

Consumer Workshop IV
**The Intersection Between
Bankruptcy and Consumer
Protection Laws**

Hon. Kevin R. Anderson, Moderator

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The Intersection Between Bankruptcy and Consumer Protection Laws

ABI Rocky Mountain Conference-January 2016

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In the Matter of: Encore/Midland/ Asset Acceptance/ Portfolio Recovery Associates

- Encore must pay up to \$42 million in refunds:
- Portfolio Recovery Associates must pay \$19 million in refunds:
- Encore must stop collecting on \$125 million of debt:
- Portfolio Recovery Associates must stop collecting on \$3 million of debt:
- Encore must pay a penalty of \$10 million to the CFPB's Civil Penalty Fund.
- Portfolio Recovery must pay a penalty of \$8 million to the CFPB's Civil Penalty Fund.

http://files.consumerfinance.gov/f/201509_cfpb_consent-order-encore-capital-group.pdf

http://files.consumerfinance.gov/f/201509_cfpb_consent-order-portfolio-recovery-associates-llc.pdf

Collecting Bad Debts

- Attempted to collect on unsubstantiated or inaccurate debt:
- Misrepresented their intention to prove debts they sued consumers over:
- Relied on misleading, robo-signed court filings to churn out lawsuits:
- Sued or threatened to sue consumers past the statute of limitations:
- Pressured consumers to make payments using misrepresentations:
 - Encore falsely told consumers the burden of proof was on them to disprove the debt:
 - Portfolio Recovery Associates falsely claimed an attorney had reviewed the file and a lawsuit was imminent:
- Encore disregarded or failed to adequately investigate consumers' disputes:
- Encore farmed out disputed debts to law firms without forwarding required information:
- Encore made harassing collection calls to consumers: 20x in 2 days. Before 8am after 9pm.

Collecting Bad Debts

Attempted to collect on unsubstantiated or inaccurate debt:

Encore and Portfolio Recovery Associates stated incorrect balances, interest rates, and payment due dates in attempting to collect debts from consumers. The companies purchased large portfolios of consumer debt with balances that sellers claimed were "approximate" or that otherwise did not reflect the correct amount owed by the consumer. Sellers also warned the companies that some of the debts they were buying may not have the most recent consumer payments deducted from the balance. Some sellers also represented that documents were not available for some of the accounts. The companies continued purchasing from these sellers and then collecting on that debt without first conducting any investigation to determine whether the debts were accurate and enforceable.

Illegal Litigation Practices

Misrepresented their intention to prove debts:

Encore and Portfolio Recovery Associates regularly attempted to collect on debts by suing consumers in state courts across the country. In numerous cases, the companies had no intention of proving these debts. They placed tens of thousands of debts with law firms staffed by only a handful of attorneys and in many cases made no effort to obtain the documents to back up their claims. Instead, the companies relied on consumers not filing a defense and winning the lawsuits by default.

Relied on misleading, robo-signed affidavits:

Encore and Portfolio Recovery Associates filed affidavits that contained misleading statements in debt collection lawsuits across the country. For example, they both used affidavits that misrepresented that the affiants had reviewed original account-level documentation confirming the consumers' debts when they had not. The companies also submitted affidavits with documents attached that they claimed were the consumers' specific account contracts or records when they weren't. These shortcuts allowed the companies to churn through lawsuits without doing the research and due diligence required to obtain a legitimate judgment.

12/16/15

Sued or threatened to sue consumers past the statute of limitations:

From at least July 21, 2011 to March 31, 2013, Encore sent thousands of letters offering a time-limited opportunity to “settle” without revealing that the debt was too old for litigation. From January 2009 to March 2012, Portfolio Recovery Associates sent similar letters to consumers. Both of the companies also filed cases past the applicable statute of limitations.

Pressured consumers to make payments using misrepresentations:

- o Encore falsely told consumers the burden of proof was on them to disprove the debt:
- o Portfolio Recovery Associates falsely claimed an attorney had reviewed the file and a lawsuit was imminent:

Other Illegal Collection Practices

- Encore disregarded or failed to adequately investigate consumers' disputes:
- Encore farmed out disputed debts to law firms without forwarding required information:
- Encore made harassing collection calls to consumers: 20x in 2 days. Before 8am after 9pm.
- Portfolio Recovery Associates misled consumers into consenting to receive auto-dialed cell phone calls:

In the Matter of Westlake Services and Wilshire Consumer Credit

- \$44.1 million in cash relief and balance reductions.
- Civil penalty of \$4.25 million.

http://files.consumerfinance.gov/f/201509_cfpb_consent-order-westlake-services-llc.pdf

Illegal Debt Collection Tactics

- Pretended to call from repo companies:
- Faked calls from pizza delivery services, flower shops, or family and friends:
- Falsely threatened to refer borrowers for investigation or criminal prosecution:
- Tricked borrowers whose vehicles had been repossessed into making partial payments:
- Called consumers' employers, friends, and family members without permission and told them the debt was delinquent and car was to be repossessed.

CFPB v. Hanna

Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assocs., P.C., F. Supp 3d , 2015 U.S. Dist. LEXIS 91357, 2015 WL 4282252, (N.D. Ga., Atlanta Div. July 14, 2015)

Between 2009-2013 approximately 350,000 lawsuits.

In 2009 and 2010, for instance, the Firm allegedly arranged for one attorney to sign about 138,000 lawsuits, averaging about 1,300 collection suits each week. (Id. ¶ 15.) Assuming this one attorney did nothing but review and sign collection suits for eight hours a day, five days per week, for every week of the year without vacation, the lawyer would literally have less than a minute to approve each suit.

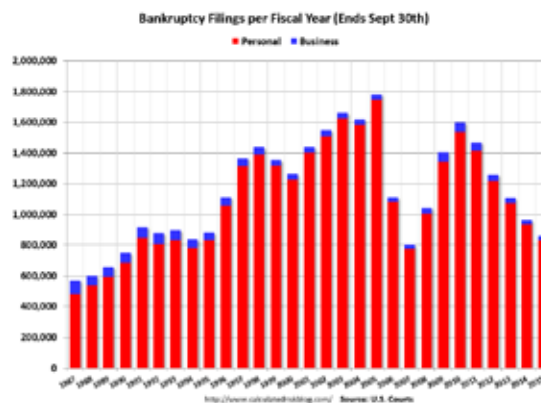
Filings falsely conveyed that an attorney was meaningfully involved in preparing and filing of the suits.

