

"ABUSIVE" ACTS OR PRACTICES: A DIFFERENT APPROACH

Susan Manship Seaman

Susan Manship Seaman is an associate in the Columbus, Ohio, office of Dreher Tomkies LLP. She practices in a variety of areas relating to banking, consumer financial services, and small business funding, including multistate compliance, online lending, and emerging payments. She received her J.D. from the Moritz College of Law at the Ohio State University in 2013 and is licensed to practice in Ohio. Susan is a member of the Consumer Financial Services Committee of the Business Law Section of the American Bar Association and serves as a young lawyer liaison to the Federal and State Trade Practices Subcommittee.

Over seven years ago, Congress gave the Consumer Financial Protection Bureau ("CFPB") the authority to declare an act or practice "abusive" if the act or practice meets one of four broad categories set forth in the Dodd Frank Wall Street Reform and Consumer Protection Act ("DFA").¹ The CFPB has the authority to define "abusive" acts or practices further through rule-making; however, the CFPB has declined to provide direct guidance on the scope of the DFA's "abusive" standard.



Susan
Manship Seaman

The CFPB first asserted an "abusive" act or practice claim in May 2013. Since then, financial services providers and practitioners have attempted to deduce the CFPB's view of the "abusive" standard by studying the CFPB's enforcement actions. This speculative exercise has been challenging because of: (i) the vague language in the DFA's "abusive" standard, (ii) the small number of enforcement actions asserting an "abusive" claim, (iii) the variety of practices and industries involved in such actions, (iv) the pre-filing negotiations between the CFPB and parties, (v) the CFPB's inconsistencies in alleging "abusive" claims in actions with similar fact patterns, and (vi) the CFPB's tendency to couple "abusive" claims with "deceptive" or "unfair" claims.

1. 12 U.S.C. § 5531(d) (2010) ("The Bureau shall have no authority under this section to declare an act or practice abusive in connection with the provision of a consumer financial product or service, unless the act or practice: (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 to act in the interests of the consumer.")

As of January 1, 2018, the CFPB had filed 28 enforcement actions that include an "abusive" act or practice allegation.² Given the variety of practices and industries in enforcement actions alleging an "abusive" act or practice, perhaps patterns in the CFPB's use of its "abusive" authority can be identified by analyzing enforcement actions within each of the four categories of the "abusive" standard. This article groups the 28 enforcement actions by category and identifies potential emerging trends within each category and between categories.

I. CATEGORY 1: ACTS OR PRACTICES THAT MATERIALLY INTERFERE WITH THE ABILITY OF A CONSUMER TO UNDERSTAND A TERM OR CONDITION

An act or practice is abusive in connection with the provision of a consumer financial product or service if the act or practice "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service" ("Category 1").³ The CFPB has initiated seven enforcement actions using this first prong of the "abusive" standard. The acts or practices that the CFPB has identified as materially interfering with a consumer's ability to understand a term or product can be organized into the following three groups: (i) misrepresentations, (ii) omissions, and (iii) deliberately distracting processes.

The CFPB has deemed two types of misrepresentations "abusive" as opposed to merely "deceptive": misrepresentations related to the enforceability of an agreement and misrepresentations related to the nature of a product. For example, in *CFPB v. NDG Financial Corp.*, a payday loan company collected unpaid loan balances when state law allegedly rendered the loans void or limited consumers' obligations to repay the loans.⁴ By engaging in collections, the company allegedly misrepresented that consumers had enforceable obligations to repay the loan balances. Interestingly, the CFPB did not allege a Category 1 "abusive" claim in *CFPB v. CashCall, Inc.*, which involved similar facts.⁵ The CFPB has also brought Category 1 "abusive" claims against companies that allegedly misrepresented the nature of their products. In *CFPB v. Pension Funding, LLC*, and *CFPB v. RD Legal Funding, LLC*, the companies represented that they offered non-credit products, but the products allegedly extended credit to consumers.⁶ According to the CFPB, misrepresenting the nature of the product and failing to provide credit-related terms, such as an APR,

2. Appendix A sets forth the enforcement actions initiated by the CFPB that allege an "abusive" act or practice as of January 1, 2018. Enforcement actions involving the same company or matter were grouped together for purposes of this article.

3. 12 U.S.C. § 5531(d)(1) (2010).

