



The CFPB's Abusiveness Claim Against Nationwide: If an Interest Minimizer Program is Abusive, What About a Refinancing?

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The crux of the CFPB's "abusive act or practice" claim^[1] against Nationwide Biweekly Administration, Inc. ("Nationwide") is that its customers do not understand how long they must remain in the company's Interest Minimizer ("IM") program to save interest on their mortgage loans. Customers enrolled in the program typically remit half of their mortgage payments to Nationwide every two weeks. Nationwide then remits biweekly payments to lenders, and its customers end up making one extra mortgage payment each year. During the first several years of enrollment, customers typically pay more in initial setup fees (up to \$995) and biweekly processing fees (up to \$3.50 per payment) than they realize in savings.

The CFPB claims the IM program is abusive because Nationwide guarantees that its customers will save money even though "a substantial number ... will leave the IM program prior to saving any money." According to the CFPB, Nationwide takes "unreasonable advantage" of the fact that its customers "are unlikely to understand that during the first several years of enrollment in the IM program, they will pay more in fees to Nationwide than they will save."^[2]

Setting aside the question of whether a savings guarantee can be considered deceptive, the CFPB's abusiveness claim against Nationwide, *if credited*, calls into question whether a standard refinance can be considered abusive. This is because a claim for abusiveness under Dodd-Frank requires proof that an act or practice either:

1. Materially interferes with consumers' ability to understand a financial product or service; or
2. Takes unreasonable advantage of: (A) consumers' lack of understanding of risks, costs, or conditions of a financial product or service; (B) consumers' inability to protect their own interests; or (C) consumers' reasonable reliance that a covered person is acting in their interests.^[3]

Refinance consumers, like IM enrollees, also want to save money. However, depending on differences in interest rates, fees, taxes, and closing costs, it can easily take three years to start saving money on a refinance. During that time, some percentage of consumers will invariably default or sell. Some may even refinance again – all without ever realizing any savings. In other words, refinance consumers, like IM enrollees, risk losing money. Yet, in either scenario, consumers *will* eventually save money *if* they

remain with their new loan or IM program long enough. Thus, setting aside Nationwide's guarantee and focusing instead on the issue of consumer understanding, the CFPB's abusiveness theory could just as easily apply to almost any refinancing where the consumer absorbs upfront costs in order to save money down the road. It would be unsettling if the CFPB deemed consumers capable of understanding the need to get past a breakeven point in one scenario but not another.

Perhaps recognizing the weakness of its abusiveness claim, the CFPB recently moved for partial summary judgment on all of its *other* claims against Nationwide (deceptive acts or practices and violation of the Telemarketing and Consumer Fraud and Abuse Prevention Act). This move backfired, however, as the district court concluded that the agency's abusiveness claim rested on the same facts as its other claims; therefore, granting partial summary judgment "would achieve no significant reduction in the issues and evidence at trial."^[4]

The district court also denied the CFPB's motion for summary judgment on Nationwide's counterclaims, which are based on the agency's role in Operation Choke Point, a DOJ initiative that led several banks to terminate their relationships with Nationwide, effectively cutting off its ability to do business. All claims are scheduled for a jury trial beginning on April 24, 2017.

In a final twist, on February 16, 2017, the CFPB moved to strike Nationwide's jury demand for all claims and counterclaims now set for trial. The irony is rich: the very agency charged with protecting the people from financial abuse and deception now wants to avoid having the people decide its case.

^[1] The 2010 Dodd-Frank Act prohibits all covered persons (i.e., any provider of consumer financial products or services) from engaging "in any unfair, deceptive, or *abusive* act or practice." 12 U.S.C. § 5536(a)(1)(B) (emphasis added).

^[2] *CFPB v. Nationwide Biweekly Administration, Inc., et al.*, Dkt. No. 1, ¶¶ 60, 62, Case No. 3:15-cv-2106 (N.D. Cal.)

^[3] 12 U.S.C. § 5531(d)

^[4] *CFPB v. Nationwide Biweekly Administration, Inc., et al.*, Dkt. No. 186, Case No. 3:15-cv-2106 (N.D. Cal.)

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