"Risky" Business: CFPB Consent Orders Suggest Field Visits Are Unfair Practices Per Se Based on Inherent Risks

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Recently, the Consumer Financial Protection Bureau ("CFPB") issued its second consent order in a year that permanently restrained a creditor from conducting in-person debt collection activities ("field visits"). The two consent orders - applicable to all covered persons under CFPB Director Richard Cordray's "regulation by enforcement" approach - suggest that field visits are *per se* unfair under the Dodd-Frank Act, despite the Bureau's guidance in a December 16, 2015, Bulletin ("Bulletin") stating that whether field visits violate the Act is a case-by-case determination. Read together, the Bulletin and the consent orders depart from the established definition of an unfair practice and convert the mere risk of harm to consumers into a violation.

CFPB Bulletin 2015-07: "In-Person Collection of Consumer Debt"

The CFPB's December 2015 Bulletin, which was intended to provide guidance to creditors, debt buyers, and third-party collectors on the legality of field visits, explained that field visits may constitute an unfair practice, depending on the specific facts and circumstances.

An act or practice is unfair under the Dodd-Frank Act when "it causes or is likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers and is not outweighed by countervailing benefits to consumers or to competition."

With respect to "substantial injury," the Bulletin explained that "depending on the facts and circumstances, in-person collections *may cause* or be likely to cause substantial injury to consumers." As an example, the Bulletin provided that "in-person collection visits *may result* in third parties such as consumers' co-workers, supervisors, roommates, landlords, or neighbors learning that the consumers have debts in collection, which *could* harm the consumer's reputation and, with respect to in-person collection at a consumer's workplace, result in negative employment consequences."

The Bulletin further provided that, "depending on the facts and circumstances, in-person collection visits *may result* in substantial injury to consumers even when there is no risk that the existence of the debt in collections will be disclosed to third parties." As an example, the Bulletin noted, "a consumer who is not allowed to have visitors at work *may* suffer adverse employment consequences as a result of these visits, regardless of whether there is a risk of disclosure to third parties."

Finally, the Bulletin omitted any discussion of the remaining elements of the unfairness test: reasonable avoidability and the familiar balancing test that weighs injury against countervailing benefits to consumers or competition.

In using "may result" and "may cause" language in its discussion of substantial injury and by altogether omitting the remaining elements of the standard, the Bureau appeared to leave open the possibility that creditors may conduct lawful field visits. This type of loose language is expected in supervisory guidance, which is often instructive rather than prescriptive.

However, the Bureau's consent orders following the Bulletin, with "facts and circumstances" on opposite ends of the severity spectrum, establish that the Bureau views field visits as such an inherent risk, that a field visit will result in an unfair practice.

In the Matter of EZCORP, Inc.

On the same day that the CFPB issued its Bulletin, it also issued a consent order that permanently restrained the small-dollar lender EZCORP, Inc., from conducting field visits. In the attendant press release, the Bureau alleged that during EZCORP's field visits, the company "disclosed or risked disclosing consumers' debt to third parties and caused or risked causing adverse employment consequences to consumers such as disciplinary actions or firing."

Specifically, the Bureau alleged that "in numerous instances," EZCORP's employees:

- discussed the debt with, and took payments from consumers at their homes and workplaces (including in places where third parties could overhear);
- visited consumers' workplaces when they knew or should have known that such visits were inconvenient or prohibited;
- stated the name of the company, wore name tags, handed out business cards to third parties, or left business cards on consumers' doors;
- threatened consumers with in-person visits if a consumer did not return a call or make a payment; and
- attempted to leave letters with third-parties, including supervisors, co-workers, and family members.

The CFPB further alleged that EZCORP employees visited a consumer's home or workplace even when they were able to contact the consumer through other means or had recently spoken with a consumer by phone.

In addition to findings of actual injury, the Bureau also harped on the risk of harm to consumers. Regarding a threat to visit a consumers' workplace, the CFPB noted "such visits *could* disrupt the consumers' workplace and cause or risk adverse employment consequences to consumers."