4. Complaint, *CFPB v. NDG Fin. Corp.*, No. 15-05211 (S.D.N.Y. July 31, 2015).

5. Complaint, *CFPB v. CashCall, Inc.*, No. 13-13167 (D. Mass. Dec. 16, 2013).

6. Complaint, *CFPB v. Pension Funding, LLC*, No. 15-01329 (C.D. Cal. Aug. 20, 2015); Complaint, *CFPB v. RD Legal Funding, LLC*, No. 17-00890 (S.D.N.Y. Feb. 7, 2017).

made it difficult for consumers to understand the risk of the credit product and evaluate the cost of credit.

The second group of acts or practices includes enforcement actions where the company allegedly materially interfered by failing to disclose a term or condition. In *CFPB v. All American Check Cashing, Inc.*, the defendant allegedly interfered with the ability of consumers to understand check cashing fees by physically blocking the fees, minimizing the time the consumer could view the fees, and making misleading statements regarding the fees.⁷ The CFPB also asserted a Category 1 "abusive" claim against Wells Fargo for opening deposit accounts and submitting credit card applications without the knowledge of consumers.⁸ Failing to notify a consumer of the existence of a deposit account or the submission of a credit card application, in the CFPB's view, constituted material interference with the consumer's ability to understand a term or condition of a financial product.

The final Category 1 group involves actions where a company purposefully designed a process to distract or confuse consumers regarding a term or condition. In *TMX Finance, LLC*, a lender offered a 30-day auto title loan that a consumer could roll over from month to month for a fee.⁹ Although the sales pitch disclosed the 30-day loan term, it also included questions related to a multi-month loan product. Repayment guides showed repayments for multi-month loans. The sales pitch and repayment guides allegedly materially interfered with a consumer's ability to understand the cost of rolling over the 30-day loan from month to month. In *CFPB v. TCF National Bank*, a bank allegedly designed an account opening process to decrease the consumer's ability to understand an opt-in notice for overdraft protection and fees.¹⁰ The bank allegedly used test groups to design a process that would maximize opt-in notice rates, and subsequently coached employees on how to maximize opt-in notice rates during account opening.

In five of the seven Category 1 enforcement actions, the CFPB asserted multiple "abusive" claims under different prongs of the "abusive" standard. In some cases, the CFPB alleged multiple "abusive" claims for the same conduct.¹¹ While bringing multiple "abusive" claims for the same conduct could be disregarded as a litigation strategy, the assertion of multiple "abusive" claims suggests that the CFPB is still determining the limits of Category 1.

7. Complaint, *CFPB v. All Am. Check Cashing, Inc.*, No. 16-00356 (S.D. Miss. May 11, 2016).

8. Consent Order, *In re Wells Fargo Bank, N.A.*, No. 2016-CFPB-0015 (Sept. 8, 2016).

9. Consent Order, *In re TMX Fin., LLC*, No. 2016-CFPB-0022 (Sept. 26, 2016).

10. Complaint, *CFPB v. TCF Nat'l Bank*, No. 17-00166 (D. Minn. Jan. 19, 2017).

11. *See, e.g.*, Complaint, *CFPB v. RD Legal Funding, LLC*, No. 17-00890 (S.D.N.Y. Feb. 7, 2017).

**II. CATEGORY 2: ACTS OR PRACTICES THAT TAKE UNREASONABLE
ADVANTAGE OF A LACK OF UNDERSTANDING ON THE PART OF
THE CONSUMER OF THE MATERIAL RISKS, COSTS, OR CONDITIONS OF
A PRODUCT OR SERVICE**

An act or practice is abusive in connection with the provision of a consumer financial product or service if the act or practice "takes unreasonable advantage of a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service" ("Category 2").¹² The CFPB has initiated 14 enforcement actions with Category 2 "abusive" claims. As the most frequently used prong of the "abusive" standard, Category 2 enforcement actions involve a variety of conduct and industries. Nonetheless, some patterns have emerged with the acts or practices and the material risks, costs, or conditions involved in these enforcement actions.

