Regulation by Enforcement
CFPB’s Use of UDAAP

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Dodd-Frank Act

- Dodd-Frank Act $\rightarrow$ Consumer Financial Protection Bureau (CFPB)
- CFPB has independent rulemaking and enforcement authority regarding **unfair, deceptive, or abusive acts or practices (UDAAPs)** by any person or service provider of consumer financial services.
UDAAP Violation Elements

• Unfairness:
  – Act or practice that causes or is likely to cause **substantial injury** to consumers;
  – Injury is **not reasonably avoidable** by consumers; and
  – Injury is not outweighed by countervailing benefits to consumers or to competition.

• Deceptive:
  – Representation, omission, act, or practice **misleads or is likely to mislead** the consumer;
  – Consumer’s **interpretation** of the representation, omission, act, or practice is **reasonable** under circumstances; and
  – The misleading representation, omission, act, or practice is **material**.
UDAAP Violation Elements (cont.)

• Abusive:
  – Act or practice that
    • Materially \textit{interferes with the ability to understand} a term or condition of a consumer financial product or service; \textit{or}
    • \textbf{Takes} unreasonable \textit{advantage} of:
      – A \textit{lack of understanding} on the part of the consumer of the material risks, costs, or conditions of the product or service;
      – The \textit{inability of the consumer to protect its interests} in selecting or using a consumer financial product or service; \textit{or}
      – The reasonable reliance by the consumer on a covered person to act in the interests of the consumer.
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CFPB Mortgage Enforcement Actions

• **CFPB v. Bancorpsouth Bank**
  – July 25, 2016
  – Joint Action by CFPB and Department of Justice (DOJ) for Discriminatory Mortgage Lending Practices (Redlining)

• **In re David Eghbali**
  – May 25, 2016
  – CFPB enforcement action against an individual Loan Officer
CFPB v. Bancorpsouth Bank

• CFPB Allegations:
  – Unlawfully redlining majority-minority neighborhoods;
  – Illegally discriminating against African-American mortgage loan applicants in:
    • Underwriting of certain mortgage loans;
    • Pricing of certain mortgage loans; and
  – Implementing a discriminatory loan denial policy.

• CFPB Order:
  – $10.6 million Total pay
    • $800,000.00 in advertising, outreach and community partnership efforts
    • $3 million Civil Money Penalty to CFPB
    • $6.8 million in relief for impacted individuals and neighborhoods
In re David Eghbali

- **CFPB Allegations and Findings:**
  - Eghbali engaged in illegal mortgage “Fee-Shifting Scheme.”
    - Avoided firm pricing constraints restricting offers for “no-cost” loans and increased the amount of loan transactions he could close.
  - Eghbali “received fees, kickbacks, and things of value” in exchange for referrals to a single escrow company.

- **CFPB Order:**
  - $85,000 penalty to CFPB’s Civil Penalty Fund;
  - One Year ban from working in the mortgage industry.
In re David Eghbali (cont.)

- Key Takeaway:
  - Richard Cordray: “This should send a strong message that the law must be followed not only by large financial institutions, but also by the individuals who work for them.”
Other Notable CFPB Enforcement Actions

• *In re Flurish, Inc., d/b/a LendUp*
  – September 27, 2016
  – CFPB and California Department of Business Oversight (DBO) coordinated investigation → Separate Enforcement Actions

  – August 31, 2016
  – State law violations as grounds for UDAAP violations.
In re Flurish, Inc., d/b/a LendUp

• CFPB Allegations and Findings:
  – Deceptive practices related to marketing and advertising:
    • “LendUp Ladder” marketed as a way for consumers to build credit and attain financial stability
    • Advertised would regularly report credit information and payment history to consumer reporting agencies to help build credit
    • Advertised four level of loans nationwide: Silver, Gold, Platinum, and Prime
    • Violations → Platinum and Prime levels not offered outside of California and did not furnish any information, about any loans, to nationwide consumer reporting agencies.
  – Unfair and deceptive practices related to extension and default fees:
    • Offered a “discount” on the fee charged at origination if borrower chose a date earlier than the latest available loan-maturity date.
    • In CA, MS, and TN loan contracts expressly stated LendUp did not charge extension fees to extend payment due dates.
    • Violations → Did not disclose that the “discount” would be reversed if borrowers subsequently extended their repayment date or if they ultimately defaulted on the loan; added amount of the discount reversal to the amount sent to collections.
In re Flurish, Inc., d/b/a LendUp (cont.)

• CFPB Allegations and Findings (continued):
  – Failure to establish **policies and procedures** regarding the accuracy and integrity of the information furnished to consumer reporting agencies; and
  – **Inaccurate credit disclosures** in loan contracts and failure to include APR disclosures in advertisements.
    • Offered expedited-funding service through third-party payment processors and charged an expedited-funding fee (EFF) and retained a portion of the EFFs it charged.
    • Faulty APR-calculation tool miscalculated APR for certain loans and understated rates disclosed to consumers.
      – **Violations** → failed to include retained portion of the EFFs in the finance charge it disclosed or in the annual percentage rate (APR) calculations for loans subject to expedited-funding, which understated the finance charge and the APR for those loans; failed to take reasonable steps to verify accuracy of the APR-calculation tool before using it or otherwise to ensure accurate APR calculations, including monitoring or testing APRs before or after consummation.

• First use UDAAP authority against an alternative lender.
• CFPB: **Will treat start-ups “just like established companies.”**
• CFPB Consent Order:
  – $1.83 million Order to Pay Redress and $1.8 million Civil Money Penalties
In re Flurish, Inc., d/b/a LendUp (cont.)

