without disclosing in the modification offer letter that the permanent loan modification was contingent on a title search;
- stating that deferred interest on a daily simple interest mortgage would be repaid at the end of the loan term, when it was actually collected immediately after the deferment;
- sending foreclosure notices to consumers who were current on a home equity line of credit; and
- requiring a waiver of “defenses, set-offs, and counterclaims” that, although not related to the mortgage, were impliedly related to the mortgage when

such waivers were prohibited by Regulation Z.

The following practices were considered abusive:

- including language in a modification offer that made it impossible for consumers to understand how and when charges would be incurred.

D. June 2016 Supervisory Highlights²²

The CFPB’s Summer 2016 edition of its Supervisory Highlights identified UDAAP issues in connection with debt collection and deposit reconciliation practices. Specifically, the CFPB indicated that it was an unfair practice to sell debt without properly reflecting that the accounts were in bankruptcy, were the product of fraud, or were settled in full.

The CFPB also noted that interagency guidance was issued with respect to deposit reconciliation practices.²³ The guidance builds upon an enforcement action against Citizens Financial Group²⁴ and concludes that a “financial institution’s deposit reconciliation practices for transaction and non-transaction accounts may, depending on the facts and circumstances, [constitute an unfair practice if they] result in credit discrepancies.”

21. CFPB Supervisory Highlights, Issue 11 (June 2016), available at http://files.consumerfinance.gov/f/documents/Mortgage_Servicing_Supervisory_Highlights_11_Final_web.pdf.

22. CFPB Supervisory Highlights, Issue 12 (June 2016), available at http://files.consumerfinance.gov/f/documents/Supervisory_Highlights_Issue_12.pdf.

23. Interagency Guidance Regarding Deposit Reconciliation Practices (May 18, 2016), available at http://files.consumerfinance.gov/f/documents/201605_cfpb_interagency-guidance-regarding-deposit-reconciliation-practices.pdf.

24. *In the Matter of RBS Citizens Financial Group, Inc.* (N/K/A Citizens Financial Group, Inc.); *RBS Citizens, N.A.* (N/K/A Citizens Bank, N.A.); and *Citizens Bank of Pennsylvania*, File No. 2015-CFPB-0020, Consent Order (Aug. 12, 2015). This was summarized in Maerec & Morton, *supra* note 14, at Part III.L.

V. Other Litigation

A. Commonwealth of Pennsylvania v. Think Finance, Inc., *et al.*²⁵

The Pennsylvania Attorney General filed a lawsuit against Think Finance and a series of other companies involved in the promotion, sale, and collection of loans that allegedly exceeded the state's interest rate cap through "rent-a-bank" and "rent-a-tribe" arrangements. Along with a series of claims under state law, the Attorney General alleged the following violations of the federal UDAAP law under 12 U.S.C. section 5536(a)(1)(B). In a January 2016 order, several of the allegations were dismissed, as also noted below. The Attorney General alleged:

- that it was unfair to condition the quick receipt of loan

proceeds via electronic direct deposit on the consumer's agreement to electronic repayment, where the option to repay by mail was given but subject to a longer disbursement period. This allegation was rejected by the court, which found that the incentives to make electronic payments were not coupled with a lack of consumer understanding or any consumer injury;

- that it was unfair and deceptive to induce consumers to provide personal information, which in turn made them "vulnerable to future improper use." This allegation was denied by the court because it failed to specify consumer harm; and

- that it was abusive to: (1) fail to disclose the terms of a loan; and (2) take advantage of consumers' lack of understanding about the legality of a loan. The first allegation was denied by the court for failing to meet the definition of "abusive" conduct under the statute, but the second allegation survived the motion to dismiss, with the court reasoning that the alleged misrepresentations regarding the legality of offered loans could have allowed the company to take unreasonable advantage of the consumer's lack of knowledge regarding the loans' purported illegality.

This case was not resolved at the time of this writing.

25. Commonwealth of Pennsylvania v. Think Fin., Inc., No. 14-CV-7139, 2016 WL 183289 (E.D. Pa. Jan. 14, 2016).

2015 Survey of Activities Identified as Unfair, Deceptive, or Abusive under the Dodd-Frank Act, Part Two

By Adam D. Maarec and John C. Morton



Adam D. Maarec is a member of Davis Wright Tremaine LLP's Payments Team located in Washington, D.C. He concentrates his practice on consumer financial services, primarily advising financial institutions on regulatory compliance matters involving payment product structures, marketing, and servicing. Adam has experience with a broad range of financial services laws, including the Dodd-Frank Act, the Truth in Lending Act, the CARD Act, the Gramm-Leach-Bliley Act, the Fair Credit Reporting Act, and the Real Estate Settlement Procedures Act, as well as state-based insurance regulations. His regulatory practice involves helping companies comply with various laws and regulations, drafting rulemaking comment letters, meeting with government agencies, and responding to regulatory investigations.



John C. Morton is a Member in the Financial Services Practice Group of Gordon Feinblatt LLC, in Baltimore, Md. He provides legal advice to an extensive range of financial institutions, including: nationwide, regional and community banks; credit unions; consumer lending companies; sales finance companies; mortgage lenders and brokers; investment advisers; and other regulated businesses. He provides counsel regarding multi-jurisdictional compliance issues, including: advising clients on federal and state credit statutes and regulations; UDAAP and the CFPB; interaction with state and federal regulators; licensing and registration matters; due diligence and transactional matters; and general corporate governance issues.

Mr. Morton is a graduate of Gettysburg College and the University of Baltimore School of Law. He writes and speaks frequently on consumer finance issues and is the co-author of *A SURVEY OF MARYLAND LAWS RELATING TO EXTENDING CREDIT & CONSUMER FINANCIAL SERVICES AND MARYLAND SECURED TRANSACTIONS UNDER REVISED ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE* (Data Trace Publishing 2d ed. 2014). Mr. Morton also is Chair of the Committee on Consumer Credit and Financial Institutions, Maryland State Bar Association, Business Law Section, and Vice Chair of the Compliance Management Subcommittee of the American Bar Association Consumer Financial Services Committee.

I. Introduction

This article surveys activities identified as unfair, deceptive or abusive acts or practices (UDAAP) by the Bureau of Consumer Financial Protection (CFPB) and state attorneys general and consumer financial services regulators, using federal UDAAP powers created by the Dodd-Frank Act,¹ for the six-month period between July 1, 2015 and December 31, 2015.² As with the other articles in this series, this survey includes enforcement actions and other statements by the CFPB in reports and bulletins that discuss UDAAP violations.³ Among other things, these activities provide insight into the specific types of practices that could be considered UDAAP violations in the future.

II. Overview: Identification of Unfair, Deceptive, or Abusive Acts or Practices

Between July 1, 2015 and December 31, 2015 the CFPB engaged in twenty-five public enforcement actions involving alleged UDAAP violations. Past UDAAP actions can provide a road map for industry participants to identify and better understand acts or practices that are

1. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. §§ 5301 *et seq.*) [the Dodd-Frank Act]; *see, e.g.*, 12 U.S.C. § 5552 (2016).

2. The first half of 2015 was covered in Part One of this 2015 survey. *See* Adam D. Maarec & John C. Morton, *2015 Survey of Activities Identified as Unfair, Deceptive or Abusive under the Dodd-Frank Act, Part One*, 69 Consumer Fin. L.Q. Rep. 20 (2015).

3. Your authors have attempted to make this survey as comprehensive as possible, however, it is not exhaustive and there may be other relevant actions that are not discussed in this article. Also, it must be noted that this area of law is rapidly evolving and new actions are arising monthly.

considered problematic by law enforcement authorities. UDAAP enforcement actions during the period of this survey involved marketing, debt collection/settlement, credit reporting, product servicing, and information brokering. The CFPB also highlighted other UDAAP issues involving student-loan servicing and in-person debt collection efforts, in reports and guidance. During this period there were no enforcement actions filed independently by state regulators or attorneys general alleging violations of the federal UDAAP prohibition. Finally, a series of private lawsuits alleging violations of the federal UDAAP prohibition were adjudicated, all of which failed because the statute does not provide a private right of action, as discussed.

The summaries of each UDAAP action noted below appear in chronological order and are intended to provide a straightforward identification of the specific acts or practices that were alleged to be unfair, deceptive, or abusive by the CFPB, state attorneys general and/or state regulators.

III. CFPB Enforcement Actions

A. Intersections, Inc. – July 2015 (Marketing/Debt Collection)⁴

Intersections, Inc. (the company) is a service provider to financial institutions, that markets and manages ancillary identity theft and credit monitoring products. Many of the company's financial institution clients have been subject to separate consent orders for alleged UDAAP violations in connection with the sale and operation of identity theft and credit monitoring products.

The CFPB alleged in a civil complaint that the company did not provide the full value of three-credit bureau monitoring services because it did not obtain three credit reports in all cases. The error typically occurred when consumer reports could not be obtained, either because

an authorization to obtain a credit report was not obtained from the consumer, or fraud alerts or incomplete social security information prevented the report from being produced. The company typically resolved these errors at some point between a few hours and a few years, but the CFPB alleged that it was an unfair act or practice for the company to cause consumers to be charged (through their financial institution clients) the full cost of the product when the full benefits of the product were not being provided. In addition, the CFPB alleged that the company was responsible for knowingly or recklessly providing substantial assistance to banks that collected the full cost of the product.

The company agreed to settle the CFPB's allegations and pay \$55,000 in restitution and a \$1.2 million civil money penalty.

B. Affinion Group Holdings, Inc. – July 2015 (Marketing/Debt Collection)⁵

Affinion Group Holdings, Inc., along with a series of related entities (the company), is a service provider to financial institutions that markets and manages ancillary identity theft and credit monitoring products. The CFPB alleged in a civil complaint that the company engaged in UDAAP violations when billing consumers for these products and with respect to its customer retention practices.

The CFPB alleged that the following statements made over the phone to consumers who called to cancel a product (customer retention practices) were false or misleading and thus deceptive practices:

- stating that the credit scores provided were "from" one or all of the three major credit reporting agencies when they were not;
- claiming that an identity theft insurance benefit provided broad

coverage, including coverage of "any" or "all" expenses, such as legal fees, court costs, and lost wages resulting from identity theft, when material limitations and exclusions existed that were not disclosed;

- stating that a credit information hotline would improve consumers' credit scores by directly removing inaccurate information credit reports when the company did not have the authority to remove such information from credit reports; and
- stating that the product covered up to \$5,000 of unauthorized credit or debit card use without disclosing that consumers' individual liability under federal law was actually much less.

Consistent with the fact patterns in several other enforcement actions involving identity theft and credit monitoring products, the company allegedly failed to obtain the promised number of credit reports either because proper written authorization wasn't obtained from the consumer or because some other circumstances prevented the report from being generated. The CFPB alleged that it was an unfair act or practice to bill consumers for the full value of the product when the company failed to obtain the promised credit reports and did not deliver the full value of the product.

The company agreed to settle the CFPB's allegations and pay \$6.756 million in restitution and a \$1.9 million civil money penalty.

C. Student Financial Aid Services, Inc. – July 2015 (Marketing/Servicing)⁶

Student Financial Aid Services, Inc. (the company) provides fee-based

4. Consumer Financial Protection Bureau v. Intersections Inc., Case No. 1:15-cv-00835-LO-JFA (E.D. Va. July 1, 2015).

5. Consumer Financial Protection Bureau v. Affinion Group, LLC et al, Case No. 3:15-cv-01005-VAB (D. Conn. July 1, 2015).

6. Consumer Financial Protection Bureau v. Student Financial Aid Services, Case No. 2:15-cv-00821-GEB-KJN (E.D. Cal. July 23, 2015).

financial aid assistance and preparation services including consultation and assistance with preparing the federal government's Free Application for Federal Student Aid (FAFSA). In a civil complaint, the CFPB alleged that the company is a covered person under the CFPB because it offers and provides "financial advisory services."

The CFPB alleged that the company engaged in deceptive acts or practices through its then-operating websites, FAFSA.com and SFAS.com, and through telephone communications, by advertising certain service plans as an "upgrade" at "no additional cost," when in reality consumers who signed up for those services were automatically charged an additional recurring fee of \$67 to \$85 per year. The CFPB alleged that such "representations and omissions created a misleading net impression regarding the total amount and recurring nature of the fees charged" for its services. The CFPB further alleged that the company engaged in unfair practices by charging consumers for services on an automatic, recurring basis without their authorization for future charges.

Violations of Regulation E also were alleged for failure to obtain proper authorization for preauthorized electronic fund transfers. Finally, the CFPB alleged that the company violated the Telemarketing Sales Rule by misrepresenting the material terms and conditions of the "negative option feature" of certain of its services, including that a consumer's account would be charged recurring fees, unless the consumers engaged in an affirmative action to avoid the charges.

The company agreed to settle the CFPB's allegations and pay \$5.2 million in consumer redress and a \$1 civil money penalty.

D. NDG Financial Corp. et al – July 2015 (Debt Collection)⁷

NDG Financial Corp. and related offshore companies (the company) offered payday loans over the internet. The CFPB filed a civil complaint against the company arising out of allegations that its payday loans violated state usury laws, and accordingly, were void.

In its complaint, the CFPB alleges that the company's payday loans are void in the following states because the company issued the loans without a license and/or the loans exceeded the state's usury cap: Alabama, Arizona, Arkansas, Illinois, Indiana, Kentucky, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, and Utah. Colorado's laws also state that consumers are not obligated to repay fees and charges that exceed certain interest rate limits or are issued by an unlicensed company.

The CFPB alleged the company engaged in deceptive practices by:

- falsely stating in consumer loan agreements that such agreements were not subject to federal or state law, which was a material aspect of the agreement;
- falsely representing that it had a right to collect debts under the consumer loan agreements when those debts were void under state law; and
- falsely claiming that non-payment would result in lawsuits, arrest, imprisonment, or wage garnishment when the company did not intend to, or lacked the legal authority to, pursue any of those actions.

The CFPB also alleged that the company engaged in unfair acts or practices by:

- "forcing" consumers to pay debts they did not owe, when consumers could not avoid this harm since they were both unlikely to know the debt was void under state law and because the company affirmatively stated that state laws did not apply to their loans; and
- conditioning certain loans on irrevocable wage assignment clauses.

Finally, the CFPB alleged that the company engaged in abusive acts or practices by:

- interfering with consumers' ability to understand: (1) the material terms, costs, and conditions of a loan, namely that consumers did not have a legal obligation to repay the loan because it was void under state law; and (2) that federal and state law applied to the companies and governed disputes arising in connection with the loans; and
- taking unreasonable advantage of consumers' lack of understanding about the enforceability of a loan by: (1) stating that loans were not subject to state laws; and (2) collecting a debt that was actually void.

In addition, the CFPB alleged violations of the Credit Practices Rule. The case was not resolved at the time of this writing.

E. Chase Bank, USA N.A. – July 2015 (Debt Collection)⁸

Chase Bank, USA (Chase) issues credit cards and engaged in certain practices to collect delinquent credit card debts. The

7. Consumer Financial Protection Bureau v. NDG Financial Corp. et al, Case No. 1:15-cv-05211-CM (S.D. N.Y. July 31, 2015).

8. *In the Matter of Chase Bank, USA N.A. and Chase Bankcard Services, Inc.*, File No. 2015-CFPB-0013, Consent Order (July 8, 2015).

CFPB, in coordination with the Office of the Comptroller of the Currency and attorneys general in forty-seven states and the District of Columbia, entered into a consent order with Chase to resolve allegations of unfair and deceptive acts or practices in connection with the bank's debt sales and debt collections practices.