Use of affidavits unsupported by personal knowledge violated e(2)(A), (10) and f

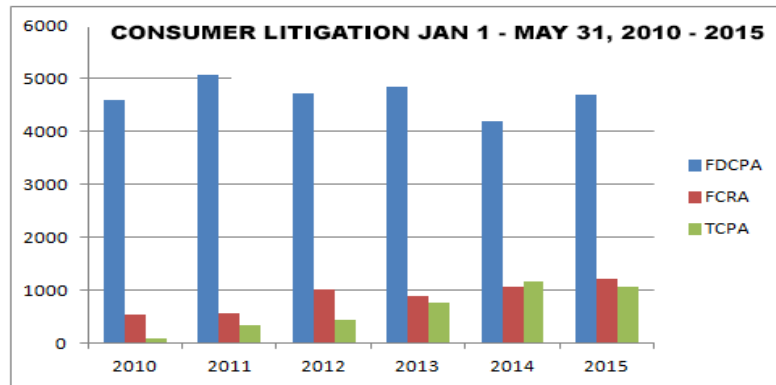
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BK filings are down



Consumer filings are steady



Common consumer claims

- FDCPA
- FCRA
- TCPA
- Debt Defense

FDCPA

- The FDCPA was passed by Congress in 1977 in an effort to protect consumers from threats, harassment, abuse and other deceptive practices that might be utilized by unscrupulous debt collectors.
- Part of the Consumer Credit Code which includes FCRA, TILA, ECOA, ect.
- Provides for up to \$1,000.00 statutory damages, plus actual damages, plus attorney fees and cost to prevailing consumer.

Johnson v. Riddle, 305 F.3d 1107, 1117 (10th Cir. 2002)

- The substantive heart of the FDCPA lies in three broad prohibitions. First, a "debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." § 1692d. Second, a "debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." § 1692e. Third, a "debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt." § 1692f.

Prerequisites

- Must be a consumer debt, i.e. incurred for personal family or household purposes.
- The debt must be in default.
- Must be a third party collector i.e. the Act does not apply to original creditors.

Violations

- Statute breaks down examples of violations into categories e.g. Third Party Contacts (b); and Prohibited Communications Practices (c) Harassment/Abuse (d) and False or Misleading Representations (e) and Unfair Practices (f) Validation Notices (g).
- A single communication may violate several subsections at the same time but the Plaintiff only has to win once.
- Primarily three types of communications; voicemails, letter cases and live phone calls.

Foti

- Voicemail -- *Foti v. NCO Financial Systems, Inc.*, 424 F. Supp. 2d 643(S.D.N.Y. 2006) Leave a message heard by a third party, violation. Leave a message without meaningfully identifying the company, violation. If it refers to the debt and is the initial communication, give a mini Miranda or violation. Or just don't leave a voicemail.

Letter

- Have consumers bring in collection letters.
- Misstatement of amount of debt.
- Misstatement of amount/entitlement to attorney fees.
- Misstatement of right to dispute debt.
- Threats to sue outside of SOL.

Phone Calls

- California, Connecticut, Florida, Hawaii (in general a one-party state, but requires two-party consent if the recording device is installed in a private place), Illinois (???), Maryland, Massachusetts(only "secret" recordings are banned), Montana (requires notification only), Nevada, New Hampshire, Pennsylvania, and Washington
- All others and DC are one party states.
- Colorado Ethics Opinion 112 on recording.

Dispute the Debt

- Can dispute for any reason or no reason.
- a "dispute" does not need to be in writing. *Hudspeth v. Capital Mgmt. Servs., L.P.*, 2013 U.S. Dist. LEXIS 25260 (D. Colo. Feb. 25, 2013)
- A debt collector's "failure to communicate [to any person] that a disputed debt is disputed" is a false or misleading practice. [§ 1692e\(8\)](#)
- A debt collector's reports to credit agencies constitute collection activity. *Williams v. LVNV Funding, LLC*, 2014 U.S. Dist. LEXIS 112882, 2014 WL 4066612 (D. Colo. Aug. 14, 2014)

Least Sophisticated Consumer

- The FDCPA protects all consumers, the gullible as well as the shrewd. *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. Conn. 1993).
- Applicable to 1692e (false and misleading representations) and 1692f (unfair practices)
- How the least sophisticated consumer would interpret the information received from the debt collector.

Bona fide error

- A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. § 1692k(c).

BFE

- Bona fide error defense in 15 USCS § 1692k(c) does not apply to violation of Fair Debt Collection Practices Act resulting from debt collector's incorrect interpretation of requirements of that statute.

[*Jerman v Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S Ct 1605, 176 L Ed 2d 519 \(2010\)](#)

BFE

- Bona fide error defense involves two-step inquiry; first step is whether debt collector "maintained," that is, actually employed or implemented, procedures to avoid errors; second step is whether procedures were "reasonably adapted" to avoid specific error at issue; this is fact-intensive inquiry.

[*Owen v I. C. Sys., Inc.* 629 F3d 1263, \(2011, CA11 Ga\)](#)

Materiality

- "[t]he FDCPA does not result in liability for every statement later alleged to be inaccurate, no matter how small or ultimately harmless." *Maynard v. Bryan W. Cannon, P.C.*, 401 Fed. Appx. 389, 2010 U.S. App. LEXIS 23308 (10th Cir. 2010)
- *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1033 (9th Cir. 2010)

FCRA

- § 1681s-2(b) governs the duties of "furnishers of information" to credit agencies upon notice of a disputed debt. This provision provides that, within 30 days of notification by a credit agency of a dispute, the furnisher shall:

- (A) conduct an investigation with respect to the disputed information;
- (B) review all relevant information provided by the consumer reporting agency pursuant to section 1681i(a)(2) of this title;
- (C) report the results of the investigation to the consumer reporting agency;
- (D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis; and
- (E) if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified after any reinvestigation under paragraph (1), for purposes of reporting to a consumer reporting agency only, as appropriate, based on the results of the reinvestigation promptly —
 - (i) modify that item of information;
 - (ii) delete that item of information; or
 - (iii) permanently block the reporting of that item of information.

