Abusive: Dodd-Frank Section 1031 and the Continuing Struggle To Protect Consumers

Carey Alexander

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact seljbyc@stjohns.edu.

ABUSIVE: DODD-FRANK SECTION 1031 AND THE CONTINUING STRUGGLE TO PROTECT CONSUMERS

CAREY ALEXANDER[†]

INTRODUCTION

On July 21, 2011, the Consumer Financial Protection Bureau (“Bureau” or “CFPB”) stood up and gazed over a fragmented and ineffective regulatory landscape.¹ Armed with the power to stamp out abusive practices, the CFPB represents Congress’s latest and most potent stab in its century-long struggle to protect consumers.² Originally proposed only in 2007,³ the Bureau was ushered into the United States Code via Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act⁴ (“Dodd-Frank”) with remarkable speed in response to a remarkable crisis.⁵

[†] Associate Managing Editor, *St. John’s Law Review*; J.D. Candidate, 2012, St. John’s University School of Law; B.A., 2004, Skidmore College. My endless thanks to Professor Jeff Sovern for being the epitome of a great advisor: generous with his ideas, accomodating with his time, and supportive throughout.

¹ See Designated Transfer Date, 75 Fed. Reg. 57252 (Sept. 20, 2010).

² See *infra* Part I.A–B.

³ See Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY J., Summer 2007, at 8, 17.

⁴ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

⁵ See S. REP. NO. 111-176, at 2 (2010) (characterizing Dodd-Frank as “a direct and comprehensive response to the financial crisis that nearly crippled the U.S. economy beginning in 2008”); TIM FERNHOLZ, NEW AM. FOUND., THE CONSUMER FINANCIAL PROTECTION BUREAU: TOOLS, TRANSITIONS, AND CHOICES 8 (2010), available at http://www.newamerica.net/sites/newamerica.net/files/policydocs/Fernholz_CFPB_10-2010_Final.pdf (“The CFPB represents a rarity in recent U.S. political history: an entirely new bureaucracy, created swiftly in response to a crisis . . .”).

Congress has long struggled to provide consumers with a safe and reliable marketplace. In 1890, Congress passed the landmark Sherman Antitrust Act.⁶ Although the Act professed to attack some of the most egregiously monopolistic, and hence anti-consumer practices, the Supreme Court in 1911 limited the Act's reach to unreasonable restraints of trade.⁷ Congress responded in 1914 by establishing the Federal Trade Commission ("Commission" or "FTC"), bestowing on it the mandate, if not the power, to promulgate regulations protecting consumers.⁸ Yet from its very first days, the FTC was barred from addressing the types of financial practices that recently crippled the United States economy. Section 5 of the 1914 FTC Act restricted the FTC's power and jurisdiction from reaching banks,⁹ a prohibition that would eventually expand to encompass savings and loan institutions and federal credit unions.¹⁰ Although the Commission's continued work on behalf of consumers is a testament to its partial success, the Commission has fallen well short of Congress's lofty goals.¹¹ This failure is evidenced by calls over the past three decades for a more powerful agency with the sole mandate to protect consumers.¹²

The broader ineffectiveness of Congress's consumer safety net is also revealed through harrowing statistics. In recent years, America has become a land defined by its debilitating addiction to consumer debt. In a country of 310 million, more than 225 million Americans are over eighteen and empowered to contract with banks.¹³ 197 million Americans enjoy access to

---

⁶ Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2006)).

⁷ See *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911).

⁸ See Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 719 (1914) (codified as amended at 15 U.S.C. § 45 (2006)).

⁹ See *id.*

¹⁰ See 15 U.S.C. § 45(a)(2) (2006) ("The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, *except banks, savings and loan institutions . . . [and] Federal credit unions . . .* from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.") (emphasis added).

¹¹ See *infra* Part I.B.

¹² See, e.g., H.R. REP. NO. 95-347, at 2-3 (1977) (recommending establishment of an Agency for Consumer Protection).

¹³ See U.S. CENSUS BUREAU, S0101, AGE & SEX, AMERICAN COMMUNITY SURVEY (2008); U.S. Census Bureau, *U.S. & World Population Clocks*, <http://www.census.gov/population/www/popclockus.html> (last revised Dec. 29, 2011).

traditional bank accounts.¹⁴ Of those, 176 million hold a credit card.¹⁵ These card-toting Americans do not hold just a single card, but 3.5 credit cards on average.¹⁶ In total, Americans carry 691 million credit cards, and they use them.¹⁷ The average household charges \$889 on each card every month, with nearly \$1.8 trillion flowing through our nation's credit cards every year.¹⁸

What credit card companies might characterize as a well-oiled, efficient credit market instead represents the problem underlying consumer indebtedness and bankruptcy. While in 1975, Americans carried a revolving debt of \$13 billion, by 2008, Americans were hamstrung with a staggering \$972 billion in unpaid revolving consumer debt.¹⁹ Nearly 90% of consumers who file for bankruptcy carry a median credit card debt of \$16,500.²⁰ Credit card debt is second only to mortgage debt as a cause of bankruptcy, and 52% of filers list it as a "major factor" in their decision to file for bankruptcy.²¹

---

¹⁴ Twenty-eight million Americans are considered "unbanked." See Martin J. Gruenberg, Vice Chairman, FDIC, Address at the Tennessee Bankers Association (Dec. 12, 2006), available at <http://www.fdic.gov/news/news/speeches/archives/2006/chairman/spdec1206.html>.

¹⁵ See KEVIN FOSTER ET AL., FED. RES. BANK OF BOSTON, THE 2008 SURVEY OF CONSUMER PAYMENT CHOICE 56 (2008) [hereinafter CONSUMER PAYMENT CHOICE SURVEY] ("[T]o estimate the total number of credit card users in the U.S. from the percentage of U.S. consumers who had a credit card in 2008, one would take the percentage of U.S. consumers who had adopted credit cards . . . (78.3 percent), divide by 100, and multiply by the population in 2008 (225,852,350) to get 176.8 million consumers.").

¹⁶ See *id.* at 9.

¹⁷ See U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO-06-929, CREDIT CARDS: INCREASED COMPLEXITY IN RATES AND FEES HEIGHTENS NEED FOR MORE EFFECTIVE DISCLOSURES TO CONSUMERS 9 (2006) [hereinafter GAO CREDIT CARD REPORT].

¹⁸ See CONSUMER PAYMENT CHOICE SURVEY, *supra* note 15, at 7.

¹⁹ See FED. RES., G.19, FEDERAL RESERVE STATISTICAL RELEASE: CONSUMER CREDIT (2011), available at http://www.federalreserve.gov/releases/g19/hist/cc_hist_sa.html (as of December 2011, outstanding revolving debt fell to approximately \$800 billion); see also *Consumer Debt: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. 14–15 (2009) [hereinafter *Consumer Debt Hearings*] (statement of Adam J. Levitin, Associate Professor of Law, Georgetown University Law Center) ("[M]acroeconomic pressures on the American family are the primary driver of card debt. Card debt is the Scotch tape holding together the middle class.").

²⁰ See *Consumer Debt Hearings*, *supra* note 19, at 12 (statement of Adam J. Levitin, Associate Professor of Law, Georgetown University Law Center) (citing the 2007 Consumer Bankruptcy Project).

²¹ See *id.* at 12, 14.

Responding to the Great Recession's devastating effects on the housing market and broader economy, the President and Congress joined to create the CFPB, bestowing on it both the mandate and the power to curb abusive practices. What Congress's desire to protect consumers lacked in novelty was more than made up for by the unique and necessary powers granted to the Bureau to secure the dangerous wilderness of the consumer credit market. The crux of Congress's power grant lies in Section 1031:

The Bureau may take any action authorized . . . to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.²²

This Note first contextualizes the need for Section 1031 by examining the roots and shortcomings of existing consumer protection law embodied in unfairness, deception, and unconscionability doctrines. Part II chronicles the enactment of Section 1031, paying close attention to the Administration's proposed definitions for unfair, deceptive, and abusive practices, and Congress's replies. Part III applies the enacted definition of "abusive" to several widespread practices in the consumer credit market, and urges the CFPB to adopt a broad interpretation of the term as consistent with Congress's longstanding intent to protect consumers.

I. THE FRAGMENTED STATE OF CONSUMER PROTECTION LAW

Congress has long worked to achieve a consistent goal: protect consumers from harm. While on one end of the spectrum, independent agencies like the Consumer Product Safety Commission and the Food and Drug Administration exist to protect consumers from products that could compromise their physical safety, most consumer protection legislation—including the legislative portfolio the CFPB is meant to enforce²³—protects consumers from dangerous practices that could compromise their

---

²² Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1031(a), 124 Stat. 1376, 2005 (codified at 12 U.S.C. § 5531(a) (Supp. IV 2011)).

²³ See *id.* § 1002(12), 124 Stat. at 1957 (codified at 12 U.S.C. § 5481(12)).

financial safety.²⁴ Statutes banning unfair and deceptive acts and practices (“UDAP”) provide the overarching framework for modern consumer protection actions. Unfairness and deception have well-established meanings, and their inclusion alongside “abusive” suggests that the new doctrine represents something different from but as substantial as the old doctrines. To better contextualize the potential reach of “abusive” as used in Section 1031, it is necessary to first consider the development and reach of the existing doctrines.

A. Unfairness

Congress’s initial attempt to enact overarching consumer protection legislation came in the form of unfairness doctrine, which the new Federal Trade Commission was meant to implement. Established in 1914, the FTC was fashioned as “an instrumentality for doing justice to business where the processes of the courts or the natural forces of correction outside the courts are inadequate to adjust the remedy to the wrong in a way that will meet all the equities and circumstances of the case.”²⁵ Section 5 of the Federal Trade Commission Act powerfully proclaimed: “unfair competition in commerce is hereby declared unlawful,”²⁶ and the nascent FTC was directed to “prevent corporations from using unfair methods of competition in commerce.”²⁷ What constituted unfair practices remained intentionally undefined, a decision the Senate Committee on Interstate Commerce felt necessary to explain:

The Committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their

---

²⁴ See *id.*; see also Warren, *supra* note 3, at 8–9.

²⁵ S. REP. NO. 597, at 7 (1914). Not all Members of Congress were enthusiastic about the Commission’s creation. For example, Senator Brandegee characterized the Commission’s effect on the country as “nothing but a scourge and a dose of Spanish fly and cayenne pepper.” 51 CONG. REC. 12,218 (1914) (statement of Sen. Brandegee). He colorfully added, with a twinge of fear regarding the nascent Commission’s potential reach: “[N]o benevolent despots are to be allowed to roam about with an eclectic commission to fix things so that they will run smoothly according to their notions of what may be ‘ethical’ or not ‘anti-social’ or for the ‘public interest,’ or any of those ‘goo-goo’ phrases.” *Id.* at 12,734.

²⁶ S. REP. NO. 597, at 3 (1914).