When selling debt, the CFPB alleged that Chase engaged in unfair practices because it sold debt with inadequate information to support claims that the consumer owed the debt, and when the company sold debt that it knew or should have known was unenforceable. In addition, the CFPB implied that the debt buyer's attempts to collect these debts were deceptive and held Chase responsible for providing "substantial assistance" to a debt buyer that it knew or should have known would attempt to collect these debts based on faulty information.

When attempting to collect debts directly, the CFPB alleged that Chase engaged in deceptive practices by falsely stating that sworn documents were: executed and notarized in accordance with the law; accurate; and based on direct knowledge or a review of account level documentation. The use of these false statements in judicial debt collect proceedings was allegedly unfair since it resulted in judgments with improper evidentiary support. In addition, the CFPB also alleged that Chase engaged in unfair acts or practices when it failed to notify consumers and the courts of the improper documentation practices. Finally, the CFPB alleged that calculation errors overstated the judgment amounts in nine percent of the cases filed and that Chase's failure to address the inaccuracy was an unfair act or practice.

Chase agreed to pay \$50 million in restitution, a \$30 million civil money penalty to the CFPB, and \$106 million to the states. In a separate but related enforcement action with the Office of the Comptroller of the Currency involving the debt collection practices described above and deficiencies in the company's Servicemembers Civil Relief Act compliance program, Chase agreed to pay an additional \$30 million civil money penalty.

F. Citibank, N.A. *et al* – July 2015 (Marketing/Debt Collection)⁹

Citibank, N.A., Department Stores National Bank (DSNB), and Citicorp Credit Services, Inc. (the companies) issue credit cards. The CFPB alleged in a consent order that the companies engaged in UDAAP violations when marketing, selling, and administering credit card add-on products (namely debt protection products and identity theft monitoring), and when collecting certain delinquent debts. The allegedly improper practices in this case are similar to those involved in the numerous other CFPB credit card add-on product enforcement actions (reviewed in earlier surveys and elsewhere in this survey).

The CFPB alleged that the following practices were deceptive:

- misrepresenting or omitting the costs, terms, benefits, and material limitations of debt protection products by:
 - stating that fees could be avoided if a credit card balance was paid in full before the statement due date, when the balance actually had to be paid in full by the close of the billing cycle to avoid a fee, and failing to correct consumers who expressed the incorrect belief that fees could be avoided if the balance was paid in full by the statement due date;
 - describing in telemarketing scripts a thirty-day trial period as "free" when consumers were actually charged for the product if he/she did not cancel within the trial period;
- failing to disclose consumers' ineligibility for certain benefits after consumers disclosed information indicating his/her ineligibility (e.g., a person identified as self-employed was not made aware that he/she was ineligible for the product's employment benefits); and
- at point-of-sale terminals:
 - (i.) not presenting material information about the product's benefits, material limitations, conditions, or restrictions during the pin-pad session before the consumer enrolled;
 - (ii.) using a sequence that conflated the process of applying for a credit card and the purchase of debt protection coverage;
 - (iii.) ambiguously describing enrollment as the receipt of product literature;
 - (iv.) not clearly and prominently notifying consumers of the debt protection purchase; and
 - (v.) failing to ensure in-store personnel provided debt protection product terms to consumers before they enrolled via pin-pad;
- misrepresenting or omitting the terms, benefits, and material limitations of ID theft monitoring products by:
 - indicating that fraud would be monitored at the "transaction level" when alerts

9. *In the Matter of Citibank, N.A.; Department Stores, National Bank; and Citicorp Credit Services, Inc. (USA)*, File No. 2015-CFPB-0015, Consent Order (July 21, 2015).

were only provided with respect to changes in the consumer's credit report;

- stating that the credit score benefit was from all three credit bureaus when the scores provided were actually from a third party that used credit bureau reports as an input; and
- failing to disclose the monthly cost of the product, and that affirmative action had to be taken to cancel the product, after consumers expressed an incorrect belief that they could enroll for thirty days for \$1 without further obligation;
- engaging in improper identity theft monitoring retention practices by:
 - offering a "downsell" product with reduced benefits and a lower price, while stating that the benefits would not change or downplaying the reduced benefits; and
 - misrepresenting the benefits or omitting their material limitations;
- the intentional and systematic misrepresentations of product terms and conditions by a service provider, including:
 - encouraging telemarketing agents to make material misrepresentations on calls that were not reviewed for quality assurance; and
 - failing to take corrective action when this behavior was known to the service provider's management;

- with respect to the collection of delinquent debts over the phone by DSNB:

- misrepresenting that an expedited payment fee, which was only required for same-day payments, was a "processing" fee to allow consumers to pay by phone;
- automatically setting phone-based payments to be processed on the same day and failing to disclose no-cost alternatives (*e.g.*, processing next day); and
- charging the expedited payment fee "even though it was almost never in the DSNB Cardholder's financial interest to ensure same-day payment on their account."

With respect to the identity theft monitoring product, in some cases, credit reports from three credit bureaus could not be monitored as promised, either because the company did not obtain sufficient written authorization to obtain the report or because it could not be processed by the credit bureau(s). The CFPB alleged that it was unfair for the companies to bill consumers the full fee of the identity theft monitoring product when consumers were not receiving all of the benefits. The CFPB also alleged that the companies' compliance monitoring, vendor management, and quality assurance programs "failed to prevent, identify, or correct" this problem.

The companies agreed to pay \$700 million in restitution and a \$35 million civil money penalty to the CFPB. In an overlapping consent order with the Office of the Comptroller of the Currency, Citibank, N.A. and DSNB agreed to pay an additional \$35 million civil money penalty.

G. Discover Bank *et al* – July 2015 (Loan Servicing/Debt Collection)¹⁰

Discover Bank expanded its private Student Loan Portfolio in 2010 by acquiring a private student-loan business with more than 800,000 private student-loan accounts, some of which were in default. The company and its affiliates, The Student Loan Corporation and Discover Products, Inc. entered into a consent order with the CFPB in connection with allegations that the companies engaged in illegal private student-loan servicing and debt collection practices.

The CFPB alleged that the following acts or practices were deceptive:

- representing, expressly or impliedly, in numerous instances, that borrowers had paid "\$0.00" in student-loan interest when borrowers had in fact paid student-loan interest; and
- overstating the minimum payment due in nearly 30,000 account statements sent to 7,000 borrowers.

The CFPB alleged that the following acts or practices were unfair:

- failing to provide clear information regarding the student-loan interest borrowers paid, because borrowers likely believed that "they did not pay interest qualifying for the tax deduction, and consequently, [did] not seek this tax benefit, when in fact they may have qualified for it";
- placing collection calls to borrowers in default at inconvenient times, namely

10. *In the Matter of Discover Bank, The Student Loan Corporation, and Discover Products, Inc.*, File No. 2015-CFPB-0016, Consent Order (July 22, 2015).

early in the morning (before 8 a.m.) or late in the evening (after 9 p.m.).

The CFPB further alleged that Discover was a “debt collector” under the Fair Debt Collection Practices Act in connection with loans it had acquired that were in default, and failed to provide specific information about the amount and source of the debt and the consumers’ right to contest the validity of the debt, as required by law.

Discover and its affiliates agreed to reimburse \$16 million to more than 100,000 borrowers and pay a \$2.5 million civil money penalty.

H. Paymap Inc.¹¹ and LoanCare, LLC¹² – July 2015 (Marketing/Servicing)

Paymap, Inc. is a wholly owned subsidiary of The Western Union Company, that provides payment processing services to mortgage servicers. LoanCare, LLC is a residential mortgage servicer. The companies partnered to market and provide the “Equity Accelerator Program,” an electronic payment system that enabled consumers to make automatic mortgage payments via electronic debits from their bank accounts. Each company entered into separate consent orders with the CFPB to resolve alleged UDAAP violations in connection with the jointly-offered program.

The CFPB alleged that the companies engaged in the following deceptive acts or practices:

- misrepresenting that enrollment in the “Equity Accelerator Program” would save the “typical homeowner” \$33,000 or more in interest payments, because those claims were “unsubstantiated by facts”; and

- falsely claiming that consumers who would pay their loan on a new weekly, biweekly or semi-monthly schedule would pay down loan balances more quickly and save on interest, when funds were held in a custodial account and then applied to the consumer’s mortgage on his or her original monthly payment schedule.

Pursuant to their respective consent orders, Paymap agreed to reimburse \$33.4 million to consumers, which represents all fees paid by consumers who enrolled in the Equity Accelerator Program since July 21, 2011, and to pay a \$5 million civil money penalty. LoanCare agreed to pay a \$100,000 civil money penalty.

I. Residential Credit Solutions, Inc. – July 2015 (Mortgage Servicing)¹³

Residential Credit Solutions, Inc. is a mortgage servicer. The CFPB alleged in a consent order that the company engaged in UDAAP violations when it: failed to honor in-process mortgage modifications; misrepresented payment obligations and the status of loan modifications; misrepresented when escrow refunds would be provided; and required consumers to waive certain rights before agreeing to a repayment plan.

The CFPB alleged that the following acts or practices were unfair:

- only honoring mortgage modifications agreed to by a prior servicer if the company agreed, based on its own determination, that the prior servicer should have agreed to the modification;
- refusing to honor modifications that it determined should not have been agreed to by

the prior servicer and treating these consumers as if they were in default, including requiring consumers to repay their loans on the original terms (*e.g.*, the original payment, not the modified payment), assessing late fees, sending default and delinquency notices, initiating collection calls, rejecting certain payments, and sending homes into foreclosure; and

- offering a “payment plan” to consumers as a last opportunity to avoid default or foreclosure but making acceptance of the plan contingent on the consumer’s waiver of “any and all defenses, jurisdictional and other otherwise, associated with the continuation foreclosure proceedings and possible subsequent public auction of [the consumer’s] property” and agreement “not to file any opposition to a motion for relief from the automatic stay filed on behalf of” the company in any bankruptcy.

The CFPB alleged that the following acts or practices were deceptive:

- not honoring the prior servicer’s modification, presenting the original loan terms for repayment, and misrepresenting the actual unpaid balance, payment due dates, interest rates, monthly payments, and delinquency statuses; and
- representing to consumers that they had an escrow surplus that would be refunded within thirty days when the consumer did not actually have an escrow surplus and did not receive any refund within thirty days.

Residential Credit Solutions agreed to pay \$1.5 million in restitution and a \$100,000 civil money penalty to resolve the CFPB’s alleged UDAAP

11. *In the Matter of Paymap, Inc.*, File No. 2015-CFPB-0017, Consent Order (July 28, 2015).

12. *In the Matter of LoanCare, Inc.*, File No. 2015-CFPB-0018, Consent Order (July 28, 2015).

13. *In the Matter of Residential Credit Solutions, Inc.*, File No. 2015-CFPB-0019, Consent Order (July 30, 2015).

violations, in addition to an alleged violation of Regulation P's annual privacy policy disclosure requirements.

J. Pension Funding, LLC – August 2015 (Marketing)¹⁴

Pension Funding, LLC, along with a related company and related individuals (the defendants), offered lump sum “pension advances.” The company represented in its marketing materials that the products were not loans but were purchases of the right to future pension payments. The CFPB and the New York Department of Financial Services (NYDFS) jointly filed a civil complaint alleging that the pension advances were actually loans and that the loan’s undisclosed, effective interest rate exceeded New York’s usury cap.

The CFPB and NYDFS alleged that the defendants engaged in unfair acts or practices by failing to disclose or misrepresenting the interest rate of the loan, and failing to disclose or denying the existence of fees, in a way that prevented consumers from understanding and comparing the product’s costs.

The CFPB and NYDFS also alleged that the defendants engaged in deceptive acts or practices by misrepresenting that the product:

- did not have an interest rate, but had costs comparable to interest rates of thirteen percent or less than eighteen to twenty-four percent, when the product actually had an effective interest rate of over twenty-eight percent; and
- did not require life insurance or have other fees.

Finally, the CFPB and NYDFS alleged that the defendants engaged in abusive acts or practices by:

- obscuring the nature of a credit transaction by referring to a product as a “pension advance, pension buyout, pension lump sum, money purchase pension plan, purchase of a cash stream of payments, or purchase”;
- failing to disclose interest rates and fees;
- giving consumers misleading advice that the pension advance product was in the consumer’s best interest because its costs were more favorable than a home equity loan or credit card, when the rates on home equity loans and credit cards were “typically much lower” than the pension advance’s effective interest rate; and
- through the above disclosure failures and misrepresentations:
 - materially interfering with consumers’ ability to understand the risks and costs of the loan;
 - taking unreasonable advantage of consumers’ lack of understanding of the risks, costs, and conditions of the loan; and
 - taking unreasonable advantage of consumers’ inability to protect their interests in selecting the loan.

In addition, the NYDFS alleged violations of a series of state laws, including those preventing usury, false and misleading advertisements of loans, intentional misrepresentations of material facts, and unlicensed money transmitter activities.

This case was not resolved at the time of this writing.

K. World Law Group – August 2015 (Debt Relief)¹⁵

World Law Group and a family of related companies (the companies) operated a debt relief business. The CFPB alleged in a civil complaint that the companies collected advance fees but failed to provide the promised debt relief services.

The CFPB alleged that the companies engaged in deceptive acts or practices by misrepresenting that consumers enrolling in a debt relief program would receive legal representation, be represented by a local attorney, and have an attorney attempt settle their debts with creditors. The CFPB also alleged that the companies violated the Telemarketing Sales Rule.

This case was not resolved at the time of this writing.

L. Citizens Financial Group – August, 2015 (Deposit Account Servicing)¹⁶

Citizens Bank, N.A., formerly known as RBS Citizens Bank, N.A., Citizens Financial Group, Inc., formerly known as RBS Citizens Financial Group, Inc., and Citizens Bank of Pennsylvania (the companies) operate retail banking branches in a dozen states and offer various financial products and services to consumers, including deposit accounts.

In a consent order, the CFPB alleged that the following deposit processing activities of the companies were unfair:

- Where the total deposit amount read on a consumer’s deposit slip appeared to differ from the total of the amounts from the associated checks, cash deposited, and/or other deposit items, and the deposit discrepancy fell below \$50.00 prior to September 2012 and \$25.00 thereafter, the

14. Consumer Financial Protection Bureau v. Pension Funding, LLC, *et al.*, Case No. 8:15-cv-01329-JLS-JCG (C.D. Cal. Aug. 20, 2015).

15. Consumer Financial Protection Bureau v. World Law Group, Case No. 1:15-cv-23070-MGC (S.D. Fla. Aug. 17, 2015).

16. *In the Matter of* RBS Citizens Financial Group, Inc. (N/K/A Citizens Financial Group, Inc.), RBS Citizens, N.A. (N/K/A Citizens Bank, N.A.), and Citizens Bank of Pennsylvania, File No. 2015-CFPB-0020, Consent Order (Aug. 12, 2015).

companies credited the consumers' accounts with the amount shown on the deposit slip, even where the companies knew the items the consumer deposited indicated a different amount. In certain circumstances, this practice resulted in customers receiving less than full credit for their deposits; and

- in total, under-crediting consumers by approximately \$12.3 million.

The CFPB also alleged that a deceptive act or practice occurred because the deposit account agreement did not disclose the practice relating to the deposit discrepancies described above. On the contrary, in numerous instances, either expressly or impliedly in connection with advertising and marketing, the companies allegedly represented that deposits were subject to verification and that steps would be taken to ensure that customers were credited with correct deposit amounts, but the companies allegedly did not verify and correct the deposit inaccuracies.

The companies agreed to pay \$11 million to reimburse affected customers and a \$7.5 million civil money penalty.

