Bloomberg Law

BNA's
Banking Report™

Reproduced with permission from BNA's Banking Report, 108 BBR 269, 2/13/17. Copyright © 2017 by The Bureau of National Affairs, Inc. (800-372-1033) http://www.bna.com

Consumer Protection

Bloomberg Law Insights: Defining 'Abusive' Acts and Practices

BY ERIC MOGILNICKI AND D. JEAN VETA

One of the important innovations of the Dodd-Frank Act was the addition of a prohibition on ''abusive'' acts and practices to established prohibitions on unfair and deceptive conduct. However, as Senator Chris Dodd remarked on the Senate floor, ''[t]he word 'abusive' does need to be defined.'' Congress did little to explain the statutory language, however, and so left it to the Consumer Financial Protection Bureau to breathe meaning into the new standard.

Unfortunately, the Bureau has also failed to clearly state how and why it determines what practices are ''abusive.'' The resulting uncertainty has led to proposals to simply eliminate the new standard from the statute. For example, the Financial CHOICE Act proposed by House Financial Services Committee Chairman Jeb Hensarling in the last Congress ''repeals the CFPB's standard-less authority to deny consumers access to any financial product and service it declares 'abusive.' '' House Financial Services Committee, Comprehensive Summary of Financial CHOICE Act, page 50 (June 23, 2016).

This article seeks to bring some order to the ''abusive'' standard, and thereby preserve it. Although the Bureau has not been entirely consistent in bringing ''abusive'' cases, there are now enough cases to identify a pattern that is consistent with the Bureau's apparent enforcement strategy, the statutory language, and the legislative history of the new standard. In short, the Bureau generally enforces the ''abusive'' standard on behalf of a large group of consumers when it can prove that a product, service, or fee is highly unlikely to provide *any* benefit to *any* consumer. In such cases, the Bureau may assert that all of the relevant consumers lacked either the understanding or power to protect themselves because there is no other rational explanation for each consumer's behavior.

This working definition of ''abusive'' solves a host of problems. First, it provides financial institutions with a map to avoiding ''abusive'' conduct. Second, it offers courts and litigants alike a tool to analyze the appropriateness of an ''abusive'' claim. Third, it helps the Bureau, in exercising its enormous discretion, adopt a rigorous approach to bringing such charges. Most importantly, providing definition to the ''abusive'' standard may be essential to avoiding its repeal.

Eric Mogilnicki is a partner in Covington & Burling's Financial Services Group and Co-Chair of its Consumer Financial Services Practice resident in Washington. D. Jean Veta is a partner in Covington & Burling's Washington office and a member of its Financial Services and White Collar Groups. *The authors gratefully acknowledge the thoughtful comments of their colleagues at Covington on earlier drafts of this article.*

The Problems with ''Abusive'' Enforcement

Instead of providing explicit guidance on the ''abusive'' standard, the Bureau has brought a set of enforce-

ment cases employing the new law. Unfortunately, as first demonstrated in an article published here two years ago, the Bureau has made an allegation of ''abusive'' conduct in some cases, only to avoid such an allegation in other cases with very similar facts. See Eric J. Mogilnicki and Eamonn K. Moran, *The CFPB's Enforcement of the Prohibition on Abusive Acts and Practices*, (104 BBR 236, 2/3/15). For example, the Bureau has alleged that creating ''an artificial sense of urgency'' for a consumer considering a payday loan is abusive, but that creating ''an artificial sense of urgency'' for a consumer considering a student loan is merely deceptive. Compare Consent Order, *In the Matter of: CFPB v. ACE Cash Express, Inc.*, 2014-CFPB-0008 (July 10, 2014) with Complaint, *CFPB v. Global Financial Support et al.*, 15-cv-2440-GPC-WVG (S.D. Cal. Oct. 29, 2015).

This inconsistency persists. Within two weeks in late 2016, the Bureau reached settlements in cases against two different lenders for very similar misconduct. In both cases, employees engaged in allegedly improper sales practices during meetings with consumers. In both cases, the employees allegedly focused consumers on monthly payments in order to hide the true costs of a loan. However, this conduct was alleged to be deceptive (but not abusive) in one case and abusive (but not deceptive) in the other. Compare Consent Order, *In The Matter of: Bridgepoint Education, Inc.*, 2016-CFPB-0016 (Sept. 12, 2016) with Consent Order, *In The Matter of: TMX Finance LLC*, 2016-CFPB-0022 (Sept. 26, 2016).

