

## Top 10 Considerations In Litigating Against The CFPB

*Law360, New York (February 03, 2014, 5:58 PM ET)* -- If you have not encountered the Consumer Protection Bureau you likely will. The CFPB, the federal government's newest and most powerful agency that regulates consumer financial products and services, has made clear that it will set its policy primarily through enforcement proceedings and lawsuits. CFPB lawsuits are just getting underway and can be expected to significantly increase now that the agency is up and running after the Senate confirmed its director, Richard Cordray.

A CFPB investigation is not necessarily a bad thing. It could be an opportunity to improve your business processes, bring your business in line with federal policy and improve transparency and fairness to consumers. In these situations, you can achieve a voluntary resolution through cooperation and partnership with the CFPB.

On the other hand, there is a different kind of CFPB action: one that threatens a core aspect of your business — or your business itself. In this instance, you may believe that CFPB is simply wrong and want to defend yourself on principle and elect to litigate against the CFPB. If so, you will need to carefully think through the litigation process with an eye toward enhancing your defenses. While you still should afford CFPB staff the utmost respect and professionalism that they are due; at the same time, with a disputed claim, you should not confuse CFPB's accusations with the final adjudication on the merits, which may well be decided against CFPB by a judge or jury.

The CFPB has authority over virtually every consumer financial transaction and every business that engages in such transactions. The breadth of the CFPB's authority is breathtaking and unprecedented: the bureau has broad and exclusive rulemaking, supervision, and enforcement authority, power to implement 18 pre-existing statutes, transferred authority from seven different federal regulators, power to declare what constitutes an "abusive act or practice," and \$600 million per year to work with, which is not subject to Congress's appropriation authority.

The CFPB also has made it clear that it will push the bounds of its power and bring its enforcement power to virtually all aspects of the U.S. economy. In addition to administrative proceedings, CFPB has the power to sue you and your business in federal court.

When the CFPB puts your business in the crosshairs, and a federal court lawsuit appears inevitable, think through an affirmative litigation strategy from the initial pleadings to the final determination.

Here are 10 key issues to include in your thinking:

### 1. Move to set aside the CID.

When you receive a civil investigative demand, make a timely — within 20 days — motion to modify or set aside the CID after first conferring with the CFPB — within 10 days — which will serve to preserve your objections.[1]

Object comprehensively, for example, that the CID is unduly burdensome, vague, in excess of the CFPB's authority, calls for privileged and irrelevant information, etc. The purpose of the motion is preservation of your arguments for later; the purpose is not to persuade CFPB — the motion will almost certainly be denied in its entirety by the bureau. However, the CFPB acknowledges that its CIDs are not self-enforcing, and the Dodd-Frank Act does not impose a fine or penalty for failure to comply with a CID. Instead, in the event the CFPB does not find your response to the CID sufficient, the bureau must file a petition in federal district court seeking enforcement of the CID.

Provided that you have preserved your objections by filing the motion to set aside or modify the CID, you have a better chance at narrowing the scope of the CID before the court than you do voluntarily with the CFPB.

## **2. Limit your response to the NORA letter.**

As the CFPB completes its investigation, and assuming you are the target, the bureau will issue a Notice and Opportunity to Respond and Advise (“NORA”) letter. This letter sets forth in general terms whether the bureau believes you have violated any laws, and invites a response within 14 days.

One may be tempted to explain in extensive detail the reasons the CFPB's claim should fail. However, if litigation is inevitable, consider a more concise document, or skip the response altogether. At this point, your response can do little but educate the CFPB — soon to be your opponent in a federal court lawsuit.

## **3. Move to dismiss on constitutional and substantive grounds.**

The CFPB is powerful yet extremely insulated, and litigants have already mounted challenges to the constitutionality of CFPB's structure. The CFPB has features of insulation that other comparable regulatory agencies, such as the U.S. Securities and Exchange Commission and the Federal Trade Commission), that also bring enforcement lawsuits, lack.

For example, the CFPB has boasted that its immunity from the congressional appropriations process gives it complete independence from Congress. Also, although the Obama administration proposed the CFPB as a bipartisan, multimember commission, like the SEC and FTC, so that the agency would benefit from the diverse views of multiple commissioners, at the eleventh hour the Senate abruptly changed this to a single CFPB director who does not need to consult anyone before acting, including before filing an enforcement lawsuit.

The Ninth and D.C. Circuit Courts of Appeals have cases under consideration that question the constitutionality of this structure. No appellate court has yet ruled on whether the CFPB is constitutional. Be sure to preserve these arguments along with your substantive defenses in the motion to dismiss and answer.

## **4. Attack CFPB's UDAAP authority as vague on its face, or unfair as applied.**

Section 1031(a) of the Dodd-Frank Act empowers the CFPB to bring enforcement actions to prevent

"unfair," "deceptive," or "abusive act[s] or practice[s]" ("UDAAP" authority). "Abusive" is, according to CFPB Director Richard Cordray, "a little bit of a puzzle because it is a new term" and its meaning will have to be developed on a case-by-case basis.[2]

The novelty of "abusive," and the director's acknowledgement of its vagarity, provides an opening to argue that UDAAP commits the twin violations of void-for-vagueness, because it: (1) "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits"; and (2) "authorizes or even encourages arbitrary and discriminatory enforcement." [3]

Look for opportunities to argue that the CFPB's enforcement posture reflects a use of UDAAP authority to retroactively create a new standard of conduct, which is higher than that required by existing law and regulation and without fair notice.