²⁷ *Id.* at 3. Section 5 declared in full: “That unfair competition in commerce is hereby declared unlawful. The commission is hereby empowered and directed to prevent corporations from using unfair methods of competition in commerce.” *Id.*

continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better . . . .²⁸

Similarly, the House Conference Report lamented:

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task.²⁹

Unfairness doctrine never lived up to its full potential³⁰ and lay fallow for nearly fifty years as an independent basis in which to ground consumer protection measures. It was not until 1964, in articulating what came to be known as the Cigarette Rule, that the FTC tried to declare a practice as unfair without invoking other consumer protection doctrines.³¹ Prefacing the 1964 rule, the Commission echoed Congress, warning: "No enumeration of examples can define the outer limits of the Commission's authority to proscribe unfair acts or practices . . . ."³² In declaring a practice unfair, the Commission announced that it would consider: (1) whether the practice offended public policy established by statute or the common law; (2) whether it was immoral, unethical, oppressive, or unscrupulous; and (3) whether it caused substantial injury to consumers.³³ The Supreme Court endorsed the definition in the landmark 1972 case *FTC v. Sperry & Hutchinson Co.*,³⁴ confirming that unfairness was an independent basis in which to ground consumer protection measures.

Congress, however, curtailed the doctrine's reach after the FTC—secure in its new interpretation of its old power—tested the doctrine's potential by attempting to restrict advertising

---

²⁸ S. REP. NO. 597, at 13 (1914).

²⁹ H.R. REP. NO. 1142, at 19 (1914).

³⁰ See *infra* Part I.B; *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244–45 (1972) (declaring unfairness doctrine to be broader than deception doctrine).

³¹ See Neil W. Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225, 239–41 (1981).

³² Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (July 2, 1964).

³³ See *id.*

³⁴ 405 U.S. at 244.

targeting children as unfair on public policy grounds.³⁵ So incensed was Congress over the proposal that it temporarily revoked the Commission's power to declare advertising as unfair.³⁶

The FTC tweaked its interpretation of unfairness doctrine in 1980, promulgating a definition that placated Congress and which mostly survives to this day.³⁷ In deciding whether to declare a practice unfair, the Commission claimed that it would consider whether a consumer injury was: (1) substantial, (2) outweighed by countervailing benefits to consumers or competition, and (3) something that consumers themselves could not reasonably avoid.³⁸ The definition is significant for two reasons. First, it restricts the Commission from acting without weighing a practice's net societal benefits against the benefit of any consumer protection.³⁹ Second, in explaining the definition, the Commission suggested that violations of established public policy by themselves might support a finding of unfairness.⁴⁰

---

³⁵ See *Children's Advertising*, 43 Fed. Reg. 17967, 17968–69 (Apr. 27, 1978); *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 969 (D.C. Cir. 1985); Roscoe B. Starek, III, Comm'r, Fed. Trade Comm'n, *The ABCs at the FTC: Marketing and Advertising to Children*, Address at the Minnesota Institute of Legal Education (July 25, 1997), available at <http://www.ftc.gov/speeches/starek/minnfin.shtm>.

³⁶ See Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96–252, 94 Stat. 374 (codified as amended at 15 U.S.C. § 58 (2006)).

³⁷ Although the current definition is different from the old *Sperry & Hutchinson* rule, both definitions arguably reach the same universe of practices. See CAROLYN CARTER ET AL., *UNFAIR AND DECEPTIVE ACTS AND PRACTICES* § 4.3.3.3.2, at 255 (7th ed. 2008) (“To some extent, distinctions between the ‘S&H’ standard and the current FTC definition of unfairness may have little practical effect.”).

³⁸ Letter from Michael Pertschuk et al., Chairman & Comm’rs, Fed. Trade Comm’n, to Wendell H. Ford, Chairman, Consumer Subcomm. & John C. Danforth, Ranking Minority Member, Consumer Subcomm., *FTC Policy Statement on Unfairness* (Dec. 17, 1980) [hereinafter *FTC Policy Statement on Unfairness*], available at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>.

³⁹ See *id.* (“To justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.”).

⁴⁰ See *id.* (“Sometimes public policy will independently support a Commission action. This occurs when the policy is so clear that it will entirely determine the question of consumer injury, so there is little need for separate analysis by the Commission. In these cases the legislature or court, in announcing the policy, has already determined that such injury does exist and thus it need not be expressly proved in each instance.”).

Congress eventually codified the FTC's interpretation of unfairness doctrine,⁴¹ but not before restricting the Commission's ability to consider public policy. The Senate's initial codification attempt would have adopted the Commission's definition, allowing it to weigh the net societal benefits of an unfair practice while remaining silent with regards to the effect of public policy.⁴² The House, however, insisted that the codified version limit the Commission from making a finding of unfairness solely on public policy grounds.⁴³ The version Congress ultimately accepted included the net societal benefits standard and cemented the House's limit on the role of public policy.⁴⁴ A similar debate would again arise during Section 1031's drafting.⁴⁵

B. Deception

Although Congress meant for unfairness doctrine to cover practices that affected both consumers and businesses,⁴⁶ the Supreme Court in the 1931 case *FTC v. Raladam Co.*⁴⁷ constrained unfairness doctrine to reach only practices that

---

⁴¹ See 15 U.S.C. § 45(n) (2006) ("The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.").

⁴² See Federal Trade Commission Act Amendments of 1993, H.R. 2243, 103rd Cong. § 10 (as passed by Senate, Sept. 22, 1993) ("The Commission shall have no authority under this section or section 18 to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.").

⁴³ See 15 U.S.C. § 45(n); H.R. REP. NO. 103-617, at 12 (1994) (Conf. Rep.); see also 140 CONG. REC. H 6162 (1994) (statement of Rep. Moorhead) ("Taken as a whole, these new criteria defining the unfairness standard should provide a strong bulwark against potential abuses of the unfairness standard by an overzealous FTC—a phenomenon we last observed in the late 1970's.").

⁴⁴ See 15 U.S.C. § 45(n).

⁴⁵ See *infra* Part II.A.

⁴⁶ See H.R. REP. NO. 1613, at 3 (1937).

⁴⁷ 283 U.S. 643 (1931).

affected businesses.⁴⁸ In doing so, the Court created the need for a new doctrine to protect consumers. Congress responded with the 1938 Wheeler-Lea Act, establishing deception doctrine.⁴⁹

The House clearly identified the evil that deception doctrine was meant to address, saying: “[W]e cannot ignore the evils and abuses of advertising; the imposition upon the unsuspecting; and the downright criminality of preying upon the sick as well as the consuming public through fraudulent, false, or subtle misleading advertisements.”⁵⁰ Congress provided only a threadbare definition of “deceptive,” stating that the term covered acts that were “misleading in a material respect.”⁵¹ Defending the expansiveness of the statute, the House report explained:

The definition is broad enough to cover every form of advertisement deception *over which it would be humanly practicable to exercise governmental control*. It covers every case of imposition on a purchaser for which there could be a practical remedy. It reaches every case from that of inadvertent or uninformed advertising to that of the most subtle as well as the most vicious types of advertisement.⁵²

Congress meant for deception doctrine to be the last word needed to protect consumers from false advertising.⁵³ Indeed, deception doctrine frames the basis for most consumer protection regimes around the world.⁵⁴

---

⁴⁸ See *id.* at 647–48 (“The paramount aim of the act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree, and this presupposes the existence of some substantial competition to be affected, since the public is not concerned in the maintenance of competition which itself is without real substance.”); see also H.R. REP. NO. 1613, at 3 (1937) (“Thus, if a person, partnership, or corporation has a monopoly in a certain field, so that there is no competitor, his acts, no matter how deceptive or misleading and unfair to the consuming public, may not be restrained.”).

⁴⁹ Wheeler Lea Act, ch. 49, 52 Stat. 111 (1938) (codified as amended at 15 U.S.C. § 45 (2006)).

⁵⁰ H.R. REP. NO. 1613, at 4 (1937).

⁵¹ *Id.* at 5.

⁵² *Id.* (emphasis added).

⁵³ See *id.*

⁵⁴ See, e.g., Council Directive 2005/29, 2005 O.J. (L 149) 22, 27 (EC); Section 13 of the Fair Trading Act 1986 (N.Z.); *Trade Practices Act 1974* (Cth) s 53 (Austl.); Competition Act, R.S.C. 1985, ch. 34 § 74.01 (Can.).

Congress itself offered praise to the agency charged with realizing the doctrine's theoretical reach:

The Federal Trade Commission has the machinery and trained personnel to investigate in a proceeding against false advertising of all industries and all commodities. The common motive of false advertisement is the same in every line of industry, to gain an economic advantage through defrauding or misleading the purchaser. This method of protecting the public should be harmonized and unified under one organization with consistent and uniform methods of enforcement and penalization. Efficiency, uniformity, and economy suggest this course. This legislation is framed with that purpose in mind.⁵⁵

In the years since, the FTC itself has offered narrower boundaries that have limited deception doctrine's reach. According to the Commission, deceptive practices have three elements: (1) a material (2) representation or omission that is (3) likely to mislead the consumer acting reasonably under the circumstances.⁵⁶ The state of consumer protection today and the need for the CFPB suggest that deception doctrine, like unfairness doctrine, has fallen short of Congress's lofty goals.

C. *State and Common Law Remedies*

While it took Congress until the early twentieth century to enter the consumer protection sphere, courts of equity have summoned the common law doctrine of unconscionability for more than two centuries to shield consumers from onerous contracts.⁵⁷ In 1750, Lord Hardwicke described unconscionable contracts as those "such as no man in his senses and not under delusion would make on the one hand, and as no

---

⁵⁵ H.R. REP. NO. 1613, at 5 (1937).

⁵⁶ Letter from James C. Miller Michael, Chairman, Fed. Trade Comm'n, to John D. Dingell, Chairman, Comm. on Energy & Commerce, *FTC Policy Statement on Deception* (Oct. 14, 1983), available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

⁵⁷ See *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 83 (3d Cir. 1948) ("That equity does not enforce unconscionable bargains is too well established to require elaborate citation."). Just as legislative action reflected judicial practice, judicial practice reflected deep-seated cultural norms. The Bible itself warns: "You shall not . . . put a stumbling block in front of the blind." *Leviticus* 19:14 (New International). Some have interpreted this to require protection for consumers who are ignorant about the items they purchase. See JEFF SOVERN, CONSUMER PROTECTION APPENDIX 1.1 (22d ed. 2010).

honest and fair man would accept on the other.”⁵⁸ Born into modern jurisprudence by the Uniform Commercial Code,⁵⁹ unconscionability is an occasionally but unreliably powerful doctrine. One court rightly complained: “[U]nconscionability has proved difficult to define and has been rarely invoked undoubtedly because, other than in exceptional cases, it has been largely viewed as grossly interfering with the freedom to contract.”⁶⁰ Yet, at its most powerful, unconscionability doctrine has been used to strike down some of the very practices that led to the country’s current economic woes.⁶¹

Although useful as a shield, unconscionability doctrine serves as a poor sword to wield against abusive practices. First, it can only be used as a defense to onerous contracts. Second, unconscionability claims are notoriously difficult to win.⁶² While courts frown on “bargaining naughtiness”⁶³ in the form of

---

⁵⁸ *Hume v. United States*, 132 U.S. 406, 411 (1889) (quoting Earl of Chesterfield v. Janssen, 2 Ves. Sen. 125, 155, 28 Eng. Rep. 82, 100 (Ch. 1750)).