In the same month, the Bureau brought an ''abusive'' charge against Wells Fargo for allegedly using customer information without consent and opening unauthorized accounts. See Consent Order, *In The Matter of: Wells Fargo Bank, N.A.*, 2016-CFPB-0015 (Sept. 8, 2016). However, the Bureau had previously brought a case against the Hydra Financial Limited Funds for allegedly using customer information without consent to make actual loans— and withdrawals from their accounts to pay off these phony loans. The Bureau did not allege that Hydra's conduct was ''abusive.'' See Complaint, *CFPB v. Richard Mosely Sr. et al.*, No. 4-140-cv-00789-DW (W.D. Mo. Sept. 9, 2014).

This inconsistency appears to reflect the Bureau's unwillingness to grapple explicitly with two analytical problems with the ''abusive'' standard. Under the Dodd-Frank Act, an act or practice may be abusive only if 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 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.

See 12 U.S.C. § 5531(d). The origins and details of this standard are described in a Jan. 2015 article in this publication by Eric J. Mogilnicki and Eamonn K. Moran, *Understanding and Applying Dodd-Frank's Abusive Standard*, (104 BBR 161, 1/27/15). The Bureau has primarily used subsections (2)(A) and 2(B), which relate to the consumer's understanding and ability to protect their own interests, and so those provisions are the focus of this analysis.

This standard poses at least two significant analytical problems. First, how can the ''abusive'' standard be used to resolve large cases when it seems to require individualized determinations of the understanding, power, or reasonable reliance of ''the consumer''? It is often impossible to generalize about all of the many people who choose a product or service. Second, the ''abusive'' standard seems to overlap the standards for unfairness and deception. When should the Bureau bring an ''abusive'' claim on the basis of activities that also qualify as unfair or deceptive? These two problems are discussed in more detail below.

Individualized Determinations

The text of the ''abusive'' standard appears to anticipate an assessment of individual facts and circumstances. The first prong of the standard refers to an act or practice that materially interferes with the ability of ''*a consumer*'' to understand a term or condition. The remaining prongs all relate to the issue of whether ''*the consumer*'' lacked understanding, was unable to protect ''the interests of *the consumer*,'' or reasonably relied upon another to act in ''the interests of *the consumer*.'' This focus is quite different from the unfairness standard, which asks if an act or practice causes injury to ''consumers,'' plural, and whether there are countervailing benefits to ''consumers.''

This difference between the standards appears to be intentional. The focus on individual consumers in the ''abusive'' standard allows the Bureau to parse whether particular individuals were unable to protect themselves from an act or practice that is not universally ''abusive.'' One of the framers of the Dodd-Frank Act, former House Financial Services Chairman Barney Frank, explained that the ''abusive'' standard:

> says you should not take unreasonable advantage of a lack of understanding. [For example], there are mortgage products that are not suitable for an 89-year old woman who has never had her own experience in economic affairs.

House Financial Services Committee, Subcommittee on Financial Institutions and Consumer Credit Hearing, ''The Consumer Financial Protection Bureau: the First 100 Days,'' 112th Con. (Nov. 2, 2011). CFPB Director Cordray endorsed this case-by-case approach, explaining at a Mar. 2012 House Financial Services Committee hearing that enforcing the ''abusive'' standard involves the ''facts and circumstances'' of individual situations, and that proving a lack of understanding requires that the Bureau investigate the facts ''consumer by consumer.'' Such a focused standard may prove a useful tool to protect particularly vulnerable consumers.

However, this focus on individual situations seems missing in the Bureau's broad-brush approach to enforcement cases. The Bureau's enforcement actions generally do not distinguish among individual consumers. Instead, Bureau cases typically make findings regarding, and order redress to, *all* consumers who purchased a particular product or service. This approach appears to be odds with an ''abusive'' standard that requires an analysis of individual circumstances. Indeed,

 COPYRIGHT © 2017 BY THE BUREAU OF NATIONAL AFFAIRS, INC. ISSN 0891-0634

the Bureau has yet to bring an ''abusive'' case that includes the kind of detail regarding an individual consumer that Chairman Frank and Director Cordray identified as central to the new standard. Accordingly, any coherent theory of the Bureau's enforcement of the ''abusive'' standard must explain how the Bureau can seek sweeping redress without reviewing the ''facts and circumstances'' of individual consumers' experiences.