M. Springstone Financial, LLC – August 2015 (Marketing)¹⁷

Springstone Financial, LLC administered the Springstone Patient Financing Program, which offered consumers loan products to finance health care services through partner banks that issued and serviced the loan products. Springstone offered a deferred interest loan product, whereby consumers would pay no interest if the loan balance was paid in full within promotional periods of six to twenty-four months. Springstone authorized a network of about 9,000 health care providers, in-

cluding dentists, to offer its loan products and assist consumers with applications.

The CFPB alleged in a consent order that some participating providers in the dental services market engaged in deceptive acts or practices by improperly describing the deferred interest loan product to consumers as a “no-interest” loan, rather than a deferred interest loan, or failed to inform consumers that interest would accrue at a rate of 22.98 percent from the date of purchase if the balance was not paid before the promotional period ended.

Springstone agreed to pay \$700,000 in redress to approximately 3,200 consumers in its dental services provider network.

N. Encore Capital Group, et al¹⁸ and Portfolio Recovery Associates¹⁹ – September 2015 (Debt Collection)

Encore Capital Group, Inc. as well as its affiliates, including Midland Funding, LLC, Midland Credit Management, Inc., and Asset Acceptance Capital Corp. (the companies), are debt buyers that purchase and collect consumer debt on a large scale at a substantial discount, primarily from consumer finance and telecommunications companies. Portfolio Recovery Associates is also a debt buyer.

In these consent orders, the CFPB alleged that the companies engaged in the following deceptive acts or practices:

- attempting to collect debts from consumers based upon incorrect balances, interest rates, and payment due dates;
- representing that consumers owed the claimed amount on the accounts in question, without obtaining and reviewing additional information when

consumers had disputed, challenged, or questioned the validity or accuracy of the debt;

- misrepresenting to consumers that the companies intended to prove their claims, if contested;
- filing misleading collection affidavits stating: that debts not disputed are presumed valid that the affiants had reviewed account-level documentation from the original creditor corroborating the consumer's debt; and that the affiants had reviewed hard copy records corroborating the consumer's debt;
- attempting to collect time-barred debts;
- misrepresenting to consumers through litigation or the threat of litigation that, under the Fair Debt Collection Practices Act, the failure to dispute a debt in writing within a certain period of time shifts the legal burden of proof to consumers to prove in court that they do not owe a debt (Encore Capital only);
- misrepresenting to consumers that an attorney had reviewed the consumer's debt or that the collector was calling on behalf of an attorney (Portfolio Recovery Associates only);
- misrepresenting to consumers that litigation was planned, imminent, or underway (Portfolio Recovery Associates only); and
- misrepresenting that consumers could not prevent collection calls on their cell phones before 9 a.m. unless they consented to receiving computer dialing system calls (Portfolio Recovery Associates only).

18. *In the Matter of* Encore Capital Group, Inc., Midland Funding, LLC, Midland Credit Management, Inc. and Asset Acceptance Capital Corp., File No. 2015-CFPB-0022, Consent Order (Sept. 9, 2015).

19. *In the Matter of* Portfolio Recovery Associates, LLC, File No. 2015-CFPB-0023, Consent Order (Sept. 9, 2015).

17. *In the Matter of* Springstone Financial, LLC, File No. 2015-CFPB-0021, Consent Order (Aug. 19, 2015).

The CFPB also alleged that Encore Capital engaged in unfair acts or practices by making an excessive number of phone calls at inconvenient times in connection with collecting or attempting to collect debts. The CFPB further alleged that the practices noted above were, in some instances, also in violation of the Fair Debt Collection Practices Act and the Fair Credit Reporting Act.

Encore Capital agreed to pay \$42 million in consumer redress and a \$10 million civil money penalty. Portfolio Recovery Associates agreed to pay \$19 million in consumer redress and an \$8 million civil money penalty.

O. Fifth Third Bank – September 2015 (Marketing)²⁰

Fifth Third Bank (the company) issues credit cards and offered debt protection products as credit card “add-ons.” In a consent order with the company, the CFPB alleged a series of UDAAP violations in connection with the telemarketing sales of debt protection products. The allegedly improper practices in this case are similar to those involved in the numerous other CFPB credit card add-on product enforcement actions (reviewed in earlier surveys and elsewhere in this article).

The CFPB alleged that the following acts or practices in connection with the company’s debt protection products were deceptive:

- during telemarketing calls, failing to adequately inform consumers that they were purchasing a product by:
 - stating that consumers were agreeing to receive information rather than purchasing a product;
 - describing the offer as a “risk-free trial” rather than

an optional product purchased for a fee; and

- confirming enrollment by asking cardholders to verify their “participation” in the debt protection product by providing their date of birth;
- sending an acknowledgment form that implied a form had to be signed and returned to elect to purchase the product, when the consumer’s consent to purchase had already been processed based on the telephone call and the form was not required to be returned to purchase the product;
- misrepresenting the terms and conditions of the product’s benefits by:
 - failing to disclose consumers’ ineligibility for certain benefits after consumers disclosed information indicating their ineligibility (e.g., a person identified as self-employed was not made aware that he/she was ineligible for the product’s employment benefits);
 - failing to disclose that consumers over age seventy were not eligible for the death benefit;
 - stating that certain events were covered when they were not;
 - stating that coverage began immediately when there was a ninety-day waiting period for one benefit (the hospitalization benefit); and
 - sending out-of-date fulfillment kits with incorrect

product benefit descriptions;

- misrepresenting the product’s cost by:
 - stating that a fee would not be incurred if the credit card balance was paid in full before the monthly due date when the balance actually had to be paid in full before the statement cutoff date (billing cycle end date) so that the statement had a zero balance; and
 - sending out-of-date fulfillment kits that included the incorrect unit price (\$0.81 per \$100 instead of \$0.89 per \$100).

The company agreed to pay \$3 million in restitution and a \$500,000 civil money penalty.

P. Westlake Services, LLC and Wilshire Consumer Credit, LLC – September 2015 (Debt Collection)²¹

Westlake Services, LLC purchases and services subprime and near-subprime auto loans; Wilshire Consumer Credit, LLC is a wholly-owned subsidiary of Westlake that extends auto title loans directly to consumers, largely via the internet, and services those loans (the companies).

The CFPB alleged in a consent order with the companies that the following practices were deceptive:

- using “Skip Tracy,” a third party paid service that alters the phone number that appears on Caller ID, to:

20. *In the Matter of Fifth Third Bank*, File No. 2015-CFPB-0025, Consent Order (Sept. 28, 2015).

21. *In the Matter of Westlake Services, LLC*, also doing business as Westlake Financial Services, LLC and Wilshire Consumer Credit, LLC, also doing business as Wilshire Commercial Capital, LLC, File No. 2015-CFPB-0026 (Sept. 30, 2015).

- place or receive calls associated with over 137,000 loan accounts, so that the terms “Repo,” “Repossession Services,” or “Asset Recovery,” among others, would appear in the borrower’s Caller ID and suggest that the call was coming from a repossession company or similar third-party business rather than from Westlake or Wilshire;
- call borrowers and cause phrases such as “Pizza Delivery” and “Flower Shop” to appear on the borrower’s Caller ID, and posing as employees of pizza delivery services or flower shops to entice borrowers to disclose their locations or the locations of their vehicles;
- manipulate the information on the borrower’s Caller ID and to make collection calls appear to originate from a family member or friend of the borrower;
- misrepresenting to borrowers that collectors were employees of investigation departments and threatening to recommend or file criminal charges;
- directing a third party repossession company to make debt collection calls to borrowers, even when repossession was not imminent;
- calling borrowers whose vehicles had already been repossessed and using “Skip Tracy” to make it appear that the calls were coming from a party associated with the word “Storage,” and giving the impression that paying some amount of money (usually less than the full amount due) would enable the borrower to retrieve the car

when, in many instances, borrowers who paid the amounts agreed upon would not have their vehicles released;

- changing the due dates on accounts or extending loan terms without consulting with or even speaking with affected borrowers; and
- advertising a low interest rate but not disclosing the annual percentage rate, also in violation of the Truth in Lending Act and Regulation Z.

The CFPB alleged that the following acts or practices were unfair:

- threatening to contact borrowers’ family members, friends, employers, or references without the borrowers’ permission; and
- contacting borrowers’ family members, friends, employers, or references without borrowers’ prior consent and disclosing information about borrowers’ delinquent debts.

The CFPB further alleged that many of the practices outlined above also violated the Fair Debt Collection Practices Act. The companies agreed to pay \$44.1 million in consumer redress, in the form of approximately \$25.8 million in cash payments and the remainder in balance reductions, and pay a civil money penalty of \$4.25 million.

Q. Global Financial Support, Inc. – October 2015 (Financial Aid Product Servicing)²²

Global Financial Support, Inc., doing business as Student Financial Resource

Center and operated by its owner and CEO (the company), held itself out as providing student financial aid advisory services to aspiring college students. The CFPB alleged in a civil complaint that the company collected fees from consumers but did not actually provide the promised student financial aid services.

The CFPB alleged that the company engaged in deceptive acts or practices by making misleading statements, leading consumers to believe:

- that by submitting an application and paying a fee, they were applying for student financial aid and that the company would submit student aid applications on their behalf, when neither was true;
- the company would conduct searches to match consumers with particular student financial aid opportunities when such searches were not conducted;
- that applications and payment had to be submitted within a deadline or the consumer would miss the company’s financial aid opportunities, when there was not a real deadline; and
- the company was affiliated with the government or particular colleges or universities, when it was not.

The CFPB also alleged that the company failed to provide privacy notices required by Regulation P. The case had not been resolved at the time of this writing.

22. Consumer Financial Protection Bureau v. Global Financial Support, Inc. *et al.*, Case No. 15-cv-2440-GPC-WVG (S.D. Cal. Oct. 29, 2015).

R. Integrity Advance, LLC – November 2015 (Marketing/Debt Collection)²³

The CFPB alleged in an administrative proceeding that Integrity Advance, LLC, a provider of small dollar loans, along with its former chief executive (the company), engaged in unfair and deceptive practices when disclosing the cost of payday loans and withdrawing funds from consumers' accounts. The company's loan documents were alleged to have two key flaws: (1) terms that allowed the company to automatically debit the consumer's account for the finance charge rather than payment in full (thereby rolling over the consumer's payday loan), absent an affirmative request from the consumer that the full payment be made; and (2) terms that allowed the company to automatically deduct funds from consumers' checking accounts via an automated clearing house (ACH) or, if the ACH authorization was revoked, via a remotely-created check.

The CFPB alleged that the following acts or practices were deceptive:

- providing Truth in Lending Act disclosures based on repayment of the loan in a single payment with a single finance charge when, by default, the loan was actually repaid over a series of payments and subject to multiple finance charges, so that the "net impression" of the disclosures resulted in misleading, low statements of the APR and total finance charges; and
- debiting more than the total cost disclosed.

The CFPB alleged that the following acts or practices were unfair:

- providing deceptive or unclear or inadequate disclosures regarding the costs of the loans and withholding complete cost information during the application process; and
- using a hidden, confusing term in the loan agreement as the basis for the consumer's authorization to generate remotely created checks, and to use those remotely created checks to take funds that consumers did not believe they owed, "causing an unexpected loss of funds and precluding consumers from stopping [the] debits."

This case was not resolved at the time of this writing.

S. D and D Marketing, Inc. – December 2015 (Marketing/Information Brokering)²⁴

D and D Marketing, Inc., doing business as T3Leads (the company), provided lead aggregator services to payday and installment lenders and, accordingly, was a service provider to a covered person. The CFPB alleged in a civil complaint that the company and its individual owners engaged in unfair and abusive acts or practices when it failed to perform due diligence on the companies generating leads (lead generators) and on the payday and installment lenders to whom it sold leads (purchasers).

The CFPB alleged that the company engaged in the following unfair acts or practices:

- knowing that its lead generators made statements regarding the purchasing lenders and the loans that they provided that were often false and misleading

(e.g., lead aggregators falsely suggesting it would find loans for consumers with "the best rates or lowest fees");

- failing to vet or monitor the payday and installment lenders purchasing leads for illegal activity;
- when selling leads to data brokers or data managers that then sold leads to third parties, failing to require disclosure of the end purchaser; and
- not notifying consumers that the company was involved in transferring loan application information from lead generators to lead purchasers, and thereby not allowing consumers to investigate or assess the reliability of the lenders purchasing their information.

The CFPB also alleged that the company engaged in the following abusive acts or practices:

- steering consumers to loans with less-favorable terms than loans otherwise available, including less-favorable material risks, costs, or conditions (namely high interest rates, non-compliance with state usury laws, and claimed immunity from state regulation and jurisdiction);
- despite contrary representations by lead generators that they would, among other things, provide the "best rates or lowest fees"; and
- without disclosure; and
- only providing loan terms and links to disclosures of other material terms after consumers are linked to lenders, where the likelihood of consumers reading the disclosures was lessened

23. Integrity Advance, LLC and James R. Carnes, File No. 2015-CFPB-0029, Notice of Charges Seeking Restitution, Disgorgement, Other Equitable Relief, and Civil Money Penalties (Nov. 18, 2015).

24. Consumer Financial Protection Bureau v. D and D Marketing, Inc., *et al.*, Case No. 2:15-cn-9692 (C.D. Cal. Dec. 17, 2015). For a further update, see Adam D. Maarec & John C. Morton, *2016 Survey of Activities Identified as Unfair, Deceptive or Abusive under the Dodd-Frank Act, Part One*, in this issue at Part III.G.

by statements made on the lead generators' website.

The company's individual owners were also held responsible for knowingly and recklessly providing substantial assistance to the company's allegedly unfair and abusive acts or practices. The case was not resolved at the time of this writing.

T. Collecto, Inc. – December 2015 (Debt Collection)²⁵

Collecto, Inc. was a debt buyer that purchased a large portfolio of cell phone-related debt from a large telecommunications company. The CFPB alleged in a civil complaint that Collecto engaged in deceptive acts or practices by:

- implying that it had a reasonable basis to believe debts were owed by consumers by reporting, collecting, and attempting to collect the debts when they either were not owed or were unsubstantiated (despite learning that some information in the portfolio was unreliable); and
- collecting disputed and challenged debt, and reporting disputed and challenged debt as delinquent, even when the company lacked information to believe the debt remained outstanding.

The CFPB also alleged violations of the Fair Credit Reporting Act and Fair Debt Collection Practices Act. Collecto agreed to pay \$743,000 in restitution and a \$1.85 million penalty to settle the alleged violations of law.

U. EZCORP, Inc. – December 2015 (Debt Collection)²⁶

EZCORP, Inc. and its family of companies offered payday and installment loans at over 500 storefront locations in fifteen states. The CFPB alleged in a consent order that the company engaged in improper debt collection practices when collecting its own debts.

The CFPB alleged that the following acts or practices were deceptive:

- making false threats if consumers failed to pay, including that legal action would be taken or was possible, or that additional fees might be incurred;
- falsely representing that:
 - consumers could only revoke their consent for electronic fund transfers by making a payment or setting up a payment arrangement;
 - consumers could only stop debt collection calls by making a payment or setting up a payment arrangement;
 - electronic fund transfers would be made at a specific time on the due date when the transfers were actually conducted at an earlier time;
 - consumers in Colorado could not prepay their installment loans or could not prepay their installment loans without penalty when prepayments were allowed and there were no prepayment penalties; and

- credit checks would not be conducted in connection with loan applications when credit checks were routinely conducted.