Category 2 "abusive" claims generally address acts or practices that take advantage of the information asymmetry between a consumer and a company. Similar to Category 1, Category 2 has a string of enforcement actions involving information asymmetry caused by misrepresentations or omissions. In *CFPB v. American Debt Settlement Solutions, Inc.*, *CFPB v. Nationwide Biweekly Administration, Inc.*, and *CFPB v. Freedom Debt Relief, LLC*,¹³ the CFPB asserted an "abusive" claim against companies that allegedly misrepresented a program's benefits, including mortgage interest savings and renegotiating or settling unsecured debts. Similarly, in *CFPB v. D & D Marketing, Inc.*, the CFPB alleged that T3 Leads (D & D's trade name) engaged in an "abusive" act or practice by failing to correct misrepresentations made by lead generators in T3 Leads' network regarding the quality of lenders available through the lead generators' websites.¹⁴ In *Fort Knox National Co.*,¹⁵ the CFPB alleged that the company failed to adequately disclose when a fee on the residual balance of an allotment account would be assessed.

Another set of enforcement actions involves information asymmetry between consumers and companies regarding the implications of state law. Information asymmetry with respect to state law is common in the marketplace. Generally, companies should know and comply with all applicable laws. An average consumer is not expected to be familiar with the specifics of applicable law. So then, why did the CFPB allege Category 2 "abusive" claims against CashCall, Colfax Capital, NDG Financial, Golden

12. 12 U.S.C. § 5531(d)(2)(A) (2010).

13. Complaint, *CFPB v. Am. Debt Settlement Solutions, Inc.*, No. 13-80548 (S.D. Fla. May 30, 2013); Complaint, *CFPB v. Nationwide Biweekly Admin., Inc.*, No. 15-02106 (N.D. Cal. May 11, 2015); Complaint, *CFPB v. Freedom Debt Relief, LLC*, No. 17-06484 (N.D. Cal. Nov. 8, 2017).

14. Complaint, *CFPB v. D & D Mktg., Inc.*, No. 15-09692 (C.D. Cal. Dec. 17, 2015).

15. Consent Order, *In re Fort Knox Nat'l Co.*, No. 2015-CFPB-008 (Apr. 20, 2015).

Valley Lending, and Think Finance for information asymmetry that is commonly found in the marketplace.¹⁶ The CFPB asserted that these companies took unreasonable advantage of a consumer's lack of understanding of state lending or usury laws by representing that the consumer had an enforceable obligation to repay the loan when state law voided the loan or limited the consumer's repayment obligation.

In *Zero Parallel, LLC*, the CFPB used similar reasoning to allege an "abusive" claim against a lead generator that sold leads to small-dollar installment lenders who made loans that were void in whole or in part under state law.¹⁷ The CFPB asserted that the lead generator knew or had reason to believe that selling leads to these lenders would result in wholly or partially-voided loans because, before selling a lead, the lead generator knew where the leads resided, the identity of the in-network lead purchaser, and whether the purchaser was likely to abide by state lending and usury laws. Unlike *D & D Marketing*,¹⁸ *Zero Parallel* notably lacks a specific allegation that the lead generator made misrepresentations to consumers regarding the quality of lenders available through the lead generator's network. The less desirable products in these enforcement actions potentially motivated the CFPB to assert that these companies took unreasonable advantage of information asymmetry between consumers and companies even though such asymmetry is commonly found in the marketplace.

Category 2 enforcement actions feature a risk, cost, or condition that likely would have affected a consumer's choice or conduct if the consumer had known about the risk, cost, or condition. As recognized by Eric Mogilnicki and D. Jean Veta in *Defining "Abusive" Acts or Practices*, many enforcement actions involved the material risk of consumers making payments for services that did not benefit the consumers or making payments that were not legally required.¹⁹ Another material risk identified by the CFPB is selecting a product with less favorable terms when more consumer-friendly products are potentially available.²⁰ In *CFPB v. Access Funding, LLC*, the CFPB identified the material risk as receiving advice on structured-settlement transfers from an "independent professional advisor" who was paid by the structured-settlement advance provider.²¹

16. Complaint, *CFPB v. CashCall, Inc.*, No. 13-13167 (D. Mass. Dec. 16, 2013); Consent Order, *In re Colfax Capital Corp.*, No. 2014-CFPB-009 (July 29, 2014); Complaint, *CFPB v. NDG Fin. Corp.*, No. 15-05211 (S.D.N.Y. July 31, 2015); Complaint, *CFPB v. Golden Valley Lending, Inc.*, No. 17-3155 (N.D. Ill. Apr. 27, 2017); Complaint, *CFPB v. Think Finance, LLC*, No. 17-00127 (D. Mont. Nov. 15, 2017).

