NEWS

How Does The CFPB Actually Litigate?

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At the risk of kicking the CFPB while it's down, a question worth asking is: how does it actually litigate once a "covered person"[1] decides to resist? Setting aside the noteworthy PHH case, the vast majority of enforcement actions result in a complaint, consent order, and press conference – all in one day! However, in those rare instances when a company does resist, the ensuing litigation often reveals an agency at odds with basic rules of discovery and inconsistent in its theories of recovery and presentation of evidence.

For example, at least two federal district courts have been forced to explain to the CFPB that it is not exempt from Rule 30(b)(6) depositions, even for matters already covered in written discovery. See CFPB v. Universal Debt Solutions, LLC, et al., No. 1:15-cv-859-RWS (N.D. Ga.) (Dkt. No. 316); CFPB v. Borders & Borders, PLC, et al., No. 3:13-cv-1047-CRS-DW (W.D. Ky.) (Dkt. No. 119).

In the Borders & Borders case, the Court put it bluntly:

The Bureau has elected to bring suit against the Defendants. In doing so it has subjected itself fully to all of the controlling provisions of the Federal Rules of Civil Procedure including those that relate to discovery and Rule 30(b)(6). The scope of discovery remains the same irrespective of the status of the Plaintiff as an agency of the federal government. …

Merely because the Bureau has attempted to provide additional information via other discovery devices, such as responses to interrogatories, does not foreclose the defense from conducting an oral deposition of the CFPB simply because responses to interrogatories are more palatable to the Government. …

While the initial deposition topics may involve potentially hundreds of files, this magnitude is unavoidable given the nature of the CFPB's own claims. It would be decidedly ironic if the CFPB could rely upon the very magnitude of its own allegations to avoid providing proof to support them.

(Dkt. No. 119, pp. 13-15)

In the same litigation, *one day after the close of written discovery*, the CFPB served a "Fourth Supplemental Initial Disclosure", in which, *for the first time*, it identified 561 consumer witnesses. The Court struck that disclosure, along with portions of a Second Supplemental Disclosure, explaining that:

Both disclosures are clearly untimely and come years after the first initial disclosures were due in February of 2014. The CFPB has failed to show that its delay was substantially justified in either case, nor does it persuade the Court that its violation of Rule 26(a)(1)(A) is harmless. Just the opposite, the Court agrees with Borders & Borders that the CFPB at essentially the "11th hour" apparently has decided at the close of fact discovery to broaden its theory of recovery contrary to what had been its

consistent position to this point – – that discovery concerning the consumers involved in the affected real estate transactions had no bearing on the outcome of its RESPA violation theory. …

The unfairness of such a situation to Borders is manifest, and is highlighted by the fact that as recently as January 2016 the CFPB opposed that portion of the Rule 30(b)(6) deposition notice served by Borders that sought to question the Bureau concerning the topic of the consumers.

(Dkt. No. 120, pp. 10-11)

Even in its thus far successful action against Integrity Advance, LLC and its CEO James Carnes (2015-CFPB-0029)[2] relating to the lender's use of remotely created checks for borrowers who had withdrawn ACH authorization, the CFPB tried to prove consumer harm *not through sworn testimony* but through the submission of several Better Business Bureau complaints:

Mr. Carnes's uncontroverted testimony is that Integrity Advance only used [remotely created checks] when consumers had not paid on the loan, had blocked ACH access, and could not be contacted. *Without having entered any supporting evidence in the record*, the Bureau claims consumers were only trying to protect their accounts after having paid more than the "total of payments" on their loans. In addition, the Bureau asserts that "Integrity Advance took money from consumer bank accounts through remotely created checks when consumers were specifically trying to protect those accounts. … *The Bureau has not provided any credible, sworn testimony in support of its claim that consumers blocked ACH access out of sheer self-preservation*. The record merely contains several Better Business Bureau complaints. Had the Bureau called Integrity Advance customers to testify at the hearing about their experience with [remotely created checks], I could have credited such testimony, but I will not give weight to unsworn, largely anonymous consumer complaints. Certainly, the Bureau would have bolstered its case if it had presented credible testimony from persons who were actually harmed by Respondents' actions.

(Dkt. No. 176, pp. 36-37) (emphasis added).

From a reputational risk standpoint, it is of course quite difficult to withstand government accusations of unfairness, deception, and abuse towards your own customers. But for those companies that have the defenses and the means to resist, the above cases show that the CFPB may be prone to stumble in discovery or at trial. Clearly, the agency is more comfortable in the press room than the court room.

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[1] A "covered person" includes "any person that engages in offering or providing a consumer financial product or service" and affiliate service providers. 12 U.S.C. § 5481(6).

[2] Respondents have appealed the administrative law judge's decision recommending $38 million in damages plus several million in civil fines for violations of the Truth in Lending Act, the Electronic Fund Transfer Act, and the Consumer Financial Protection Act.

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