The CFPB alleged that the following acts or practices were unfair:

- when an electronic payment was returned, subsequently splitting the electronic payment into three separate but simultaneous payments (each for fifty percent, thirty percent, and twenty percent of the amount due) without adequately disclosing this policy, resulting in a large number of non-sufficient funds bank charges;
- attempting to collect debts in-person at consumers' homes and places of employment, causing injury by:
 - disclosing or risking disclosure of the debt to third parties; or
 - visiting consumers' places of employment when the company knew or should have known personal visitors were not permitted or that the visit was inconvenient; and
- calling third parties without prior consent and:
 - disclosing or risking the disclosure of the debt to third parties; and
 - for reasons other than acquiring location information; and
- calling consumers at work after being told such calls were not allowed.

The CFPB alleged that the company's calls to third parties caused or were likely

26. *In the Matter of EZCORP, Inc. et al*, File No. 2015-CFPB-0031, Consent Order (Dec. 16, 2015). A CFPB bulletin regarding in-person debt collection was issued simultaneously, as discussed *infra* at Part VI.

25. *Consumer Financial Protection Bureau v. Collecto, Inc.*, d/b/a EOS CCA, Case No. 1:15-cv-14024 (D. Mass. Dec. 7, 2015).

to cause substantial injuries, including humiliation, reputational damage, and other negative consequences at work.

The CFPB also alleged violations of the Electronic Fund Transfer Act's and Regulation E's prohibition on the compulsory use of preauthorized electronic fund transfers as a condition to the issuance of credit. The company agreed to pay \$7.5 million in restitution and a \$3 million civil money penalty to settle the alleged violations of law.

V. Interstate Auto Group, Inc., d/b/a "CarHop" and Universal Acceptance Corporation – December 2015 (Marketing/Credit Reporting)²⁷

Interstate Auto Group, Inc. (CarHop) is a "buy-here, pay-here" motor vehicle dealer, meaning that the company, through its affiliated financing company, Universal Acceptance Corporation, both sells cars and originates and services auto loans. The company specifically markets its credit product as a way to build credit by promising consumers that it will provide positive payment histories to the credit reporting agencies. The two companies had been reporting consumer account information to the three major credit reporting agencies on a monthly basis. However, the CFPB alleged in a consent order that the companies furnished inaccurate information to the credit reporting agencies, resulting in damage to consumers' credit histories.

The CFPB alleged that CarHop and Universal Acceptance engaged in deceptive acts or practices by representing to consumers in written marketing materials that it reports "good credit," *i.e.*, positive payment histories, to the credit reporting agencies and, therefore, that it helped consumers build good credit, when, in fact, from January 2009 to December 2015, the companies did not furnish, or have controls to ensure that they furnished,

certain positive consumer information for tens of thousands of consumers.

The companies agreed to pay a \$6.465 million civil money penalty.

W. Lead Publisher – December 2015 (Marketing/Information Brokering)²⁸

Lead Publisher (the company) was a lead aggregator that sourced payday loan leads from online lead generators and sold them for eventual distribution to payday lenders. The CFPB alleged in a consent order that the company engaged in reckless conduct when it entered transactions to sell significant amounts of consumer loan application information to other companies (purchasers). As previously reported, one of those purchasers, Universal Debt Solutions, Inc., was subject to a prior lawsuit filed by the CFPB in March 2015 for alleged UDAAP violations stemming from online payday loan activities (that action is summarized in an earlier survey²⁹).

The CFPB alleged that the company recklessly provided substantial assistance to Universal Debt Solutions, Inc.'s alleged UDAAP violations when it sold consumer information without conducting reasonable diligence to detect warning signs of the purchaser's unlawful conduct. The CFPB indicated that the company failed to verify whether the purchaser offered a legitimate product or service, and did not inquire about the purchaser's policies or practices, legal compliance, or licensing. The company's assistance appeared to be substantial because the purchaser could not have engaged in its allegedly unlawful conduct absent the company's provision of information.

The company settled the CFPB's allegations by disgorging \$21,151 and agreeing to be permanently banned from offering or providing consumer financial products and services.

IV. Updates on Past Cases

A. Frederick J. Hanna & Associates, P.C.³⁰

A previous article reported that the CFPB had filed a civil complaint in July 2014 against the law firm of Frederick J. Hanna & Associates, P.C. and its three principal partners (the firm).³¹ The complaint alleged that the firm operated as a debt collection "lawsuit mill" engaging in deceptive acts or practices in the course of its debt collection activities by preparing and filing complaints without "meaningful attorney involvement" and using affidavits that were executed by persons who lacked personal knowledge of the facts contained in them.

In December 2015 the parties entered a settlement with the CFPB and agreed to pay a civil money penalty of \$3.1 million.

B. Corinthian Colleges³²

A previous article reported that the CFPB had filed a civil complaint in September 2014 against Corinthian Colleges, Inc. for allegedly "luring tens of thousands of students into taking out private loans...to cover expensive tuition costs by advertising bogus job prospects and career services."³³ As reported, in November 2014 the ECMC Group negotiated an agreement with the U.S. Department of Education and the CFPB whereby it acquired a number of Corinthian-affiliated campuses and, in connection with the acquisition, paid hundreds of millions of dollars in loan forgiveness to Corinthian student loan borrowers. On May 4, 2015, Corinthian filed for Chapter 11 bankruptcy and an order confirming a liquidation plan

27. *In the Matter of Interstate Auto Group, Inc.*, also doing business as "CarHop," and Universal Acceptance Corporation, No. 2015-CFPB-0032, Consent Order (Dec. 16, 2015).

28. *In the Matter of Eric V. Sancho d/b/a Lead Publisher*, File No. 2015-CFPB-0033, Consent Order (Dec. 17, 2015).

29. See Maarec & Morton, *supra* note 2, at 22 - 23.

30. Consumer Financial Protection Bureau v. Frederick J. Hanna & Associates, P.C., Frederick J. Hanna, individually, Joseph C. Cooling, individually, and Robert A. Winter, individually, Civ. No. 1:14-cv-02211-AT (N.D. Ga., Dec. 28, 2015).

31. See Adam D. Maarec & John C. Morton, *Survey of Activities Identified as Unfair, Deceptive or Abusive under the Dodd-Frank Act: July 1, 2014 Through December 31, 2014*, 68 Consumer Fin. L.Q. Rep. 421, 422 (2014).

32. Consumer Financial Protection Bureau v. Corinthian Colleges, Inc. *et al.*, Civ. No. 1:14-cv-07194 (N.D. Ill., Oct. 27, 2015).

33. See Maarec & Morton, *supra* note 31, at 425.

was entered by the bankruptcy court on August 28, 2015. Corinthian's counsel withdrew from the CFPB case and a default judgment was entered against Corinthian on October 27, 2015. The court held that, based on the well-pled allegations in the CFPB's complaint (which were taken as true), Corinthian:

- engaged in deceptive acts or practices by misrepresenting career prospects and career services available to students and prospective students in order to induce them to enter into loans; and
- engaged in unfair acts or practices causing substantial injury to loan borrowers by pressuring students to pay loans by:
 - barring or pulling them from class;
 - withholding educational resources, and
 - otherwise preventing them from gaining access to educational courses or materials for which they had already paid.

A judgment for equitable money relief was entered in favor of the CFPB in the amount of \$531,224,267.

C. Cash Call, Inc.³⁴

As previously reported, the CFPB filed a civil complaint in December 2013 against CashCall, Inc. alleging that 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.³⁵ The CFPB's UDAAP al-

legations were based on the company's actions in servicing and collecting debts that were void under state law.³⁶

CashCall filed a motion for judgment on the pleadings in November 2015, arguing that the CFPB's UDAAP allegations should be dismissed because they were predicated solely upon violations of state law and that the agency was attempting to establish a usury limit, which is prohibited by statute. The court denied CashCall's motion, finding that the company's alleged conduct in collecting payments on debt that consumers did not actually owe fell within the broad range of conduct covered by the federal UDAAP prohibition, and that prohibiting such conduct did not amount to the establishment of a usury limit.

V. CFPB Supervisory Highlights

The CFPB periodically issues Supervisory Highlights reports that summarize its supervisory activity over a period of time. The CFPB's Fall 2015 Supervisory Highlights³⁷ report identified the following UDAAP issues in the student loan servicing industry, which have been observed in the course of the CFPB's examination work and not otherwise publicly disclosed in enforcement actions:

- Payment allocation: As noted in previous CFPB Supervisory Highlights reports (and noted in a previous article³⁸), the CFPB has observed unfair practices in the allocation of partial payments. Specifically, the CFPB notes that unfairness occurs when student loan borrowers are not given a choice as to how partial payments will be allocated among multiple outstanding student loans and allocating them, by default,

proportionally across all loans in a manner that results in higher late fees.

- Payment processing:
 - Unfairness may occur if automatic debits are deducted early and injury results in the form of overdraft or insufficient funds fees.
 - Unfairness also may occur if an automatic debit is scheduled on a day that the processing bank is closed and, as a result, the payment date is delayed and the balance continues to accrue interest for some additional amount of time. The CFPB concluded that failing to credit the accrued interest after the scheduled payment date to the customer's account and not informing the customer of these additional costs was unfair and directed a student lender to stop this practice.

VI. CFPB Guidance – In-Person Collection of Consumer Debt³⁹

The CFPB issued a bulletin that outlines potentially unfair acts or practices in connection with in-person debt collection visits, including to a consumer's workplace or home.⁴⁰ The CFPB has found that substantial injury to consumers can arise when in-person collection visits result in third parties learning that a consumer may have debts in collection. Specifically, it could harm a consumer's reputation and result in negative employment consequences.

Even when the in-person visit does not pose a risk of disclosing

34. *Consumer Financial Protection Bureau v. CashCall, Inc.*, Case No. 2:15-cv-07522-JFW-RAO (C.D. Cal. Dec. 30, 2015).

35. See Adam D. Maarec & John C. Morton, *A Survey of Activities Identified as Unfair, Deceptive or Abusive by the CFPB*, 68 Consumer Fin. L.Q. Rep. 19, 25 (2014).

36. *Id.*

37. CFPB Supervisory Highlights, Issue 9 (Fall 2015), available at http://files.consumerfinance.gov/f/201510_cfpb_supervisory-highlights.pdf.

38. See Maarec & Morton, *supra* note 31, at 430.

39. CFPB Bulletin 2015-07 (Dec. 16, 2015), available at: http://files.consumerfinance.gov/f/201512_cfpb_compliance-bulletin-in-person-collection-of-consumer-debt.pdf (last visited Dec. 30, 2015).

40. *Id.*

the existence of the debt in collections to third parties, injury to consumers may result when a collector goes to a consumer's place of employment, where personal visitors are prohibited, resulting in negative employment consequences. Additionally, in-person visits are likely to cause substantial injury to consumers

when the likely or actual consequence of the visits is to harass the consumer.

VII. Other Litigation

A series of private lawsuits have been filed by individuals against financial institutions alleging that their

conduct violates the Dodd-Frank Act's prohibition of unfair, deceptive or abusive acts or practices. In each of these cases, the courts held that a private right of action does not exist to enforce the federal prohibition of unfair, deceptive, or abusive acts or practices.⁴¹

41. *See* *Nguyen v. Ridgewood Sav. Bank*, No. 14-CV-1058 MKB, 2015 WL 2354308, at 11 (E.D.N.Y. May 15, 2015) ("Plaintiffs provide no statutory basis, and the Court can find none, for finding a private right of action under these provisions of the statute [Sections 5531, 5536(a), 5563 and 5565 of the Consumer Financial Protection Act], which outline duties, authorities and enforcement powers of the CFPB."); *Diaz v. Argon Agency Inc.*, No. CV 15-00451 JMS-BMK, 2015 WL 7737317, at 3 (D. Haw. Nov. 30, 2015) ("there is no private right of action under these provisions of the CFPA, which merely outline duties, authorities and enforcement powers of the CFPB."); *Beider v. Retrieval Master Creditors Bureau, Inc.*, No. 14CV6563DRHARL, 2015 WL 7454119, at *5 (E.D.N.Y. Nov. 24, 2015) ("The Court is not aware of any language of Dodd-Frank explicitly providing for a private cause of action for unfair, deceptive, or abusive acts or practices. *See* 12 U.S.C. § 5531. Moreover, courts have commonly declined to read private causes of action into provisions of Dodd-Frank that do not explicitly provide for them. *Regnante v. Sec. Exchange Officials*, 2015 WL 5692174, at 7 (S.D.N.Y. Sept. 28, 2015) (collecting cases); and *Pittman v. Seterus, Inc.*, No. 3:14-CV-3852-M (BF), 2015 WL 744108, at *3 (N.D. Tex. Oct 28, 2015) ("The [Plaintiff's] claim resting on this statute [authorizing the CFPB to take action for a UDAAP violation (Section 5531(a) of the CFPA)] must fail, because they are not bringing this suit in the name of or on behalf of the Consumer Financial Protection Bureau.").

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

PEOPLE OF THE STATE OF ILLINOIS,	)	
by LISA MADIGAN, ILLINOIS ATTORNEY	)	
GENERAL,	)	
	)	
Plaintiff,	)	
	)	No. 14 C 2783
v.	)	
	)	Judge Sara L. Ellis
CMK INVESTMENTS, INC. d/b/a ALL	)	
CREDIT LENDERS, an Illinois Corporation, ¹	)	
	)	
Defendant.	)	

OPINION AND ORDER

This is a case brought for and on behalf of the People of the State of Illinois by Lisa Madigan, the Illinois Attorney General (“Plaintiff”) to remedy alleged violations of the Illinois Consumer Fraud and Deceptive Business Practices Act (“ICFA”), 815 Ill. Comp. Stat. 505/1 *et seq.*, and the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”), 12 U.S.C. § 5301 *et seq.*, by Defendant CMK Investments, Inc., d/b/a All Credit Lenders (“All Credit Lenders”). Plaintiff alleges that All Credit Lenders offers an unfair revolving line of credit product and engages in unfair, abusive, and deceptive practices in connection with that product. Before the Court is All Credit Lenders’ motion to dismiss. Because the Court finds that the claims are not barred by *res judicata* or by the disclosures that accompanied the loan agreement, the motion to dismiss [13] is denied.

¹ The Defendant has been incorrectly identified as “CMK Investments, Inc. d/b/a All Credit Lenders, Inc.” The Court reforms the caption to exclude the “Inc.” from the d/b/a name.

BACKGROUND²

I. Consumer Finance Regulations

Both federal and state law provide protections for consumers obtaining credit from an entity like All Credit Lenders. The Truth in Lending Act (“TILA”) and its implementing regulation, Regulation Z, provide that certain disclosures must be made for all open-end credit products. Open-end credit is defined as

consumer credit extended by a creditor under a plan in which:

- (i) The creditor reasonably contemplates repeated transactions;
- (ii) The creditor may impose a finance charge from time to time on an outstanding unpaid balance; and
- (iii) The amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid.

12 C.F.R. § 226.2(a)(20). Additionally, the Dodd-Frank Act makes it unlawful for a creditor to provide a consumer with a financial product that violates federal consumer financial law and to engage in any unfair, deceptive, or abusive act or practice. 12 U.S.C. § 5536(a). Abusive acts or practices are those that

- (1) materially interfere[] with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
- (2) take[] unreasonable advantage of—

² The facts in the background section are taken from Plaintiff’s complaint and exhibits attached thereto and are presumed true for the purpose of resolving All Credit Lenders’ motion to dismiss. *See Virnich v. Vorwald*, 664 F.3d 206, 212 (7th Cir. 2011); *Local 15, Int’l Bhd. of Elec. Workers, AFL-CIO v. Exelon Corp.*, 495 F.3d 779, 782 (7th Cir. 2007). A court normally cannot consider extrinsic evidence without converting a motion to dismiss into one for summary judgment. *Hecker v. Deere & Co.*, 556 F.3d 575, 582–83 (7th Cir. 2009). Where a document is referenced in the complaint and central to plaintiff’s claims, however, the Court may consider it in ruling on the motion to dismiss. *Id.* The Court may also take judicial notice of matters of public record. *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1080–81 (7th Cir. 1997).