17. Consent Order, *In re Zero Parallel, LLC*, No. 2017-CFPB-0017 (Sept. 6, 2017).

18. Complaint, *D & D Mktg., Inc.*, No. 15-09692 at ¶ 40 (C.D. Cal. Dec. 17, 2015). See *supra* note 14 and accompanying text.

19. Eric Mogilnicki and D. Jean Veta, *Bloomberg Law Insights: Defining "Abusive" Acts or Practices*, BNA BANKING REPORT, Feb 13, 2017.

20. See, e.g., Complaint, *D & D Mktg., Inc.*, No. 15-09692 (C.D. Cal. Dec. 17, 2015).

21. Complaint, *CFPB v. Access Funding, LLC*, No. 16-03759 (D. Md. Nov. 21, 2016).

In *CFPB v. Fort Knox National Co.*, the CFPB alleged that service members did not understand the material cost of leaving residual balances in allotment accounts.²² Finally, in *CFPB v. Freedom Debt Relief, LLC*, the CFPB alleged that consumers did not understand the material conditions of enrolling in a debt settlement program, including that consumers might be required to negotiate directly with their creditors and to pay a service fee regardless of whether the debt settlement company or the consumer ultimately negotiated with a creditor.²³ Had the risk, cost, or condition been known in the aforementioned enforcement actions, a reasonable consumer likely would not have made a particular decision, e.g., made a payment, selected the product, trusted advice, left funds in an account or enrolled in a program. Based on these risks, costs, and conditions, the CFPB appears to have adopted a "material" standard in Category 2 "abusive" claims similar to the "material" standard used in "deceptive" acts or practices claims.²⁴

**III. CATEGORY 3: ACTS OR PRACTICES THAT TAKE UNREASONABLE
ADVANTAGE OF THE INABILITY OF THE CONSUMER TO PROTECT
THE INTERESTS OF THE CONSUMER IN SELECTING OR USING
A PRODUCT OR SERVICE**

An act or practice is abusive in connection with the provision of a consumer financial product or service if the act or practice "takes unreasonable advantage of the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service" ("Category 3").²⁵ The CFPB has initiated 13 enforcement actions with Category 3 "abusive" claims, making Category 3 the second most frequently used prong of the "abusive" standard. Like Category 2 enforcement actions, Category 3 enforcement actions involve a variety of conduct and industries. Most of the Category 3 enforcement actions focus on the inability of a consumer to protect his or her interest in *selecting* a product or service. Two actions, *CFPB v. PayPal, Inc.*, and *CFPB v. Fort Knox National Co.*, involve the consumer's *use* of a product or service.²⁶

To date, the CFPB has alleged that a company took unreasonable advantage of a consumer's inability to protect his or her interests by engaging in the following four types of acts or practices, which are discussed below: (i) "burying" pro-lender provisions in consumer contracts,²⁷ (ii) engaging

22. Consent Order, *In re Fort Knox Nat'l Co.*, No. 2015-CFPB-008 (Apr. 20, 2015).

23. Complaint, *CFPB v. Freedom Debt Relief, LLC*, No. 17-06484 at ¶ 63 (N.D. Cal. Nov. 8, 2017).

24. See CFPB Bulletin No. 2013-07 (July 10, 2013) (summarizing the applicable standard for "deceptive" acts or practices).

25. 12 U.S.C. § 5531(d)(2)(B) (2010).

26. Complaint, *CFPB v. PayPal, Inc.*, No. 1:15-cv-01426 (D. Md. May 19, 2015).

27. See *infra* note 31 and accompanying text.

in high-pressure sales tactics,²⁸ (iii) providing minimal disclosures to consumers,²⁹ and (iv) funding high-cost loan programs.³⁰

First, the CFPB has used Category 3 to bring enforcement actions against companies that relied on pro-lender contract provisions to take actions that allegedly harmed the consumer. In *CFPB v. Freedom Stores, Inc.*, and *CFPB v. Security National Automotive Acceptance Co.*, the CFPB alleged that consumers were "surprised" to learn that their financing agreements contained certain provisions, including a venue selection clause or an authorization to contact an employer or commanding officer in the event of default.³¹ Not only did the CFPB claim that these contract provisions were "buried" in paper work or that the consumer had no time to read the provision, but the CFPB also alleged that even if a consumer had read and understood the provision, the consumer had no bargaining power to remove the provision in the take-it-or-leave-it financing agreements.