TCPA

- (1) the defendant called a cellular telephone number;
- (2) using an automatic telephone dialing system;
- (3) without the recipient's prior express consent. 47 U.S.C. § 227(b)(1)

CFPB and FDCPA Issues for Creditors

ABI Rocky Mountain Conference – January, 2016
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Life of a Recycled Delinquent Debt – General Overview

- Original Creditor – Original Debt
- Debt Becomes Delinquent – Debt Charged Off or Sent to Collections/Sold
 - Debt Sold to Debt Buyer 1 by Data Tape – Assigned Debt With or Without Media, With or Without Reps and Warranties (may have rep to obtain media from original creditor)
 - Debt Sold to Debt Buyer 2 by Data Tape - Assigned Debt With or Without Media, With or Without Reps and Warranties (may have rep that Debtor Buyer 1 can obtain media from original creditor)

Recycled Delinquent Debt – Con't.

- While media may not be available, debt (or principal balance thereof) generally always accurate and correct
 - But, proof of claim still subject to attack for issues related to standing or media deficiencies
- Query: If accurate amount of debt, and debt actually incurred, should debtor be able to maintain objection to legally valid debt or claim, acknowledged under penalty of perjury in debtor's petition, on basis of lack of media alone?

How Creditors May Avoid or Reduce Scrutiny From the CFPB:

- Don't file claims on time barred debt
- Don't file claims on discharged debt
- Ensure that your claim is not a duplicate claim (special attention to debt buyers)
- Don't participate in systematic practices that the CFPB may consider questionable
- Review interest rates on debt before filing proof of claim to ensure that it is not usury
- Establish a monetary baseline or minimum for filing a proof of claim (e.g. don't file claims for \$10 – may draw unwarranted scrutiny)

Reducing CFPB Scrutiny – Con't.

- Ensure that debts purchased or acquired come with sufficient reps and warranties. If debts are contemplated for purchase, can debt buyer obtain a sample of available media before closing of transaction?
- Ensure that sufficient due diligence has been performed on debts to be purchased or acquired to confirm legal validity and accuracy
- Protect your Creditor Client :
 - When reviewing proofs of claim or other collection documents, consider, what is "meaningful review"? Do creditor's processes and procedures for review of documents and media meet this standard?
 - Develop Standard Operating Procedures that mirror CFPB Compliance Examination Manual. Create "safe harbor" for client.

Avoiding CFPB Portal Pitfalls - for Creditors:

- Respond timely to Portal Complaints (although, for the most part, the portal seems to be a sounding board for debtors wanting to absolve themselves of valid debts, portal complaints must be taken very seriously and responded to promptly and timely, within portal policy)
- Make sure you are using the system correctly and logging responses according to their status
- Monitor for a response
- Track complaints and monitor responses to identify patterns which may need to be addressed on global company level

More Info. – The CFPB

- For additional information concerning the CFPB rules, regulations and implementation, in addition to the CFPB portal and complaint process, visit:

<http://www.consumerfinance.gov/>

FDCPA Hot Topics Now – The Split in Circuits Regarding Proofs of Claim and Expired Debt

- **The SPLIT IN CIRCUITS**
- **Crawford v. LVNV Funding LLC**, 758 F.3d 1254 (11 Cir 2014).
- Summary of decision – Creating a split between the Circuits, the **11th Circuit** overruled both the bankruptcy and district courts, holding that the filing of a proof of claim on time-barred debt violates the Fair Debt Collection Practices Act (FDCPA).

See also....the 3rd and 7th Circuits

• RELEVANT DECISIONS

- Simon v. FIA Card Services, NA, 732 F.3d 259 (3rd Cir. 2013).
- Randolph v. IMBS, Inc., 368 F.3d 726 (7th Cir. 2004).
- Summary of decisions – The FDCPA and the Bankruptcy Code can be enforced simultaneously in different contexts.
 - Unless one federal statute repeals or replaces the other, both statutes (the Bankruptcy Code and the FDCPA) can be enforced in harmony

The Other Side of the Split....

- **Simmons v. Roundup Funding, LLC**, 662 F.3d 93 (2d Cir. 2010)
 - Summary of decision – The **2nd Circuit**, relying on *Walls v. Wells Fargo Bank*, held that “the filing of a proof of claim in bankruptcy court cannot form the basis for an FDCPA claim.”
- **Walls v. Wells Fargo Bank**, 276 F.3d 502 (9th Cir. 2002)
 - Summary of decision – The **9th Circuit** holds “no FDCPA action can be based upon an act that violates any provision of the Bankruptcy Code, because such violations are dealt with exclusively by the Bankruptcy Code.”
 - Issues concerning proofs of claim are be addressed by the Bankruptcy Code.

FDCPA v. the Bankruptcy Code

- Who Trumps Whom?
- And What Will the Supreme Court Do??

OVERVIEW OF CFPB AUTHORITY

Hon. Kevin R. Anderson
U.S. Bankruptcy Court
District of Utah

Statutory Authority. Congress created the Consumer Financial Protection Bureau (CFPB) in 2010 as part of the Dodd-Frank Act.¹ The CFPB has broad authority to “regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws”² and to implement those laws through “rules, orders, guidance, interpretations, statements of policy, examinations, and enforcement actions.”³ It is also charged (some say ironically) with reducing “unwarranted regulatory burdens.”⁴ The CFPB is defined as an “independent bureau” within the Federal Reserve System.⁵ This excludes it from regulatory review by Congress and the Office of Management and Budget. It also means that the Federal Reserve cannot intervene in any CFPB matter.⁶

Mission Statement & Strategic Goals. “The CFPB is a 21st century agency that helps consumer-finance markets work by making rules more effective, by consistently and fairly enforcing those rules, and by empowering consumers to take more control over their economic lives.”⁷ The CFPB’s strategic plan is grounded in four goals:

Goal 1: Prevent financial harm to consumers while promoting good practices that benefit them.

