

Consumer Financial Protection Bureau Reporter

CFPB WATCH – FERRARA & KARCHER

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Auto-lender accused of UDAAP Violations for leveraging military status

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On June 17, 2015, the Consumer Financial Protection Bureau commenced a civil action in the Southern District of Ohio against an auto lender catering primarily to United States military personnel. The CFPB alleges that the lender engaged in unlawful acts and practices in its collection of consumer debt by threatening to contact the commanding officers of delinquent borrowers, and in certain instances, actually contacting commanding officers, and disclosing details about borrowers' debts and delinquencies. According to the complaint, by leveraging the borrower's status as a member of the military, the lender took advantage of a particular vulnerability of the borrower that would not be available to the lender if the borrower was a civilian.

The CFPB alleges that the lender made misleading statements regarding the potential impacts on borrowers' military careers and tax liability if they remained delinquent on their car loans. Further, the CFPB alleges that the lender made misleading statements regarding its intention to take legal action and its ability to obtain certain relief, such as involuntary allotments and garnishments.

According to the CFPB, the lender's conduct was "unfair, deceptive, and abusive" in violation of the Consumer Financial Protection Act of 2010 (12 U.S.C. §§ 5531, 5536).

Background

The case is styled *Consumer Financial Protection Bureau v. Security National Automotive Acceptance Company, LLC*, Civ Action No. 1:15-CV-401. The defendant, headquartered in Mason, Ohio, purchases and services retail-installment-sales contracts originated by motor vehicle dealers—primarily in the sale of used vehicles. The defendant operates in approximately 30 states, and its customers primarily are current and retired members of the United States military. The defendant also has civilian customers.

Allegations of bad conduct: contacting commanding officers

The CFPB alleges that the defendant, on many occasions, told its customers that the defendant would contact the customers' commanding officers or chains of command (or, in the case of civilian borrowers, their employers) about alleged debts and delinquencies. Further, according to the CFPB, collectors have said that

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they would inform the commanding officers that servicemember borrowers were in violation of the Uniform Code of Military Justice (UCMJ), military regulations, or a Department of Defense instruction, standard, or regulation, and that the servicemembers could be subject to proceedings or discipline under the UCMJ.

According to the CFPB, in some circumstances, the defendant actually “contacted servicemembers’ [commanding officer] by telephone and in writing, disclosing details of the servicemembers’ debts and delinquencies and requesting assistance in bringing the accounts current.”

The lender also told the commanding officers, among other things, that the servicemembers were subject to UCMJ action. This conduct continued, according to the complaint, even after the borrower requested the defendant cease contacts.

Threatening adverse effects

The complaint alleges that, in addition to the threats of military action, the defendant told borrowers that delinquencies could have a “number of adverse impacts on the servicemembers’ military careers, including demotion, loss of promotion, discharge, denial of re-enlistment, loss of security clearance, or re-assignment.” The CFPB notes in the complaint that, “in many instances, consequences described by [the collectors] were exaggerated: they were extremely unlikely to occur or could not occur as a result of servicemembers’ consumer-debt delinquencies.”

Amending contracts to allegedly authorize contact with commanding officer

The complaint asserts that the defendant included an addendum on its contracts that purports to authorize contact with commanding officers. “Buried in the addendum is a provision purporting to give SNAAC permission to contact the borrower’s ‘employer/commanding officer’ to assist in collecting in the event of default and for other purposes.” According to the complaint, many borrowers were unaware

that they had given such authorization to the defendant and had no ability to negotiate with the defendant regarding the provision. Further, the CFPB notes in its complaint that borrowers could not have understood the nature or frequency of the contact, which suggests that the borrowers could not have provided the requisite consent.

False threats of intent to take legal action

Finally, the complaint states that the defendant told borrowers that they intended to file collection actions when, at the time such statements were made, the defendant had not determined whether to take such action. According to the CFPB, the defendant’s company policy required it to take several steps before legal actions could be initiated. According to the complaint, these steps had not been completed when the company’s representatives were threatening such legal action.

All of the foregoing, according to the complaint, constituted unfair acts or practices under the CFPA because they were likely to “cause substantial injury to consumers that is not reasonably avoidable and is not outweighed by countervailing benefits to consumers or to competition.” 12 U.S.C. § 5531(c)(1).

While we have not seen the response from the defendant, and the foregoing are merely allegations, the CFPB’s action highlights the bureau’s emphasis on protecting vulnerable consumers.

Different than other actions

Since the CFPB’s inception, the auto lending industry has come under significant scrutiny by the bureau for alleged discrimination in the setting of rates for borrowers. The instant action is similar in many respects, but what sets this action apart from other lending actions is that the CFPB is not enforcing laws to prohibit discrimination against protected classes, such as racial or age discrimination. In this case, the CFPB is asserting that the lender should not be able to contact a commanding officer, even if the contract provides that the lender can do so.

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Servicemembers are particularly vulnerable because of their status as members of the military and may not have as many lending options available to them. A lender that can put pressure on a borrower by threatening to contact their commanding officer can wield a great deal of influence over a defaulting borrower's decisions. The magnitude of this influence cannot be overlooked if the borrower specifically sought a contractual waiver for permission to contact the borrower's commanding officer.

CFPB focus and the future

It remains to be seen how this will play out in court. The CFPB seems to focus on the inability of the borrower to

negotiate the terms of its contract and indicates that a provision allowing the lender to contact the commanding officer is unfair where the borrower has no ability to negotiate the terms. This implies that there is a value to such provision and that the servicemember could extract something in return. In other words, it might be OK to have such a provision in the contract if the borrower was given something of value for it. For example, would it be permissible to provide that the lender can contact the commanding officer and provide details about alleged delinquency if the rate for the loan was lower? This probably is not what the CFPB had in mind, but it begs the question of whether it is proper to leverage the consumer's military status to collect the debts if the consumer can negotiate the terms.

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