Federal District Court Dismisses CFPB Enforcement Action Against Payment Processor; UDAAP Not Sufficiently Pled

By Joann Needleman / Mar 22, 2017

A federal district court judge for the District of North Dakota has granted a payment processor's motion to dismiss an enforcement action brought by the Consumer Financial Protection Bureau (CFPB or Bureau). This is one of a few instances in which the CFPB has lost such a motion.

In the case of *Consumer Financial Protection Bureau v. Intercept Corporation et al.* (Intercept), the CFPB brought a 2 count complaint alleging violations of the Consumer Financial Protection Act (CFPA) against Intercept, a third-party payment processor, as well as its President and CEO. Intercept is in the business of processing electronic transfer of funds through the Automated Clearing House (ACH) network on behalf of its clients. The CFPB's complaint alleges that Intercept processed payments for consumer lenders, auto title lenders, sales finance companies and debt collectors but did so "in the face of numerous indicators that those clients engaged in fraudulent or illegal transactions." The CFPB also alleged in part that Intercept:

> "Ignored warnings from its own bank about the lawlessness of the transactions Intercept was processing, complaints from consumers, high return rates and law enforcement actions against [Intercept's] clients. Intercept's due diligence procedures when signing up clients have been perfunctory, and it ignored indicia of problems that were revealed through even minimal due diligence."

The complaint also alleged that Intercept did not properly investigate "red flags" during its clients' application process, using instead a rating system which the CFPB alleges did not include indicators of fraud or illegal activity by Intercept's clients.

The crux of the CFPB's allegations was that Intercept and its officers violated the CFPA's prohibitions against "unfair, deceptive or abusive acts or practices" (UDAAP). The Court disagreed with the CFPB's claims and in a somewhat scathing opinion took the Bureau to task for its lack of factual support stating that, "Although the [CFPB's] complaint need not contain factual details it must contain more than an unadorned, the defendant-unlawfully-harmed-me accusation." The court's opinion zeroed in on the statutory definition of UDAAP, in particular whether Intercept's conduct was "unfair" and/or "abusive" and in doing so found that none of the allegations of the CFPB's complaint could "back up its conclusory statements regarding Intercept's allegedly unlawful acts or omissions." In granting the motion to dismiss, the court specifically found that none of the Bureau's allegations could support any injury sustained by any consumer or that any industry standards were violated. The court also took great exception to the fact that the CFPB failed to identify those clients whose activities were considered "red flags" and how those client activities harmed or would likely cause harm to any identified group of consumers.

This decision appears to be the first in analyzing the pleading standard necessary to make a claim under UDAAP in a case brought by the Bureau. The identical motion in a more favorable jurisdiction might produce the same result. This court's conclusion is that the CFPB like any other plaintiff must comport with the principles outlined in the cases of *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Both stand for the proposition that "formulaic recitations of the elements of a claim or assertions lacking factual enhancement are not sufficient" to comply with the pleading standard of Rule 8 of the Federal Rules of Civil Procedure.

The decision to defend against a Bureau action is not an easy one to make. Reputational risk and long term business implications weigh heavily in determining the costs to a defendant in making that decision. The court's reasoning in Intercept suggests a higher pleading standard under UDAAP, which may be a new factor to consider when mounting a possible defense to a CFPB claim. Any enforcement action brought by the Bureau is subsequent to a protracted period of intense investigation. The facts supporting an enforcement action are known to the Bureau and the Intercept ruling suggests that the Bureau must clearly plead those facts to support its claim under UDAAP. The CFPB in Intercept simply failed to do so.

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