⁵⁹ See U.C.C. § 2-302 (2003) (“If the court as a matter of law finds the contract or any term of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable term, or it may so limit the application of any unconscionable term as to avoid any unconscionable result.”).

⁶⁰ *Sitogum Holdings, Inc. v. Ropes*, 800 A.2d 915, 916 (N.J. Super. Ct. Ch. Div. 2002).

⁶¹ See, e.g., *Besta v. Beneficial Loan Co. of Iowa*, 855 F.2d 532 (8th Cir. 1988). There, the Eighth Circuit of the United States Court of Appeals struck down a mortgage with a six-year term as unconscionable because the loan company failed to inform the consumer that she was eligible to receive a three-year term with a lower payment. See *id.* at 535 (“[N]o person in her senses would have accepted the more expensive term. This constituted, at least, procedural unconscionability.”). Were such a ruling promulgated not by a court as a shield against a single mortgage, but as a sword against a set of practices wielded by a regulatory agency, it would have struck at one of the central pillars of the mortgage crisis. See CONGRESSIONAL OVERSIGHT PANEL, FORECLOSURE CRISIS: WORKING TOWARD A SOLUTION 15 (2009) [hereinafter FORECLOSURE CRISIS] (“The underlying problem in the foreclosure crisis is that many Americans have unaffordable mortgages. . . . [B]orrowers who qualified for lower cost mortgages were steered into higher priced subprime mortgage products.”).

⁶² See Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1097–99 (2006) (“Data revealed that in only 37.8% (56 out of 148) of the cases sampled unconscionability was found . . .”).

⁶³ See *id.* at 1073; Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 504 (1967). More broadly, procedural unconscionability examines the sophistication of the contracting parties, whether both were represented by counsel, and whether the questionable clause was obscure or buried in fine print. See DiMatteo, *supra* note 62, at 1077 (quoting *Nasco, Inc. v.*

procedural unconscionability, they seldom strike down a contract without also finding substantive unconscionability, which evaluates the contract's fairness.⁶⁴

Unconscionability doctrine, however, is extremely useful to the extent that it dialogues with state UDAP statutes. Seventeen state UDAP statutes expressly prohibit unconscionable practices,⁶⁵ yet only a handful of statutes adopt both an unconscionability provision and a bar against unfairness.⁶⁶ Two states, Massachusetts and Missouri, go so far as to statutorily equate unconscionability to unfairness.⁶⁷ Clearly, UDAP statutes and other consumer protection measures are meant to codify unconscionability doctrine's soul, and the equitable principles underlying the latter should be considered a useful guide when attempting to interpret the former.⁶⁸

II. ENACTING UNFAIRNESS, DECEPTION, AND ABUSIVE DOCTRINES IN DODD-FRANK

Dodd-Frank fundamentally reworked consumer protection law, altering not only the accepted definitions of unfairness and deception, but adding a potent new tool in the form of abusive doctrine. This Part will chronicle the Obama Administration's proposed changes to the existing consumer protection doctrines along with Congress's skeptical but ultimately accommodating response. Section A will trace the evolution of the existing consumer protection doctrines under Dodd-Frank, showing how Congress subtly changed their meanings as applied to the CFPB. Section B will consider the origin and development of "abusive" as a term in Dodd-Frank, highlighting in particular the adoption

---

Pub. Storage, Inc., No. 92-12731-RCL, 1995 WL 337072, at *5 (D. Mass. May 11, 1995)).

⁶⁴ See DiMatteo & Rich, *supra* note 62, at 1098 ("[W]here substantive unconscionability is found without a finding of procedural unconscionability the contract is ultimately found to be unconscionable 100% (15 out of 15) of the time. Only in one instance did the court rule that a contract was unconscionable after finding only procedural unconscionability present."). Substantive unconscionability looks for significant cost-price disparities, clauses that deny basic rights and remedies, penalty clauses, and overall imbalances in the bargaining process. See *id.* at 1079.

⁶⁵ See CARTER, *supra* note 37, § 4.4.1, at 266.

⁶⁶ See *id.*

⁶⁷ See 940 MASS. CODE REGS. 3.16 (2011); MO. CODE REGS. ANN. tit. 15, § 60-8.080 (1994).

⁶⁸ See CARTER, *supra* note 37, § 4.3.12, at 265.

of a powerful and flexible definition over a weak and hobbled alternative. Finally, against this backdrop, Section C will contextualize the use of “abusive” in Dodd-Frank and distinguish it from the term’s use in other statutes, demonstrating that it represents a substantial and unique grant of power that the CFPB can draw upon to protect consumers.

A. The Evolving Consumer Protection Landscape Under Dodd-Frank

To appreciate the full reach of the CFPB’s power to prohibit abusive practices, one must first acknowledge that Congress quietly overhauled the consumer protection landscape by altering the accepted definitions of unfairness and deception. The Administration’s initial proposal for the CFPB arrived on the Hill in the form of a ninety-page document simply called the President’s White Paper, which later became H.R. 3126 (“White Paper”).⁶⁹ The White Paper’s proposed changes to the existing doctrines were mostly rejected in the House-passed H.R. 4173,⁷⁰ which attempted to codify existing law. The Senate’s parry,⁷¹ adopted as the conference report and later codified,⁷² refused to accept references to existing law, providing evidence that the CFPB may have different powers under Dodd-Frank than the FTC under the FTC Act to curb unfair and deceptive practices.

Unfairness doctrine experienced the most tumultuous journey through the legislative process. Rekindling Congress’s earlier debates, all three versions of Dodd-Frank weighed the importance of public policy differently as it related to a finding of

---

⁶⁹ H.R. 3126, 111th Cong. (2009).

⁷⁰ H.R. 4173, 111th Cong. (as passed by House, Dec. 11, 2009).

⁷¹ S. REP. NO. 111-176 (2010).

⁷² Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended in scattered sections of the U.S. Code).

unfairness. While retaining the net societal benefits standard,⁷³ the White Paper placed public policy on a seemingly equal footing with other considerations:

ESTABLISHED PUBLIC POLICY AS FACTOR.—In determining whether an act or practice is unfair, the Agency may consider established public policies as evidence to be considered with all other evidence.⁷⁴

The House-passed version, however, rejected the White Paper proposal. Instead, the House chose to reference existing law, which would have bound the CFPB to the FTC's restrictive interpretation of unfairness:

UNFAIR ACTS OR PRACTICES.—Any determination by the Director and the Agency that an act or practice is unfair shall be consistent with the standard set forth under section 5 of the Federal Trade Commission Act and with the policy statement adopted by the Federal Trade Commission pursuant to section 5 of the Federal Trade Commission Act and dated December 17, 1980.⁷⁵

Rather than codify the current conception of unfairness doctrine, the Senate chose to adopt most of the base language provided by the White Paper, but only after adding one key caveat:

CONSIDERATION OF PUBLIC POLICIES.—In determining whether an act or practice is unfair, the Bureau may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.⁷⁶

---

⁷³ See *supra* Part I.A; see also Vincent DiLorenzo, *The Federal Financial Consumer Protection Agency: A New Era of Protection or More of the Same?* 81–83 (St. John's Univ. Sch. of Law Legal Studies Research Paper Series, Paper No. 10-0182, 2010), available at <http://ssrn.com/abstract=1674016>. Some commentators argue that the net societal benefits requirement provides flexibility. Unlike deception doctrine, which requires a per se analysis of whether conduct is deceptive or not, unfairness doctrine allows the FTC to condemn, for example, the use and implementation of a technology, rather than the technology itself. See Dara J. Diomande, *The Re-Emergence of the Unfairness Doctrine in Federal Trade Commission and State Consumer Protection Cases*, 18 ANTITRUST 53, 54–55 (2004).

⁷⁴ H.R. 3126, 111th Cong. § 131(c)(2) (2009).

⁷⁵ H.R. 4173, 111th Cong. § 4301(c)(1) (as passed by House, Dec. 11, 2009); see also *supra* Part I.A.

⁷⁶ § 1031(c)(2), 124 Stat. at 2006 (codified at 12 U.S.C. § 5531(c)(2) (Supp. IV 2011)) (emphasis added).

The definition of deception underwent a similar, if less substantial, set of legislative changes. The White Paper declined to define deception, instead giving the CFPB the power to take “any action authorized . . . to prevent a person from committing or engaging in an unfair, deceptive, or abusive act or practice.”⁷⁷ As with unfairness doctrine, the House attempted to codify the existing definition of deception articulated by the FTC:

DECEPTIVE ACTS OR PRACTICES.—Any determination by the Director and the Agency that an act or practice is deceptive shall be consistent with the policy statement adopted by the Federal Trade Commission pursuant to section 5 of the Federal Trade Commission Act and dated October 14, 1983.⁷⁸

The Senate again asserted itself and adopted the White Paper language without modification, leaving deception undefined in Dodd-Frank.⁷⁹

Supreme Court jurisprudence conspires with the canons of interpretation to underscore the importance of these changes. It is “of paramount importance,” the Court has declared, “that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.”⁸⁰ Whenever Congress adopts language with a “known and settled construction,” it is presumed to adopt the previous judicial interpretations surrounding that language.⁸¹

Had Congress codified the House language expressly adopting the FTC’s policy statements, the CFPB’s powers to prohibit unfair and deceptive acts would be known and settled: they would be the same as the FTC’s under the FTC Act. Instead, because Congress effectively rejected the FTC’s definitions, the CFPB may have a freer hand to define its ability to reach unfair and deceptive practices under Dodd-Frank.⁸² While a complete discussion of the implication of these changes

---

⁷⁷ H.R. 3126, § 131(a).

⁷⁸ H.R. 4173, § 4301(c)(2).

⁷⁹ See § 1031(a), 124 Stat. at 2005 (codified at 12 U.S.C. § 5531(a)).

⁸⁰ *Finley v. United States*, 490 U.S. 545, 556 (1989).

⁸¹ *Capital Traction Co. v. Hof*, 174 U.S. 1, 36 (1899); see also *Carolene Prods. Co. v. United States*, 323 U.S. 18, 26 (1944); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 402 (1950) (“Where a foreign statute which has received construction has been adopted, previous construction is adopted too.”).