Goal 2: Empower consumers to live better financial lives.

Goal 3: Inform the public, policy makers, and the CFPB with data-driven analysis of consumer finance markets and consumer behavior.

Goal 4: Advance the CFPB’s performance by maximizing productivity and enhancing its impact.

Director. The President appoints the CFPB Director, with the advice and consent of the Senate, for a five-year term. And only the President can remove the Director “for inefficiency, neglect of duty, or malfeasance in office.”⁸ Richard Cordray, a lawyer and former Ohio Attorney General, is the current CFPB Director, but his recess appointment and subsequent confirmation is not without controversy. The Supreme Court unanimously invalidated the President’s recess appointment of members to the National Labor Relations Board made on the same day as

¹Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

² 12 U.S.C. § 5491(a) (unless otherwise indicated, all statutory references are to 12 U.S.C.).

³ § 5492(a)(10).

⁴ § 5511(b)(3).

⁵ § 5491(a).

⁶ *Id.*

⁷ See <http://www.consumerfinance.gov/the-bureau/>

⁸ § 5491(a).

Cordray's appointment.⁹ Prior to this ruling, the President re-nominated Cordray to the Director position, and the Senate confirmed Cordray in July of 2013. The validity of Cordray's appointment, and any CFPB regulations created under his directorship, remain the subject of legal challenge.¹⁰

Budget. The CFPB's budget for FY 2016 is \$605 million.¹¹ The CFPB is not funded by Congress but receives up to 12% of the total operating budget of the Federal Reserve System. For FY 2016, that maximum amount is \$631.7 million. The CFPB budget is "not subject to review by the Committees on Appropriations of the House of Representatives and the Senate."¹² The CFPB has been criticized for its exception from budgetary oversight by Congress.¹³

Covered Persons. The CFPB has authority to supervise, examine, audit, and regulate "any person [or affiliate of such person] that engages in offering or providing a consumer financial product or service."¹⁴ This includes large banks (i.e., over \$10 billion in assets), nonbank mortgage lenders, brokers and servicers, payday lenders, private student loan lenders, and debt buyers and collectors. The CFPB's authority also covers "service providers" defined as "any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service."¹⁵

The CFPB can also oversee "larger participants of a market for other consumer financial products or services."¹⁶ The CFPB recently defined such "larger participants" as auto lenders with at least 10,000 loans or leases per year. Auto dealers are exempt under § 5519, but the CFPB has pressed to extend its authority to buy-here-pay-here auto dealers who self-finance a motor vehicle purchase without later selling the note. This unilateral ability to extend the scope of its authority has come under scrutiny from the business community and from Congress.¹⁷

⁹ *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). See also *Mathew Enterprise, Inc. v. NLRB*, 771 F.3d 812 (D.C. Cir. 2014).

¹⁰ *State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48 (D.C. Cir. 2015) (overruling district court's dismissal of case for lack of standing and remanding for ruling on constitutionality of CFPB and Director Cordray's appointment). See also *CFPB v. ITT Educational Services*, 2015 WL 1013508, (S.D. Ind., Mar. 06, 2015) (appeal presently pending before Seventh Circuit Court of Appeals, Case No. 15-1761).

¹¹ See http://files.consumerfinance.gov/f/201502_cfpb_report_strategic-plan-budget-and-performance-plan_FY2014-2016.pdf

¹² § 5497(a)(2)(C).

¹³ See OIG's Response to January 29, 2014, Congressional Request Regarding the CFPB's Headquarters Renovation, available at [http://oig.federalreserve.gov/reports/cfpb-congressional-request-headquarters-renovation-project-jun2014.htm#The CFPB's Budgeting and Approval Process](http://oig.federalreserve.gov/reports/cfpb-congressional-request-headquarters-renovation-project-jun2014.htm#The%20CFPB's%20Budgeting%20and%20Approval%20Process) and Financial Services Committee Report on CFPB Oversight and Accountability available at <http://financialservices.house.gov/news/documentprint.aspx?DocumentID=339512>

¹⁴ § 5481(6).

¹⁵ § 5481(26).

¹⁶ § 5514.

¹⁷ See UNSAFE AT ANY BUREAUCRACY: CFPB JUNK SCIENCE AND INDIRECT AUTO LENDING, Report Prepared by Republican Staff of the Committee on Financial Services, U.S. House Of Representatives (11/24/2105) (http://financialservices.house.gov/uploadedfiles/11-24-15_cfpb_indirect_auto_staff_report.pdf)

Bankruptcy attorneys should be aware that the CFPB has come out in opposition to mandatory arbitration provisions in contracts, that likely include attorney retention agreements. The CFPB's report to Congress questioning arbitration clauses is available online.¹⁸

Covered Consumer Laws. Dodd-Frank gave the CFPB exclusive jurisdiction to enforce eighteen “enumerated consumer laws” previously administered by other agencies.¹⁹ The covered consumer laws include the Truth in Lending Act (TILA), the Fair Credit Reporting Act (FCRA), the Fair Debt Collection Practices Act (FDCPA), the Equal Credit Opportunity Act (ECOA), the Home Mortgage Disclosure Act (HMDA) and the Electronic Fund Transfer Act and Regulation E (EFTA).