Distinguishing ''Abusive'' from Deception and Unfairness

A second open question regarding the ''abusive'' standard is how it fits with the pre-existing ''deception'' and ''unfairness'' standards. The Bureau generally has avoided bringing an abusive claim without a closely related unfairness or deception claim. However, it routinely brings cases that allege deceptive or unfair conduct without adding an ''abusive'' claim. *See* Mogilnicki and Moran, *The CFPB's Enforcement of The Prohibition on Abusive Acts and Practices* (104 BBR 236, 2/3/15). This raises the question of what criteria the Bureau uses to decide whether to add an ''abusive'' claim.

Critics of the Bureau may read the seeming inconsistencies among the enforcement cases as an indication that factors beyond the factual allegations are in play. For example, a review of the cases suggests that the Bureau is more likely to enforce the ''abusive'' standard against nonbanks than banks; on behalf of servicemembers than ordinary consumers; and in settlement than in litigation. On the basis of this and other evidence, an argument could be made that the Bureau's decision to charge ''abusive'' conduct is best explained not by the legal standard but by the relative bargaining position of the defendant, or the Bureau's level of empathy for the victims.

This is a serious criticism, as an absence of standards hurts businesses and consumers alike. An ''abusive'' standard that is contingent on the negotiations (and negotiating power) between the parties, or on the Bureau's sympathies, provides little guidance to financial services companies seeking to avoid violating the law. Such guidance is essential not only to the industry but also to consumer protection, which depends upon compliance and deterrence as much as enforcement. Given a clear meaning, the ''abusive'' standard can proactively protect consumers, rather than simply be meted out as punishment after injury has occurred. The absence of such meaning would be an argument for repeal of such ''standard-less authority.''

However, careful analysis suggests that the Bureau has been more thoughtful towards the ''abusive'' standard than it has articulated. Although the Bureau has not explained when and why it alleges that conduct is ''abusive,'' there are general principles implicit in its enforcement cases. These general principles do not explain every choice made by the Bureau to include or exclude an ''abusive'' allegations, but they explain the bulk of the available data, and provide a basis to further analyze the exceptions. More important, these principles provide some instruction to financial institutions seeking to avoid engaging in abusive practices, and some comfort to those concerned that the ''abusive'' standard is merely in the eye of the beholder.

Explaining the Abusive Cases

The Bureau generally enforces the ''abusive'' standard when it can prove that a product, service or fee is highly unlikely to provide *any* benefit to *any* consumer. In such cases, the Bureau is comfortable alleging that large groups of consumers lacked understanding or power because there is no other rational explanation for each consumer's decision. Under such circumstances, individualized allegations are unnecessary. As set forth below, this general principle explains a wide range of the Bureau's ''abusive'' cases and solves the analytical puzzles posed by the new standard.

Worthless Products. The Bureau's focus on worthless products began with its first ''abusive'' case, *American Debt Settlement Solutions*, which involved a company's failure to disclose that its debt relief program was ''highly unlikely'' to benefit consumers. Indeed, the Bureau alleged that 89 percent of all ADSS consumers did not receive benefits from the program, with relief ''nearly impossible'' to obtain for smaller debts. These facts sufficed, in the Bureau's view, to demonstrate that the consumers who signed up for the ADSS program did not understand it. See Complaint, *CFPB v. American Debt Settlement Solutions, Inc., et al.*, No. 9:13-cv-80548 (S.D. Fla. May 30, 2013); see also Mogilnicki and Moran, *The CFPB's Enforcement of the Prohibition on Abusive Acts and Practices* (discussing *ADSS*).

ADSS was the first in a line of cases where worthless products were deemed ''abusive.'' In 2014, the Bureau alleged abusive conduct by College Education Services when it took fees for services that did not materialize:

> For example, CES took advance fees to consolidate private loans that were not eligible for consolidation . . . [and] to enroll some consumers in income-based repayment plans or loan forgiveness programs for which they were not eligible.