⁸² But see *Trailmobile Co. v. Whirls*, 331 U.S. 40, 61 (1947) (“The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers.”).

and the CFPB's powers to address unfair and deceptive practices is beyond the scope of this Note, the implications of these altered definitions will be briefly touched upon below.⁸³

B. The Evolving Definition of "Abusive"

In fashioning the newest arrow in the consumer protection quiver, the Administration understandably wanted to provide the nascent CFPB with substantial room for regulatory interpretation.⁸⁴ As a term, "abusive" was delivered via the White Paper without a definition.⁸⁵ Just as the White Paper saw fit to let CFPB itself define deception, the Obama Administration was willing to let the CFPB determine the constellation of factors that would mark the bounds of abusive doctrine.

Both chambers of Congress objected to such an unbridled grant of power and asserted themselves with competing definitions. The definition of "abusive," however, never became the subject of Congressional debate, and any committee-level maneuvering over the definition failed to percolate into the public record. Consequently, the full meaning of each chambers' replies must be inferred solely from the language of the bills they passed.

The House would have established a high bar, permitting the CFPB to declare a practice abusive only after meeting two conditions:

The Director and the Agency may determine that an act or practice is abusive only if the Director finds that—

(A) the act or practice is reasonably likely to result in a consumer's inability to understand the terms and conditions of a financial product or service or to protect their own interests in selecting or using a financial product or service; and

(B) the widespread use of the act or practice is reasonably likely to contribute to instability and greater risk in the financial system.⁸⁶

---

⁸³ See *infra* Part III.C.

⁸⁴ The words and phrases delineating a statute's outer boundaries are utterly critical. See Frank H. Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533, 537 (1983) ("[M]embers of Congress know that zipper clauses in statutes just invite clever evasions.").

⁸⁵ See H.R. 3126, 111th Cong. § 131 (2009).

⁸⁶ H.R. 4173, § 4301(c)(3) (emphasis added).

The definition has several noteworthy features. While the phrase “reasonably likely”—the Congressional drafter’s go-to ambiguous phrase—would appear to give the CFPB a broad reach, that reach is substantially curtailed by subsection B’s requirement that the practice in question contribute to both risk and instability in the financial system. Further, the definition adopts an arguably harsher version of the net societal benefits standard by requiring the CFPB to not only consider the systemic impact of a practice, but to also find such systemic harm reasonably likely.

The Senate balked at the House’s language and replied with a definition that provides a broader and firmer base of support from which the CFPB can address abusive practices. The Senate definition was accepted into the conference report and codified as follows:

(d) Abusive.—The Bureau shall have no authority under this section to declare an act or practice abusive in connection with the provision of a consumer financial product or service, unless the act or practice—

- (1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
- (2) takes unreasonable advantage of—

- (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;

- (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or

- (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.⁸⁷

Both the language and the substantive reach of the codified version are substantially more expansive than the House’s proposal. The Senate jettisoned the House’s “reasonably likely” language, which, with its emphasis on foreseeability, sounds almost in tort, in favor of the near-contractual concepts of

---

⁸⁷ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1031(d), 124 Stat. 1376, 2006 (codified at 12 U.S.C. § 5531(d) (Supp. IV 2011)) (emphasis added).

interference and advantage.⁸⁸ Gone was the House's two-step barrier to action and its embrace of the net societal benefits standard, replaced instead by four independent criteria under which the CFPB could act.

The Senate accepted two of the grounds identified by the House for declaring a practice abusive. First, in Section 1031(d)(1), the Senate, like the House, targeted practices that materially interfere with a consumer's ability to understand a product or service's terms or conditions. Among other things, this prong seems to acknowledge that some disclosures by themselves, regardless of how they are drafted, may be insufficient to protect consumers grappling with complex financial devices. Second, in Section 1031(d)(2)(B) both the House and Senate, reflecting many of the equitable principles undergirding unconscionability doctrine, offered express protections to consumers who are unable to protect their own interests.

The Senate's definition provides two additional independent grounds for declaring a practice abusive. The language in Section 1031(d)(2)(A) encompassing practices that take unreasonable advantage of a consumer's lack of understanding echoes and amplifies the language prohibiting practices that materially interfere with a consumer's ability to understand a term or condition.⁸⁹ The language in Section 1031(d)(2)(C) also adds a seemingly expansive provision that protects a consumer's reasonable reliance on financial agents to act in the consumer's best interest, which would address many of the causes of the current foreclosure crisis.⁹⁰ Taken together, these codified provisions give the CFPB vastly more power and flexibility than the Bureau would have received under the House's language.

---

⁸⁸ See *supra* notes 62–64 and accompanying text. Compare RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 (2010), with RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981).

⁸⁹ These first three prongs appear to target much of the pre-contractual bargaining naughtiness that procedural unconscionability is meant to remedy. See *supra* note 63 and accompanying text.

⁹⁰ See, e.g., *supra* note 61.

C. *Distinguishing “Abusive” in Dodd-Frank from “Abusive” in Other Statutes*

Although as a term, “abusive” has appeared primarily in debt collection statutes, such statutes are an improper lens through which to view the reach of “abusive” as used in Section 1031. On the federal level, the term appears prominently in the Fair Debt Collection Practices Act’s (“FDCPA”) findings.⁹¹ Likewise, the term has filtered down into state statutes targeting debt collection practices.⁹²

Debt collection, by its nature, is a field lending itself to what would be conversationally termed “abusive practices.” As a result, legislatures impose a form of absolute liability on debt collectors, delineating narrow bands of permitted activity and declaring acts falling outside those bounds to be abusive.⁹³ Construing Section 1031’s use of “abusive” to confer any conception of absolute liability would, however, drastically limit both the power and reach of the CFPB to only the most heinous offenses.

Debt collection statutes, however, are readily distinguishable from Dodd-Frank because they include a private right of action allowing individuals to file civil suits against debt collectors alleging violation of the FDCPA.⁹⁴ Because the threat of civil litigation, backed by absolute liability, looms over debt collectors, there is a strong incentive for collectors to conform their behavior

---

⁹¹ See 15 U.S.C. § 1692(e) (2006) (“It is the purpose of this [title] to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.”).

⁹² See CONN. GEN. STAT. ANN. § 36a-646 (West 2011) (“No creditor shall use any abusive, harassing, fraudulent, deceptive or misleading representation, device or practice to collect or attempt to collect any debt.”); D.C. CODE § 28-3814(c)(4) (2001); HAW. REV. STAT. § 480D-1 (2011) (“ensur[ing] that consumers are not subjected to unfair, deceptive, coercive, abusive, or harassing conduct in collection activities”); IOWA CODE ANN. § 537.7103(1)(d) (West 2011) (making it illegal to “subject the debtor to harsh, vindictive or abusive collection attempts”); MICH. COMP. LAWS ANN. § 445.252(n) (West 2011) (regulated persons shall not use “a harassing, oppressive, or abusive method to collect a debt”).

⁹³ See Elwin Griffith, *The Search for More Fairness in the Fair Debt Collection Practices Act*, 37 U. RICH. L. REV. 511, 561 (2003).

⁹⁴ See 15 U.S.C. § 1692k (2006 & Supp. IV 2011). State statutes occasionally provide similar civil remedies. See, e.g., TEX. FIN. CODE ANN. § 392.403(a) (West 2011) (permitting both civil recovery of actual damages and injunctive relief to prevent continuing violations).

as closely as possible to the letter of the law.⁹⁵ This is by design. Congress meant to augment the FTC's own enforcement authority with the threat of civil action.⁹⁶

The CFPB, by contrast, does not need to set the bar for abusive conduct nearly as high as the FDCPA because Dodd-Frank does not authorize a private right of action.⁹⁷ As a result, it is reasonable for Congress to have greater faith in the Bureau to responsibly regulate abusive conduct that might fall short of the absolute liability regime established by the FDCPA.⁹⁸

As a term, "abusive" has also been subject to agency interpretation. In 1994, Congress passed the Home Ownership and Equity Protection Act ("HOEPA"), conferring on the Federal Reserve Board ("Fed") the power to prohibit abusive practices associated with mortgage loan refinancing.⁹⁹ While the Fed largely ignored this grant of authority, it finally found it expedient to call upon its dormant powers in 2008 at the peak of

---

⁹⁵ Congress's deployment of "abusive" in service of an absolute liability regime is further echoed in the Telemarketing Consumer Fraud and Abuse Prevention Act ("TCFAPA"). See 15 U.S.C. § 6102(a)(1) (2006) ("The Commission shall prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices."). As with the FDCPA, TCFAPA provides consumers with a private right of action. See 15 U.S.C. § 6101 ("The Congress makes the following findings . . . Interstate telemarketing fraud has become a problem of such magnitude that the resources of the Federal Trade Commission are not sufficient to ensure adequate consumer protection from such fraud. . . . Consequently, Congress should enact legislation that will offer consumers necessary protection from telemarketing deception and abuse."); 15 U.S.C. § 6104.

⁹⁶ See S. REP. NO. 95-382, at 5 (1977).

⁹⁷ One scholar, however, has suggested that Congress may want to establish an absolute liability regime for consumer credit cards:

The better regulatory structure would be to prohibit anything, except for specific permitted practices. Such a regulatory model could be combined with a mandatory simplification of credit card price structures. All of credit cards' myriad price points can be boiled down into three price terms: an availability fee, a transaction fee, and an interest rate. Congress would do well to mandate that these and only these three fees may be charged by card issuers, and to require standardization of key cardholder agreement terms, just as is currently done with insurance policies. Card issuers would be free to compete and price as they wish within this focused structure.

Consumer Debt Hearing, *supra* note 19, at 21 (statement of Adam J. Levitin, Associate Professor of Law, Georgetown University Law Center).

⁹⁸ See Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 OHIO ST. L.J. 437, 452 (1991).

⁹⁹ See 15 U.S.C. § 1639(2)(B) ("The Board, by regulation or order, shall prohibit acts or practices in connection with . . . refinancing of mortgage loans that the Board finds to be associated with abusive lending practices, or that are otherwise not in the interest of the borrower.").

the financial crisis. In doing so, the Fed characterized its power as “broad[,] both in absolute terms and relative to HOEPA’s statutory prohibitions.”¹⁰⁰ Yet, while the Fed launched into a lengthy discourse on the definitions of unfair and deceptive practices, relying mostly on the FTC’s policy statements, it remained silent as to the precise definition of its power to target abusive practices.¹⁰¹ Instead, the Fed proceeded to repeatedly invoke the term to characterize several practices.

Although the Fed declined to define abusive, it did identify several practices that were not abusive. The Fed sharply rejected any notion that abusive practices were those that were simply unaffordable to consumers.¹⁰² Of especial relevance to the CFPB was the Fed’s suggestion that better disclosure by itself could not stop abusive practices.¹⁰³

The Fed hesitantly declared only two practices as abusive: loan flipping and equity stripping.¹⁰⁴ Loan flipping involves repeated mortgage loan refinancing within a short time period with no benefit to the borrower.¹⁰⁵ As each refinancing generates additional fees and more principal owed at higher rates, the

¹⁰⁰ Truth in Lending, 73 Fed. Reg. 1672, 1679 (Jan. 9, 2008).

