CFPB Relies on Questionable Premise in Bulletin About Repossession

April 26, 2022 | Chuck Dodge

In February, the Consumer Financial Protection Bureau issued a compliance bulletin to the vehicle finance industry to make sure that industry participants—including and especially servicers—remember the CFPB's authority to enforce the Dodd-Frank Act's prohibition against unfair, deceptive, or abusive acts and practices that can cause consumers harm. The bulletin refers to a number of repossession practices that the CFPB has called out over the past few years in public enforcement actions to identify the ways that secured creditors or their servicers *could* violate the Dodd-Frank Act's prohibition against unfair, deceptive, or abusive acts or practices when engaging in repossessions.

It is always helpful to know how the CFPB and other regulators view broad statutory terms like "unfair" and "deceptive" in any regulated context, so the bulletin is welcome and noteworthy. But the CFPB seems to have reached for its purported reason for issuing guidance related to repossession conduct. Specifically, in the opening of the bulletin, the CFPB notes that used car prices have been going up (a fact also noted in the CFPB's " Rising car prices means more auto loan debt" blog post discussed in an article in the April issue of *Spot Delivery* by my colleague, Jean Noonan). After stating that fact, the CFPB takes a massive leap to claim that it is concerned that higher prices of used cars could "incentivize" creditors or their servicers to engage in "risky" repossession practices to take advantage of the higher prices available on the used car market, citing numerous (but limited) examples of cases where the CFPB has claimed that creditors or their servicers have engaged in unfair, deceptive, or abusive practices in repossession. Notably, though, the CFPB does not tie that observed conduct to the rise in car prices or otherwise explain what secured creditors or their servicers would stand to gain by engaging in risky repossession practices.

The idea that creditors or their servicers would intentionally engage in risky, non-compliant repossession practices simply because they can resell cars at higher prices defies logic in the highly regulated world of vehicle finance. The CFPB notes in the bulletin what many of us know—that servicers (the CFPB includes creditors servicing their own accounts in its definition of "servicers" for purposes of the bulletin, so I will do the same in this article) "generally" do not immediately repossess vehicles following default and "may" give consumers the opportunity to avoid repossession by making additional payments or promises to pay. It is true not just from a legal perspective (think of states that require creditors to allow consumers an opportunity to cure their payment defaults before repossession or other serious consequences), but also from a practical and economic perspective, that servicers typically allow consumers an opportunity to cure defaults before repossessing collateral. It is in all parties' interest to keep consumers in their cars and paying as agreed, even if the servicer has to work with the consumer to come up with a plan to make up payments. So it is unlikely that rising used car

prices would cause dealers, finance companies, or their servicers to discard all of their compliance management systems and the laws reflected in those systems to rush to repossession.

You might think that the bulletin goes on to explain how rising used car prices might tempt servicers to abandon good practices for bad and risk litigation and government enforcement, but you can read the bulletin over and over (I did) and not find that connection. Rather, the CFPB discusses the conduct it has identified in enforcement and in supervisory examinations that might violate federal law, including:

- Wrongful repossessions - The CFPB said that it can be an unfair or deceptive practice for a servicer to allow or follow through on a repossession after giving a consumer options for avoiding repossession and the consumer satisfies one of those options with enough time to make it reasonably practicable to avoid the repossession. The CFPB noted that sometimes those repossessions were the result of incorrect coding of accounts, failure to timely cancel a repossession order, or repossession agents failing to confirm that a repossession order was still active just before the repossession.

- Violations of the automatic stay - The CFPB noted that there were instances where servicers repossessed collateral after consumers filed for bankruptcy protection, when the automatic stay was in effect.

- Crossed-up cure information - The CFPB said that there were instances where servicers gave consumers a specific amount of time to pay an amount sufficient to avoid repossession and then repossessed collateral before that time elapsed. The CFPB also identified that sometimes servicers quoted cure amounts that were insufficient to actually cure, and, after consumers paid those amounts, the servicers repossessed collateral.

- Payment application - The CFPB identified circumstances where a servicer's website indicated a certain payment application (finance charges, then principal, then fees), but the servicer applied payments differently, causing consumers who made otherwise sufficient payments to remain delinquent.

- Force-placed insurance - The CFPB noted instances where servicers placed insurance after consumers allowed required collateral protection insurance to lapse and then continued to impose charges for the force-placed insurance, in some cases even after the consumer provided proof of insurance. The additional cost of that insurance in some cases allegedly caused consumers to default and end up in repossession.

- Fees for returning non-collateral personal property - This is not a new one, but the CFPB observed that servicers or their agents imposed a fee for consumers to retrieve non-collateral personal property following the repossession of collateral.

- Force-placed insurance after repossession - The CFPB noted four instances where a servicer continued to charge consumers for force-placed insurance even after repossession, when, by the policy's terms, the insurance should have automatically terminated at the time of repossession. Despite noting what appear to be clear examples of human error in these four cases, the CFPB framed the "practice" of continuing to charge those premiums as "unfair."

These practices do not sound intentional; they sound like mistakes. In theory, they should not

happen—at least not often—when a creditor or servicer has a compliance management system designed to prevent them. And none of the practices jump off the page as the kinds of practices a creditor or servicer might be tempted to try now that used car prices are up. The CFPB summarized the above in a bulleted list near the end of the bulletin and then described how companies can review and monitor practices and procedures to avoid these UDAAP practices. But the CFPB never again in the bulletin brings up rising used car prices and the corresponding apparent temptation to engage in risky repossession practices.

And maybe that does not matter, but it just seems like an odd way to cue up a repossession bulletin that actually does identify some practices that could be unfair, deceptive, or abusive and reminds us that a well-executed compliance management system should work to manage the risk of committing UDAAPs. Focusing on the recommendations that the CFPB makes about elements that vehicle finance creditors and their servicers should consider in order to avoid UDAAPs in repossession could result in a productive tune-up to your compliance management system.

HUDSON
COOK

Celebrating its 25th anniversary in 2022, Hudson Cook, LLP is a national law firm representing the financial services industry in compliance, privacy, litigation, regulatory and enforcement matters.

7037 Ridge Road, Suite 300, Hanover, Maryland 21076
410.684.3200

www.hudsoncook.com