The CFPB has also alleged Category 3 "abusive" claims in connection with high-pressure sales tactics that, according to the CFPB, make consumers feel that they have no choice but to select the product or service. For example, ITT Education Services allegedly pushed low-income students who had few educational financing options into high-cost private student loans by (i) threatening to withhold transcripts or expel the student and (ii) providing class credits that could not be transferred to other schools.³² Thus, the CFPB claimed that students had no choice but to take the expensive student loans or forfeit their educational investment. The CFPB also brought an enforcement action against ACE Cash Express for allegedly creating an artificial "sense of urgency" to pressure borrowers into taking a new loan to payoff a delinquent loan.³³ In a third case, All American Check Cashing allegedly pressured or coerced customers to use its check cashing service by creating barriers for consumers to use alternative check cashing services.³⁴

The third group of Category 3 enforcement actions involved consumers who could not protect their interests because of a lack of information. In the most obvious example, the CFPB asserted a Category 3 "abusive" claim against Wells Fargo for opening deposit accounts and submitting

28. See *infra* notes 32-34 and accompanying text.

29. See *infra* notes 35-40 and accompanying text.

30. See *infra* notes 41-44 and accompanying text.

31. Complaint, *CFPB v. Freedom Stores, Inc.*, No. 2:14-643 (E.D. Va. Dec. 18, 2014); Complaint, *CFPB v. Security Nat'l Auto. Acceptance Co.*, No. 15-00401 (S.D. Ohio June 17, 2015).

32. Complaint, *CFPB v. ITT Educ. Serv., Inc.*, No. 14-00292 (S.D. Ind. Feb. 26, 2014).

33. Consent Order, *In re ACE Cash Express, Inc.*, No. 2014-CFPB-008 (July 10, 2014).

34. Complaint, *All Am. Check Cashing, Inc.*, No. 16-00356 (S.D. Miss. May 11, 2016).

credit card applications without the knowledge of consumers.³⁵ Consumers could not protect their interests because the consumers did not know that Wells Fargo had used their personal information to open accounts.³⁶ The CFPB took issue with companies that provided no or little information to consumers in two other cases. In *CFPB v. PayPal, Inc.*, the CFPB alleged that PayPal's inadequate explanation of how payments are applied to multiple deferred interest balances constituted an "abusive" act.³⁷ In *Y King S Corp.*, the CFPB alleged that the company engaged in "abusive" acts by (i) charging hidden finance charges in connection with motor vehicle retail installment sales contracts and (ii) withholding a vehicle's purchase price until after credit approval.³⁸

Category 3 enforcement actions also involve a lack of information stemming from misrepresentations. As discussed above, in *CFPB v. Pension Funding, LLC*, and *CFPB v. RD Legal Funding, LLC*, the companies allegedly misrepresented the nature of the products they were offering.³⁹ PayPal represented that consumers could control the payment allocation for deferred interest balances but, according to the CFPB, consumers had difficulty requesting a specific payment allocation.⁴⁰

In August, the CFPB alleged that Aequitas Capital took unreasonable advantage of a consumer's inability to protect his or her interests by purchasing private student loans with high default rates from a loan program sponsored by a for-profit school.⁴¹ The school allegedly inflated tuition and created a loan program to enable students to cover the increased tuition, all to remain eligible to receive revenue from Title IV federal student aid. The CFPB asserted that the company knew that the student loan program was a sham, that most students would default on the loans, and that students would be harmed by defaulting on the loans, and that it disregarded these alleged facts to earn a profit.⁴² Curiously, the CFPB did not assert an "abusive" claim in its 2014 complaint against the for-profit school.⁴³

CFPB v. Aequitas Capital is interesting in several respects. First, the allegedly "abusive" conduct is unlike the acts or practices that have been subject to other Category 3 claims. The CFPB identified the "abusive"

35. *In re Wells Fargo Bank, N.A.*, No. 2016-CFPB-0015 (Sept. 8, 2016).