¹⁰¹ See *id.* (“HOEPA does not set forth a standard for what is unfair or deceptive, but the Conference Report for HOEPA indicates that, in determining whether a practice in connection with mortgage loans is unfair or deceptive, the Board should look to the standards employed for interpreting state unfair and deceptive trade practices acts and the Federal Trade Commission Act, Section 5(a), 15 U.S.C. 45(a).”).

¹⁰² See *id.* at 1675, 1677 (Repeatedly mentioning “abusive *and* unaffordable loans”) (emphasis added). Congress appears to agree that unaffordable or excessive loans, without more, are not abusive; this is reflected in Congress’s decision to prohibit the CFPB from imposing a usury limit. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1027(o), 124 Stat. 1376, 2003 (codified at 12 U.S.C. § 5517(o) (Supp. IV 2011)) (“No provision of this [title] shall be construed as conferring authority on the Bureau to establish a usury limit applicable to an extension of credit offered or made by a covered person to a consumer, unless explicitly authorized by law.”).

¹⁰³ See Truth in Lending, 73 Fed. Reg. 1672, 1676 (Jan. 9, 2008) (“[I]t appears unlikely that better disclosures, alone, will address adequately the risk of abusive or unaffordable loans in the subprime market.”). But see *id.* at 1703 (“The Board believes that disclosure of a dollar figure for each fee will discourage abusive servicing practices by enhancing the consumer’s understanding of servicing charges.”).

¹⁰⁴ See *id.* at 1686.

¹⁰⁵ Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1263 (2002).

borrower's equity in his home is "stripped."¹⁰⁶ The Fed's findings suggest that two threads run through both practices: consumer action is induced by a potential benefit that is supposed to run to the consumer, and the action taken causes either no benefit or a detriment to the consumer.¹⁰⁷ Such a definition was far too restrictive to carry out the Fed's mandate to address abusive practices. If anything, it serves as an example of a narrow definition that the CFPB should avoid.

Congress's dissatisfaction with the Fed's hobbled interpretation of its powers to crack down on abusive practices compels a broader reading of the term. The conference report accompanying Dodd-Frank stated in unmistakably pointed language: "[T]he Federal Reserve Board failed to meet its responsibilities under HOEPA, despite persistent calls for action."¹⁰⁸ The Conference Report continued:

In spite of the rampant abuses in the subprime market and all the damage imposed on consumers by predatory lending—billions of dollars in lost wealth—the Board has never implemented a single discretionary rule under HOEPA outside of the high cost context. To put it bluntly, the Board has simply not done its job.¹⁰⁹

---

¹⁰⁶ See *Legislative Solutions for Preventing Loan Modification and Foreclosure Rescue Fraud: Hearing Before the Subcomm. on Hous. & Cmty. Opportunity of the H. Comm. on Fin. Servs.*, 111th Cong. 25 (2009) (statement of Robert E. Story, Chairman-Elect, Mortgage Bankers Association); Engel & McCoy, *supra* note 105; Vincent DiLorenzo, *Mortgage Market Deregulation and Moral Hazard: Equity Stripping Under Sanction of Law* 66–67 (St. John's Univ. Sch. of Law Legal Studies Research Paper Series, Paper No 09-0179, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1488293. HOEPA itself contains provisions that address equity stripping, however the mortgage crisis proved that those provisions alone were ineffective. See 15 U.S.C. § 1602(aa)(1) (2006 & Supp. IV 2011) ("A mortgage referred to in this subsection means a consumer credit transaction that is secured by the consumer's principal dwelling, other than a residential mortgage transaction . . ."); 12 C.F.R. § 226.32(a)(1) (2009); *Consumer Protections in Financial Services: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 111th Cong. 60 (2009) (statement of Patricia A. McCoy, George J. and Helen M. England Professor of Law, Univ. of Conn. Law Sch.) ("After 1994, it increasingly became evident that HOEPA was incapable of halting equity stripping and other sorts of subprime abuses.").

¹⁰⁷ See Truth in Lending, 73 Fed. Reg. 1672, 1674–75 (Jan. 9, 2008).

¹⁰⁸ S. REP. NO. 111-176, at 15 (2010).

¹⁰⁹ *Id.* at 27 n.77.

Congress's enactment of a flexible definition of abusive, coupled with Congress's clear dissatisfaction with the Fed's narrow interpretation of its powers to reach abusive practices suggests that the CFPB should adopt a broad, expansive interpretation of its powers to address abusive practices.

III. A NEW HOPE: THE THEORETICAL REACH OF SECTION 1031

As a command to an agency, Section 1031's ultimate reach will be a matter for the courts to decide.¹¹⁰ The CFPB will be free to interpret Section 1031 subject only to its understanding of Congress's intent, and the courts will decide whether those interpretations are entitled to *Chevron* deference.¹¹¹ Under *Chevron*, courts first ask whether Congress has spoken to the issue in question.¹¹² If Congress's intent is clear, the agency must defer to Congress's unambiguously expressed intent.¹¹³ If the statute is silent or ambiguous, then the court will uphold the agency's regulation so long as it is based on a reasonable, permissible, rational construction of the statute.¹¹⁴

Despite *Chevron* deference, statutory interpretation is a dark art.¹¹⁵ The starting point for all statutory construction is the language of the statute itself.¹¹⁶ Because the Restatement-like Section 1031 is inherently ambiguous, the plain text itself is

---

¹¹⁰ See *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 968 (D.C. Cir. 1985).

¹¹¹ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

¹¹² See *id.*

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See Easterbrook, *supra* note 84, at 550 (“Good statutory construction requires the rarest of skills. The judge must find clues in the structure of the statute, hints in the legislative history, and combine these with mastery of history, command of psychology, and sensitivity to nuance to divine how deceased legislators would have answered unasked questions.”); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) (“I suggest that the task for the judge called upon to interpret a statute is best described as one of imaginative reconstruction. The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar.”).

¹¹⁶ See *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (“The task of resolving the dispute over the meaning of [the statute] begins where all such inquiries must begin: with the language of the statute itself. . . . [I]t is also where the inquiry should end, for where . . . the statute's language is plain, the sole function of the courts is to enforce it according to its terms.”) (citations omitted) (internal quotation marks omitted).

unlikely to be dispositive.¹¹⁷ Courts often deputize dictionaries in service of interpretation; however, these too are unlikely to be helpful.¹¹⁸ Black's Law Dictionary defines abusive as something "characterized by wrongful or improper use."¹¹⁹ The Oxford English Dictionary is equally vague, defining abusive as something "involving injustice or illegality."¹²⁰ Departing from the text of the statute, courts employ a range of interpretive tools, including the canons of interpretation and legislative history, to wring meaning out of ambiguous statutes. Using those tools, this Note will next consider potential interpretations and applications that might earn *Chevron* deference as reasonable, permissible, and rational constructions of Section 1031.

A. *Unilateral Credit Card Rate Increases*

Congress shined the legislative spotlight on several of the most pernicious credit card practices with the Credit CARD Act of 2009,¹²¹ an Act that serves as a natural starting point to identify abusive practices the CFPB can address. Working within the Truth in Lending Act ("TILA") framework, the Credit CARD Act continued to emphasize disclosure as an effective consumer remedy.¹²² The Act requires the Fed to post copies of all credit card contracts on the Internet so that consumers can ostensibly compare the terms and conditions attached to different

---

¹¹⁷ See *supra* Part II.B. Like the American Law Institute's Restatements of Law, Section 1031 speaks in broad strokes, invoking inherently ambiguous phrases that require refining interpretations to unlock their full meaning and reach.

¹¹⁸ See *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 225–28 (1994); *cf.* *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) ("In the absence of [a statutory] definition, we construe a statutory term in accordance with its ordinary or natural meaning.").

¹¹⁹ See BLACK'S LAW DICTIONARY 4 (9th ed. 2009) (defining abusive as related to people as "habitually cruel, malicious, or violent").

¹²⁰ See OXFORD ENGLISH DICTIONARY 46 (2d ed. 1971) (defining abusive alternatively as "extremely offensive and insulting," and "engaging in or characterized by habitual violence and cruelty").

¹²¹ See Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (codified as amended in scattered sections of 15 U.S.C.).

¹²² See generally *id.*

cards.¹²³ The Act also requires enhanced disclosure of fees, penalties, and the consequences of paying only the minimum amounts due.¹²⁴

Consumer advocates broadly agree that one of the most dangerous features of credit card contracts—indeed, the feature that makes credit card contracts unlike virtually any other contract—is the credit card issuer’s ability to unilaterally change, at any time, for any reason, the interest rate applied to completed purchases.¹²⁵ The Credit CARD Act chipped away at the credit card issuer’s ability to unilaterally change contract terms, codifying proposed rules that would have required at least forty-five-day written notice before creditors could raise interest rates.¹²⁶

While the Credit CARD Act purports to prevent creditors from unilaterally raising rates, it provides a large exception that is likely to render such protections meaningless. Under the Act, creditors are allowed to unilaterally raise rates if a consumer fails to make at least the minimum payment for sixty days.¹²⁷ With such an uncomfortably high unemployment rate,¹²⁸ it is not

¹²³ See *id.* § 204, 123 Stat. at 1746 (codified at 15 U.S.C. § 1632(d) (2006 & Supp. IV 2011)).

¹²⁴ See *id.* §§ 201–203, 123 Stat. at 1743–46 (codified as amended in scattered sections of 15 U.S.C.); see also 15 U.S.C. § 1637.

¹²⁵ See *Modernizing Consumer Protection in the Financial Regulatory System: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 111th Cong. 60 (2009) [hereinafter *Modernizing Consumer Protection Hearing*] (statement of Adam J. Levitin, Associate Professor of Law, Georgetown University Law Center); *Frontline: Secret History of the Credit Card* (David Rummel & Nelli Kheyfets, producers) (PBS television broadcast Nov. 23, 2004), transcript available at <http://www.pbs.org/wgbh/pages/frontline/shows/credit/etc/script.html>. Then-professor Elizabeth Warren explained,

I don’t know any merchant in America who can change the price after you’ve bought the item, except a credit card company. . . . The real question here is whether or not you can change the price, not for new items you buy after your credit score has changed, but for old credit that you’ve already taken out. My mortgage company agreed to an interest rate, and if I lost my job, my mortgage company does not get to double my mortgage. Credit card companies can say, “Remember how you bought the big-screen TV at 9.8 percent interest? We’ve decided we want 29.9 percent interest.” And there’s not a darn thing you could do about it right now.

Id.