See Complaint, *CFPB v. College Education Services LLC*, No. 8:14-cv-3078, (M.D. Fla. Dec. 11, 2014), ¶ 60. As in *ADSS*, the *College Education Services* case involved a strong claim of ''abusive'' behavior because the very fact that a consumer purchased these worthless services served as evidence that College Education Services had taken unreasonable advantage of them.

Similarly, in 2015 the Bureau alleged abusive conduct by Nationwide Biweekly Administration, Inc. because purchasers of its ''Interest Minimizer'' product ''pay more in fees to Nationwide than they will save through the program'' for several years, and ''a substantial number of consumers will leave the IM Program prior to saving any money.'' Here too, the absence of benefits allowed the Bureau to conclude that all purchasers of the product must have been subject to ''abusive'' conduct. See Complaint, *CFPB v. Nationwide Biweekly Admin., Inc., et al.*, No. 3:15-cv-02106, (N.D. Cal. (May 11, 2015) (''Nationwide Biweekly Complaint''), ¶¶ 59, 60.

These types of cases provided an initial core to the Bureau's ''abusive'' jurisprudence. Early on, the Bureau implicitly concluded that it could allege ''abusive'' conduct when the relevant financial product or service is worthless without analyzing the ''facts and circumstances'' of individual consumers' decisions. The mere fact that a consumer purchased a worthless product demonstrates that the seller took unreasonable advantage of a lack of understanding.

Unnecessary Payments. In addition to its worthless product cases, the Bureau has employed similar logic to bring ''abusive'' claims where the consumer pays more for a product than a readily available alternative. Just as some products provide no value to consumers, so do some payments. Thus, worthless payments offer the Bureau another opportunity to allege ''abusive'' conduct without analyzing the ''fact and circumstances'' of individual consumers' decisions. The mere fact that a consumer made a payment that accomplished nothing demonstrates that the seller took unreasonable advantage of a lack of understanding.

One early example of an ''abusive'' claim based on unnecessary payments is the Bureau's April 2015 Complaint against S/W Tax Loans (''Southwest'') and its owner, Jeffrey Scott Thomas. Southwest tax preparers allegedly steered consumers towards Southwest Refund Anticipation Loans (''RALs''), based on expected income tax refunds, which had APRs ranging from 240 percent to 310 percent, even though Southwest's principals also sold an H&R Block line of credit with a maximum APR of 36 percent. Southwest also persuaded consumers to take out a second Refund Anticipation Loan after Southwest had received a tax refund on the consumers' behalf. Complaint, *CFPB v. Nationwide Biweekly Administration, Inc., et al.*, No. 3:15-cv-02106, (N.D. Cal. May 11, 2015).

Both practices were abusive because readily available lower-cost alternatives existed. Indeed, the relative costs and benefits were so one-sided that the Bureau was comfortable concluding, without citing testimony or other evidence, that consumers would not have taken out another Southwest RAL ''had they know[n] that their refunds had been received . . .'' Given the economics of the transaction, the consumers' unnecessary payments proved that Southwest ''took unreasonable advantage of their tax clients' inability to protect their own interests'' and so engaged in ''abusive'' conduct.

This thread of concern with demonstrably unnecessary payments runs through other Bureau ''abusive'' cases:

- In its case against PayPal and its online-payments system, PayPal Credit, the Bureau alleges that PayPal made it difficult for consumers to understand and adjust their payment allocation across different balances. As in *Southwest*, the Bureau cited the ready availability of a lower-cost alternative as the basis for an allegation of abusive conduct: ''consumers could not clearly understand how payments were applied . . . and Defendants allocated payments in a way that consumers would not have chosen.'' Complaint *CFPB v. PayPal, Inc. et al.*, No. 1:15-cv-01426 (D. Md. May 19, 2015), ¶ 74.

- The Bureau alleges that T3 Leads was ''abusive'' when it caused consumers to pay interest and endure loan terms that were worse than those they could have obtained from other lenders. Complaint, *CFPB v. D and D Marketing Inc., et al.*, No. 2:15-cv-9692 (W.D. Cal., Dec. 17, 2015), ¶ 40.

