

New Sheriff in Town? CFPB Areas of Focus with Change of Administration

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April 2021. The CFPB was formed in 2010 as part of the Dodd-Frank Act. The Consumer Financial Protection Act provides the CFPB broad powers to regulate financial institutions, including through a “supervisory” mandate and enforcement powers.

On January 24, 2020 the CFPB enacted a policy that suggested the Bureau might exercise its supervisory mandate and enforcement powers in a more “hands-off” way. Specifically, the 2020 Policy Statement set out a new approach concerning “abusive acts or practices” prohibited by the CFPA, including by:

- (1) finding conduct “abusive” only if the potential consumer harm outweighs the conduct’s benefit to the consumer;
- (2) avoiding finding conduct “abusive” if the designation relied on facts the CFPB alleges are *also* unfair or deceptive; and
- (3) not seeking certain types of monetary relief for “abusive” acts or practices where the covered person was making good-faith efforts to comply with the abusiveness standard.

On March 8, 2021, the CFPB, now controlled by a new administration, revoked the 2020 policy, stating it will “exercise the full scope of its supervisory and enforcement authority to identify and remediate abusive acts or practices.” This perhaps portends more fulsome and robust regulatory supervision and enforcement actions over the next four years in favor of borrowers.

The repossession industry should take note and redouble its compliance efforts in response.

COVID-19 and Repossessions:

Former CFPB director Richard Cordray issued a white paper in April of 2020 outlining steps he believed the Bureau should take in light of the pandemic including to “*Closely Monitor Efforts to Repossess Vehicles.*”

In his white paper, Cordray stated:

There is an entire industry whose business is repossessing automobiles. Close efforts to police those companies are especially important for those consumers facing possible repossession of their vehicles. In much of the country, this is the only lifeline many families have: to get to work, to secure food, or to be able to access emergency medical care. The CFPB should lead an effort to work with Congress on putting in place a moratorium on auto repossessions for the duration of the crisis and its economic aftermath. It should also take steps to ensure that consumers facing possible repossession of their vehicles are informed, treated fairly, and have the remaining equity in their car or truck fully applied to the balance of their loan.

Again, this signals additional regulatory scrutiny is on the horizon for the industry. At minimum, repossession agents should remain cognizant of state-issued and lender-issued moratoriums and borrower relief measures arising from the pandemic that impact the lender's ability to seek recovery of collateral.

UDAAP Concerns Highlighted in the Nissan Consent Decree:

On October 13, 2020, the CFPB entered into a consent order with Nissan. The CFPB alleged Nissan had engaged in unfair acts and practices through its repossession agents inconsistent with the CFPA, among other alleged failures to comply with the Act. The CFPB alleged the following failures to comply with the CFPA:

- Repossessing vehicles where there were agreements with the borrower to not repossess. Specific examples include instances where (1) borrowers made payments that decreased delinquency to less than 60 days past due after representing that a vehicle would not be repossessed if delinquency was less than 60 days past due; (2) borrowers made and kept promises to pay; (3) borrowers made promises to pay by a future date that had not passed; and (4) borrowers agreed to extension agreements with the lender.
- Refusing, through its repossession agents, to return private property contained in repossessed vehicles unless borrowers paid fees for holding the property.
- Failing to fully inform borrowers of the difference in fees between various over-the-phone payment options such that, in effect, borrowers did not have the option of choosing payment methods with lower fees.
- Entering into loan extension agreements with borrowers that included contractual provisions suggesting the borrower was contractually prohibited from filing for bankruptcy.

Nissan was required under the consent decree to pay a monetary penalty. The consent decree further required Nissan and to:

- Review its repossession assignment and cancellations process, implement further system or employee controls, and adopt policies and procedures to avoid wrongful repossession.
- Track wrongful repossessions and conduct quarterly reviews to identify patterns or practices for compliance concerns.
- Adopt policies and procedures to remedy instances of wrongful repossessions including waiver or refund of all repossession-related fees, correction of credit reporting, and a refund of actual costs incurred for loss of use of the vehicle.
- “Prohibit its repossession agents (through contract or otherwise) from charging personal property fees to Nissan consumers directly and demanding fees as a condition of returning personal property.”
- Disclose the borrower fee for each method of payment to borrowers if it offers borrowers the option to pay by phone.