36. *Id.* at ¶ 40.

37. Complaint, *CFPB v. PayPal, Inc.*, No. 1:15-cv-01426 (D. Md. May 19, 2015).

38. Consent Order, *In re Y King S Corp.*, No. 2016-CFPB-0001 (Jan. 21, 2016).

39. Complaint, *CFPB v. Pension Funding, LLC*, No. 15-01329 (C.D. Cal. Aug. 20, 2015); Complaint, *CFPB v. RD Legal Funding, LLC*, No. 17-00890 (S.D.N.Y. Feb. 7, 2017).

40. Complaint, *PayPal, Inc.*, No. 1:15-cv-01426 at ¶ 73 (D. Md. May 19, 2015).

41. Complaint, *CFPB v. Aequitas Capital Mgmt. Inc.*, No. 17-01278 (D. Or. Aug. 17, 2017).

42. *Id.*

43. Complaint, *CFPB v. Corinthian Colleges, Inc.*, No. 14-07194 (N.D. Ill. Sept. 16, 2014).

act or practice as funding and participating in a sham loan program to earn a profit.⁴⁴ Before *Aequitas Capital*, Category 3 claims had focused on “abusive” conduct in customer transactions. Here, the CFPB challenged a third-party loan purchaser that likely had minimal, if any, interactions with consumers. Another interesting aspect of this action is that the CFPB asserted only a Category 3 claim to challenge a “sham” loan program. The CFPB has relied primarily on Category 2 claims to attack alleged “sham” bank and tribal loan programs. In those Category 2 enforcement actions, the CFPB identified the “abusive” act or practice as representing that a consumer had an enforceable obligation. Perhaps the difference in pleading a Category 3 claim versus a Category 2 claim can be explained by *Aequitas Capital*’s lack of consumer interaction in its position as a mere loan purchaser. The departure in *Aequitas Capital* from the type of conduct and the type of company that have been involved in Category 3 claims could signal the CFPB’s new use of this prong of the “abusive” standard.

IV. CATEGORY 4: ACTS OR PRACTICES THAT TAKE UNREASONABLE ADVANTAGE OF THE REASONABLE RELIANCE BY THE CONSUMER ON A COVERED PERSON TO ACT IN THE INTERESTS OF THE CONSUMER

An act or practice is abusive in connection with the provision of a consumer financial product or service if the act or practice “takes unreasonable advantage of the reasonable reliance by the consumer on a covered person to act in the interests of the consumer” (“Category 4”).⁴⁵ Category 4 claims are the least common, with the CFPB bringing only five enforcement actions alleging a Category 4 “abusive” claim. The infrequent use of Category 4 “abusive” claims is potentially explained by the relatively uniform fact patterns in Category 4 enforcement actions compared to the varying fact patterns in enforcement actions in the other “abusive” categories. Generally speaking, companies have allegedly engaged in a Category 4 “abusive” act or practice by acting in the company’s own interest after representing that the company will act in the consumer’s best interest.

The CFPB has claimed that a consumer’s reliance on a company is reasonable based on affirmative representations made by the company. In *CFPB v. Navient Corp.* and *CFPB v. College Education Services, LLC*, the companies made statements in connection with providing services that allegedly induced consumers’ reliance.⁴⁶ The representations included “we can help you get back on track” or “we can help you fix your student loans.”⁴⁷

44. Complaint, *Aequitas Capital Mgmt. Inc.*, No. 17-01278 at ¶ 123 (D. Or. Aug. 17, 2017).

45. 12 U.S.C. § 5531(d)(2)(C) (2010).

46. Complaint, *CFPB v. Navient Corp.*, No. 17-0010 (M.D. Pa. Jan. 18, 2017); Complaint, *CFPB v. Coll. Educ. Serv., LLC*, No. 14-3078T36EAJ (M.D. Fla. Dec. 11, 2014).

47. Complaint, *Navient Corp.*, No. 17-0010 at ¶ 38 (M.D. Pa. Jan. 18, 2017); Complaint, *Coll. Educ. Serv., LLC*, No. 14-3078T36EAJ at ¶ 12 (M.D. Fla. Dec. 11, 2014).