¹²⁶ See 12 C.F.R. § 226.9(c)(2) (2010); § 101, 123 Stat. at 1735–36.

¹²⁷ See § 171, 123 Stat. at 1736–37; 15 U.S.C. § 1666i-1(b)(4).

¹²⁸ See, e.g., *Employment Status of the Civilian Noninstitutional Population, 1941 to Date*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/cps/cpsaat01.htm> (last modified Mar. 1, 2012) (reporting a 2010 unemployment rate of 9.6%).

unreasonable to expect troubled consumers to increasingly miss their payments.¹²⁹ Those who do, the most vulnerable among us, will be left unprotected by the Act and subject to unilateral rate increases.

Existing consumer protection doctrines cannot reach unilateral rate increases. A finding of unfairness is potentially foreclosed on two grounds. First, although raising rates on unsuspecting consumers certainly causes substantial injury, Congress's embrace of a net societal benefits standard requires that the injury not be outweighed by any countervailing or competitive benefit to industry.¹³⁰ Despite loud objections from consumer advocates, credit card companies have consistently asserted that risk-based pricing remains critical to their business success.¹³¹ Thus, the CFPB may be unable to argue that the harm caused by unilateral rate increases outweighs the benefits. Second, there is an established public policy supporting the freedom to contract.¹³² As a result, it is unlikely that the CFPB could declare that unilateral rate increases are unfair.

Deception doctrine is equally unhelpful.¹³³ Rather than misrepresent or omit material information, credit card companies reserve in unambiguous and certain terms the right to unilaterally raise rates. Thanks to the Credit CARD Act, those reservations now hide in plain sight on the government's own servers.

Consumers have found that unconscionability doctrine is especially unsuited to fight unilateral rate increases. As an initial matter, as a defense to a contract, the single-litigant structure of unconscionability litigation makes it a less-than-

---

¹²⁹ See *Frontline: The Card Game* (Lowell Bergman & Oriana Zill de Granados, producers) (PBS television broadcast Nov. 24, 2009), *transcript available at* <http://www.pbs.org/wgbh/pages/frontline/creditcards/etc/script.html>. Explaining how the exception nearly swallows the rule, Martin Eakes, Chief Executive Officer of the Center for Responsible Lending, stated, "So here we are in a period of unprecedented unemployment, and everyone who loses their job is going to become 60 days late on their credit card bill. What sense does it make to let someone, when they're down, get stomped on by increasing their credit card interest rate from 9 percent to 29 percent?" *Id.*

¹³⁰ See *FTC Policy Statement on Unfairness*, *supra* note 38.

¹³¹ See *Modernizing Consumer Protection Hearing*, *supra* note 125, at 53 (statement of Adam J. Levitin, Associate Professor of Law, Georgetown University Law Center).

¹³² See *infra* Part III.B.1.

¹³³ See 15 U.S.C. § 45 (2006) (depriving the FTC of the ability to regulate banks).

ideal vehicle to protect consumers at large, especially from a practice where the harm is so particularized.¹³⁴ While as part of a contract of adhesion, it would not be especially difficult to establish procedural unconscionability, courts have rejected attempts to find unilateral rate increases substantively unconscionable. One court bluntly stated: “[t]he practice of retroactively increasing the interest rate is not unconscionable.”¹³⁵

Unilateral rate increases, however, likely implicate three of Section 1031’s four independent bases for declaring a practice abusive.¹³⁶ First, under Section 1031(d)(1), the practice likely materially interferes with a consumer’s ability to understand the terms and conditions affecting his use of credit. As defined by the FTC, materiality encompasses “information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.”¹³⁷ Even the Fed itself warns consumers: “One of the most important things to understand about your credit card is its interest rate.”¹³⁸ By reserving the right to unilaterally change rates at any time, creditors make it impossible for consumers to know what interest rate will attach to a given transaction. Thus, unilateral rate increases are both material and interfere with a consumer’s ability to understand the terms and conditions attached to his credit card. Further, a finding of abusiveness would vindicate the policy considerations

---

¹³⁴ See Oren Bar-Grill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 75–77 (2008).

¹³⁵ *Augustine v. FIA Card Servs.*, 485 F. Supp. 2d 1172, 1174 (E.D. Cal. 2007) (alteration in original) (internal quotation marks omitted). *But see McCoy v. Chase Manhattan Bank USA, N.A.*, 559 F.3d 963, 970–71 (9th Cir. 2009), *cert. granted* 130 S. Ct. 3451 (2010); *Evans v. Chase Bank USA, No. C-05-3968 SC.*, 2006 WL 213740, at *3 (N.D. Cal. Jan. 27, 2006) (“Plaintiffs’ unconscionability contention may have had some weight.”).

¹³⁶ The practice would even likely fall under the House’s rejected definition of “abusive.” See *supra* Part II.B. By reserving the right to unilaterally raise rates, preventing consumers from knowing what interest rate might apply to a purchase, creditors deprive consumers of the ability to protect their own interest in using a financial product. When taken in the aggregate, the practice is reasonably likely to contribute to instability and greater risk to the financial system as consumers are plunged further into debt.

¹³⁷ *Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984).

¹³⁸ *Credit Card Interest Rates*, BOARD OF GOVERNORS OF THE FED. RES. SYS., <http://www.federalreserve.gov/creditcard/rates.html> (last updated June 15, 2010).

underlying this prong by acknowledging that disclosure is unlikely to adequately address as complex a financial concept as a unilateral rate increase.

Second, under Section 1031(d)(2)(A), even if consumers understood the nature of the contractual condition provision to which they were agreeing, the reserved prerogative to raise rates still takes unreasonable advantage of the consumer's inability to understand the card's risks and costs. In fact, the creditors' contract regime makes it impossible for consumers to ever understand the true cost of using the card since the price of a transaction can never be known with certainty until it is paid off in full.

Finally, unilaterally changing rates implicates Section 1031(d)(2)(B) by taking unreasonable advantage of a consumer's inability to protect his interests in using the credit card. Even if a responsible consumer researched the cost of his purchase and paid his bill on time in accordance with the contract month after month, his creditor would still retain the power to retroactively and unilaterally raise the cost of his purchase.¹³⁹ As a result, the CFPB could likely prohibit unilateral rate increases as an abusive practice under Section 1031.

B. Abusive Drafting Practices

1. Amorphous Fine Print Credit Card Contracts

Credit card contracts are notorious for their long, fine print, a function and privilege of America's strong notion of the freedom to contract. Forming a contract requires only a bargain, mutual assent, and consideration.¹⁴⁰ Credit card issuers are generally able to avail themselves of this contractual freedom subject only to a handful of limitations.¹⁴¹

---

¹³⁹ Paying bills in full is the only way for consumers to avoid interest rates. Fifty-eight percent of families carry a balance and do not pay off their credit cards in full. See BRIAN K. BUCKS ET AL., RECENT CHANGES IN U.S. FAMILY FINANCES: EVIDENCE FROM THE 2001 AND 2004 SURVEY OF CONSUMER FINANCES 31 (2006); accord CONSUMER PAYMENT CHOICE SURVEY, *supra* note 15, at 42 (reporting that 56.3% of consumers carried a balance).

¹⁴⁰ See RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981).

¹⁴¹ See, e.g., Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (codified as amended in scattered sections of 15 U.S.C.) (restricting certain terms, conditions, and practices that creditors may employ in credit card contracts).

Despite being widely regarded as ineffective, the current regulatory regime emphasizes disclosure as the best way to protect consumers from harmful contract provisions.¹⁴² Although disclosures are important, both the contract reader and the contract writer conspire to render them ineffective. Although most Americans read at or below the eighth-grade level, most credit card companies write their contracts at or above the tenth-grade level.¹⁴³ Even if consumers had the basic proficiency to understand the content of credit card contracts, credit issuers routinely eschew best practices in favor of confusing fonts, misleading organization, and ineffective headings.¹⁴⁴ The average credit card contract spans 3,771 words, while some of the wordiest agreements take more than 20,000 words to explain their terms.¹⁴⁵ As a result, studies show that consumers routinely ignore credit card contracts, including government-mandated disclosures.¹⁴⁶ Clearly, disclosure by itself is insufficient to protect consumers.

---

¹⁴² See *Consumer Debt Hearings*, *supra* note 19, at 20 (statement of Adam J. Levitin, Associate Professor of Law, Georgetown University Law Center) ("Disclosure has been the primary paradigm for card regulation since the 1968 Truth-in-Lending Act. Unfortunately, there is no evidence that it works for complex financial products like credit cards. . . . The sheer number of explicit prices [sic] points that make it difficult for consumers to accurately and easily gauge the total cost of using credit cards.").

¹⁴³ See GAO CREDIT CARD REPORT, *supra* note 17.

¹⁴⁴ See *id.*

¹⁴⁵ See Connie Prater, *U.S. Credit Card Agreements Unreadable to 4 out of 5 Adults*, CREDITCARDS.COM (July 22, 2010), <http://www.creditcards.com/credit-card-news/credit-card-agreement-readability-1282.php>.

¹⁴⁶ See *Gutierrez v. Wells Fargo Bank, N.A.*, 730 F. Supp. 2d 1080, 1127 (N.D.Cal. 2010) ("customers would *not* and could *not* be expected to read the lengthy document"); Jeff Sovern, *Preventing Future Economic Crises Through Consumer Protection Law or How the Truth in Lending Act Failed the Subprime Borrowers*, 71 OHIO ST. L.J. 761, 794 ("[E]ven under perfect conditions, when no one is attempting to distract consumers from focusing on disclosures, deceive them, or rush them into a particular transaction, disclosures may not be useful to consumers when they create cognitive dissonance.") (discussing MACRO INT'L INC., DESIGN AND TESTING OF EFFECTIVE TRUTH IN LENDING DISCLOSURES 6, 11 (2007)) ("When shown a sample cardholder agreement, few of the participants said they would read the entire document if they received it. Others said that they would skim it and look for what they felt were the most important headings. In each group about half of participants said that they would not look at the cardholder agreement at all. . . . Most participants indicated that the reasons they do not read their agreements are that the type size is very small and they find them difficult to understand."); see also Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 233 (2002) ("Most consumers do not read contracts or disclosure forms.").

