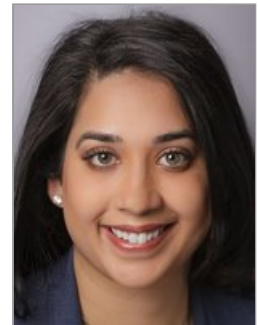


## What Does 'Abusive' Really Mean Under Dodd-Frank?

By **Vaishali Rao** (July 25, 2019, 3:12 PM EDT)

On June 25, 2019, the Consumer Financial Protection Bureau hosted the first in a series of scheduled symposia, which explored the Dodd-Frank Act's prohibition on abusive acts or practices. While the symposium appeared to center on academic opinions, it offered an opportunity to reflect on the bureau's use of the abusive standard over its close to 10-year history, and the practical lessons implicated.

For example, has the bureau used the standard consistently among market participants? What are the key takeaways from the panelists, as well as from the approximately 30 cases that have been filed in state and federal courts around the country alleging an abusive act or practice? Importantly, how should businesses operationalize those lessons when offering a financial product or service?



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The June 25 symposium consisted of two panels of unfair, deceptive, or abusive acts or practices (UDAAP) experts. The panels robustly discussed the perceived meaning of "abusive" (especially as distinguishable from "unfair" or "deceptive"), noting that abusive does not include a cost/benefit analysis, and that abusive tends to focus on the business practice rather than the harm to consumers. Several panelists indicated that the four circumstances provided by Congress in the statute were sufficient to define the scope of abusive.

Predictably, the panelists did not reach a consensus on the definition of "abusive." In fact, it is likely that a similar symposium on the phrases "unfair" or "deceptive" would yield a similar result, even with a far deeper historical context.

Following are nine key takeaways from the symposium panel discussions.

### **No One Agrees on How "Abusive" Should Be Used, But One Simple Test Still Exists**

UDAAP theories are, by their nature, amorphous. Whether or not one believes it is possible to comply with a fluid legal theory is largely a scholarly question. More practically, businesses must attempt to comply with UDAAP — including its prohibition on abusive practices — in order to adequately mitigate risk.

Although a thorough UDAAP analysis can be complex, there is one, simple question that can ignite the process: How would your grandmother respond to your product or service offering?

The question certainly begs for more context: Who is your grandmother? What is the product or service? Does she speak English? How is the business communicating information to her? But, importantly, it starts the wheels in motion to begin thinking about a product offering from a consumer's perspective. It also necessarily injects some level of judgment and perception into the equation. There can be no effective UDAAP analysis without exercising judgment.

### **What Consumers Understand About Your Product or Service Matters**

After analyzing court opinions related to cases in which the CFPB alleged a particular act or practice was

abusive, the most commonly upheld abusive prong appeared to be "taking unreasonable advantage of a lack of understanding on the part of the consumer of the material risks, costs, and conditions" of the product.

What a consumer understands about your product is different from what you have disclosed to a consumer. Consumers gain an understanding of products from contextual clues: who is selling the service, what is said in marketing, and what medium is being used to market. While clear and conspicuous disclosures are one piece of the puzzle, context is king in determining whether someone will understand your service offering. Another complicating factor is deciding what risk tolerance to use in order to evaluate your product, the most vulnerable consumer or the reasonable consumer. Again, a proper evaluation of other market indicators will assist in determining the appropriate standard.

### **A Product's Profits Should Not Be Dependent on a Loophole**

Products that do not sustain profit solely from the core service offering are high risks for abusive claims. For example, low-priced products that depend on add-on fees to consumers to substantially increase profit margin are low hanging fruit for the bureau. These types of claims are often alleged as "abusive" under the prong describing that the benefits to the consumer do not outweigh the harm.

From the perspective of law enforcement, nothing is closer to Dodd-Frank's mandate than this standard. Recall that Dodd-Frank, created in the wake of the financial crisis, was an attempt to curb entities and practices that were perceived to be "too big to fail." Likewise, products that depend on obfuscated or undisclosed ancillary features, are sometimes described as "designed to fail."

### **Offering a Product to Consumers Who Need Quick Access to Money or Credit Increases Exposure to an Abusive Claim**

During the symposium, the panelists (both academics and practitioners) debated the public policy implications of abusive claims focusing on certain industries or consumers — for example, payday, subprime lending and collection. Some panelists believed that the bureau's focus on industries catering to lower income or minority persons tightened access to credit and conflicted with free market economics.

After an assessment of the cases the bureau has brought alleging the abusive standard, it appears the bureau's cases have touched several industries including those mentioned above, but also student loans, mortgage and online banking. For now, no matter the academic perspectives, offering products or services to those who need quick access to money or credit still greatly increases exposure to an abusive claim, which requires greater front-end compliance scrutiny.

### **If You Are Litigating an Abusive Claim Against the CFPB, You Are in It Past the Pleading Stage**

An analysis of the cases filed by the bureau alleging "abusive" showed that courts routinely denied motions to dismiss and allowed abusive claims to proceed. In order to appropriately evaluate the risk associated with defending against an abusive claim brought by the CFPB, it is important to understand that the cost is very likely to extend past the pleading stage.

### **The Bureau May Issue Guidance on the Parameters of "Abusive"**

A major focus of the June symposium was panelists offering perspectives on whether the bureau should (1) allow courts to continue to define the parameters of a viable "abusive" claim; (2) develop regulatory guidance relating to the standard; or, (3) initiate a rulemaking to further define the term. Most agreed that a rulemaking is premature given the short history of the standard. However, given the bureau's stated commitment to listening to industry perspective, it is certainly not out of the question that the bureau attempt to put pen to paper on the current administration's perspective of "abusive."

### **The Future of Abusive Claims May Relate to Data, Privacy or Tech**

Currently, the bureau has broad flexibility to apply the abusive standard to a variety of topics related to

financial services. It is important to note that what is acceptable in today's marketplace may be considered abusive in tomorrow's market. Much of this variance will depend on market conditions, the bargaining position of consumers, and the strength of the economy.

When the bureau feels that industry is taking too many liberties in one particular arena, it will attempt to flex the curve back toward consumers. One such area is likely to be data privacy. Businesses should be alert to the idea that disclosures, lack of consumer choice, and content and method of delivering terms and conditions related to data privacy — can all be challenged using an abusive claim by state and federal law enforcers.

### **When Unsure, Consider Testing the Waters With a Functional Regulator**

Unlike law enforcement staff from the CFPB or state attorneys general (whose job is to find violations of law), "functional regulators" like state banking departments may be a valuable forum to test ideas on product or service offerings. Even in states with no official regulatory sandbox, staff from functional regulators are usually willing to entertain a meeting to discuss market participants offering appropriate products or services to its consumers. Particularly in the fintech arena, meetings with functional regulators can be useful tools, and can often help identify particular areas for UDAAP risk.

### **Determining the Appropriate Balance of Risk to Reward Requires Judgment**

Ultimately, when the business seeks an opinion from legal regarding a UDAAP risk, there is a tremendous amount of judgment involved in determining whether particular acts or practices are appropriate for the business. It is vital to think through the big picture, appropriately understand the exposure posed by regulatory actions from the CFPB and state attorneys general, consider how other industries approach the same questions, and understand the types of practices that courts have already found to be abusive.

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