Without these statements by the servicer, the consumers' reliance in *Navient* could be challenged as unreasonable insofar as consumers should understand that servicers act on behalf of creditors. The CFPB has also asserted Category 4 "abusive" claims against companies that hold themselves out as advisors or agents of the consumer. *College Education Services, CFPB v. ITT Educational Services, Inc.*, and *CFPB v. Access Funding, LLC*, featured individuals that held themselves out as "independent professional advisors," "advisors," or "financial aid advisors" with specialized knowledge that could help the consumer.⁴⁸ In *CFPB v. American Debt Settlement Solutions, Inc.*, the debt relief services company represented that it would renegotiate or settle the consumer's unsecured debts on behalf of the consumer.⁴⁹

However, the CFPB has not consistently pleaded a Category 4 "abusive" claim when a company provides advice to consumers or holds itself out as an advisor to consumers. For example, in *CFPB v. Pension Funding, LLC*, a company that offered advances on pension payments allegedly misled consumers by stating that it was in the consumer's best interest to take an advance from them as opposed to obtaining funds through a credit product.⁵⁰ Perhaps the CFPB viewed these statements as mere marketing puffery versus promises on which consumers could reasonably rely. In *CFPB v. S/W Tax Loans, Inc.*, the CFPB alleged that tax preparers, who provided tax preparation advice to consumers, steered consumers into high-cost refund anticipation loans, but the CFPB did not assert a Category 4 "abusive" claim against S/W Tax Loans.⁵¹ The CFPB may have viewed the tax preparer's advisory role as too attenuated from facilitating refund anticipation loans to allege a Category 4 "abusive" claim.

In addition to including affirmative representations by companies, Category 4 enforcement actions involve complex products or services that could be difficult for consumers to understand independently. In *ITT Educational Services*, the financial aid staff allegedly took control of and advised students on the complex financial aid process.⁵² In *Navient, College Education Services*, and *American Debt Settlement Solutions*, the companies offered to help distressed borrowers select and enroll in hardship plans,

48. Complaint, *Coll. Educ. Serv., LLC*, No. 14-3078T36EAJ at ¶ 17 (M.D. Fla. Dec. 11, 2014); Complaint, *CFPB v. ITT Educ. Serv., Inc.*, No. 14-00292 at ¶ 19 (S.D. Ind. Feb. 26, 2014); Complaint, *CFPB v. Access Funding, LLC*, No. 16-03759, at ¶ 13 (D. Md. Nov. 21, 2016).

49. Complaint, *CFPB v. Am. Debt Settlement Solutions, Inc.*, No. 13-80548 (S.D. Fla. May 30, 2013).

50. Complaint, *CFPB v. Pension Funding, LLC*, No. 15-01329 (C.D. Cal. Aug. 20, 2015).

51. Complaint, *CFPB v. S/W Tax Loans, Inc.*, No. 15-00299 (D.N.M. Apr. 14, 2015).

52. Complaint, *ITT Educ. Serv., Inc.*, No. 14-00292 at ¶ 69 (S.D. Ind. Feb. 26, 2014).

which can be difficult for consumers to evaluate.⁵³ The consumers in *Access Funding* sought advice in connection with structured settlement advances, an uncommon consumer funding product. The complexity of a product or service might make the consumer's reliance on a covered person appear more reasonable.

V. COMPARING CATEGORIES

A few themes emerge when comparing enforcement actions between the four categories of the "abusive" standard. First, the "abusive" categories overlap to a degree, with Category 4 being the potential exception. Some actions include multiple "abusive" claims for the same conduct. In addition, many of the allegedly "abusive" acts or practices in Category 2, specifically actions involving misrepresentations or omissions, arguably also could have been brought under Category 1 or Category 3 and visa versa.

Setting enforcement actions involving misrepresentations or omissions aside, Category 2 and Category 3 claims can potentially be distinguished. Category 2 enforcement actions seem to relate to acts or practices that prevent consumers from making informed decisions when the consumer has options; whereas Category 3 enforcement actions appear to involve acts or practices that restrict a consumer's ability to have a meaningful choice by, for example, limiting a consumer's options or taking advantage of consumers with few options.

Finally, Category 3 and Category 4 enforcement actions involve products or services that are complex, such as multiple deferred interest balances in *PayPal* or student financial aid options in *ITT Educational Services*. The complexity of products or services potentially increases the risk that the CFPB will allege a Category 3 or Category 4 "abusive" claim.

