

UDAAP

Unfair, Deceptive or Abusive Acts or Practices

“You’ll Know it When You See it...Which Will be Often!”

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UDAAP INTRODUCTION

- **Roadmap:**

- Introduction
 - Things to Know & Other Fun Stuff
- **Unfair Test**
- **Deceptive Test**
- **Abusive Test**
- UDAAP Impact
- Compliance Management Systems & Complaints
- Best Practices for Lawyers

UDAAP INTRODUCTION

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INTRODUCTION

- **Blame Game - Bubble & Trouble '08**
 - Lenders
 - Consumers
 - Investors &
 - Regulators

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INTRODUCTION

- **Dodd-Frank Act (Title X; 7/21/10)**
 - Dodd-Frank Act Enforcement (CFPB; FTC; DOJ-Fraud)
 - CFPB; 7/21/11 (Rules, Supervision & Enforcement)
- **UDAAP “The What”** Companies that provide financial products, services to consumers. *Depo; Direct Lender; Credit Unions... 12 USC 5536*
 - *Fed & States Coordinate (CFPB; NCUA; State Regulator...)*
 - *EX: Credit Union (+ or - \$10B Assets)*
- **UDAAP “The Why”**
 - Financial Injury Consumers &
 - Damages Consumer & Market Confidence

UDAAP INTRODUCTION

- **Three Stand-Alone Tests** (**Unfair** and/or **Deceptive** and/or **Abusive**)
 - 1/24/20 Policy (Trump) **Abusive** “Duel Pleading”
 - 3/11/21 Policy (Biden) **Abusive** “Stand-Alone Test”
 - Enforcement Actions: Obama (235) vs. Trump (77)
 - Advertising —> Loan Servicing

UNFAIR TEST

UNFAIR TEST

- **Unfair Acts or Practices**

12 USC 5531(c)

- Cause/Likely to Cause Substantial Injury
- Injury Not Reasonably Avoidable &
- Injury Not Outweighed by Benefits

UNFAIR TEST

- **Substantial Injury**

- Monetary Harm
- Emotional Harm (Harassment)
- Small Harm + Many Consumers
- Actual Injury “NOT” Required (Sig Risk)

- **Avoid Injury**

- Interference with Decisions
- Material Info Inaccurate, Modified or Withheld
- Experts/Legal Action \$\$\$\$

- **Benefits**

- Offsets (Cost & Availability)

UNFAIR TEST

- **FTC vs. Capital City Mortgage (98 CV-237) 2005**
- **Allegations** / Issue: Lender refused to release lien/
PIF
 - Injury - Money & Time
 - Avoidance - Consumer can't choose or change loan servicer; can't know in advance
 - Benefits - No offsets

DECEPTIVE TEST

DECEPTIVE TEST

- **Deceptive Acts or Practices**

(from FTC Act, Section 5)

- Representation, Omission, Act or Practice —>
 - Misleads/Likely to Mislead
 - Reasonable Consumer Test &
 - R/O/A/P is Material

DECEPTIVE TEST

- **Mislead/Likely to Mislead**

- Context & Net Impression
- Express/Implied; Written/Oral
- “Intent” not Required
- Accurate...but too Complex
- “Four P’s” (Prominent; Presentment; Placement; Proximity)

- **“Reasonable” Consumer**

- Intended Consumer POV
- Majority or Significant Minority; Two Meanings

- **“Material” R/O/A/P**

- Impacts Consumer’s Choice (Costs; Benefits; Restrictions; Availability)
- Not Typically Material...but Important to Consumer (local shop)

DECEPTIVE TEST

- **FTC vs. Chase Financial Funding (SACV04-549; C.D.Cal.) 2004**
- **Allegations** / Issue: Mortgage broker misrepresented Option-ARM loan as Fixed. Minimum monthly payment = partial interest added to principal. **“3.5% Fixed Payment 30-Year Loan”**
 - Misleading - Advertisement compared a true 30-year Fixed loan to ARM Loan with lower initial payments
 - Reasonable Consumer - Omission of Option-ARM Features
 - Material - Consumers relied on reps to refinance from Fixed to ARM loan that would cost more over time

DECEPTIVE TEST

- **Other Deceptive Examples (CFPB)**
 - Misleading Cost or Price Claims
 - Offering Product or Service Not Available
 - Bait & Switch
 - Omitting Material Limits or Conditions of Offer
 - Failing to Provide Promised Services
 - **PUFFERY = WORLD'S BEST COFFEE**

ABUSIVE TEST

ABUSIVE TEST

- Dodd-Frank added “Abusive” Prong to UDAAP
 - FTC “Unfair, Deceptive Acts or Practices (UDAP)
 - CFPB “Abusive” Acts or Practices (UDAAP)
- Congress - No Guidance...Abusive????
 - Scope - “What is” Abusive?
 - Enforcement Responses

ABUSIVE TEST

- **Abusive Acts or Practices (“NEW TOY!!!)**

12 USC 5531(d)

- **Materially interferes** with consumer’s understanding of terms or conditions, **OR**
- Takes **unreasonable advantage** of —>
 - Consumer’s **lack of understanding** of risks, costs, conditions,
 - Inability of consumer to **protect interests**, **OR**
 - Consumer’s **reliance** on lender for protection

ABUSIVE TEST

- **CFPB vs. Pension Funding, LLC (Material Interference)**
- **Allegations** / Issues: Creditor marketed a “loan” as a “Pension Advance”
- **Obscuring Product** = Materially interfered with Consumer’s ability to understand loan terms.