- The Bureau's case against All American Check Cashing includes allegations that consumers paid high check cashing fees even though ''there are business and financial institutions located near AACC stores that charge consumers lower fees to cash a check.'' Complaint, *CFPB v. All American Check Cashing Inc., et al.*, No. 3:16cv356WHB-JCG, (S.D. Miss., May 11, 2016), ¶10.

- One of the Bureau's most recent ''abusive'' case alleges that the student loan servicer Navient steered borrowers into short-term payment relief options that were more expensive than available long-term repayment options, thereby adding nearly $4 billion in unnecessary interest charges. Complaint, *CFPB v. Navient Corp., et al.*, No. 3:17-cv-00101-RDM, (M.D. Pa. Jan. 18, 2017).

The Bureau has also brought several cases in which it found ''abusive'' conduct occurred when lenders induced borrowers to make payments on loans that were void. For example, in its lawsuit against Cash Call, Inc., the Bureau alleged that ''[i]f consumers had known or understood that they were not legally obligated to pay all or part of the loans, many consumers likely would not have authorized Defendants to process debits for the full loan balances. . . . '' First Amended Complaint, *CFPB v. Cash Call et al.*, No. 1-13-cv-13167 (GAO)(D. Mass., Mar. 21, 2014). Here too, the Bureau did not allege in detail how it knew what each consumer knew or would have chosen. The mere fact that each consumer made payments on a debt that they did not legally owe demonstrates that the lender took ''unreasonable advantage'' of them.

The same logic explains a portion of the Bureau's recent ''abusive'' claim against RD Legal Funding. The Bureau's complaint explains that RD Legal Funding advances funds to consumers who are entitled to receive compensation under a settlement fund or judgment, even when RD Legal Funding knows or should know that the resulting assignment is prohibited under the terms of the settlement or judgment. As in *Cash Call*, the Bureau assumes that only a lack of understanding could explain any consumer's payment on a void instrument. Complaint, *CFPB et al. v. RD Legal Funding, LLC et al.*, No. 1:17-cv-00890, (S.D.N.Y., Feb. 7, 2017).

These cases broaden the Bureau's ''abusive'' jurisprudence. The Bureau has not merely deployed the new standard against worthless products. Instead, it has reached more broadly to punish financial institutions that hoodwink consumers into other kinds of wasted spending. These cases all share a common core, however, which is that the Bureau has identified fact patterns where it believes further analysis of the ''facts and circumstances'' of individual consumers is unnecessary. When a consumer makes a payment that accomplishes nothing -- whether because the product is worthless, the price is unreasonably inflated, or the debt is void -- the Bureau is confident that the only remaining explanation for the consumer's action is that a financial institution has taken advantage of the consumer's lack of understanding or lack of ability to protect themselves. This confidence is often expressed by the Bureau explaining that the consumer would have made a different choice absent the abusive conduct.

Solving the Analytical Puzzles. The worthless product and unnecessary payments cases solve the key analytical puzzles posed by the Bureau's effort to enforce an individualized standard on a broad basis. When the product is worthless or the payment accomplishes nothing, the Bureau believes it need not plumb nor prove the precise 'facts and circumstances' of each individual decision to purchase the product or service. Their purchase or payment itself serves as proof of the abusive conduct.

 COPYRIGHT © 2017 BY THE BUREAU OF NATIONAL AFFAIRS, INC. ISSN 0891-0634

This standard also explains when and why the Bureau adds an ''abusive'' claim to a enforcement action alleging deception or unfairness. Deception claims require allegations that an act or practice is likely to mislead the consumer and of materiality, which exists whenever the information ''is likely to affect a consumer's choice,'' or conduct. *See* CFPB Supervision and Examination Manual (v.2-October 2012) at UDAAP 6. The Bureau appears to add an ''abusive'' charge to a deception claim to signal its confidence that the consumer was in fact misled, and that the deception in fact affected their choice. Such certainty exists when a consumer spends money on a product or service that offers them no benefits, or makes an unnecessary payment. Similarly, unfairness claims may be made only when the alleged harm to consumers is not reasonably avoidable nor ''outweighed by countervailing benefits to consumers or to competition.'' The Bureau appears to tack on an ''abusive'' charge when there are no countervailing benefits at all.