The credit card industry defends the length and complexity of their contracts as a function of judicial and regulatory action, rather than a conscious abuse of the freedom to contract.¹⁴⁷ Blaming “the nature of contract law,” one of the industry’s top lobbyists has asserted that the reason consumers cannot understand credit card contracts is that “required state and federal disclosures” coupled with “lawsuits . . . have compelled [us] to use certain terms, certain words, and to include certain information.”¹⁴⁸ The practice of writing long, fine print credit card contracts is likely to implicate two of the CFPB’s independent bases for declaring a practice abusive under Section 1031. First, by making contracts difficult to read, credit card companies likely violate Section 1031(d)(1) by materially interfering with a consumer’s ability to understand both the terms and conditions of his credit card. Consumers who overpay

---

¹⁴⁷ Despite the industry’s assertions, working with a group that included, among others, a professor of banking law and a former counsel to Citibank, branding expert Alan Siegel designed a one-page credit card contract that Americans with an eighth-grade education could understand. See Press Release, Siegel+Gale, Siegel+Gale Introduces a Simple, One-Page Credit Card Agreement that Anyone Can Understand (June 3, 2009), available at http://www.siegelgale.com/pdf/Siegel+Gale_Introduces_a_Simple_One-Page_Credit%20Card%20Agreement%20That%20Anyone%20Can%20Understand.pdf. The model contract is a poignant example of how disclosure, when presented properly, can be effective. The CFPB, drawing on its in-house research office to refine the content and design, would be well advised to promulgate a similar model contract. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1013(b)(1), 124 Stat. 1376, 1968 (codified at 12 U.S.C. § 5493(b)(1) (Supp. IV 2011)). Any such contract would be entitled to safe harbor status under Dodd-Frank, and would seem to be exactly what Congress had in mind when enacting the provision. See *id.* § 1032, 124 Stat. at 2006–07 (codified at 12 U.S.C. § 5532); S. REP. NO. 111-176, at 172 (2010) (“[T]he Bureau is granted rulemaking authority to ensure that information relevant to the purchase of such products or services is disclosed to the consumer in plain language in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service. In prescribing rules, the Bureau is required to consider available evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of consumer financial products or services. The Bureau is granted the authority to provide a model form of such disclosure standards, and a safe harbor is provided for covered persons that use model forms included with a rule issued under this section.”).

¹⁴⁸ See *Your Bottom Line: Credit Card Contracts May Change Due to New Legislation* (CNN broadcast Nov. 21, 2009), transcript available at <http://archives.cnn.com/TRANSCRIPTS/0911/21/ybl.01.html>; Jessica Yellin, *A Push To Simplify Credit Card ‘Gobbledygook’*, CNN (Nov. 20, 2009, 10:27 PM), <http://edition.cnn.com/2009/POLITICS/11/19/credit.card.contracts/> (quoting American Bankers Association senior vice president Nessa Feddis).

because of an inability to understand their credit contracts may switch banks.¹⁴⁹ Thus, sticking with the FTC's definition of materiality,¹⁵⁰ the practice of writing long, fine print contracts is material to those consumers. Further, eschewing best practices and writing contracts that the average American cannot understand interferes with a consumer's ability to understand the terms and conditions of his credit cards. A finding of abusiveness under this prong would also acknowledge the reality that the disclosure-based regime underpinning the Credit CARD Act is simply insufficient by itself to protect consumers from contracting abuses.

Second, by obfuscating key terms and conditions, credit card companies take unreasonable advantage of a consumer's ability to protect his interest in choosing which credit card to use, potentially violating of Section 1031(d)(2)(B). As with unilateral rate increases, if consumers cannot understand the very terms attached to their cards, how can they choose among competing cards in the first place? As a result, the CFPB can likely declare that the practice of writing long, fine print contracts is abusive.

2. Real World Examples of Abusive Creditor Practices

Beyond merely writing long, fine print contracts, companies have conducted market research to determine how best to dissuade consumers from reading their contracts. For example, in *Ting v. AT&T*,¹⁵¹ AT&T's market research determined that the vast majority of consumers would stop reading a special mailing informing them of major changes to their contracts if it was prefaced with the statement: "[P]lease be assured that your AT&T service or billing will not change under the AT&T Customer Services Agreement; there's nothing you need to do."¹⁵²

---

¹⁴⁹ See Brian Grow & Robert Berner, *About that New, "Friendly" Consumer Contract*, BUSINESSWEEK, (Apr. 30, 2009, 5:00 PM), http://www.businessweek.com/magazine/content/09_19/b4130048127451.htm ("Innovative lenders and other companies are trying to . . . attract new customers by eliminating tricky fees and payment terms."); cf. SUMIT AGARWAL ET AL., DO CONSUMERS CHOOSE THE RIGHT CREDIT CONTRACTS? 12–13 (Dec. 2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=843826.

¹⁵⁰ See *supra* note 138 and accompanying text.

¹⁵¹ 319 F.3d 1126 (9th Cir. 2003).

¹⁵² *Id.* at 1133–34 (alteration in original) (internal quotation marks omitted). AT&T's market research indicated that only twenty-five percent of customers would open the notice if it was sent as a separate mailing, ten percent would not even look at it, and only thirty percent would read the entire contract. *Id.* at 1134.

The practice has analogues in credit card agreements. In addition to its standard contract, Bank of America provides an additional sheet labeled "Important Summary of Changes to Your Account."¹⁵³ Consumers who read the summary but not the agreement would miss a default provision that lets Bank of America impose a penalty APR that is ten percent higher than the standard APR.¹⁵⁴ While the Ninth Circuit of the United States Court of Appeals struck down the worrisome contracts in *Ting* on unconscionability grounds, the CFPB could likely address a range of similar practices under Section 1031, rather than strike at the application of an individual contract, as unconscionability requires.¹⁵⁵

Conducting market research to dissuade consumers from reading contracts likely implicates at least two bases for finding a practice abusive under Section 1031. First, both AT&T's market research and Bank of America's practice of sneaking material information into a separate notice likely implicate Section 1031(d)(1)'s ban on materially interfering with a consumer's ability to understand the terms or conditions attached to a service. The market research employed in *Ting* was used specifically to interfere with a consumer's understanding of the conditions associated with AT&T's service. Similarly, by needlessly making important disclosures difficult to find, Bank of America interfered with consumers' ability to process the universe of information needed to responsibly use their credit cards. Because both companies knew that consumers would be less likely to read material information, rendering their disclosures ineffective, the CFPB could likely declare the practice abusive.

Second, it is difficult to imagine a practice more thoroughly tailored to Section 1031(d)(2)(A)'s prohibition on taking unreasonable advantage of a consumer's lack of understanding of the material risks or costs of a service. By choosing a method of communicating for the express purpose of denying consumers the information they need to responsibly use a service, both companies took unreasonable advantage of their customers'

---

¹⁵³ See Ronald J. Mann, "Contracting" for Credit, 104 MICH. L. REV. 899, 908 (2006) (internal quotation marks omitted).

¹⁵⁴ See *id.*

¹⁵⁵ See *infra* Part III.C. As discussed above, unconscionability doctrine is unable to serve as a basis for broader consumer protection measures. See *supra* Part I.C.

ability to understand the risks and costs of their services. Thus, the CFPB could declare that it is an abusive practice within the meaning of Section 1031 to research which disclosures consumers will not read, and then choose them precisely because of that quality.

Not all such research, however, would need to be declared abusive per se. The CFPB could issue a nuanced rule that accounts for how companies use the results of such research. The CFPB could choose to make corporations carry the burden of proving that their market research was used, for example, to increase consumer attention. If, however, research was used to increase only their bottom line to the detriment of their consumers, then the CFPB could choose to act on a case-by-case basis.

C. ATM Overdraft Marketing

Overdraft protection ostensibly exists to protect consumers who overdraw their checking accounts.¹⁵⁶ In 2008, more than seventy-five percent of large banks automatically enrolled their customers in overdraft protection that charged them up to \$38 each time they overdrew their account.¹⁵⁷ Fifty-three percent of banks, however, went further by writing abusive overdraft policies that minimized consumer benefit while maximizing bank profit.¹⁵⁸

Abusive overdraft fees are tremendously lucrative for banks. In 2008, banks collected nearly \$40 billion from their customers in service fees alone.¹⁵⁹ Of that, overdraft and not sufficient funds ("NSF") fees constituted over \$34 billion; overdraft fees by themselves accounted for a staggering \$27 billion in profit.¹⁶⁰

---

¹⁵⁶ See *The Overdraft Protection Act of 2009: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. 8 (2009) [hereinafter *House Overdraft Hearings*] (statement of Nessa Feddis, Vice President and Senior Counsel, Center for Regulatory Compliance, American Bankers Association).

¹⁵⁷ See FED. DEPOSIT INS. CORP., FDIC STUDY OF BANK OVERDRAFT PROGRAMS 6, 15 (2008) [hereinafter FDIC STUDY]. The median fee is \$27, which, when charged against a \$60 withdrawal and repaid in two weeks, translates into an APR of 1,173%. See *id.*

¹⁵⁸ See *id.* at 11.

¹⁵⁹ See LESLIE PARRISH, CTR. FOR RESPONSIBLE LENDING, OVERDRAFT EXPLOSION: BANK FEES FOR OVERDRAFTS INCREASE 35% IN TWO YEARS 4 (2009).

¹⁶⁰ See *id.* But see FDIC STUDY, *supra* note 157, at iv ("Banks operating automated overdraft programs earned \$1.77 billion in NSF fees in 2006 . . .").

Seventy-five percent of consumers do not incur overdraft fees.¹⁶¹ Instead, the entirety of the banks' profit comes from the twenty-five percent of consumers who spend upwards of \$64 each year paying NSF fees.¹⁶² The banks' most lucrative customers though, are the five percent of consumers who spend an average of \$1,610 each year paying NSF fees, often without receiving any substantial benefit in return.¹⁶³

1. Overdraft Protection as an Abusive Product

As chronicled in *Gutierrez v. Wells Fargo Bank, N.A.*,¹⁶⁴ banks carefully craft abusive overdraft policies for the sole purpose of boosting profit.¹⁶⁵ As one of seven class actions filed against some of the largest banks in the United States,¹⁶⁶ *Gutierrez* alleged that Wells Fargo adopted three distinct anti-consumer practices.¹⁶⁷ First, instead of initially debiting smaller charges to minimize overdrafts, the bank began charging the highest amounts first.¹⁶⁸ This had the effect of quickly draining the consumer's account to generate additional overdraft fees.¹⁶⁹ Second, the bank began comingling checks and ACH transactions along with debit charges.¹⁷⁰ While debit charges themselves are usually small, checks and ACH transactions are often used for

---

¹⁶¹ See FDIC STUDY, *supra* note 157, at iv.

¹⁶² See *id.*

¹⁶³ See *id.*

¹⁶⁴ 730 F. Supp. 2d 1080 (N.D. Cal. 2010).

¹⁶⁵ The court concisely described the allegations as follows:

[T]he essence of this case is that Wells Fargo has devised a bookkeeping device to turn what would ordinarily be one overdraft into as many as ten overdrafts, thereby dramatically multiplying the number of fees the bank can extract from a single mistake. . . . These neat tricks generated colossal sums per year in additional overdraft fees, just as the internal bank memos had predicted. The bank went to considerable effort to hide these manipulations while constructing a facade of phony disclosure.

Id. at 1082.

¹⁶⁶ See *In re Checking Account Overdraft Litig.*, No. 09-MD-02036-JLK, MDL 2036, 2010 WL 3377592, at *1 (S.D. Fla. July 1, 2010).

