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CFPB Case Against Payment Processors Dismissed: Court Sanctions Bureau for Non-Responsive Discovery

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In another significant litigation setback for the Consumer Financial Protection Bureau (CFPB or “Bureau”), a U.S. District Court in Atlanta imposed discovery sanctions against the Bureau and dismissed all claims against payment processors alleged to have aided and abetted an unlawful debt collection scheme. Cases brought by the CFPB’s Division of Enforcement have seen the imposition of significant levels of damages as well as the imposition of severe penalties.¹ More recently, however, some litigants have pushed back with success against the CFPB, demanding that the Bureau be held to its burden of proving the factual and legal bases of its claims.²

A recent case involved a lawsuit in which the CFPB sought to hold accountable those alleged to have perpetrated a debt collection scheme targeting millions of consumers. But the CFPB did not limit its claims to those directly involved in the alleged debt collection scheme. The Bureau also sued the companies that provided payment processing services and telephone broadcast services, alleging that those companies provided substantial assistance to the debt collectors’ unfair or deceptive conduct and engaged in unfair acts or practices in violation of the Consumer Financial Protection Act (CFPA), 12 U.S.C. §§ 5531, 5536(a).³ The Court dismissed the claims against these alleged aiders and abettors as discovery sanctions for the CFPB’s failure to come forward with factual information substantiating its claims.

The case took on a somewhat unique procedural posture. The Court had earlier denied the Defendants’ motions to dismiss for failure to state a claim or plead facts of the alleged CFPA violation with particularity.⁴ Nor did the Court consider the issue on a Rule 56 motion for summary judgment challenging the adequacy of proof after the close of discovery. Instead, the Court ruled that the CFPB failed to provide adequate testimony pursuant to Rule 30(b)(6) in defiance of a Court order.

Unlike the deposition of an individual fact witness or an expert, the Federal Rules of Civil Procedure allow a party seeking information from an entity to serve a notice of deposition requiring the entity to designate one or more individuals to testify in a deposition on specified topics. Over the CFPB’s objection, the Court permitted the Defendants to depose representatives of the Bureau as to the facts underlying the Bureau’s contentions.

¹ See, e.g., *In the Matter of Wells Fargo Bank, N.A.*, 2016-CFPB-0015 (Sept. 8, 2016) (consent order imposing a \$100 million civil penalty); *In the Matter of Santander Bank N.A.*, 2016-CFPB-0012 (July 14, 2016) (consent order imposing a \$10 million civil penalty).

² See, e.g., *CFPB v. Accrediting Council for Independent Colleges and Schools*, 854 F.3d 683 (D.C. Cir. 2017) (invalidating CFPB CID for not stating with sufficient particularity the nature of the conduct under investigation and the applicable provisions of law); *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016) (challenging constitutionality of Bureau Director and fines for violating RESPA); *CFPB v. Intercept Corporation, et al.*, No. 3:16-cv-144 (D.N.D. Mar. 17, 2017) (dismissing case against payment processor for failure to state a claim).

³ *CFPB v. Universal Debt Solutions, LLC, et al.*, C.A. 1:15-CV-859-RWS, (N.D. Ga. August 25, 2017), Slip Op. at 2.

⁴ *CFPB v. Universal Debt & Payment Solutions, LLC, et al.*, C.A. 1:15-CV-859-RWS, 2015 WL 11439178 (N.D. Ga. Sept. 1, 2015).

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The CFPB objected to those notices, arguing that:

the Court should not require it to sit for 30(b)(6) depositions for three reasons:

(1) the CFPB had already provided the information that Defendants were seeking in written responses to Defendants' contention interrogatories; (2) the noticed topics included inquiry into topics protected by the law enforcement and deliberative process privilege; and (3) the depositions were an improper attempt to depose the CFPB's counsel as to counsel's mental impressions and analyses. The Court rejected those arguments and refused to categorically bar depositions of the CFPB.⁵

The Court permitted the 30(b)(6) depositions to proceed as to factual issues, but not as to the mental impressions or legal strategies of the Bureau, which the Court deemed protected attorney work product.⁶ Other courts, however, might not have let these 30(b)(6) depositions go forward and might have sustained the Bureau's objections.

Once the 30(b)(6) depositions commenced, the Bureau's witnesses responded to questions by reading from "memory aids" or scripts to recite answers lasting up to 45 minutes.⁷ As to exculpatory facts, the CFPB witnesses could identify none.⁸ The attorneys for the CFPB also imposed what the Court found to be improper objections as to matters of fact as opposed to privileged materials. As to these objections, the Court held a telephonic hearing to address the issue and admonished the CFPB counsel about such objections.⁹ Nonetheless, after the hearing the CFPB's counsel continued with the same conduct that the Judge directed them to stop. The Court then concluded that:

The deposition transcripts show that the CFPB's approach comes in two forms. The first is to bury the Defendants in so much information that it cannot possibly identify, with any reasonable particularity, what supports the CFPB's claims. The second is to assert privilege objections to questions that the Court has repeatedly ordered to be answered. Neither form is proper, and together they demonstrate a willful disregard of the Court's instructions.¹⁰

The Court thus found that the "CFPB's pattern of conduct warrants substantial sanctions,"¹¹ under Rule 37(b) and (d) of the Rules of Civil Procedure. Rule 37(b) provides that a district court may impose sanctions upon a party for failure to comply with a discovery order, and Rule 37(d) similarly provides that a court may order sanctions when a person designated under Rule 30(b)(6) is not appropriately knowledgeable to respond to questions.¹² The Court concluded, "the CFPB willfully violated the Court's repeated instructions to identify for Defendants the factual bases for its claims and that, in each deposition, it willfully failed to present a knowledgeable 30(b)(6) witness."¹³

⁵ *CFPB v. Universal Debt*, Slip Op. at 4.

⁶ *Id.* at 4-7.

⁷ *Id.* at 13-14.

⁸ *Id.* at 15-17.

⁹ *Id.* at 17-20.

¹⁰ *Id.* at 21.

¹¹ *Id.* at 12.

¹² *Id.* at 10-11.

¹³ *Id.* at 21.

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The Court's bottom line was to strike the CFPB's claims against the Defendants alleged to have aided and abetted the unlawful debt collection scheme and to dismiss those Defendants from the litigation.¹⁴

The CFPB may view this decision as a minor setback based upon the unique posture of this case, but there are a few lessons for litigants facing CFPB actions. First, litigants have already begun to push against the CFPB in discovery and in motions to dismiss to hold the CFPB accountable to detail the substantive bases for its demands and claims. Second, if a case survives a motion to dismiss, litigants may use the playbook of the *Universal Debt Solutions* case and try to force the CFPB to present the basis for its claims through 30(b)(6) depositions. The CFPB may try to avoid being put into that posture, but litigants still can try other efforts to force (upon motion to the court, if necessary) the CFPB to state with particularity the legal and factual foundations of its claims, such as contention interrogatories. In the end, other courts may grant similar relief to defendants and not permit the CFPB to rely on broad allegations or unspecified factual claims.

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¹⁴ *Id.* at 21-22.

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