The take home message? There are two. First, adding fees will attract regulatory scrutiny. Ensure that there is a basis in law and contract any fee or cost that is to be passed on to the borrower. Second, if the lender is signaling to the borrower that no repossession will take place due to an extension or payment arrangement, but the repo file is placed nonetheless, a wrongful repossession lawsuit is likely. Make sure to review the loan status carefully before executing on the collateral. Also be sure to communicate regularly with lender clients about their processes for calling defaults and how they determine a file is repossession eligible.

Industry Impact of the Santander Consent Decree:

In December 22, 2020, Santander, pursuant to a consent decree, paid \$4.7 million dollars to the CFPB concerning allegations that it knowingly supplied inaccurate information to the credit reporting agencies. The CFPB alleged numerous failures to comply with the Fair Credit Reporting Act including:

- Reporting the incorrect date of first delinquency in more than 23 million instances.
- Reporting that accounts were current while also reporting a date of first delinquency on the same accounts in more than 22 million instances.
- Reporting a date of first delinquency on accounts while also reporting information that suggested the same accounts were not delinquent in 890,700 instances.
- Reporting information that suggested accounts were closed while also reporting information suggesting the same accounts were still open.
- Reporting that some accounts had a current balance while also reporting information suggesting the same accounts were paid in full.

The CFPB alleged Santander knew it was reporting this inaccurate information because the information was internally inconsistent—the date of first delinquency and date of account information are rarely the same—and the credit reporting agencies had notified Santander about the alleged errors.

In addition to the monetary penalty, the CFPB required Santander to:

- (1) correct all inaccuracies and errors identified by the CFPB;
- (2) conduct monthly assessments of furnished data to identify such errors and resolve them before providing data to any credit reporting agency;
- (3) establish and implement reasonable written policies and procedures regarding the accuracy and integrity of information furnished to the credit reporting agencies; and,
- (4) examine policies and procedures to ensure employees properly route, categorize, investigate, and respond to all direct disputes.

Credit reporting creates a minefield of litigation. Although repossession may not furnish any data to the credit reporting agencies, the industry impact of a lender's allegedly erroneous credit reporting practices is clear: if the borrower believes they are current because the lender told them they were, the borrower is more likely to contest a repossession effort or sue for wrongful repossession. Make sure to keep good lines of communication with your lender clients regarding the status of the loan, including any credit reporting issues that might give the borrower an opportunity to argue that repossession is not warranted.

Takeaways:

In light of the CFPB's past, and now seemingly renewed, focus on the automotive industry, it is only a matter of time until the regulatory spotlight is shone directly onto the repossession and remarketing segment of the industry. Taking steps now to bring your company into compliance will save time and expense when regulators come knocking or lawsuits are filed.

Based on the above, here are some policies you may consider implementing:

- Develop and maintain solid contractual relationships with servicers and forwarders. Key contractual provisions include:
 - Warranties that lenders send all require notices and verify repossession is permitted under the terms of the contract and the current payment status on the loan prior to placement.
 - Indemnification provisions to help shield you from lender mistakes.
 - Clear and concise fee schedules that include any costs or fees that will ultimately be passed onto the borrower and the contractual basis for the cost or fee.

- Create written policies and procedures to memorialize that your organization:
 - Independently verifies whether a vehicle can be legally repossessed based on the loan and security agreements, communications with the borrower, and applicable laws.
 - Reviews all information provided by lenders or forwarders upon placement.
 - Clearly records personal belongings found in repossessed vehicles and does not make return of personal belongings in repossessed vehicles contingent on payment of fees.
- Start implementing policies and procedures now for how your organization is going to handle the influx of repossessions as the Covid-19 pandemic winds down:
 - Designate a person to monitor state and federal moratorium's on repossession. Verify, and document, that there is no current moratorium on repossession before taking steps to repossess.
 - Communicate with your forwarder and lender clients to confirm that any repossession placements comply with any internal-moratoriums or file-specific agreements not to repossess due to the pandemic (or any other reason).
 - Verify and re-verify that the lender has not entered into an any payment or other agreements with the borrower that could render a repossession unlawful.

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