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Government Enforcement and Corporate Compliance

**PULLING BACK THE CURTAIN**

If the CFPB Is Remiss, the Court Must Dismiss

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On Friday, August 25, 2017, a federal district court in the Northern District of Georgia took the extraordinary step of dismissing an enforcement action brought by the Consumer Financial Protection Bureau (CFPB) against various payment processors, due to the bureau's conduct during depositions and despite orders from the court to the contrary. In those depositions, the bureau refused to provide any facts that would support the claims that the payment processors had aided and abetted in the collection of illegal debts.

**Background**

The history of the matter is as follows: In April 2015, the CFPB brought suit against various debt collectors as well as their payment processors (Pathfinder Payment Solutions Inc., Frontline Processing Corp., Global Payments Inc., and Electronic Merchant Systems Inc., collectively the “payment processors” and “defendants”), alleging that they had perpetrated a debt-collection scheme, which resulted in consumers paying for debts that were not owed. The bureau specifically alleged that the payment processors “ignored numerous red flags of the debt collectors' illegal conduct and by providing debt collectors the ability to utilize their payment processing systems in order to accept payments by credit and debit card [they] helped legitimize the [debt] collectors' business and facilitated millions of dollars in ill-gotten profits.” By this conduct, the bureau alleged, the payment processors violated the Consumer Financial Protection Act's prohibition against unfair, deceptive, or abusive acts or practices. [12 U.S.C. §§5531, 5536\(a\)](#).

The payment processors mounted a strong opposition from the outset. The district court denied initial motions to dismiss the case, and then proceeded to the discovery phase. It was during discovery, specifically the depositions of bureau representatives, when the case began to unravel.

**The Case Unravels**

In August 2016, after the written discovery was completed, the payment processors sought Rule 30(b)(6) depositions from the CFPB, seeking factual testimony that supported the claims alleged as well as identifying exculpatory facts. The CFPB objected and filed motions for a protective order stating that (1) the testimony was protected by law enforcement and deliberative process privilege, and (2) the depositions sought improper mental impressions and analysis of CFPB counsel. The court denied all of the CFPB's motions and ordered the CFPB not only to produce the witnesses, but also that ordered each to testify to the topics identified by the defendants.

The first deposition of a CFPB witness took place in April 2017. Throughout the deposition and when an objection was made based upon privilege, the witness read from a prepared script, which the CFPB defined as a “memory aid.” For the most part, the script was not responsive to many of the questions asked, and sometimes it lasted longer than 40 minutes.

The day after the first deposition, the court held a conference call with counsel for all parties, and the payment processors made the court aware of the CFPB's conduct during the deposition. The court again reminded the CFPB that “factual support for contentions in the area of inquiry... is not protected by work product.” For the remaining depositions, the court instructed the CFPB that it was required to produce a witness with knowledge, meaning that a witness should be prepared to answer the questions and not read from a script. However, the subsequent depositions fared no better. The CFPB continued to produce witnesses who would read only from their prepared script or the CFPB objected to the questions upon the basis of privilege. Upon conclusion of discovery, the payment processors each filed Rule 37 motions for sanctions as the result of the bureau's failure to cooperate with discovery as well as for blatantly disregarding the court's instructions.

The court's analysis for granting the motions was that it found that the CFPB's witness' reliance upon “memory aids” was not only improper but went far beyond refreshing the recollection of the deponents. Additionally, the court took great exception to the fact that each witness failed to abide by the court's specific instructions that witnesses not only be produced but be knowledgeable and prepared to testify to any facts that the bureau could ““reasonably identify as exculpatory.” The CFPB took the position that its investigation had not yielded a single exculpatory fact without any explanation or confirmation that it even undertook an inquiry. The court found this response unreasonable, in bad faith, and an intentional failure to comply with the court's instructions. Finally, the court recognized that its repeated rulings were clear on the issue of privilege, yet as the court put it, “the CFPB has put up as much opposition as possible at every turn.” The court found that reopening discovery would not correct the CFPB's conduct. Under the circumstances, striking all the claims against the payment processors was the only appropriate remedy.

#### **Disregard for the Federal Rules, or Inexperience?**

A lawsuit brought by the CFPB is not the beginning of the enforcement process. Enforcement usually starts with a civil investigation demand (CID), a powerful tool that requires the target of a CID to produce vast amounts of documents and information with very little opportunity for objection. The CID can also require witnesses to appear and provide oral testimony. Ironically, the rules relating to investigations and oral testimony do not even permit a witness to otherwise object or refuse to answer any question. 12 C.F.R. §1080.9(b)(2) (Rights of Witnesses in Investigations). If targets of an investigation do not cooperate with the bureau in response to a CID, they could be subject to contempt proceedings, including significant sanctions and penalties.

The payment processors in this matter may have spent several years under investigation before the CFPB filed the lawsuit. Those same defendants have certainly spent well over two years defending it. Many covered entities subject to CFPB jurisdiction simply do not have the resources to respond to an investigation and then subsequently defend a lawsuit; the cost-benefit analysis dictates an “early out.” The CFPB has been successful in extracting millions of dollars in consent orders without ever stepping foot in a courtroom, and certainly without ever engaging in discovery. This case may have pulled back the curtain and exposed the bureau's inexperience when it comes to formal litigation, but at what cost to a defendant to make that point?

It is clear that in this instance the bureau disregarded the scope and intent of the federal rules surrounding discovery, which first and foremost is cooperation. As advocates for the client, which in this case were “millions of consumers,” the CFPB failed in its representation. Had this been a private class action, the plaintiffs' attorney could have very well been subject to potential malpractice claims. Federal Rule 11, applicable to attorneys who come before a court, dictates that those who sign a pleading do so for a proper purpose and not to increase the cost of litigation unnecessarily. The CFPB's conduct here was not in the best interests of consumer protection because it could not, or would not, provide the facts on which its claims were made.

Footnotes

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