In the Matter of TMX Finance LLC

On September 26, 2016, the CFPB announced that it permanently restrained TMX Finance LLC and its lending subsidiaries, who offer vehicle-secured credit products in several states principally under the TitleMax brand, from making field visits to the homes of consumers or their workplaces. Without alleging specific facts, the Bureau maintained that "some" TitleMax employees "disclosed" or "exposed" the existence of consumers' past-due debts to third parties, including neighbors, roommates, family members, supervisors, and co-workers. The Bureau concluded in cursory fashion that such disclosure "caused or was likely to cause substantial injury to consumers that was not reasonably avoidable or outweighed by any countervailing benefit to consumers or to competition."

The Bureau also alleged that when TitleMax employees visited consumers' workplaces, any visit resulted in a likely or substantial injury to consumers, noting "[i]n-person visits to a place of employment put consumers *at risk* of losing their employment or of being disciplined by their employers," and that "[s]uch visits *can* damage consumers' reputations, interfere with their ability to do their jobs, and trigger disciplinary action or firing."

Under the company's written policies, employees were authorized to locate a consumer and discuss his or her debt if it was at least three days late and consumer had not committed to making a payment. Employees could conduct in-person visits at the workplace if a consumer's payment was at least eleven days late, the consumer was non-responsive by phone, and was not present during the in-person visit to his or her home. TitleMax employees did not wear company identifying clothing or accept payments during the visits. Despite these facts, the CFPB did not analyze whether the alleged harm from field visits was reasonably avoidable by the consumer as required by the unfairness standard, nor did it analyze whether such visits were outweighed by any countervailing benefit to consumers or to competition.

Regulation by Enforcement: What EZCORP and TitleMax Reveal About the Bureau's Position on Field Visits

In a prepared statement to the Consumer Bankers Association in March 2016, Director Cordray indicated that consent orders issued in a specific enforcement action are "intended as guides to all participants in the marketplace to avoid similar violations." He noted that it would be "compliance malpractice" for companies "not to take careful bearings from the contents of these orders about how to comply with the law and treat consumers fairly." The take-away from his remarks was clear: consent orders are intended to be norm-enforcing, deterrent direction for all market participants.

Creditors wishing to conduct field visits following the EZCORP and TitleMax enforcement actions should assume that any field visit will be deemed an unfair practice. On one end, the Bureau found EZCORP's aggressive in-person collection tactics to amount to "harassment" and "humiliation." Lenders looking to the EZCORP consent order can readily understand how to craft or adjust a field visit compliance policy that avoids the

EZCORP order. The conduct alleged in EZCORP fits into long-standing rules under the Fair Debt Collection Practices Act, which the CFPB has repeatedly applied to creditors under its UDAAP authority. *See* CFPB Bulletin 2013-07.

But guidance gleaned from CFPB's enforcement of TitleMax's "intrusive" field visits suggests that the Bureau will look unfavorably on *any* field visit. If TitleMax is instructive, then lenders should assume that the CFPB will find substantial injury in any visit that *could* result in the "disclosure" or "exposure" of the existence of a debt to third parties. Likewise, the Bureau now appears to believe that any workplace visit can cause negative employment consequences, and in the case of TitleMax, that possibility was sufficient to constitute a "likely" substantial injury.

Further, lenders should not expect the CFPB to evaluate the requirement that the harm to the consumer be "not reasonably avoidable" or "outweighed by any countervailing benefit to consumers or to competition." These elements of the unfairness test have not played a part in the CFPB's guidance or in its recent consent orders.

Many lenders continue to conduct field visits under policies that track the FDCPA, in the hope that by carefully following the policy, they will avoid UDAAP liability. TitleMax's policies, as described in the order, complied with the FDCPA but were not sufficient to avoid an enforcement action.

The compliance framework created by the EZCORP and TitleMax orders, along with accompanying guidance, produces an absurd result for market participants: creditors are allowed to conduct field visits in theory, but are practically prohibited from doing so, because the mere risk of harming consumers creates an unfairness claim. Accordingly, it would be wise to avoid the "risky" business of conducting field visits.

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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

hudsoncook.com