- In re Flurish, Inc., d/b/a LendUp Settlement with CA DBO
  - CA DBO allegations:
    - Charged illegal fees and other violations of payday and installment lending laws.
  - CA DBO Settlement:
    - $2.68 million
      - $1.62 million as refunds for customers charged unlawful fees and interest rates
      - $1.06 million for penalty and costs.
CFPB v. CashCall, Inc.

• CFPB allegations:
  – CashCall, a non-bank payday lender, was “true lender”
    • CashCall placed money at risk.
    • Assumed all economic and regulatory risks upon assignment of loans.
  – Absent an effective choice-of-law provision, the law of the borrowers’ home states applies.
  – Loan contracts were wholly or partially void and/or uncollectible due to excess interest rate charges above state usury limits.
  – CashCall engaged in deceptive practices by servicing and collecting on void and/or uncollectible loan contracts.
CashCall arguments:

- CFPB is not authorized “to transform a state law violation into a violation of federal law.”
  - Proper for CFPB to use violations of state laws as grounds to satisfy elements of a UDAAP violation under the CFPA.
- CFPB is seeking to establish prohibited usury limit.
  - Proper for CFPB to enforce a prohibition on collecting amounts not owed by consumers.
- CFPB violated CashCall’s due process rights by seeking punishment for UDAAP violations without fair notice.
  - Proper notice provided by CFPA language explaining conditions that qualify as UDAAP violations.
CFPB Supervisory Examinations

- Supervisory examinations of mortgage servicers:
  - Compliance with CFPB servicing rules and
  - UDAAPs
  - If more significant violations observed during examination, may refer to Action Review Committee:
    - Considers variety of factors:
      - Magnitude of consumer harm, whether violation was self-identified, and timeliness/scope of remediation.
    - May result in:
      - Confidential Supervisory Action (board resolution or memorandum of understanding); or
      - Public Enforcement Action
CFPB Supervisory Observations

- Loss Mitigation Acknowledgement Notices
- Loss Mitigation Offers and Related Communications
- Loan Modification Denial Notices
- Policies and Procedures
- Servicing Transfers
Loss Mitigation Acknowledgement Notices

- Application received 45 days or more before a foreclosure sale
  - Written notice to borrower within five days
  - Acknowledge receipt of application
  - Notice of Complete or Incomplete application
    - If Incomplete: state additional document and/or information required and reasonable submission deadline
Loss Mitigation
Acknowledgement Notices (cont.)

• Deceptive practices:
  – Notices represented homes would not be foreclosed on before the submission deadline for missing documents, but did foreclose before submission deadline
    • Regardless if foreclosure was permitted by the servicing rules
Loss Mitigation
Acknowledgement Notices (cont.)

• Supervision Cited servicers for:
  – Failing to send *any* loss mitigation acknowledgment notices because of repeated loss mitigation processing platform malfunction;
  – Failing to state additional documents and information required to complete application in its acknowledgment notice;
  – Requesting inapplicable documents;
  – Requesting previously submitted documents;
  – Failing to provide reasonable submission deadline;
  – Providing 30 days to submit additional documents, but denying application before 30 days; and
  – Failing to include statement suggesting borrowers contact servicers of any other mortgage loans secured on same property to discuss available loss mitigation options.
Loss Mitigation Offer Letters and Related Communications

• Deceptive Practices:
  – Servicer misrepresented to borrowers that outstanding fees, charges, and advances would be deferred to the maturity date of the loan, but assessed hundreds of dollars of such charges after borrowers signed the permanent modification agreement.
  – Sent permanent modification agreements but did not execute after borrowers signed and returned; sent updated modification agreements with materially different terms affecting payments and acceptance of the modification.
  – Loan modification trial period plans represented borrowers would receive permanent modification after three trial payments; failed to disclose modification was contingent on a title search and could be denied based on the results of the title search.
  – Made misleading representations in terms of deferred mortgage payment plan; represented that deferred interest would be repayable at end of the loan term, but were actually collected immediately after deferment ended.
Loss Mitigation Offer Letters and Related Communications (cont.)

• Deceptive Practices (cont.):
  – Sent foreclosure warning notices to borrowers who were current on their low-balance home equity lines of credit and had no monthly payment due.
  – Required borrowers to sign waivers that they would have no “defenses, set-offs, or counterclaims to the indebtedness of borrowers pursuant to the Loan Document” in order to enter mortgage repayment and loan modification plans; borrowers likely to read waiver as barring them bringing claims.

• Abusive Practices:
  – Language in the proprietary modification was impossible for borrower to understand the nature of and how fees, charges, and advances would be assessed.

• Unfair Practices:
  – Servicer delayed sending loss mitigation offer letters to borrowers; sent after response deadlines had passed or were about to pass by the time borrower received letters.
  – Failed to timely convert successfully completed trial modifications to permanent modifications; delays resulted in higher accrued interest rates; continued to report borrowers as delinquent to consumer reporting agencies.
Servicing Transfers

- **Unfair Practices:**
  - Failed to honor terms of in-place trial modifications after transfer, delayed conversion to permanent loan modification with new servicer; resulted in higher accrued interest on unpaid principal balance during delay period.
Trump Effect

• Currently funded independently through Federal Reserve.
  – Stopgap government funding bill passed in September to expire December 9, 2016.
  – Effort to bring CFPB’s funding under Congressional appropriations approval → Congress could “starve CFPB to death.”

• More accountability for CFPB.
• PHH Appeal → Trump’s removal of Richard Cordray and halt rules not finalized.