The Dodd-Frank “Abusive” Standard: Remarks of Richard Cordray

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Attorney Articles

Richard Cordray, the Director of the Consumer Financial Protection Bureau (“Bureau”) (“Director”), delivered his first semiannual report to the House Financial Services Committee on March 29. Much of the interchange between the Republican members and the Director centered on the new Dodd-Frank prohibition of “abusive” acts and practices. The members insisted the term was highly subjective, the Director insisted it was not. The Director’s comments shed light on how the Bureau looks on the new standard.

1. The definition of “abusive” (especially in the context of taking unreasonable advantage of the consumer’s ability to understand) is “situational.” The following are quotes from the Director, with emphasis added:

   > “We’ve been trying to puzzle through . . . exactly how that . . . term . . . should be applied in the facts and circumstances of individual situations.”
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   > “. . . for an institution, if they’re in a situation, they should be thinking carefully about whether they’re taking unreasonable advantage of their customer.”
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   > “how the law that Congress has defined applies in particular situations is something that we’re going to have to measure on a facts and circumstances basis as we go. . . . it’s our job to try to apply it. . .”
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   > “We could perhaps clarify how it applies in particular facts and circumstances. . .”
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   > “they have to be applied in facts and circumstances . . . and some of the prongs are situational to the individual consumer.”
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   > “the chairman asked me specifically about a particular prong, which was the consumer’s understanding. That seems unavoidably situational, meaning consumer by consumer.”

2. The vulnerability characteristics of the consumer matter. The following are quotes from the Director, with emphasis added:

   > “If you’re offering a refinancing to an elderly customer that you know full well may be having some difficulty understanding the terms . . .”

". . . good banks are mindful of this. They would not approach certain customers with certain products that they would approach other customers with.""It's a customer by customer thing."

"I think good business [sic] do this all the time, sir. I think they think carefully about which customer they're dealing with. Some of the community bankers I speak to . . . tout the fact that they know their customers. They know them well. They tailor their dealings with the customer to the situation of that customer. It's not one-size-fits-all."

3. The Bureau is unlikely to define "abusive" in a rulemaking anytime soon. The following are quotes from the Director, with emphasis added:

   "for us to define what abusive means feels a little presumptive, given that Congress defined what abusive means."

   "our job [is] not to make up that law ourselves."

   "I just don't think that that's probably the preferred approach when Congress has defined a term already. We could further define the term, but are we going to define it differently from what Congress defined? I don't think so."

   "We could perhaps clarify how it applies in particular facts and circumstances, but I think we ought to take some time with it . . .". . . you often have a pretty good sense of whether you're [taking unreasonable advantage of your customer] or not . . ."

4. "Abusive" is a separate standard from unfair and deceptive. An act or practice can be fair and not deceptive but yet be abusive. Again, quoting the Director:

   "there is a distinction among each of these categories."

   "that isn't to say there can't be some overlap."

   "there could be a practice that would not be unfair but that would be abusive."

5. The Bureau's examination manual is the best source for guidance:

   "we have provided [guidance] around that set of terms – unfair, deceptive and abusive acts or practices – in our examination manual."

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