Unfair, Deceptive, or Abusive Acts and Practices (UDAAP). The CFPB also has sweeping authority to regulate and prosecute “Unfair, Deceptive, or Abusive Acts and Practices.”²⁰ Penalties under this power can be significant – up to \$1 million per day for a knowing violation. Covered Persons have complained that the terms “unfair” and “deceptive” are not (yet) legally defined terms of art, and that there is little legal guidance as to what constitutes an “abusive act.” Thus, Covered Persons are concerned they may be tagged by the CFPB for an act that is not a violation of any federal statute. Others have expressed concern that allowing the CFPB to unilaterally define what constitutes a UDAAP makes it too easy for it to leverage a settlement from Covered Persons without first establishing a violation of a Congressionally-passed statute or judicially-defined legal action as opposed to a bureaucratic regulation or interpretation.²¹

Dodd-Frank defines an act or practice is unfair when: (1) it causes or is likely to cause substantial injury to consumers; (2) the injury is not reasonably avoidable by consumers; and (3) the injury is not outweighed by countervailing benefits to consumers or to competition.²²

The CFPB Examination Manual states that a representation, omission, act, or practice is deceptive if: (1) it is likely to mislead the consumer; (2) the consumer's interpretation is reasonable; and (3) the misleading is material.²³ The Examination Manual defines an act or practice as unfair if: (1) it materially interferes with the consumer's ability to understand the transaction; or (2) it takes unreasonable advantage of – (a) the consumer's lack of understanding of the costs and risks of the transaction; (b) the inability of the consumer to protect his/her interests in selecting or using a financial product; or (c) the reasonable reliance by the consumer on the promoter of product to act in the consumer's interests. *Id.*

The following examples clarify the CFPB's view of UDAAPs:

¹⁸ See http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf

¹⁹ § 5481(12) and (14) and § 5511.

²⁰ §§ 5531 and 5536.

²¹ See footnote 16.

²² § 5531(c).

²³ CFPB EXAMINATION MANUAL v.2, at UDAAP 5 (pg. 178) (Oct. 2012)

- Assessing any additional amounts (including interest, fees, and charges) not expressly authorized by contract or law.
- Failing to timely post or properly credit loan payments and then charging a late fee or additional interest.
- Taking possession of a consumer's property without the legal right to do so.
- Disclosing an indebtedness to an employer or co-worker without the consumer's consent.
- Falsely representing the nature, amount, or legal status of a debt.
- Misrepresenting that a debt collection communication is from a lawyer.
- Misrepresenting that a debt collection communication is from a governmental entity.
- Misrepresenting that the debt will be reported to a credit reporting agency.
- Misrepresenting that a debt will be reduced or forgiven if the consumer enters into a settlement repayment plan.
- Threatening any action that the creditor does not intend or is not authorized to pursue, such as lawsuits, arrest, prosecution, or imprisonment.

CFPB Divisions. To accomplish its statutory charges under Dodd-Frank, the CFPB is organized into six divisions:

1. Consumer Education: Creates consumer financial literacy programs with educational outreach to all consumer demographics, but specifically to the aged, military service members, minorities, and students.
2. Supervision, Enforcement and Fair Lending: This is the CFPB's largest division with approximately 800 lawyers. It ensures compliance with consumer financial laws and initiates and prosecutes enforcement actions.
3. Research, Markets and Regulations: Conducts research to understand consumer financial markets and consumer behavior; evaluates whether there is a need for regulation; and determines the costs and benefits of proposed or existing regulations.
4. Legal Division: Ensures the CFPB is in compliance with all applicable laws and advises the Director and the various divisions as to enforcements, appeals, and *amicus curiae*.
5. External Affairs: Manages the CFPB's relationships with interested parties to promote understanding, transparency, and accountability.
6. Operations: Creates and maintains the CFPB's operational resources and hears directly from consumers about complaints, questions, and feedback.

Remedies. The CFPB can seek the following remedies for UDAP violations: (1) injunctive relief; (2) civil penalties; and (3) consumer restitution in the form of – (a) rescission or

reformation of contracts; (b) refunds; (c) return of property; (d) restitution; (e) disgorgement; (f) damages; and (g) other monetary relief.²⁴ To date, CFPB enforcement actions have employed one or more of these remedial options.

Consumer Financial Civil Penalty Fund. The CFPB oversees the Consumer Financial Civil Penalty Fund that collects, holds and disburses monetary penalties. This fund may be used to compensate victims or to provide consumer education and financial literacy programs. In FY 2014, the Civil Penalty Fund collected \$159 million, disbursed \$144 million to injured consumers, and spent \$13.4 million on consumer education programs. The CFPB's most recent report states that "supervisory activities have either led to or supported six recent public enforcement actions, resulting in \$764.9 million being returned to consumers and \$50.7 million in civil money penalties."²⁵

Supervisory Authority. The CFPB exercises its supervisory authority through the following means: (1) issuing civil investigation demands (CIDs); (2) conducting examinations of Covered Persons by on-site visits or through discovery, including document production and depositions; and (3) bringing enforcement actions and entering into consent orders with Covered Persons.

Civil Investigation Demands (CID). The CFPB has broad powers to investigate Covered Persons if it has reason to believe there has been a violation of its rules, regulations, or of a covered consumer protection statute. A CID can involve a request for documents as well as depositions and investigational hearings. A party must respond to a CID within ten days or to raise and resolve issues as to its compliance with the CFPB's discovery requests.

The CFPB has been aggressive in its investigative requests. It asserts that a CID can essentially constitute a "fishing expedition" or be in the nature of a grand jury investigation; that it need not disclose the relevance of the documents or the purpose of the investigation; and that possible defenses to any subsequent legal action, including a statute of limitations defense, cannot constrain the scope of a CID.²⁶

CFPB Supervision and Examination Manual. In October 2012, the CFPB published its SUPERVISION AND EXAMINATION MANUAL (the "CFPB Manual"). The CFPB Manual consists of 924 pages, and has been updated two dozen times.²⁷ The CFPB Manual provides guidance on how it will supervise and examine Covered Persons. The CFPB Manual is divided into "modules" that set examination procedures relating to a specific consumer protection statute, a specific Covered Person, or a covered consumer transaction. Covered Persons should be familiar with the applicable provisions of the CFPB Manual so they can proactively prepare for a possible CFPB examination. The

²⁴ § 5565.