(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 to act in the interests of the consumer.

12 U.S.C. § 5531(d). The Consumer Financial Protection Bureau (“CFPB”) is one of the agencies charged with enforcing the Dodd-Frank Act.

Illinois has several statutes regulating consumer loans. In 2005, Illinois enacted the Payday Loan Reform Act. A “payday loan” is a loan where the finance charge exceeds an annual percentage rate of 36% and the term does not exceed 120 days. 815 Ill. Comp. Stat. 122/1-10. The Consumer Installment Loan Act (“CILA”), 205 Ill. Comp. Stat. 670/1 *et seq.*, was amended in 2010 to regulate “small consumer loans,” which are loans “upon which interest is charged at an annual percentage rate exceeding 36% and with an amount financed of \$4,000 or less.” 205 Ill. Comp. Stat. 670/15(b). Lenders licensed under CILA cannot also obtain a license under the Payday Loan Reform Act; they must choose whether they want to provide loans under one statute or the other. But a lender licensed under CILA may also make certain open-ended loans pursuant to the Illinois Financial Services Development Act (“FSDA”), 205 Ill. Comp. Stat. 675/1 *et seq.* Unlike other lenders under the FSDA, CILA licensees are capped at charging 36% interest on any open-end credit products offered under the FSDA. 205 Ill. Comp. Stat. 675/3(a).

II. All Credit Lenders’ Revolving Credit Plan

Since 1999, All Credit Lenders has offered short-term consumer loan products. Prior to 2011, All Credit Lenders was licensed under CILA. In January 2011, before the 2010 changes to

CILA and the FSDA went into effect, All Credit Lenders applied for a license under the Payday Loan Reform Act, which it received in April 2011. Shortly thereafter, All Credit Lenders returned that license to the Illinois Department of Financial Institutions, opting instead to maintain its CILA license.

In March 2011, All Credit Lenders introduced a new open-end credit product, the Revolving Credit Plan. The Revolving Credit Plan is typically for an amount between \$100 and \$2,000. Consumers are given two forms: an agreement and disclosure form, as well as a billing cycle schedule. The disclosed interest rate varies between 18% and 24%. The consumer is also required to pay an account protection fee. The account protection fee provides that the consumer will not be charged the account protection fee or interest for a period of up to twelve months if the consumer becomes unemployed or loses his or her government benefits. Certain restrictions apply, including that the account must be current before the benefit takes effect. In those agreements where the disclosed annual percentage rate is 18%, the account protection fee is at least \$10 for every \$50 of the consumer's outstanding balance, payable every billing cycle (i.e. every two weeks). For example, a consumer with an outstanding balance of \$800 would pay All Credit Lenders an account protection fee of \$160 every two weeks in addition to any daily interest that has accrued at the 18% rate. In those agreements where the disclosed annual percentage rate is 24%, the account protection fee is either \$11 or \$15 for every \$50 of the consumer's outstanding balance.

The agreement provides that the minimum payment for each billing cycle is "the total interest charged for the billing cycle plus the Account Protection Fee and paper billing fee if any." Ex. 1 to Compl. at 2. In bold letters, the agreements further states, "**PLEASE NOTE: if you only pay your minimum payment, you will not pay down your principal balance.**" *Id.*

Suggestions are made as to how to pay down the principal balance, which include making payments before due dates and in amounts greater than the minimum payment.

In connection with signing the agreement, consumers receive a billing cycle schedule that provides payment dates typically corresponding with employment pay dates for one year. Consumers are directed to make a payment at All Credit Lenders' stores on each payment due date. When a consumer asks what the payment amount is, the consumer is quoted the minimum payment amount, which includes only interest and the account protection fee. All Credit Lenders' agents do not inform consumers that the amount covers only interest and fees and not principal, leading consumers to believe that they are paying down principal in addition to interest. Moreover, the billing cycle schedule suggests to consumers that if payment is made on each listed date, the loan will be paid off. But if only the minimum payment is made on each listed payment date, consumers never pay off their loans.

III. Consumer Illustrations

Plaintiff has provided several examples of consumers who have obtained credit through All Credit Lenders' Revolving Credit Plan. In November 2012, Cheryl Wooden-Wolf met with an All Credit Lenders agent about obtaining a loan to help pay her bills. She entered a Revolving Credit Plan agreement with All Credit Lenders for \$450 on November 21, 2012, believing that she was taking out a loan in which the entire proceeds would be fully repaid through a fully amortizing payment schedule by a specified end date. When she asked for the total pay-off amount, the agent told Wooden-Wolf that she would have to pay \$101 every two weeks. In connection with this representation, Wooden-Wolf received a schedule of billing cycle dates that began in December 2012, with November 22, 2013 as the last listed date. The loan agreement specified an annual percentage rate of 24% interest, but she was also charged an

account protection fee of \$11 for every \$50 borrowed. All Credit Lenders' agent did not explain the nature or amount of the account protection fee to Wooden-Wolf when she signed the agreement. The first few times a payment was due, Wooden-Wolf paid the amount she was told to pay, believing she was paying both principal and interest. After making approximately four payments, she realized her principal balance had not decreased. Thus, in February 2013, she paid \$553.50 to pay off the remaining balance of her loan, having made payments totaling approximately \$900 over a three month period on a \$450 loan. If she had paid only the disclosed 24% interest rate on her loan over that time, she would have paid \$27 in interest.

As another example, Loralty Harden entered a Revolving Credit Plan agreement with All Credit Lenders in November 2011 for \$100 at a stated interest rate of 18%. The agreement included an account protection fee of \$15 on every \$50 borrowed. In March or April 2012, Harden paid the outstanding balance and received an additional \$100 from All Credit Lenders. In July 2012, she learned that her outstanding balance on this additional \$100 was not decreasing despite the fact that she had made payments as directed by All Credit Lenders' agents. Upon inquiry, the agent explained the account protection fee and its purpose to protect her in case she became unemployed. As Harden was retired and received monthly disability and social security benefits, she explained to the agent that the account protection fee did not apply to her. After Harden filed a complaint with the Illinois Attorney General's Office, All Credit Lenders agreed to stop collection on the agreement if she paid \$50. She did this in January 2013.

IV. Prior Investigations into All Credit Lenders' Practices

In July 2012, the Illinois Department of Financial and Professional Regulation (the "IDFPR"), which is charged with regulating lenders licensed under CILA, served All Credit Lenders with two Notices of Intent to Fine. These Notices alleged certain CILA violations,

including improper interest calculations, with respect to All Credit Lenders' Revolving Credit Plan product. An administrative hearing was scheduled on the Notices for October 2012. In October and November 2012, All Credit Lenders also received Notices of Exceptions from the IDFPR, which listed additional alleged violations of CILA, including that the annual percentage rate was not accurately disclosed, that All Credit Lenders was engaged in subterfuge to avoid CILA, that the stated periodic interest rate was incorrect, and that All Credit Lenders imposed fees or charges on the consumer that were not authorized by CILA. All Credit Lenders responded, arguing that the loans at issue were not governed by CILA but rather by the FSDA and that all charges were correct and appropriately disclosed in accordance with TILA. Moreover, All Credit Lenders argued that the IDFPR did not have authority to regulate loans made pursuant to the FSDA. Nevertheless, the IDFPR pursued the allegations by issuing All Credit Lenders five Notices of Intent to Fine in December 2012 and January 2013. Administrative hearings were scheduled on these five Notices for May 2013. In February 2013, the parties entered into a settlement of the first two Notices and the matters were "removed from the call pursuant to a settlement agreement." Ex. 1 to Pl.'s Resp. The remaining five Notices were withdrawn in April 2013.³

LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of the complaint, not its merits. Fed. R. Civ. P. 12(b)(6); *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990). In considering a Rule 12(b)(6) motion to dismiss, the Court accepts as true all well-pleaded facts in the plaintiff's complaint and draws all reasonable inferences from those facts in the plaintiff's favor. *AnchorBank, FSB v. Hofer*, 649 F.3d 610, 614 (7th Cir. 2011). To survive

³ No settlement agreement or order removing these five Notices from the administrative call has been submitted to the Court.

a Rule 12(b)(6) motion, the complaint must not only provide the defendant with fair notice of a claim's basis but must also be facially plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

ANALYSIS

I. *Res Judicata*

All Credit Lenders first argues that Plaintiff's claims should be dismissed because they are barred by *res judicata*. *Res judicata* is an affirmative defense but may be considered under Rule 12(b)(6) where the plaintiff has through the allegations in her complaint pleaded herself out of court. *Muhammad v. Oliver*, 547 F.3d 874, 878 (7th Cir. 2008). The Court applies Illinois law on *res judicata* because All Credit Lenders seeks to give preclusive effect to proceedings that occurred in an Illinois administrative agency. *See Chicago Title Land Trust Co. v. Potash Corp. of Sask. Sales Ltd.*, 664 F.3d 1075, 1079 (7th Cir. 2011). *Res judicata* applies here if (1) the identity of the parties or their privies is the same in this suit as in the administrative proceedings, (2) the claims in this and the administrative proceedings are the same, and (3) there were final judgments on the merits in the administrative proceedings. *Id.* All Credit Lenders bears the burden of proving that *res judicata* applies. *Rooding v. Peters*, 92 F.3d 578, 580 (7th Cir. 1996).

All Credit Lenders' argument fails on the third requirement and thus the Court need not consider the other two. Although IDFPF investigated All Credit Lenders in 2012 and 2013 and agreed to resolve certain citations on issues similar to those raised here, those resolutions were

not final judgments on the merits for *res judicata* purposes. “[R]es judicata cannot operate in the absence of a judgment.” *Carver v. Nall*, 172 F.3d 513, 515 (7th Cir. 1999). Although All Credit Lenders argues that the administrative actions involving the seven Notices of Intent to Fine were all dismissed with prejudice, the Court has been presented with an order indicating that two of the Notices set for hearing before an administrative law judge were “removed from the call pursuant to a settlement agreement,” Ex. 1 to Pl.’s Resp., and that the remaining five Notices were to be “withdrawn” by IDFPR, Ex. J to Def.’s Mem. These documents show only that the administrative proceedings were settled, that the notices were withdrawn, and that no judgment or finding was ever made by the IDFPR or the administrative law judge.⁴ See *Carver*, 172 F.3d at 515 (finding that there was no administrative determination or judgment where the union settled an administrative case before the Illinois State Labor Relations Board, after which the charges brought before it were withdrawn); *Bernhardt v. Fritzshall*, 293 N.E.2d 650, 655, 9 Ill. App. 3d 1041 (1973) (“A withdrawal means only that the petition is withdrawn from the court’s consideration, and certainly connotes nothing more than a voluntary dismissal which is not a bar to further proceedings. A dismissal with prejudice denotes an adjudication on the merits and is Res judicata.”). Although there was a settlement agreement, at least with respect to two of the Notices, “[a] settlement agreement that has not been integrated into a consent decree is not a judgment and cannot trigger *res judicata*.” *Carver*, 172 F.3d at 515; cf. *4901 Corp. v. Town of Cicero*, 220 F.3d 522, 529 (7th Cir. 2000) (“[U]nder Illinois law a settlement agreement that a state court adopts and incorporates, like the agreement here, is the equivalent of a consent decree. As such, it operates to the same extent for *res judicata* purposes as a judgment entered after contest and is conclusive with respect to the matters which were settled by the judgment or

⁴ All Credit Lenders argues in reply that removal from the call is “IDFPR speak for dismissal.” Def.’s Reply at 9. But All Credit Lenders provides no support for this assertion.

decree.” (citations omitted) (internal quotation marks omitted)). Because there is no administrative determination to which preclusion may apply, Plaintiff’s claims are not barred by IDFP’s previous investigation of All Credit Lenders. *See Carver*, 172 F.3d at 515 (“No preclusion doctrines, statutory or common law, operate in the absence of an underlying judgment or administrative finding. Illinois, like every other jurisdiction of which we are aware, requires at a minimum an administrative determination before it will apply preclusion doctrines.”). Thus, the Court will proceed to examine the sufficiency of Plaintiff’s allegations.

II. Sufficiency of Plaintiff’s Allegations

Plaintiff seeks relief on behalf of Illinois citizens under both ICFA and the Dodd-Frank Act, arguing that All Credit Lenders has engaged in unfair and deceptive business practices in offering the Revolving Credit Plan. Plaintiff alleges that All Credit Lenders misrepresents the true cost and nature of the Revolving Credit Plan, suggesting that the amount a consumer obtains from All Credit Lenders under the Revolving Credit Plan can be paid off in a year by making payments in the amounts told to them by All Credit Lenders agents and on the dates on the schedule given to them. This, however, is not possible, as the minimum payment amount consists only of accrued interest and the account protection fee, and thus repayment is a never-ending cycle. Plaintiff also complains that All Credit Lenders is charging interest above the allowed 36% maximum by couching interest as an account protection fee, which is of no actual benefit to some consumers and is of no benefit to other consumers in relationship to its cost.

All Credit Lenders argues that Plaintiff’s claims must be dismissed because the Revolving Credit Plan agreement discloses that the minimum payment covers only interest and the account protection fee and does not affect the principal. All Credit Lenders also contends that its practices with respect to the account protection fee are not unfair or deceptive because

they comply with TILA's disclosure requirements and nothing more is required. The Court will address these arguments separately.

A. Minimum Payment

First, All Credit Lenders argues that its disclosures in the Revolving Credit Plan agreements regarding the minimum payment bar any claims based on misrepresentations regarding the effect of making payments as directed by All Credit Lenders' agents and whether making the minimum payment in accordance with the provided repayment schedule would allow the loan to be paid off by the last date listed on that schedule. The Revolving Credit Plan agreement states that the "total minimum payment will be the total interest charged for the billing cycle plus the Account Protection Fee and paper billing fee if any." Ex. 1 to Compl. at 2. The agreement continues, in bold letters, "**PLEASE NOTE: if you only pay your minimum payment, you will not pay down your principal balance.**" *Id.* The following acknowledgment is included above the signature block:

By signing this Agreement, Borrower acknowledges that he/she has/have read, understand(s), that this Agreement was completed prior to signing and that Borrower has received an executed copy of the Agreement in English and in the language in which the Agreement was negotiated. Borrower has received a completed copy of this agreement and has all disclosure information. This Agreement constitutes the entire Agreement between the parties and no representations, warranties, promises whether oral or implied have been made by either party.

Ex. 1 to Compl. at 7. All Credit Lenders argues that these disclosures undermine any misrepresentation claim regarding minimum payments and the time it would take to pay off the initial amount a consumer borrowed.