ABUSIVE TEST

- **CFPB vs. D&D Marketing, Inc. (Lack of Understanding)**
- **Allegations** / Issues: Falsely claimed it would match consumers with “best rate” lenders.
- **Steered consumers** to higher-rate lenders; contracts included tribal law & dispute resolution.

ABUSIVE TEST

- **CFPB vs. ITT Educational Services (Reasonable Reliance)**
- **Allegations** / Issue: For-Profit College offered high-pressure, no-interest “gap” loans; repay by end of year.
- ITT then **steered** students into high-risk **private loans (refinance) it controlled.**

UDAAP IMPACT

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- **UDAAP: Lending Regulations**
 - SAFE Act - Licensing
 - GLB - Privacy & Data Protection
 - ECOA/FHA - Fair Lending
 - TILA - Loan Costs
 - RESPA Sec 8 - Co-Marketing & Kickbacks
 - Advertising/Marketing/Social Media

UDAAP IMPACT

- **UDAAP: Lending Cycle**
 - New Product; Markets; Software...
 - Advertising & Marketing
 - Staff Training (on-board/annual/remediation)
 - Entry Level —> Managers —> Senior Managers —> Execs —> BOD
 - Loan Application —> Processing —> U/W —> Close —> Service

UDAAP IMPACT

- UDAAP: Agency Focus “Three D Program”
 - Discrimination
 - Deception
 - Data Security

**COMPLIANCE
MANAGEMENT SYSTEM
(Complaints)**

CMS COMPLAINTS

- **Compliance Management System (CMS)**
 - BOD & Management Oversight &
- **Compliance Program**
 - P&P's
 - Training
 - Monitoring & Audits
 - **Consumer Complaints**

CMS COMPLAINTS

- **Consumer Complaints & UDAAP**
 - “Complaints...essential source of information for examinations, enforcement, and rule-making for regulators...**complaints can indicate weaknesses...in the compliance management system** such as training, internal controls, or monitoring.”
 - Lender + Affiliates + Vendors
 - Systems to Receive/Monitor/Respond

CMS COMPLAINTS

- **UDAAP Complaints → Exams**
 - Documents (Training; P&P's; BOD; Comp Plans)
 - Management & BOD (Head in Sand)
 - Transactions (Marketing; Disclosures; Vendors; Consumer Interviews)

UDAAP BEST PRACTICES

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BEST PRACTICES

- **CFPB 10th Anniversary, 7/21/21**
- “In the wake of the financial crisis of 2007-2008, it became clear that the nation needed a financial regulator solely focused on looking out for consumers. **The housing finance bubble and Great Recession were fueled by reckless practices in the mortgage industry**, which trapped millions of homeowners in mortgages they could not afford, and Congress created the CFPB to ensure that never happened again. The CFPB officially opened its doors as an independent agency on July 21, 2011, with a simple message to American families and consumers: We’ve got your back.”

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BEST PRACTICES

- **CFPB 10th Anniversary, 7/21/21**
 - Enforcement Actions
 - \$14.4B Consumer Relief
 - \$1.7B Civil Penalties
 - 183M Consumers Assisted
 - 3M Consumer Complaints

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BEST PRACTICES

- **Unfair Test: (Loan Servicing & Late Fee)**

- Substantial Injury
- Unavoidable **AND**
- Balance

- **Deceptive Test: (Bait & Switch “Free Checking No Strings...”)**

- Misleading
- Consumer POV **AND**
- material

- **Abusive Test (Targets Protected Class; Predatory)**

- Material Interference, **OR**
- Unreasonable Advantage
 - Lack of Understanding
 - Inability to Protect, **OR**
 - Reliance

UDAAP

BEST PRACTICES

- **UDAAP Final Tips from the Compliance Soapbox**

- Review NEW Enforcement Actions, Consent Orders & Supervisory Guidance
- UDAAP = Add-On; Subjective; Difficult to Defend
- Remote - Data Security; Encryption; Personal Devices
 - CMS 2012 & CMS-IT 2021
- Every Regulation + Department
- Training + Consequences
- Perfection vs. Effort
- Mifeasance vs. Malfeasance
- Self-Reporting (Risk vs. Reward)
- Side Swipe (Competitor; Former Employee; Exams; Whistleblower)

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