²⁵ See http://files.consumerfinance.gov/f/201510_cfpb_supervisory-highlights.pdf

²⁶ See http://www.gibsondunn.com/publications/pages/ConsumerFinancial-ProtectionBureau-Foundation-Authorities-First-Year-of-Enforcement.aspx#_ftn176

²⁷ See <http://www.consumerfinance.gov/guidance/supervision/manual/>

following example of examination procedures for a debt collection entity evidences the comprehensive scope of a CFPB onsite audit:

Examiners should obtain and review the following as applicable:

- Organizational charts and process flowcharts;
- Board minutes, annual reports, or the equivalent to the extent available;
- Relevant management reporting;
- Policies and procedures;
- Notes and disclosures;
- Telephone recordings;
- Operating checklists, worksheets, and review documents;
- Monitoring procedures;
- Compensation policies;
- Relevant computer program and system details;
- Consumer files, including original loan documents, and payment records systems;
- Historical examination information;
- Audit and compliance reports, and management responses to findings;
- Training programs and materials;
- Scripts for employee use;
- Third-party contracts and oversight materials, including monitoring reports and findings;
- Written correspondence with consumers;
- Examiners should conduct interviews with management and staff to determine whether they understand and consistently follow the policies, procedures, and regulatory requirements applicable to debt collection, and implement effective controls.
- Consumer complaints and disputes, including those submitted to CFPB Consumer Response Center, Consumer Sentinel, the Better Business Bureau, or other sources as appropriate.

Rulemaking Authority. The CFPB’s enforcement of federal consumer laws is robustly augmented by its rulemaking authority. The Director “may prescribe rules and issue orders and guidance as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.”²⁸ Previously, no single federal agency had such broad authority to promulgate regulations for federal consumer laws, and the CFPB is the first to have authority to establish regulations under the FDCPA and FCRA.

²⁸ § 5512(b)(1).

The CFPB has “the exclusive authority to prescribe rules” relating to the covered consumer laws.²⁹ In prescribing rules, the CFPB must consider the potential costs and benefits to consumers and Covered Persons, including any potential reduction of consumer access to financial products or services.³⁰ The CFPB’s rulemaking authority must also comply with the Administrative Procedures Act. The CFPB rulemaking process must include the involvement of a “Small Business Review Panel” to assess a proposed rule’s economic impacts on small businesses.³¹ The CFPB must also consult with prudential regulators and other appropriate federal agencies before proposing a rule and then consult again during the comment process. The “Financial Stability Oversight Council” can set aside a final CFPB regulation if it “puts the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk.”³²

If the CFPB is challenged in court, “the deference that a court affords to the Bureau with respect to a determination by the Bureau regarding the meaning or interpretation of any provision of a Federal consumer financial law shall be applied as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law.”³³

The CFPB’s rulemaking agenda for the fall of 2015 includes arbitration, payday and title lenders, mortgage and student loan servicers, and discriminatory lending practices.³⁴

A list of preliminary, proposed, and final CFPB rules for 2015 is posted with the Office of Information and Regulatory Affairs.³⁵

Enforcement Authority. The CFPB can conduct hearings seeking any appropriate legal or equitable relief, which may include cease-and-desist orders; rescission or reformation of contracts; monetary refunds or the return of property; restitution; disgorgement; damages or other monetary relief; and public notification of a violation. However, the CFPB cannot seek exemplary or punitive damages unless such are specifically provided for in a covered consumer statute.

The CFPB has established procedures for conducting administrative adjudications that are similar to those of a court trial. The CFPB commences an action by filing a “Notice of Charges” that must be answered by the Covered Person within fourteen days of service. A Covered Person may propose a settlement at any time during the proceeding which, if accepted, is memorialized in a “Consent Order.” At any time, a party may request the certification of a question to Director Cordray. Under the Administrative Procedures Act, a party may appeal any final CFPB decision to a federal district court. However, to set aside the ruling, the appellant must establish that the

²⁹ § 5512(a)(4).

³⁰ § 5512(b)(2).

³¹ See http://files.consumerfinance.gov/f/201205_CFPB_public_factsheet-small-business-review-panel-process.pdf

³² § 5513 and <https://www.treasury.gov/initiatives/fsoc/Pages/home.aspx>.

³³ § 5512(b)(4)(B).

³⁴ <http://www.consumerfinance.gov/blog/fall-2015-rulemaking-agenda/>

³⁵ http://www.reginfo.gov/public/do/eAgencyMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=3170&Image58.x=58&Image58.y=5&Image58=Submit

decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to a party's constitutional rights; in excess of the agency's statutory jurisdiction or limitations; or without observance of required legal procedures, or unwarranted by the facts.³⁶

The CFPB may also file a civil complaint in a federal or state court for a violation of its rules or regulations or a violation of a covered consumer statute.

Dodd-Frank provides three levels of penalties for violations.³⁷ The first applies to "any violation of a law, rule, or final order or condition imposed in writing by the Bureau" with a penalty of not more than \$5,000 per day starting when the violation occurred, or \$5,000 for each day the party fails to pay an imposed penalty. The second level provides that as to "any person that recklessly engages in a violation of a Federal consumer financial law, a civil penalty may not exceed \$25,000 for each day during which such violation continues." And the last level provides that "for any person that knowingly violates a Federal consumer financial law, a civil penalty may not exceed \$1,000,000 for each day during which such violation continues."

Referral Authority. The CFPB can also refer a matter to the Department of Justice if its examination of a Covered Person reveals suspected criminal activity.³⁸ The CFPB has made such a referral involving a Florida scam where a debt relief agency required upfront fees but then failed to provide any services.³⁹

The CFPB can also refer matters to the IRS involving noncompliance with tax laws,⁴⁰ and to the Civil Rights Division of the DOJ if it suspects discriminatory lending practices under the Equal Credit Opportunity Act.⁴¹

Finally, the CFPB can refer any other alleged violation of any law, even if outside its jurisdiction, to the appropriate federal or state authority.

Consumer Complaints. The CFPB directly interfaces with consumers through its on-line complaint system and consumer education programs. The CFPB consumer complaint portal includes a system for a direct communication with a Covered Person without necessarily involving the CFPB.⁴²

³⁶ 5 U.S.C. § 706

³⁷ § 5565(c)(2).