Illinois law provides that parties to a contract are "charged with knowledge of and assent to a signed agreement." *Johnson v. Orkin, LLC*, 928 F. Supp. 2d 989, 1007 (N.D. Ill. 2013). The fact that a consumer may not have read the Revolving Credit Plan agreement, which disclosed

that the minimum payment covers only interest and the account protection fee, does not negate the fact that this information was disclosed to the consumer; such knowledge is charged to the consumer as a result of the consumer's signature on the agreement. *Breckenridge v. Cambridge Homes, Inc.*, 616 N.E.2d 615, 620, 246 Ill. App. 3d 810, 186 Ill. Dec. 425 (1993) ("A party who has had an opportunity to read a contract before signing, but signs before reading, cannot later plead lack of understanding."). A claim of "fraud is, in most situations, unavailable to avoid the effect of the written agreement where the complaining party could have discovered the fraud by reading the instrument, and was in fact afforded a full opportunity to do so." *Belleville Nat'l Bank v. Rose*, 456 N.E.2d 281, 284, 119 Ill. App. 3d 56, 74 Ill. Dec. 779 (1983). The *Belleville* court suggested, however, that a great disparity in bargaining power and sophistication may constitute an exception to this general rule. *Id.* at 285; *see also Am. Sav. Ass'n v. Conrath*, 462 N.E.2d 849, 854, 123 Ill. App. 3d 140 (1984) ("Absent circumstances indicating a manifest inequality between the respective parties, one who is aware of the nature and character of the instrument one is signing cannot subsequently avoid the terms of the instrument by claiming that he or she was deceived by representations outside the instrument itself.").

Here, Plaintiff alleges that All Credit Lenders actively misled consumers with respect to the effect of the payments they were making. She claims the Revolving Credit Plan was aimed at vulnerable consumers, suggesting an inequality in position between the borrower and the lender. But more importantly for the purpose of this motion to dismiss, Plaintiff is not seeking to recover against All Credit Lenders under a common law fraud theory, which would require proof of reliance, but rather for abusive and deceptive practices under ICFA and the Dodd-Frank Act. ICFA does not require a showing of reliance. *Davis v. G.N. Mortg. Corp.*, 396 F.3d 869, 883 (7th Cir. 2005). As a result, some courts have found that an ICFA claim for alleged

misrepresentations may proceed notwithstanding the fact that these misrepresentations were contradicted by the terms of a contract. *See Cozzi Iron & Metal, Inc. v. U.S. Office Equip., Inc.*, 250 F.3d 570, 576–77 (7th Cir. 2001) (although common law fraud claim was barred because plaintiff could not show it relied on oral representations different from contract terms, ICFA claim could proceed past motion to dismiss based on the same facts because reliance is not a required element of an ICFA claim); *Paterson v. Wells Fargo Bank, N.A.*, No. 11 C 7954, 2012 WL 4483525, at *5 (N.D. Ill. Sept. 27, 2012) (allowing ICFA claim to proceed despite fact that alleged misstatements conflicted with terms of contract); *Duffy v. Ticketreserve, Inc.*, 722 F. Supp. 2d 977, 991 n.10 (N.D. Ill. 2010) (“[B]ecause reasonable reliance is not a pleading requirement to state a claim under the Illinois Consumer Fraud Act, the existence of contradictory contractual language does not necessarily undermine Plaintiffs’ facially adequate pleading.”). *But see RBS Citizens, N.A. v. Sanyou Import, Inc.*, No. 11 C 1820, 2011 WL 2712744, at *2 (N.D. Ill. July 13, 2011) (dismissing ICFA claim “based on misrepresentations that conflict with the terms revealed within the very loan documents signed”); *Bank of Am., N.A. v. Shelbourne Dev. Grp., Inc.*, 732 F. Supp. 2d 809, 826 (N.D. Ill. 2010) (“Shelbourne cannot state an ICFA claim based on terms that are revealed within the very loan documents that it signed.”). Following *Cozzi*, that All Credit Lenders’ agreements disclosed the effect of making minimum payments does not bar Plaintiff’s claim that All Credit Lenders violated ICFA by actively misrepresenting the effect of the payments they were telling consumers to make. Similarly, guidance from the CFPB on what constitutes a deceptive practice suggests that Plaintiff’s Dodd-Frank Act claim may proceed, as the CFPB Supervision and Examination Manual provides that “[w]ritten disclosures may be insufficient to correct a misleading statement or representation, particularly where the consumer is directed away from qualifying limitations

in the text or is counseled that reading the disclosures is unnecessary.” CFPB Supervision and Examination Manual, at UDAAP 5 (ver. 2 Oct. 2012), http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf. Thus, the Court will allow Plaintiff to proceed with these claims.

B. Account Protection Fee

All Credit Lenders also argues that Plaintiff’s claims regarding the account protection fee should be dismissed because All Credit Lenders has complied with TILA’s disclosure requirements. According to All Credit Lenders, TILA compliance forecloses any relief Plaintiff might obtain under ICFA or the Dodd-Frank Act. More specifically, All Credit Lenders maintains that TILA and Regulation Z require it to disclose interest and charges for debt suspension coverage separately, meaning that the account protection fee cannot be defined as interest under the FSDA, as Plaintiff contends. According to All Credit Lenders, the account protection fee qualifies as “debt suspension coverage,” for it “provides for suspension of the obligation to make one or more payments on the date(s) otherwise required by the credit agreement, when a specified event occurs.” CFPB Official Interpretation to 12 C.F.R. § 1026.4(b)(10). Interest and required debt suspension coverage are identified as separate components of the finance charge under TILA. 12 C.F.R. § 1026.4(b)(1), (10).

Plaintiff does not contend that All Credit Lenders violated TILA’s disclosure requirements. Consequently, All Credit Lenders maintains that its compliance with TILA is a defense to Plaintiff’s ICFA and Dodd-Frank Act claims. It is well-established under Illinois law that “compliance with the disclosure requirements in the federal Truth in Lending Act is a defense under [ICFA].” *Hoffman v. Grossinger Motor Corp.*, 218 F.3d 680, 684 (7th Cir. 2000); *Lanier v. Assocs. Fin., Inc.*, 499 N.E.2d 440, 447, 114 Ill. 2d 1, 101 Ill. Dec. 852 (1986)

(“[U]nder section 10b(1) of the Consumer Fraud Act, the defendant’s compliance with the disclosure requirements of the Truth in Lending Act is a defense to liability under the Illinois Consumer Fraud Act in the present case.”). All Credit Lenders also contends that only disclosures that violate TILA are actionable under the Dodd-Frank Act’s provision outlawing unfair, deceptive, or abusive acts or practices.

Compliance with TILA’s disclosure requirements does not absolve All Credit Lenders from liability under ICFA or the Dodd-Frank Act if its account protection fee is otherwise unfair, deceptive, or abusive, however. *See, e.g., Jenkins v. Mercantile Mortg. Co.*, 231 F. Supp. 2d 737, 752 (N.D. Ill. 2002) (“The Illinois Supreme Court in *Lanier* held only that, where TILA was implicated and the defendant was in compliance, Illinois law does not impose greater disclosure requirements than those mandated by federal law. The *Lanier* court did not hold . . . that merely because a party does not violate a federal law, it does not violate ICFA.”); CFPB Supervision and Enforcement Manual, at UDAAP 10 (“[A] transaction that is in technical compliance with other federal or state laws may nevertheless violate the prohibition against [unfair, deceptive, or abusive acts and practices]. For example, an advertisement may comply with TILA’s requirements, but contain additional statements that are untrue or misleading, and compliance with TILA’s disclosure requirements does not insulate the rest of the advertisement from the possibility of being deceptive.”). Plaintiff contends that the account protection fee is unfair, deceptive, and abusive because it should be considered interest under the FSDA and thus the Revolving Credit Plan charges interest above the FSDA’s 36% limit on interest and because the account protection fee is not beneficial to consumers. These allegations do not rest on the sufficiency of All Credit Lenders’ disclosures, and thus All Credit Lenders’ compliance with TILA is not necessarily a bar to moving forward with them.

Nonetheless, All Credit Lenders maintains that TILA's distinction between interest and debt suspension coverage controls and that the account protection fee cannot be classified as interest for purposes of calculating whether the Revolving Credit Plan violates the FSDA's cap on interest. Plaintiff, on the other hand, argues that the FSDA requires the account protection fee to be included as interest in calculating whether the interest rate exceeds the 36% cap. Section 6 of the FSDA can be read to define interest broadly:

In addition to or in lieu of interest at a periodic rate or rates as provided in Section 5, and without limitation of the foregoing Section 4, a financial institution may, if the agreement governing the revolving credit plan so provides, charge and collect as interest, in such manner or form as the plan may provide, an annual or other periodic fee for the privileges made available to the borrower under the plan, a transaction charge or charges, late fees or delinquency charges, returned payment charges, over limit charges and fees for services rendered.

205 Ill. Comp. Stat. 675/6. According to this section, the account protection fee, which Plaintiffs argue is a "periodic fee for the privileges made available to the borrower under the plan," could be treated as interest and thus included to calculate the interest rate for purposes of the FSDA's interest cap. When the account protection fee is added to the 18% or 24% interest charged, the Revolving Credit Plan exceeds the FSDA's 36% interest cap.

All Credit Lenders does not provide support for its argument that the way in which federal law defines how an interest rate is calculated controls for purposes of state law. Although the Court has not found Illinois law on point, a Louisiana court held that each state may define what constitutes interest for purposes of determining compliance with its own laws, suggesting that Illinois is not bound by TILA's distinction between interest and debt suspension coverage. *See Gulfco Fin. Co. v. Garrett*, 631 So. 2d 602, 603 (La. Ct. App. 1994) (determining whether interest rate charged on loan was usurious under Louisiana law by looking to definition of finance charge and annual percentage rate under Louisiana, not federal, law). The Court does

not find this to be inconsistent with TILA's disclosure requirements so as to trigger TILA preemption, *see* 12 C.F.R. § 1026.28(a)(1), for TILA does not address the maximum interest rate that can be charged for open-ended credit like that here and only covers disclosures, which Plaintiff is not challenging. *See Heastie v. Cmty. Bank of Greater Peoria*, 690 F. Supp. 716, 721 (N.D. Ill. 1988) (TILA does not preempt ICFA claim where, among other things, compliance with both TILA and ICFA "is not a physical impossibility"). Thus, at this stage, the Court finds that Plaintiff's ICFA claim adequately alleges a violation of state law.⁵ *Cf. Equitable Life Assurance Soc'y of the U.S. v. Scali*, 232 N.E.2d 712, 716, 38 Ill. 2d 544 (1967) ("We are of the opinion that the requirement that a borrower acquire and assign life insurance to the lender up to the amount of his loan as additional security for the loan does not render the interest usurious, absent a showing from an examination of the entire transaction that the insurance requirement was a mere device to collect usurious interest.").

Finally, All Credit Lenders makes only a conclusory argument that Plaintiff's claim that the account protection fee is of no benefit to the consumer should be dismissed. All Credit Lenders contends that Plaintiff ignores the benefit that the account protection fee provides to borrowers, which is that a consumer need not make any payments for up to twelve months if the

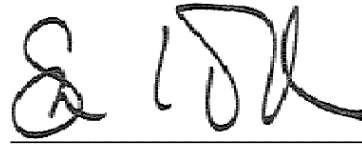
⁵ Because the parties essentially treat their ICFA and Dodd-Frank claims interchangeably in the briefing on the motion to dismiss, the Court is somewhat unclear as to whether Plaintiff is alleging that All Credit Lenders committed an abusive practice under the Dodd-Frank Act by charging an account protection fee that should be considered interest. Plaintiff's complaint alleges that All Credit Lenders violated the Dodd-Frank Act by taking advantage of consumers' lack of understanding that they "are charged a Required Account Protection Fee on their loan" and of "[t]he true nature of the Required Account Protection Fee." Compl. ¶ 182(a)–(b). This suggests to the Court that Plaintiff's allegations regarding the account protection fee under the Dodd-Frank Act do not include those under ICFA related to violation of the FSDA, as Plaintiff has specifically alleged that the account protection fee is undisclosed interest that violates the FSDA as part of her ICFA claim, *see id.* ¶¶ 178(c), 179(a). Nor can Plaintiff challenge the account protection fee under the Dodd-Frank Act for being usurious, for the CFPB has no authority to "establish a usury limit applicable to an extension of credit." 12 U.S.C. § 5517(o). But because All Credit Lenders has not developed an independent argument as to why the allegations regarding the account protection fee under the Dodd-Frank Act should be dismissed, the Court will at this stage allow them to proceed to the extent they do not challenge the account protection fee as being undisclosed interest or usurious.

consumer is unemployed or stops receiving benefits. Plaintiff, however, has alleged that the benefit provided to the consumer is minimal or non-existent, particularly where a consumer is retired and thus could not take advantage of the alleged benefit. The Court deems this to be a factual issue not appropriate for resolution on a motion to dismiss. Thus, Plaintiff may proceed on its claims in discovery.

CONCLUSION

For the foregoing reasons, All Credit Lenders' motion to dismiss [13] is denied. All Credit Lenders is ordered to answer the complaint by December 31, 2014.

Dated: December 9, 2014

A handwritten signature in black ink, appearing to read 'S. L. Ellis', written over a horizontal line.

SARA L. ELLIS
United States District Judge

CFPB Bulletin 2013-07

Date: July 10, 2013
Subject: Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the
Collection of Consumer Debts

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), all covered persons or service providers are legally required to refrain from committing unfair, deceptive, or abusive acts or practices (collectively, UDAAPs) in violation of the Act. The Consumer Financial Protection Bureau (CFPB or Bureau) is issuing this bulletin to clarify the contours of that obligation in the context of collecting consumer debts.

This bulletin describes certain acts or practices related to the collection of consumer debt that could, depending on the facts and circumstances, constitute UDAAPs prohibited by the Dodd-Frank Act. Whether conduct like that described in this bulletin constitutes a UDAAP may depend on additional facts and analysis. The examples described in this bulletin are not exhaustive of all potential UDAAPs. The Bureau may closely review any covered person or service provider's consumer debt collection efforts for potential violations of Federal consumer financial laws.

A. Background

UDAAPs can cause significant financial injury to consumers, erode consumer confidence, and undermine fair competition in the financial marketplace. Original creditors and other covered persons and service providers under the Dodd-Frank Act involved in collecting debt related to any consumer financial product or service are subject to the prohibition against UDAAPs in the Dodd-Frank Act.¹

In addition to the prohibition of UDAAPs under the Dodd-Frank Act, the Fair Debt Collection Practices Act (FDCPA) also makes it illegal for a person defined as a “debt collector” from engaging in conduct “the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt,”² to “use

¹ See Dodd-Frank Act, §§ 1002, 1031 & 1036(a), codified at 12 U.S.C. §§ 5481, 5531 & 5536(a). It is also prohibited for any person, even if not a covered person or service provider, to knowingly or recklessly provide substantial assistance to a covered person or service provider in violating section 1031 of the Dodd-Frank Act. See Dodd-Frank Act, § 1036(a)(3), 12 U.S.C. § 5536(a)(3). The principles of “unfair” and “deceptive” practices in the Act are informed by the standards for the same terms under Section 5 of the Federal Trade Commission Act (FTC Act). See CFPB Examination Manual v.2 (Oct. 2012) at UDAAP 1 (CFPB Exam Manual). To the extent that this Bulletin cites FTC guidance or authority, such references reflect the views of the FTC, and are not binding upon the Bureau in interpreting the Dodd-Frank Act’s prohibition on UDAAPs.

² FDCPA § 806, 15 U.S.C. § 1692d.

any false, deceptive, or misleading representation or means in connection with the collection of any debt,”³ or to “use any unfair or unconscionable means to collect or attempt to collect any debt.”⁴ The FDCPA generally applies to third-party debt collectors, such as collection agencies, debt purchasers, and attorneys who are regularly engaged in debt collection.⁵ All parties covered by the FDCPA must comply with any obligations they have under the FDCPA, in addition to any obligations to refrain from UDAAPs in violation of the Dodd-Frank Act.