Future "abusive" enforcement actions will reveal whether the observations included in this article align with the CFPB's view of the "abusive" standard, which may change under the Trump administration's control. Stay tuned.

53. Complaint, CFPB v. Navient Corp., No. 17-0010 at ¶ 38 (M.D. Pa. Jan. 18, 2017); Complaint, *Coll. Educ. Serv., LLC*, No. 14-3078T36BAJ at ¶ 12 (M.D. Fla. Dec. 11, 2014); Complaint, *Am. Debt Settlement Solutions, Inc.*, No. 13-80548 (S.D. Fla. May 30, 2013).

APPENDIX A

This chart sets forth the enforcement actions initiated by the Consumer Financial Protection Bureau ("CFPB") that allege an "abusive" act or practice as of January 1, 2018. The CFPB may deem an act or practice "abusive" if the act or practice meets one of four "abusive" categories set forth in the Dodd Frank Wall Street Reform and Consumer Protection Act.⁵⁴ This chart shows which "abusive" category(-ies) the CFPB has relied on in each enforcement action. Multiple "abusive" claims in an enforcement action do not necessarily cover the same conduct. This chart was created using complaints and consent orders available through the CFPB's website. The enforcement actions do not represent final adjudications by courts of the claims. An asterisk (*) indicates a consent order.

54. 12 U.S.C. § 5531(d) (2010).

Filing date	Enforcement action	Category 1: Materially interferes with the ability of a consumer to understand a term or condition	Category 2: Takes unreasonable advantage of a consumer's lack of understanding of a material risk, cost, or condition	Category 3: Takes unreasonable advantage of the inability of the consumer to protect his or her interests in selecting or using a product or service	Category 4: Takes unreasonable advantage of the reasonable reliance by the consumer on a covered person to act in the interests of the consumer
5/30/2013	American Debt Settlement Solutions, Inc.		X		X
12/16/2013	CashCall, Inc. ⁵⁵		X		
2/26/2014	ITT Educational Services, Inc.			X	X
7/10/2014	ACE Cash Express, Inc.*			X	
7/29/2014	Colfax Capital Corp.*		X		
12/11/2014	College Education Services LLC				X
12/18/2014	Freedom Stores, Inc.			X	
4/14/2015	S/W Tax Loans, Inc.			X	
4/20/2015	Fort Knox National Company*		X	X	

55. The CFPB filed a First Amended Complaint on March 21, 2014.

5/11/2015	Nationwide Biweekly Administration, Inc.			X			
5/19/2015	PayPal, Inc.					X	
7/31/2015	NDG Financial Corp.	X		X			
8/20/2015	Pension Funding LLC	X		X			
6/17/2015	Security National Automotive Acceptance Company LLC					X	
12/17/2015	D and D Marketing, Inc. d/b/a T3 Leads ^{ss}			X			
1/21/2016	Y King S Corp. d/b/a Herbies Auto Sales*					X	
5/11/2016	All American Check Cashing, Inc.	X					
9/8/2016	Wells Fargo Bank, N.A.*	X				X	
9/26/2016	TMX Finance LLC*	X					
11/21/2016	Access Funding LLC			X			X

56. The CFPB filed separate complaints against Dmitry Fomichev and Davit Gasparyan related to T3 Leads' lead generation activities. These complaints have been combined with the complaint against T3 Leads for purposes of this chart and the preceding article.

Filing date	Enforcement action	Category 1: Materially interferes with the ability of a consumer to understand a term or condition	Category 2: Takes unreasonable advantage of a consumer's lack of understanding of a material risk, cost, or condition	Category 3: Takes unreasonable advantage of the inability of the consumer to protect his or her interests in selecting or using a product or service	Category 4: Takes unreasonable advantage of the reasonable reliance by the consumer on a covered person to act in the interests of the consumer
1/18/2017	Navient Corporation				X
1/19/2017	TCF National Bank	X			
2/7/2017	RD Legal Funding LLC	X	X	X	
4/27/2017	Golden Valley Lending Inc.		X		
8/17/2017	Aequitas Capital Management, Inc.			X	
9/6/2017	Zero Parallel, LLC*		X		
11/8/2017	Freedom Debt Relief, LLC		X		
11/15/2017	Think Finance, LLC		X		