³⁸ § 5566.

³⁹ See http://files.consumerfinance.gov/f/201407_cfpb_factsheet_supervision-and-enforcement.pdf

⁴⁰ §§ 5514 and 5515.

⁴¹ 15 U.S.C. § 1691(a)

⁴² See <http://www.consumerfinance.gov/complaint>

The CFPB recently disclosed for FY 2014 the top 3 issues for the top 5 consumer financial products.

ISSUE TYPE	COMPLAINTS
Debt Collection	
Continued attempts to collect a debt not owed	30,900
Communication tactics	18,100
Taking or threatening illegal action	11,500
Mortgage	
Problems when unable to pay	24,900
Making payments	17,500
Applying for the loan	3,900
Credit Reporting	
Incorrect information on credit report	30,900
Credit reporting company's investigation	3,400
Unable to obtain credit report or score	3,300
Bank Account or Service	
Account management	10,400
Deposits and withdrawals	5,200
Sending or receiving payments	2,300
Credit Card	
Billing disputes	3,100
Other	2,300
Identity theft / Fraud / Embezzlement	2,000

Example Enforcement and Supervisory Actions. The CFPB has brought a total of 86 actions and resolved 70 of those cases as of July 2015. Examples of its examination, supervision and enforcement activities are as follows.⁴³

Credit Card Companies: The CFPB brought an enforcement action against Capital One Bank alleging that it deceptively targeted subprime credit cardholders to add credit monitoring services to their accounts. Thereafter, the CFPB brought similar actions against Citibank, American Express, Bank of America and other large card issuers for deceptively marketing other monthly “add-on” charges. The CFPB recovered approximately \$1.5 billion in public compensation for these violations.

Debt Relief Services: The CFPB sought injunctions and damages against various debt relief entities (e.g., credit counseling) that extracted fees before providing such services or failing to provide the promised relief.

Mortgage Insurers: The CFPB took enforcement actions arising from the failure of mortgage insurers to comply with the Real Estate Settlement Procedures Act. The

⁴³ See CFPB SUPERVISORY HIGHLIGHTS, Fall 2015, at http://files.consumerfinance.gov/f/201510_cfpb_supervisory-highlights.pdf

affected companies agreed to pay more than \$15 million in penalties to the CFPB to settle the enforcement actions.

Credit Reporting Deficiencies: Inadequate or outdated policies and procedures regarding verification of information; failure to provide consumers with adequate information and responses regarding notices or disputes; and the absence of adequate consumer dispute-handling processes.

Debt Collection Deficiencies: Failure of employees to state during phone calls that they worked for a debt collection agency; inadequate tracking and responding to consumer requests for follow-up communications; and failure to maintain adequate policies and procedures to verify accuracy of information passed on to credit reporting agencies.

Student Loan Lender and Servicer Deficiencies: Failure to properly allocate payments when consumer had multiple loans; failure to inform consumer of such allocation or of options to designate the allocation of such payments; and using such allocation practices to maximize late fees and other charges. Other deficiencies involved failure to back-date ECF loan payments when the payment date fell on a non-business day; making false statements regarding late fees; failure to inform consumers when a payoff attempt was unsuccessful (thus resulting in fees and interest); and failure to maintain adequate procedures to ensure accuracy of information provided to credit reporting agencies. The CFPB has also expressed concerns regarding the treatment of military service members; misleading marketing practices to induce students to take out school loans; misleading claims by for-profit colleges regarding student loans; and aggressive collection tactics coupled with a failure to provide flexible repayment options.

Mortgage Origination Deficiencies: Actual settlement charges exceeding good faith estimates by amounts greater than allowed by Reg. X; inaccurate or incomplete settlement statements; failing to provide accurate loan servicing and privacy disclosures; failing to register employees with the Nationwide Mortgage Licensing Systems and Registry; and failing to reimburse consumers when actual settlement charges were less than estimates in settlement agreement.

Mortgage Servicer Deficiencies: Inability to timely provide disclosures required by Reg. X; failure to timely process loss mitigation applications, and misleading information in loss mitigation agreements; misrepresentations regarding mortgage insurance; collecting fees not provided for in the agreements; and a general observation as to the inadequate or outdated computer processes used by mortgage servicers.

CONCLUSION

The CFPB recently posted a summary of its successes over the last five years that evidence the vigorous and expansive execution of its duty to protect consumers from unfair and deceptive practices while ensuring market compliance with all applicable consumer protection laws:

Since 2011, [the CFPB] has secured over \$10.8 billion in relief for more than 25 million consumers harmed by illegal practices.

Mortgages: We've taken several actions against mortgage-servicing companies for failing to tell borrowers when their loan-modification applications were incomplete, denying loan modifications to qualified borrowers, failing to honor modifications for loans transferred from other servicers, and illegal foreclosure practices. We have also taken action against companies in the mortgage industry for steering consumers into costlier loans, for paying illegal kickbacks in exchange for business, and for making inadequate disclosures or using deceptive ads.

Credit Cards: We've secured billions of dollars of relief for millions of consumers banned by deceptive marketing and enrollment of credit card add-on products, unfair billing, and illegal debt-collection practices.

Payday and Installment Lending: We have taken action against payday lenders and installment lenders for unlawful lending and collections practices that include using false threats of law- suits or criminal prosecution to collect debts, charging undisclosed fees to military service members, and robo-signing court documents related to debt-collection lawsuits.⁴⁴

Whether the CFPB has been overly zealous, and itself unfair and less than transparent, is the subject of some debate; however, it is beyond dispute that the CFPB has been an effective advocate of consumer rights and in providing consumers with resources and education to assist them in making better and wiser financial decisions.

⁴⁴ Anthony Alexis, "*You Have the Right to a Fair financial Marketplace*," (July 21, 2015), available at <http://www.consumerfinance.gov/blog/you-have-the-right-to-a-fair-financial-marketplace/>.