Although the FDCPA’s definition of “debt collector” does not include some persons who collect consumer debt, all covered persons and service providers must refrain from committing UDAAPs in violation of the Dodd-Frank Act.⁶

B. Summary of Applicable Standards for UDAAPs

1. Unfair Acts or Practices

The Dodd-Frank Act prohibits conduct that constitutes an unfair act or practice. An act or practice is unfair when:

- (1) It 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.⁷

A “substantial injury” typically takes the form of monetary harm, such as fees or costs paid by consumers because of the unfair act or practice. However, the injury does not have to be monetary.⁸ Although emotional impact and other subjective types of harm will not ordinarily amount to substantial injury, in certain circumstances emotional impacts may amount to or contribute to substantial injury.⁹ In addition, actual injury is not required; a significant risk of concrete harm is sufficient.¹⁰

³ FDCPA § 807, 15 U.S.C. § 1692e. This provision also imposes affirmative obligations on “debt collectors” under the FDCPA when collecting consumer debts.

⁴ FDCPA § 808, 15 U.S.C. § 1692f. This provision also imposes affirmative obligations on “debt collectors” under the FDCPA when collecting consumer debts.

⁵ See FDCPA § 803(6), 15 U.S.C. § 1692a(6). The FDCPA also covers, as a “debt collector,” a creditor who, in collecting its own debts, uses any name other than its own which would indicate that a third person is attempting to collect the debts.

⁶ The FDCPA also reaches any person who designs, compiles, or furnishes forms knowing such forms would be used to create the false belief in a consumer that a person other than the creditor is participating in collecting the creditor’s debts. See FDCPA § 812, 15 U.S.C. § 1692j.

⁷ Dodd-Frank Act §§ 1031, 1036, 12 U.S.C. §§ 5531, 5536.

⁸ CFPB Exam Manual at UDAAP 2; see also *FTC v. Accusearch, Inc.*, 06-cv-105-D, 2007 WL 4356786, at *7-8 (D. Wyo. Sept. 28, 2007); FTC Policy Statement on Unfairness (Dec. 17, 1980), available at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>.

⁹ CFPB Exam Manual at UDAAP 2.

¹⁰ *Id.*

An injury is not reasonably avoidable by consumers when an act or practice interferes with or hinders a consumer's ability to make informed decisions or take action to avoid that injury.¹¹ Injury caused by transactions that occur without a consumer's knowledge or consent is not reasonably avoidable.¹² Injuries that can only be avoided by spending large amounts of money or other significant resources also may not be reasonably avoidable.¹³ Finally, an act or practice is not unfair if the injury it causes or is likely to cause is outweighed by its consumer or competitive benefits.¹⁴

Established public policy may be considered with all other evidence to determine whether an act or practice is unfair, but may not serve as the primary basis for such determination.¹⁵

2. *Deceptive Acts or Practices*

The Dodd-Frank Act also prohibits conduct that constitutes a deceptive act or practice. An act or practice is deceptive when:

- (1) The act or practice 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.¹⁶

To determine whether an act or practice has actually misled or is likely to mislead a consumer, the totality of the circumstances is considered.¹⁷ Deceptive acts or practices can take the form of a representation or omission.¹⁸ The Bureau also looks at implied representations, including any implications that statements about the consumer's debt can be supported. Ensuring that claims are supported before they are made will minimize the risk of omitting material information and/or making false statements that could mislead consumers.

To determine if the consumer's interpretation of the information was reasonable under the circumstances when representations target a specific audience, such as older Americans or financially distressed consumers, the communication may be considered from the perspective of a reasonable member of the target audience.¹⁹ A statement or information can be misleading even if not all consumers, or not all consumers in the targeted group, would be misled, so long as a significant minority

¹¹ *Id.*

¹² *Id.*

¹³ *See id.* at 2-3.

¹⁴ Dodd-Frank Act § 1031(c)(1)(B), 12 U.S.C. § 5531(c)(1)(B); *see also* CFPB Exam Manual at UDAAP 2.

¹⁵ Dodd-Frank Act § 1031(c)(2), 12 U.S.C. § 5531(c)(2); *see also* CFPB Exam Manual at UDAAP 3.

¹⁶ The standard for "deceptive" practices in the Dodd-Frank Act is informed by the standards for the same terms under Section 5 of the FTC Act. *See* CFPB Exam Manual at UDAAP 5.

¹⁷ CFPB Exam Manual at UDAAP 5.

¹⁸ *Id.*

¹⁹ *See id.* at 6.

would be misled.²⁰ Likewise, if a representation conveys more than one meaning to reasonable consumers, one of which is false, the speaker may still be liable for the misleading interpretation.²¹ Material information is information that is likely to affect a consumer's choice of, or conduct regarding, the product or service. Information that is likely important to consumers is material.²²

Sometimes, a person may make a disclosure or other qualifying statement that might prevent consumers from being misled by a representation or omission that, on its own, would be deceptive. The Bureau looks to the following factors in assessing whether the disclosure or other qualifying statement is adequate to prevent the deception: whether the disclosure is prominent enough for a consumer to notice; whether the information is presented in a clear and easy to understand format; the placement of the information; and the proximity of the information to the other claims it qualifies.²³

3. *Abusive Acts or Practices*

The Dodd-Frank Act also prohibits conduct that constitutes an abusive act or practice. An act or practice is abusive when it:

- (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.²⁴

It is important to note that, although abusive acts or practices may also be unfair or deceptive, each of these prohibitions are separate and distinct, and are governed by separate legal standards.²⁵

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*; see also CFPB Bulletin 12-06, Marketing of Credit Card Add-On Products (July 12, 2012), available at http://files.consumerfinance.gov/f/201207_cfpb_bulletin_marketing_of_credit_card_addon_products.pdf.

²⁴ Dodd-Frank Act § 1031(d), 12 U.S.C. § 5531(d); see also CFPB Exam Manual at UDAAP 9; Stipulated Final Judgment and Order, Conclusions of Law ¶ 12, 9:13-cv-80548 and Compl. ¶¶ 55-63, *CFPB v. Am. Debt Settlement Solutions, Inc.*, 9:13-cv-80548 (S.D. Fla. May 30, 2013), available at http://files.consumerfinance.gov/f/201305_cfpb_proposed-order_adss.pdf and http://files.consumerfinance.gov/f/201305_cfpb_complaint_adss.pdf. The Stipulated Final Judgment and Order was signed by U.S. District Judge Middlebrooks and entered on the court docket on June 6, 2013. See Stipulated Final J. & Order [ECF Docket Entry No. 5], 9:13-cv-80548 (S.D. Fla.).

²⁵ CFPB Exam Manual at UDAAP 9.

C. Examples of Unfair, Deceptive and/or Abusive Acts or Practices

Depending on the facts and circumstances, the following non-exhaustive list of examples of conduct related to the collection of consumer debt could constitute UDAAPs. Accordingly, the Bureau will be watching these practices closely.

- **Collecting or assessing a debt and/or any additional amounts in connection with a debt (including interest, fees, and charges) not expressly authorized by the agreement creating the debt or permitted by law.²⁶**
- **Failing to post payments timely or properly or to credit a consumer's account with payments that the consumer submitted on time and then charging late fees to that consumer.²⁷**
- **Taking possession of property without the legal right to do so.**
- **Revealing the consumer's debt, without the consumer's consent, to the consumer's employer and/or co-workers.²⁸**
- **Falsely representing the character, amount, or legal status of the debt.**
- **Misrepresenting that a debt collection communication is from an attorney.**
- **Misrepresenting that a communication is from a government source or that the source of the communication is affiliated with the government.**
- **Misrepresenting whether information about a payment or non-payment would be furnished to a credit reporting agency.²⁹**
- **Misrepresenting to consumers that their debts would be waived or forgiven if they accepted a settlement offer, when the company does not, in fact, forgive or waive the debt.³⁰**
- **Threatening any action that is not intended or the covered person or service provider does not have the authorization to pursue, including**

²⁶ See Compl. ¶¶ 34-38 & 43-44, *FTC v. Fairbanks Capital Corp.*, 03-12219 (D. Mass. Nov. 12, 2003) (alleging that the charging of late fees and other associated charges was unfair practice under Section 5 of the FTC Act and a violation of §§ 807 and 808 of the FDCPA), available at <http://www.ftc.gov/os/2003/11/0323014comp.pdf>.

²⁷ *Id.* ¶¶ 22-25.

²⁸ See, e.g., Compl. ¶¶ 24 & 30-31, *FTC v. Cash Today, Ltd.*, 3:08-cv-590 (D. Nev. Nov. 12, 2008), available at <http://www.ftc.gov/os/caselist/0723093/081112cmp0923093.pdf>, (asserting that Cash Today engaged in unfair collection practices in violation of Section 5 of the FTC Act by, among other things, disclosing the existence of consumer's debt to employers, co-workers, and other third parties despite being told by consumers not to contact their workplaces); *FTC v. LoanPointe, LLC.*, 2:10 CV 00225-DAK, 2011 WL 4348304, at *5 -6 (D. Utah Sept. 16, 2011) (finding that disclosure of existence and amount of debt to consumer's employer without consumer's prior approval constitutes an unfair practice under the FTC Act).

²⁹ See, e.g., *In re Am. Express Centurion Bank*, Joint Consent Order at 3 (Oct. 1, 2012), available at <http://files.consumerfinance.gov/f/2012-CFPB-0002-American-Express-Centurion-Consent-Order.pdf>.

³⁰ *Id.*

false threats of lawsuits, arrest, prosecution, or imprisonment for non-payment of a debt.

Again, the obligation to avoid UDAAPs under the Dodd-Frank Act is in addition to any obligations that may arise under the FDCPA. Original creditors and other covered persons and service providers involved in collecting debt related to any consumer financial product or service are subject to the prohibition against UDAAPs in the Dodd-Frank Act. The CFPB will continue to review closely the practices of those engaged in the collection of consumer debts for potential UDAAPs, including the practices described above. The Bureau will use all appropriate tools to assess whether supervisory, enforcement, or other actions may be necessary.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff,

V.

No. 14 C 3786

ALTA COLLEGES, INC., a Delaware corporation, WESTWOOD COLLEGE, INC., a Colorado corporation d/b/a Westwood College and Westwood College Online, WESGRAY CORPORATION, a Colorado corporation d/b/a WESTWOOD COLLEGE-River Oaks and WESTWOOD COLLEGE-Chicago Loop, ELBERT, INC., a Colorado corporation d/b/a/ WESTWOOD COLLEGE-DuPage, and EL NELL, INC., a Colorado corporation d/b/a WESTWOOD COLLEGE-O'Hare Airport,

Judge Ronald A. Guzmán

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff sues defendants (collectively, “Westwood”) for their alleged violations of the Consumer Financial Protection Act and the Illinois Consumer Fraud and Deceptive Business Practices Act. The case is before the Court on Westwood’s Federal Rule of Civil Procedure (“Rule”) 12(b)(6) motion to dismiss and plaintiff’s motion to sever and remand. For the reasons stated below, the Court denies both motions.

Facts

Westwood is a for-profit, post-secondary school that has four campuses in Illinois and an online school that operates here. (2d Am. Compl. ¶ 1.) Westwood aggressively markets its programs to Illinois consumers in print media, on the internet, television and radio, through direct

mail and at job fairs. (*Id.* ¶¶ 1-2, 37-41, 46-49, 54-66.) Moreover, it makes false or misleading representations to consumers about the school’s accreditation and admissions process, the cost of attaining a degree, the terms of loans offered by Westwood’s in-house lending program, the jobs graduates will be qualified to obtain, and the likelihood that graduates will obtain employment in their chosen field. (*Id.* ¶¶ 1-7, 48-49, 56-58, 60-61, 67-78, 89, 91-92, 107-35, 141-42, 162-89, 192-216, 218, 226-70.)

On January 18, 2012, plaintiff filed a one-count complaint in state court alleging that defendants engaged in deceptive practices in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (“ICFA”). (*See* Pl.’s Mem. Opp’n Defs.’ Mot. Dismiss 2d Am. Compl., Ex. 1, Compl., *People v. Alta*, No. 12 CH 1587 (Cir. Ct. Cook Cnty.).) In March 2014, plaintiff sought leave to amend its complaint to add Count II, an ICFA unfair practice claim, and Counts III and IV for violation of the federal Consumer Financial Protection Act (“CFPA”). On May 6, 2014, the state court granted plaintiff’s motion, and on May 22, 2014, defendants removed the suit to this Court.

Discussion

Motion to Dismiss – Federal Claims

Westwood argues that the CFPA claims should be dismissed because plaintiff has not alleged that it is an entity subject to the statute. The Court disagrees. In relevant part, the statute defines “covered person” as one “that engages in offering or providing a consumer financial product or service,” *i.e.*, “extend[s] credit and servic[es] loans . . . or [makes] other extensions of credit,” if the service “is offered or provided for use by consumers primarily for personal, family, or household purposes.” 12 U.S.C. § 5481(5)(A), (6)(A), (15)(A)(i). Plaintiff alleges that Westwood operates

an in-house student loan program called APEX, which places Westwood squarely within the definition of “covered person.” (*See* 2d Am. Compl. ¶¶ 89-92, 127-34.)

Even if it is a “covered person,” Westwood argues that it falls within the exemption for “merchant[s], retailer[s], or seller[s] of any nonfinancial good or service.” *See* 12 U.S.C. § 5517(a). However, that exemption does not apply if the merchant “regularly extends credit . . . [that] is subject to a finance charge,” and “is . . . engaged significantly in offering or providing consumer financial products or services.” 12 U.S.C. § 5517(a)(2)(B)(iii), (C)(i). Plaintiff alleges that Westwood meets these qualifications. (*See* 2d Am. Compl. ¶¶ 67-135.)

Equally unpersuasive is Westwood’s argument that the CFPA claims are doomed because the students identified in the complaint took out APEX loans before the Act’s effective date. Though, as plaintiff concedes, it cannot recover for violations of the CFPA that occurred before the statute went in effect on July 21, 2011 (*see* Pl.’s Mem. Opp’n Defs.’ Mot. Dismiss 2d Am. Compl. at 18), its failure to identify students who took out loans after that date is not fatal to its claims. Given plaintiff’s allegation that Westwood has operated its APEX program since 2002 and continues to do so today (*see* 2d Am. Compl. ¶¶ 89, 477, 487-88), its failure to identify specific students who received APEX financing after July 21, 2011 is not a basis for dismissing the CFPA claims.

Alternatively, Westwood contends that Counts III and IV do not sufficiently allege the elements of an abusive or unfair practice claim under the CFPA. An unfair practice claim requires allegations that the practice causes or is likely to cause “substantial injury to consumers,” consumers cannot reasonably avoid that injury, and the injury “is not outweighed by countervailing benefits to consumers or to competition.” 12 U.S.C. § 5531(c)(1). An abusive practice claim requires allegations that a practice: (1) “materially interferes with [a consumer’s] ability 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) [his] inability . . . to protect [his] interests . . . in selecting or using a consumer financial product or service; or (C) [his] reasonable reliance . . . on a covered person to act in [his] interests.” 12 U.S.C. § 5531(d).