This reading of the statute also comports with Bureau Director Cordray's description of ''abusive'' conduct. As he testified before a House Oversight and Government Reform Subcommittee in Mar. 2012, ''what's very clear in the [Dodd-Frank Act], even though a lot of the detail and definition is . . . less clear, is for something to be an abusive practice it would have to be a pretty outrageous practice.'' He added that institutions that engage in abusive conduct ''know they are doing something wrong.'' Selling worthless products, or collecting payments without any benefit to consumers, meets this high standard.

Finally, this principle explains why the Bureau did not bring ''abusive'' claims in other cases, despite allegations of significant customer harm. For example, when the Bureau pursued a set of cases involving sales of credit card add-on products, it confined its allegations to deception and unfairness. This choice reflects the fact that, even though the Bureau alleged that consumers did not get the full use of these multi-feature products, there was no allegation that the product was worthless.

For example, the Bureau accused Bank of America (among many others) of selling an Identity Monitoring Product to consumers who did not receive ''all of the credit monitoring and/or credit report retrieval benefits of the product.'' This was allegedly unfair -- but not abusive -- because these same consumers received some of the benefits of the product. See Consent Order, *In The Matter of: Bank America, N.A.; and FIA Card Services N.A.*, No. 2014-CFPB-0004 (Apr. 9, 2014). Similarly, American Express allegedly sold an Account Protector product that would make payments in the event of unemployment or disability to consumers who were already unemployed or disabled. Here too, the product still had value to each purchaser, and there was no claim of ''abusive'' conduct. See Consent Order, *In The Matter of: American Express Centurion Bank*, 2013-CFPB-0011 (Dec. 24, 2013). In both cases -- and in many more -- the Bureau cannot know whether or not a particular consumer would have purchased the product if he or she had full information and the ability to protect his or her interests. Hence, the Bureau could not allege that the mere act or practice of selling that product was ''abusive.''

The Other Abusive Cases. One consequence of a more robust theory of what constitutes ''abusive'' conduct is that it provides a perspective from which Bureau enforcement cases may be appreciated -- or criticized. As the cases above demonstrate, the Bureau has repeatedly alleged abusive conduct when it can be reasonably certain that no consumer would have made the purchase or payment if they had full knowledge and the ability to protect themselves. Such a standard provides a useful bright line. In short, the ''abusive'' cases warn financial institutions that they must ensure that every product has value, and that every payment is consistent with a choice that a well-informed consumer might reasonably make. This standard may also point the way to future individual ''abusive'' cases when a product lacks value for a particular customer, just as Chairman Frank seemed to anticipate.

However, articulating the principles that generally undergird the Bureau's ''abusive'' cases also identifies cases in which the Bureau has strayed from those principles. These exceptions to the rule involve punishing financial institutions for inducing consumers into making purchases or payments that the Bureau simply dislikes. In particular, when the Bureau cannot demonstrate that the product or payment alone proves that the customer was fooled or unable to protect themselves, it is difficult to see how the Bureau can appropriately allege ''abusive'' conduct towards large groups of consumers.

One example of a misplaced ''abusive'' claim is in the CFPB's claim against ACE Cash Express. In that Consent Order, the Bureau's ''abusive'' claim is that some ACE collectors ''created and leveraged an artificial sense of urgency to induce delinquent borrowers with a demonstrated inability to repay their existing loan to take out a new ACE loan, with accompanying fees.'' The problem here is that delinquent borrowers with a demonstrated inability to repay their existing loans routinely take out new payday loans -- even without such sales tactics. Indeed, the Bureau's proposed payday regulation is based on the premise that consumers will take out successive new loans, with new fees, absent regulation. So the Bureau cannot know which or how many consumers (if any) were actually affected by ACE's allegedly abusive practices without individualized evidence that is absent from the Consent Order.

Another outlier in the Bureau's ''abusive'' docket is the Bureau's June 2015 Complaint against Security National Automotive Acceptance Company (''SNAAC''). When SNAAC made loans to servicemembers, it required them to sign a contract addendum that allowed SNAAC to contact the borrower's commanding officer if necessary to secure payment. The Bureau nonetheless argued it as ''abusive'' for SNAAC to threaten to contact servicemembers' commanding officers. In a series of arguments that could be made regarding many a consumer financial contract provision, the Bureau alleges that many servicemembers were unaware of the addendum they signed, lacked the ability to bargain over the addendum, and didn't fully anticipate its potential consequences. Complaint, *CFPB v. Security National Auto Acceptance Co., LLC*, No. 1:15-CV-00401, (S.D. Ohio, June 17, 2015).