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FDCPA Checklist

	(a) Definitions
§ 1692a	“Communication” conveying of info about a debt directly or indirectly to any person through any medium.
§ 1692 a(3)	“Consumer” any natural person obligated on or allegedly obligated on a debt
§ 1692 a(6)	“Debt Collector” collects debts due another through interstate commerce
§ 1692 a(5)	“Debt” an obligation or alleged obligation for goods or services for personal, family or household purposes
	(b) Third Party Contacts
§ 1692 b(1)	Fail to identify themselves, or fail to state that collector is confirming /correcting location info
§ 1692 b(2)	States to 3 rd party that the consumer owes a debt
§ 1692 b(3)	Contacted a person more than once, unless requested to do so
§ 1692 b(4)	Uses postcard
§ 1692 b(5)	Any language or symbol on envelope or communication indicating debt collection business
§ 1692 b(6)	After knows consumer is represented by lawyer
	(c) Prohibited Communications Practices
§ 1692 c(a)(1)	unusual time, unusual place, or time or place known to be inconvenient to the consumer/ before 8:00 am or after 9:00 pm
§ 1692 c(a)(2)	consumer represented by an attorney unless attorney consents or is unresponsive
§ 1692 c(a)(3)	place of employment when knows that the employer prohibits such communications
§ 1692 c(b)	With anyone except consumer, consumer’s attorney, or credit bureau concerning the debt
§ 1692 c(c)	After written notification that consumer refuses to pay debt, or that consumer wants collector to cease communication
	(d) Harassment or Abuse
§ 1692 d	Any conduct the natural consequence of which is to harass, oppress, or abuse any person
§ 1692 d(1)	Used or threat of use of violence or other criminal means to harm the person, reputation or property
§ 1692 d(2)	Profane or abusive language
§ 1692 d(3)	Published a list of consumers who allegedly refuse to pay debts
§ 1692 d(4)	Advertised for sale any debts
§ 1692 d(5)	Caused the phone to ring or engaged any person in telephone conversations repeatedly
§ 1692 d(6)	Placed telephone calls without meaningful disclosure of identity

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	(e) False or Misleading Representations in Communications
§ 1692 e(1)	Any false, deceptive, or misleading representation in connection with the debt collection
§ 1692 e(1)	Affiliated with the United States or any state including badge, uniform or shield
§ 1692 e(2)	Character, amount, or legal status of the alleged debt
§ 1692 e(3)	Any individual is an attorney or that any communication is from an attorney
§ 1692 e(4)	Nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment of wages or property unless lawful and d/c intends to take such action
§ 1692 e(5)	Threaten to take any action that cannot legally be taken or that is not intended to be taken
§ 1692 e(6)	Sale or transfer of any interest in the debt will cause the consumer to lose any claim or defense to payment of the debt
§ 1692 e(7)	Consumer committed any crime or other conduct in order to disgrace the consumer
§ 1692 e(8)	Threatens or communicates false credit information, including the failure to communicate that a debt is disputed
§ 1692 e(9)	Represent documents as authorized, issued or approved by any court, official, or agency of the United States or state.
§ 1692 e(10)	Any false representation or deceptive means to collect a debt or obtain information about a consumer
§ 1692 e(11)	Communication fail to contain the mini-Miranda warning
§ 1692 e(12)	Debt has been turned over to innocent purchasers for value
§ 1692 e(13)	Documents are legal process when they are not
§ 1692 e(14)	Any name other than the true name of the debt collector's business
§ 1692 e(15)	Documents are not legal process forms or do not require action by the consumer
§ 1692 e(16)	Debt collector operates or is employed by a consumer reporting agency
	(f) Unfair Practices
§ 1692 f	Any unfair or unconscionable means to collect or attempt to collect the alleged debt
§ 1692 f(1)	Attempt to collect any amount not authorized by the agreement or permitted by law
§ 1692 f(2)	Accept or solicit postdated check by more than 5 days without 3 business days written notice of intent to deposit
§ 1692 f(3)	Accepted or solicited postdated check for purpose of threatening criminal prosecution
§ 1692 f(4)	Depositing or threatening to deposit a post-dated check prior to actual date on the check
§ 1692 f(5)	Caused any charges to be made to the consumer, e.g., collect telephone calls
§ 1692 f(6)	Taken or threatened to unlawfully repossess or disable the consumer's property
§ 1692 f(7)	Communicated with the consumer by postcard

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§ 1692 f(8)	Any language or symbol on the envelope that indicates the comm concerns debt collection
	(g) 30 Day Validation Notice
§ 1692g	Failure to send the consumer a 30-day validation notice within five days of the initial comm
§ 1692g(a)(1)	Must state amount of debt
§ 1692g(a)(2)	Must state name of creditor to which debt owed
§ 1692g(a)(3)	Must state right to dispute within 30 days
§ 1692g(a)(4)	Must state right to have verification/judgment mailed to consumer
§ 1692g(a)(5)	Must state will provide name and address of original creditor if different from current creditor
§ 1692g(b)	Collector must cease collection efforts until debt is validated, but can sue
	(h) Multiple Debts
§ 1692h	Collector must apply payments on multiple debts in order specified by consumer and cannot apply payments to disputed debts
	(i) Legal Action
§ 1692i(a)(2)	Bring suit other than where contract signed or consumer resides
	(j) Deceptive Forms
§ 1692j	Forms created to give false belief that person other than creditor is collecting. Can be brought against anyone.

Call Log

INSTRUCTIONS:

1. Immediately make a note of every phone call received including voice mail messages left on your phone. Take detailed notes of the conversation including the name of the person(s) you speak with.
2. **SAVE EVERYTHING**, every single voice mail, answering machine, collection letter, and paper message. Don't throw anything away, including the envelopes that the collection letters come in or anything included with the collection letter.

Time and Date of call?	Type of contact Phone, Letter Voice Mail	Collection Agency Name and Number?	Collector's Name?	What Did Collector Say? Amount Demanded? Payment Terms? Threats? Profanity? Harassment? Legal Action? Calls to Friends or Neighbors? Abuse?(Use as many lines or pages as needed)
1				
2				
3				
4				
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7				
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