Plaintiff alleges that Westwood induces students to enter into financing contracts with APEX, by:

- (1) targeting as potential students people who, because of socioeconomic background or lack of sophistication, have little or no knowledge about higher education and financial aid;
- (2) holding out salespeople as “admissions representatives” who will guide potential students to the education program best suited for them;
- (3) instructing admissions representatives to build a rapport with potential students and then pressure them to enroll immediately, using scripts provided by Westwood to overcome any objections or reluctance;
- (4) falsely telling potential students that Westwood has a selective or competitive admissions process, its credits are easily transferrable to other schools, and a Westwood degree can be the foundation for a graduate degree;
- (5) simultaneously enrolling students and signing them up for financial aid;
- (6) downplaying or misrepresenting the cost of Westwood’s programs or evading cost-related questions;
- (7) falsely telling students that their APEX loans will be paid in full upon their graduation;
- (8) falsely telling students that Westwood has regional accreditation;
- (9) falsely telling students that (a) Westwood Criminal Justice graduates are eligible to be hired as federal, state or local police officers in Illinois; (b) most graduates of Westwood’s Criminal Justice Program get law enforcement jobs, (c) Westwood graduates earn about \$20,000.00 more per year than people with just a high school

diploma, and (d) a Westwood Criminal Justice Program graduate can obtain employment in law enforcement even if he has a criminal record; and

(10) bidding on internet search terms such as “FBI” and “state trooper,” so that a Westwood ad appears when an Illinois consumer searches for such terms.

(2d Am. Compl. ¶¶ 46-49, 54-78, 107-35, 139-89, 193-298, 300-10, 477; *id.*, Ex. 1, Staff of S. Comm. on Health, Education, Labor and Pensions, 112 Cong., *For Profit Education: The Failure to Safeguard the Federal Investment and Ensure Student Success* 37 (“HELP Report”), at 214-25 (Comm. Print July 30, 2012).) Plaintiff also alleges that Westwood takes these actions knowing that most students will leave Westwood without a degree or the hope of obtaining a well-paying job and with a debt that will take decades to repay and/or the certainty of being hounded by collection agencies. (2d Am. Comp. ¶ 477; *id.*, Ex. 1, HELP Report at 206, 214-25 (2012).) These allegations are sufficient to state CFPA claims for unfair and abusive practices.

Alternatively, Westwood asserts that the CFPA does not give plaintiff independent enforcement power but simply permits it to act as a “proxy” for an unconstitutional entity created by the statute, the Consumer Financial Protection Bureau (“Bureau”). Because the Bureau is unconstitutional, Westwood argues, it cannot permissibly enforce the statute by itself or through a proxy such as plaintiff.

The premise of this argument, that plaintiff does not have independent enforcement power, is based on § 5552 of the CFPA. That section permits a state attorney general to sue to enforce the statute, after notifying the Bureau of the state’s intention to sue and giving the Bureau a copy of the complaint. 12 U.S.C. § 5552(a)(1), (b)(1)(A). After receiving the notice:

[T]he Bureau may –
(A) intervene in the action as a party;

(B) upon intervening--

(i) remove the action to the appropriate United States district court, if the action was not originally brought there; and

(ii) be heard on all matters arising in the action; and

(C) appeal any order or judgment, to the same extent as any other party in the proceeding may.

12 U.S.C. § 5552 (b)(2). In Westwood's view, subsection (C) allows the Bureau to appeal orders issued in state-filed enforcement actions in which the Bureau has not intervened, thus establishing that a state sues on behalf of the Bureau, not itself, when it enforces the CFPA.

The Court disagrees for two reasons. First, § 5552 expressly authorizes states to sue on their own behalf. See 12 U.S.C. § 5552(a)(1) (“[T]he attorney general . . . of any State may bring a civil action *in the name of such State* . . . to enforce provisions of this [statute] . . .”) (emphasis added); *United States v. Misc. Firearms, Explosives, Destructive Devices & Ammunition*, 376 F.3d 709, 712 (7th Cir. 2004) (stating that a court “must . . . assume that [the] plain meaning [of statutory language] accurately expresses the legislative purpose”) (quotation omitted). Second, Westwood's interpretation of the Bureau's appellate rights as set forth in subsection (C), conflicts with the other subsections of this provision. Subsection (A) allows the Bureau to intervene “as a party” in a state-filed suit, and subsection (B) sets forth the actions the Bureau can take after intervening. Thus, read in context, subsection (C) – “[T]he Bureau may . . . appeal any order or judgment, to the same extent *as any other party* in the proceeding” – can only mean that the Bureau's appellate rights are limited to cases in which it intervenes. See *Misc. Firearms, Explosives, Destructive Devices & Ammunition*, 376 F.3d at 712 (stating that courts must interpret statutory provisions in their context and “not construe a statute in a way that makes words or phrases meaningless, redundant, or superfluous”). Because the plain language of the statute refutes the notion that the CFPA gives plaintiff no independent enforcement power, and that notion is the basis for Westwood's constitutional challenge

to plaintiff's prosecution of this suit, the Court rejects that challenge. Even if plaintiff's prosecution of this suit is constitutional, Westwood says the statute itself is not because its prohibition of "unfair, deceptive, or abusive act[s] or practice[s]" is unconstitutionally vague. See 12 U.S.C. § 5536(a)(1)(B). According to the Supreme Court:

The degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.

Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.

Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982) (footnotes omitted). Because the CFPA is an economic regulation, and Westwood does not contend that the statute inhibits its constitutionally-protected activity, the CFPA is subject to a lenient vagueness test.

The statute easily passes that test. The CFPA provides a definition of "unfair" and "abusive" practices. See 12 U.S.C. § 5531(c)(1), (d) (defining an unfair practice as one that causes or is likely to cause substantial injury to consumers that they cannot reasonably avoid and is not outweighed by benefits to consumers or competition, and an abusive practice as one that materially interferes with a consumer's ability to understand a term of a financial product, or takes unreasonable advantage of his lack of understanding of the product's risks, costs, or conditions, his inability to

protect his interest in selecting it or his reasonable reliance on defendant to act in his best interests). The statute does not define a “deceptive” practice, but the Bureau says the phrase has the same meaning under the CFPA as it does under the Federal Trade Commission Act, *i.e.*, that the act or practice is “material,” it “misleads or is likely to mislead the consumer,” and “[t]he consumer’s interpretation [of the act or practice] is reasonable under the circumstances.” See Consumer Fraud Protection Bureau Supervision and Examination Manual v.2, pt. IIC at UDAAP 5 & n.10 (Oct. 2012), *available at* http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf (last visited Aug. 28, 2014) (citing Federal Trade Commission Policy Statement on Deception (Oct. 14, 1983), *available at* <http://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception> (last visited Aug. 28, 2014).) In fact, the CFPA’s general prohibition of “unfair, deceptive, or abusive act[s] or practice[s],” is virtually identical to the prohibition of “unfair or deceptive acts or practices” contained in the Federal Trade Commission Act, which the Seventh Circuit held was not unconstitutionally vague nearly a century ago. See 12 U.S.C. § 5536(a)(1)(B); 15 U.S.C. § 45(a)(1); *Sears, Roebuck & Co. v. F.T.C.*, 258 F. 307, 311 (7th Cir. 1919). In short, the Court rejects Westwood’s vagueness challenge.

The Court is no more persuaded by Westwood’s argument that plaintiff’s enforcement of the CFPA violates the Illinois Constitution. Article V states that “[t]he Attorney General shall be the legal officer of the State, and shall have the duties and powers that may be prescribed by law.” Ill. Const. art. V, § 15. These statutory duties include: (1) “institut[ing] and prosecut[ing] all actions and proceedings in favor of or for the use of the State, which may be necessary in the execution of the duties of any State officer”; (2) “investigat[ing] alleged violations of the statutes which the Attorney General has a duty to enforce”; and (3) “attend[ing] to and perform[ing] any other duty

which may, from time to time, be required of him by law.” 15 Ill. Comp. Stat. 205/4. The plain meaning of this language encompasses the AG’s enforcement of federal law as directed by statute, and Westwood offers no authority to support a different interpretation. Accordingly, the Court denies Westwood’s motion to dismiss this suit as contrary to the Illinois Constitution.

State Law Claims

Westwood moves to dismiss the Count I ICFA deceptive practices claim as insufficiently pled. Plaintiff contends that this request is doomed by law of the case, the principle that courts generally do not revisit decisions they make during the course of a single case, unless refusing to do so will “produce an injustice” or the decision was “clearly erroneous.” *Redfield v. Continental Cas. Corp.*, 818 F.2d 596, 605 (7th Cir. 1987). Plaintiff asks the Court to abide by the state court’s determination that nearly identical allegations made in plaintiff’s initial complaint stated a viable ICFA deceptive practices claim. (See Pl.’s Mem. Opp’n Mot. Dismiss 2d Am. Compl. Ex. 1, Compl., *People v. Alta*, 12 CH 1587 (Cir. Ct. Cook Cnty.); *id.*, Ex. 2, Defs.’ Mem. Supp. Section 2-619.1 Mot. Dismiss, *People v. Alta*, 12 CH 1587 (Cir. Ct. Cook Cnty.); *id.*, Ex. 3, Order Denying Mot. Dismiss, *People v. Alta*, 12 CH 1587 (Cir. Ct. Cook Cnty.)); *see also Rekhi v. Wildwood Indus., Inc.*, 61 F.3d 1313, 1317-18 (7th Cir. 1995) (noting that law of the case applies to suits removed from state court).

Westwood contends that the Court should revisit the issue because the state court used the wrong legal standard to decide the motion. Specifically, Westwood says the state court wrongly believed that ICFA fraud claims were not subject to a heightened pleading standard. Though the state court recited a notice pleading standard, it nonetheless applied a heightened pleading standard,

concluding that plaintiff stated a viable ICFA claim because it identified specific misrepresentations made by specific Westwood representatives on specific dates. (See Pl.’s Mem. Opp’n Mot. Dismiss 2d Am. Compl. Ex. 3, Order Denying Mot. Dismiss at 4-6, *People v. Alta*, 12 CH 1587 (Cir. Ct. Cook Cnty.).) Because the state court applied the proper standard, despite its stated intent to do otherwise, there is no reason for this Court to revisit the decision. Accordingly, the Court denies Westwood’s motion to dismiss Count I.

Westwood also asks the Court to dismiss the ICFA claim alleged in Count II because it “does not allege a single deception . . . much less identify one with particularity, as Rule 9(b) requires.” (Defs.’ Mem. Supp. Mot. Dismiss 2d Am. Compl. at 12.) Count II, however, is an unfair, not a deceptive, practices claim, and thus not subject to Rule 9(b). See *Windy City Metal Fabricators & Supply, Inc. v. CIT Tech. Fin. Servs., Inc.*, 536 F.3d 663, 670 (7th Cir. 2008) (“[A] cause of action for unfair practices under the Consumer Fraud Act need only meet the notice pleading standard of Rule 8(a), not the particularity requirement in Rule 9(b).”). Because plaintiffs’ allegations are sufficient to state an ICFA unfair practice claim under Rule 8 pleading standards, the Court denies Westwood’s motion to dismiss it. See *id.* at 669 (stating that a practice is unfair within the meaning of ICFA if it “offends public policy,” is “immoral, unethical, oppressive, or unscrupulous” or “causes substantial injury to consumers”); (2d Am. Compl. ¶¶ 46-49, 54-78, 107-35, 139-89, 193-298, 300-10, 477; *id.*, Ex. 1, Staff of S. Comm. on Health, Education, Labor and Pensions, 112 Cong., *For Profit Education: The Failure to Safeguard the Federal Investment and Ensure Student Success* 37 (“HELP Report”), at 214-25 (Comm. Print July 30, 2012).)

Motion to Sever

Plaintiff asks the Court to sever the Count I ICFA deceptive practice claim from this suit, decline to exercise supplemental over the Count II ICFA unfair practice claim, and remand both claims to state court. Severance is necessary, plaintiff contends, because Count I arises from operative facts that are “separate and distinct” from those underlying the federal claims, and thus is not subject to the Court’s supplemental jurisdiction. (Pl.’s Mem. Supp. Mot. Sever & Remand at 1); *see* 28 U.S.C. § 1367(a) (“[T]he district courts shall have supplemental jurisdiction over all [state law] claims that are so related to [the federal] claims . . . that they form part of the same case or controversy”); *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966) (stating that supplemental jurisdiction can be exercised over state claims that arise from the same “nucleus of operative fact” as federal claims “such that [plaintiff] would ordinarily be expected to try” the state and federal claims together). This argument is a nonstarter, given that the state court allowed plaintiff to join the claims in one suit, which is only permissible when claims “arise out of closely related ‘transactions’ and . . . [have] a significant question of law or fact . . . [in] common.” *See Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267, 272 (Ill. 1995).

Even if supplemental jurisdiction exists over Count I, plaintiff argues that the Court should not exercise it. Because the parties completed discovery and were ready to try Count I in state court, plaintiff says keeping that claim here will inevitably result in this Court’s duplication of work done by the state court. The Court disagrees. Discovery done on Count I in state court will not be repeated here, and absent unusual circumstances, the doctrines of law of the case or collateral estoppel will bar relitigation of issues decided by that court. Thus, judicial economy is not a basis for splitting this case in two.

Alternatively, plaintiff asks the Court to decline to exercise supplemental jurisdiction over the ICFA claim in Count II because it raises a novel issue of state law: Is extending loans to borrowers without considering their ability to pay an unfair practice under the ICFA? (Pl.’s Mem. Supp. Mot. Sever & Remand at 14); *see* 28 U.S.C. § 1367(c)(1) (“[The district courts may decline to exercise supplemental jurisdiction over a claim . . . [that] raises a novel or complex issue of State law”). As Westwood implicitly admits, the Illinois courts have yet to address precisely this question. (*See* Defs.’ Resp. Pl.’s Mot. Sever & Remand at 12-13.) Thus, the Court agrees with plaintiff that this is a novel issue of Illinois law.

The Court does not agree, however, that it should relinquish supplemental jurisdiction over the claim. Courts generally do so only when:

[The state law claims] address issues of first impression that are numerous or of constitutional magnitude. *See, e.g., Fielder v. Credit Acceptance Corp.*, 188 F.3d 1031, 1037-38 (8th Cir. 1999) (affirming a district court’s decision to decline to exercise jurisdiction under § 1367(c)(1) when the claims involved at least six “complex substantive and remedial issues of first impression”); *Castellano v. Bd. of Trustees of Police Officers’ Variable Supplements*, 937 F.2d 752, 758-59 (2d Cir. 1991) (declining supplemental jurisdiction and concluding that “it would be, at the very least, imprudent for us to determine a state constitutional claim of first impression”).

Schwarm v. Craighead, 233 F.R.D. 655, 659 (E.D. Cal. 2006); *see Bonilla v. City Council of City of Chi.*, 809 F. Supp. 590, 599 (N.D. Ill. 1992) (stating that supplemental jurisdiction should not be exercised over the issue of whether “enactment of a redistricting ordinance pursuant to the Illinois statutory scheme can create mid-term aldermanic vacancies”). However, when a court “faces a single, unexceptional question of statutory interpretation,” it is appropriate to exercise supplemental jurisdiction. *Schwarm*, 233 F.R.D. at 659 (exercising supplemental jurisdiction over the novel claim of “whether [defendant debt collectors] had statutory authorization under California law to seek fees

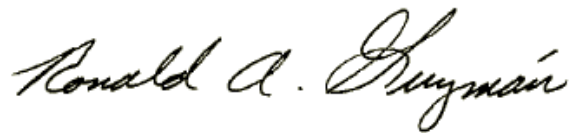
from putative plaintiffs beyond the actual amount of bank charges incurred”). Given Count II’s unremarkable nature, the wealth of case law interpreting the ICFA, the commonality of the claims in this suit, and the efficiency of litigating them together, the lack of precedent “on all fours” with Count II is not a basis for declining to exercise supplemental jurisdiction over it.

Conclusion

For the reasons set forth above, the Court denies Westwood’s motion to dismiss [17] and plaintiff’s motion to sever and remand [23].

SO ORDERED.

ENTERED: September 4, 2014

A handwritten signature in black ink, reading "Ronald A. Guzman". The signature is written in a cursive, flowing style.

HON. RONALD A. GUZMAN
United States District Judge