The critical difference between SNAAC and other ''abusive'' cases, is that the Bureau could not simply assume that the consumer consent in *SNAAC* reflected a lack of understanding or power. While it is relatively

easy to assume that consumers do not freely choose to pay for worthless products, *see ADSS;* nor to pay more interest than necessary, *see PayPal*, it is less clear that the consumers who borrowed from *SNAAC* were tricked into behaving irrationally. For example, customers may have chosen to sign the addendum because they were confident that they would make timely payments. Indeed, the Bureau's Complaint concedes some customers were aware of the provision and nevertheless signed the contract. Thus, the mere existence of signed contract addenda does not justify the allegation that all of SNAAC's customers were victimized by their lack of understanding or power.

The same problems exist on the Bureau's enforcement action against *Freedom Stores*, where consumers signed a contract that included a venue-selection clause. See Mogilnicki and Moran, *The CFPB's Enforcement of the Prohibition on Abusive Acts and Practices* (discussing the *Freedom Stores* case) (104 BBR 236, 2/3/15). There too, a rational consumer could have read and understood the relevant provision and still agreed to it. Accordingly, it is difficult to see how the Bureau could allege ''abusive'' conduct towards all consumers who reached such an agreement.

Finally, two recent Bureau enforcement actions seem like ordinary deception cases to which the Bureau appended an ''abusive'' claim. The Bureau's January 2017 Complaint against TCF National Bank includes an ''abusive'' claim that mostly repeats the allegations regarding consumer misunderstanding found in the Bureau's ''deception'' claim. The additional claims -- such as allegedly training branch employees not to answer consumer questions -- would seem to support only individual claims of ''abusive'' conduct. See *CFPB v. TCF National Bank*, No. 0:17-cv-00166, (D. Minn. Jan. 19, 2017). Similarly, the Bureau's ''abusive'' claim in the RD Legal Funding Complaint blurs any line between two concepts that Congress thought were separate. The Complaint includes the allegation that ''because consumers are misled concerning the validity of significant terms of the transactions . . . they are not able to protect their interests in entering into them.'' Complaint, *CFPB et al. v. RD Legal Funding, LLC et al.*, No. 1:17-cv-00890, (S.D.N.Y. Feb. 7, 2017). This formulation suggests that any claim of deception (consumers are misled) implies an ''abusive'' claim (based in the consumer's inability to protect his or her interests).

Just as a clear ''abusive'' standard identifies where the new law may have been used inappropriately, it also illuminates when the Bureau appears to have failed to bring an ''abusive'' charge. For example, Director Cordray described the Bureau's case against Hydra Financial as involving allegations that ''the Hydra Group has been running a brazen and illegal cash-grab scam, taking money from consumers' bank accounts without their consent.'' *CFPB Sues Online Payday Lender for Cash-Grab Scam*, http://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-online-payday-lender-for-cash-grab-scam/ (Sept. 14, 2014). These facts seem ripe for a claim of ''abusive'' conduct—but none was made.

Conclusion

The ''abusive'' standard set forth in Dodd-Frank is now over six years old and has been cited repeatedly by the CFPB. While those cases are wide-ranging and complex, they can and should be distilled into a coherent framework for the future. To date, the Bureau's cases implicitly indicate that ''abusive'' conduct occurs when a financial institution causes a consumer to purchase a worthless product, or to pay a wholly unnecessary fee.

The Bureau has resisted such elaboration on the ''abusive'' standard, but it cannot write on a blank slate forever. Indeed, there are growing indications that the Bureau's resistance to explaining the ''abusive'' standard is contributing to efforts to repeal it altogether. Bureau acceptance -- or even criticism -- of the framework set forth above would be an important step toward explaining this new legal standard, diminishing the argument for its repeal, guiding financial institutions, and protecting consumers from ''abusive'' acts and practices.

 COPYRIGHT © 2017 BY THE BUREAU OF NATIONAL AFFAIRS, INC. ISSN 0891-0634