## **5. Don't rely on other federal agencies.**

Think you've got a clean bill of health from the FTC or another federal agency? Think again. The CFPB has overlapping authority in a great number of substantive areas and can disagree and override other agencies' interpretations and guidance.

The Dodd-Frank Act also requires that courts declare the CFPB the winner in any interagency dispute.[4] Likewise, do not expect new lawyers at the U.S. Department of Justice to handle any federal court lawsuit and potentially offer a new — perhaps more moderate — view of the matter. The CFPB has its own so-called "independent litigation authority," thus, the same lawyers who conducted the investigation will prosecute the follow-on lawsuit.

## **6. Energetically pursue affirmative discovery.**

Don't let discovery be one-sided where the CFPB is throwing all the punches, filing all the motions to compel and having no incentive to negotiate. Try to even the playing field a bit with an affirmative discovery strategy. Propound extensive contention interrogatories (i.e., requesting the CFPB state all facts that support the bureau's contentions that the alleged conduct occurred, harmed consumers and is unlawful).

Propound document requests to demand the investigative materials, including all documents the CFPB has received from, or sent to, third parties related to you, including consumer feedback (positive or negative). Notice a rule 30(b)(6) deposition of a CFPB representative. Courts increasingly have acknowledged that federal agencies are subject to the very same discovery devices as is any party in a federal court lawsuit, and prior agency strategies of asserting blanket objections and "deliberative process" privileges to resist such discovery is being overruled.[5]

What's good for the goose is good for the gander. An affirmative discovery strategy may yield exculpatory information helpful to the merits of the case; plus, having discovery going both ways allows "mutuality" to inform the scope of discovery and resolution of discovery disputes.

## **7. Hold the CFPB to its burden.**

The CFPB may attempt to rely on general allegations or isolated examples of consumer complaints to make a leap toward a general conclusion that your business practices are unfair and violate federal law. The CFPB may attempt to rely on sampling or anecdotal evidence. Be sure to object at every turn to

these tactics, including through motions in limine and force the CFPB to prove its case.

#### **8. Attack the CFPB's advertising claims with the First Amendment and consumer surveys.**

Companies have a First Amendment right to tout the attributes and benefits of its products and services. If the CFPB alleges that your promotional materials are “false or misleading,” then demand the evidence.

If the advertising claim is not literally false, the CFPB should be required to produce evidence, usually an expert who has conducted a survey, proving that actual consumers are misled by the advertising, that is, the consumers “take away” a false impression. While attacking the sufficiency of this evidence, be prepared to present counterevidence to demonstrate that the advertising claims are truthful and that consumers do not take away any false messages.

#### **9. Fight for your right to trial by jury.**

The CFPB does not like juries and prefers bench trials. Some of the remedies the CFPB seeks are equitable in nature, such as injunctions, and those cannot be tried to a jury. The judge decides these.

But other remedies, such as civil penalties, should trigger your Seventh Amendment right to trial by a jury of your peers, which may not be as deferential to the CFPB. This has been a battleground in cases brought by other agencies,[6] and the law remains a bit unclear, but it is worth the effort to maximize your chances for a jury.

#### **10. Develop your own themes.**

The CFPB will have its allegations, evidence and themes against you. To be sure, a big part of your effort is to poke holes in the CFPB's case and engage in blocking strategies.

It is equally important, however, to develop your own counter themes of the case, along with witnesses and documents to support your view. Your business has many benefits and advantages — it will be important to fully communicate and sell these messages to the trier of fact — with admissible proof and testimony from those (e.g., satisfied customers and business partners) with first-hand experience.

#### **Conclusion**

Litigation against the CFPB is to be avoided when possible. But when a CFPB-initiated federal court lawsuit is inevitable, being armed with offensive litigation strategies — in the very early stages — can be essential to a fair resolution.

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[1] 12 C.F.R. § 1080.6.

[2] Director Cordray testified CFPB has "been looking at it, trying to understand it, and we have determined that that is going to have to be a fact and circumstances issue; it is not something we are likely to be able to define in the abstract. Probably not useful to try to define a term like that in the abstract; we are going to have to see what kind of situations may arise where that would seem to fit the bill under the prongs." How Will the CFPB Function Under Richard Cordray, Hearing Before the Subcomm. on TARP, Financial Services, and Bailouts of Public and Private Programs, 112th Cong., 112-107, at 69 (2012).

[3] Hill v. Colorado, 530 U.S. 703, 732 (2000).

[4] See 12 U.S.C. § 5512(b)(4)(B) (requiring courts to grant the same deference to CFPB's interpretation of federal consumer financial laws that they would "if [CFPB] were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law.").

[5] See, e.g., SEC v. Kovzan, No. 2:11-cv-2017, Dkt. No. 171 (2013) (denying SEC's motion to quash a Rule 30(b)(6) deposition of an SEC representative).

[6] F.T.C. v. Bronson Partners, LLC, 654 F.3d 359, 374 (2d Cir. 2011) (holding that disgorgement of ill-gotten profits could be characterized as equitable and thus no jury; whereas compensation to the victims in the amount of their loss could be characterized as damages and therefore as legal, rather than equitable, restitution, giving rise to a right to a jury trial).