¹⁶⁷ These practices were executed via changes to the bank's automated processing systems. See *Gutierrez*, 730 F. Supp. 2d at 1095–96 (“Wells Fargo calls its automated system HOGAN. The HOGAN deposit system does not exercise individualized discretion based upon the nature of a customer's transactions. . . . HOGAN is designed to sequence and post transactions in a preprogrammed order selected by the bank.”).

¹⁶⁸ See *id.* at 1083–84.

¹⁶⁹ See *id.*

¹⁷⁰ See *id.* at 1084.

larger items like rent and mortgage payments.¹⁷¹ This further drained accounts to generate additional overdraft fees.¹⁷² Finally, the bank extended what they termed a “shadow line” of credit, which authorized debit transactions on overdrawn accounts.¹⁷³ The consumer neither knew that their account was overdrawn, nor how much credit the bank had extended to them.¹⁷⁴ These practices, the court ruled “did not benefit in any way, shape, or form” the consumers they were ostensibly meant to help.¹⁷⁵

Wells Fargo’s own market research, which the company conveniently misplaced at trial, clearly demonstrated that the bank’s overdraft policies ran counter to consumer demand.¹⁷⁶ At trial, Wells Fargo parroted the typical lines industry lobbyists invoke in support of abusive overdraft fees: that consumers consider the largest charges like mortgage and rent payments to be the most important, and thus, large charges should be cleared first.¹⁷⁷ Yet, their internal market research explained: “*paying in serial order is the better choice. . . .* When just these two were offered, payment in order was preferred more strongly. This approach has the advantage of being highly objective and easily understood by the consumer.”¹⁷⁸ The study concluded “in bold lettering that ‘we feel that the best general policy is to pay them

¹⁷¹ See *id.*

¹⁷² See *id.*

¹⁷³ See *id.* at 1085.

¹⁷⁴ See *id.*; *House Overdraft Hearings*, *supra* note 156, at 2 (statement of Rep. Maloney).

¹⁷⁵ See *Gutierrez*, 730 F. Supp. 2d at 1090.

¹⁷⁶ See *Gutierrez v. Wells Fargo Bank, N.A.*, No. C 07-05923 WHA, 2010 WL 4072240, at *4 (N.D. Cal. Oct. 18, 2010). Conducted in 1995 by Action Marketing Research (“AMR”), the survey asked 450 individuals in the Twin Cities, Phoenix, and South Dakota markets only one question: what Norwest should do if multiple checks from a customer are presented at once without sufficient funds to cover all of them. See *id.* at *3. Two-thirds of the way through the survey, blaming “inconsistencies,” AMR changed the question asked. See *id.* The numbers above reflect the supposedly inconsistent data, which were consistent with the “tidal wave of evidence,” including “internal memos, effective cross-examination of bank witnesses, and other documentary evidence” showing that “consumer preferences did not motivate Wells Fargo’s decision to post in high-to-low order.” See *id.* at *2. Under the revised question, sixty-two consumers, forty-one percent, split evenly as to whether they would prefer charges to be deducted sequentially or by amount. See *id.* at *4.

¹⁷⁷ See *Gutierrez*, 730 F. Supp. 2d at 1105; *House Overdraft Hearings*, *supra* note 156, at 29.

¹⁷⁸ *Gutierrez*, 2010 WL 4072240, at *4.

in check serial number.'"¹⁷⁹ Characterizing the results as "astounding," the court noted that "nowhere in the . . . study was anything mentioned about 'the importance that consumers placed on making sure their most important transactions did not get rejected.'"¹⁸⁰ Clearly, neither consumer demand nor concern drove the bank's decision to write abusive overdraft policies.

The CFPB could likely find that such overdraft policies are abusive under two of Section 1031's independent bases for action. First, under Section 1031(d)(1), abusive overdraft policies materially interfere with a consumer's ability to understand the conditions attached to overdraft coverage.¹⁸¹ The *Gutierrez* court noted that had the plaintiff known of the abusive overdraft policies, she would not have made the purchases that generated the overdraft fees.¹⁸² Upon learning of the overdraft charges plaguing her account, another class plaintiff chose to close her account altogether.¹⁸³ Thus, abusive overdraft policies are material since they affect a consumer's choice of, or conduct regarding, financial transactions. The overdraft policies also interfered with the plaintiffs' ability to understand the terms and conditions of their account because they could not have known which transactions would have generated overdraft fees. The CFPB could thus declare that such policies materially interfere with consumers' ability to understand the conditions attached to their checking accounts.

Second, the CFPB could almost certainly declare under Section 1031(d)(2)(A) that Wells Fargo's efforts take unreasonable advantage of a consumer's lack of understanding of the material risks, costs, and conditions of overdraft protection. In *Gutierrez*, Wells Fargo argued that each plaintiff was responsible for tracking her checking account balances by using a check register.¹⁸⁴ "Even if [Plaintiff] had meticulously maintained a chronological check register of all of her transactions," the *Gutierrez* court replied, "it could not have accurately reflected or predicted how the bank would have posted

---

¹⁷⁹ *Id.* at *6.

¹⁸⁰ *Id.* at *3-4.

¹⁸¹ See *supra* note 137 and accompanying text.

¹⁸² See *Gutierrez*, 730 F. Supp. 2d at 1090.

¹⁸³ See *id.* at 1095.

¹⁸⁴ See *id.* at 1129. ("Registers necessarily rely upon a chronological accounting of transactions and reinforce a natural expectation by a customer that transactions will subtract chronologically.").

transactions.”¹⁸⁵ By thwarting a consumer’s ability to predict the balance of his account, Wells Fargo’s overdraft policies take unreasonable advantage of a consumer’s lack of understanding of the costs of overdraft protection and could thus be declared abusive.

2. Abusive Marketing Campaigns

The Senate Committee on Banking, Housing, and Urban Affairs has expressly declared that as deployed by banks, overdraft protection itself constitutes an “abusive practice[.]”¹⁸⁶ In 2005, the Fed agreed that such overdraft policies were “abusive and misleading.”¹⁸⁷ At Congress’s urging, the Fed issued rules in November 2009¹⁸⁸ curbing the most egregious overdraft practices, most importantly by requiring consumers to opt-in to continue receiving overdraft protection.¹⁸⁹

The Fed’s opt-in requirement led to flurry of questionable marketing efforts from banks encouraging consumers to sign up for overdraft protection. The efforts uniformly characterized overdraft protection as a necessary lifesaver, something without which consumers would be set lost and adrift in a choppy and hostile marketplace. Banks also tested several messages to determine which would be most effective. One of the more innocuous messages from Chase encouraged consumers to “[w]atch your mailbox so you can say ‘Yes’ to continue Chase debit card overdraft coverage.”¹⁹⁰ A more aggressive mailing warned:

Even though most deposits are not immediately available to approve debit card transactions, we may have authorized a debit card transaction when you did not have sufficient available funds.

SOON YOU WILL NOT BE ABLE TO DO THIS ANYMORE—UNLESS WE HEAR FROM YOU.

When a deposit is not available (so you don’t have enough money to make a purchase or even pay for an unexpected

---

¹⁸⁵ *Id.* at 1091.

¹⁸⁶ See S. REP. NO. 111-176, at 19 (2010).

¹⁸⁷ See *id.*; Electronic Fund Transfers, 71 Fed. Reg. 1638 (Jan. 10, 2006).

¹⁸⁸ See Electronic Fund Transfers, 74 Fed. Reg. 59033, 59052 (Nov. 17, 2009).

¹⁸⁹ See 12 C.F.R. § 205.17(b) (2010).

¹⁹⁰ Andrew Martin & Ron Lieber, *Banks Apply Pressure To Keep Fees Rolling In*, N.Y. TIMES (Feb. 22, 2010), <http://www.nytimes.com/2010/02/23/your-money/credit-and-debit-cards/23fee.html>.

emergency like a highway tow) Chase Debit Card Overdraft Coverage^{SM} may allow your debit card transactions to be authorized at our discretion.¹⁹¹

Yet another mailing from Chase, featuring a prominent starburst graphic promising "YOU DECIDE," posed a question to consumers: "Is Chase Debit Card Overdraft Coverage . . . right for you? Our bankers can help you make an informed decision."¹⁹² Along those lines, Chase reportedly stationed bank employees near ATMs to promote overdraft protection.¹⁹³

The intent of these efforts is evidenced by the promotional materials marketing firms developed to help banks convince consumers to opt-in to overdraft protection. "Millions of dollars are at stake," one firm warned.¹⁹⁴ "The clock is ticking . . . you know that . . . so how will you get stubborn overdraft users to opt-in?"¹⁹⁵ Another firm developed what it called the "Opt-In Total Solution Planning Guide," encouraging banks to implement a multi-step process to boost retention. The guide urged banks to identify consumers prone to overdrafts who could be targeted with "specific communication and education strategies to maximize the opt-in rate . . . and retain your income."¹⁹⁶

The banks' advertisements likely fall within the CFPB's power to address abusive practices. As an initial matter the Fed, empowered by HOEPA, chose to characterize certain types of advertisements not as deceptive, but as abusive.¹⁹⁷ By suggesting

¹⁹¹ *Pitching Overdraft Coverage*, N.Y. TIMES, <http://documents.nytimes.com/pitching-overdraft-coverage#document/p1> (last visited Jan. 28, 2012).

¹⁹² Ben Popken, *Banks Luring You into Signing Back up for High Overdraft Fees*, THE CONSUMERIST (June 18, 2010, 4:38 PM), <http://consumerist.com/2010/06/banks-trying-to-get-you-to-sign-up-for-high-overdraft-fees.html>.

¹⁹³ Laura Northrup, *Chase Now Has Human ATM Greeter Who Helpfully Sells Overdraft Protection*, THE CONSUMERIST (July 14, 2010, 8:00 AM), <http://consumerist.com/2010/07/chase-installs-atm-greeter-who-sells-debit-card-overdraft-protection.html>.

¹⁹⁴ Geoff Williams, *Why Your Bank Wants You To Sign up for Overdraft Protection*, DAILYFINANCE (Aug. 18, 2010, 3:00 PM), <http://www.walletpop.com/blog/2010/08/18/why-your-bank-wants-you-to-sign-up-for-overdraft-protection>.

¹⁹⁵ *Id.* (alteration in original).

¹⁹⁶ PINNACLE FIN. STRATEGIES, PINNACLE OPT-IN TOTAL SOLUTION^{SM}: REG E AMENDMENT PHASE I: PLANNING GUIDE 26 (2010), <http://documents.nytimes.com/pitching-overdraft-coverage#document/p5>.

¹⁹⁷ See *Truth in Lending*, 73 Fed. Reg. 1672, 1714 (Jan. 9, 2008) ("Prohibiting the use of comparisons in advertisements that are based solely on low introductory 'teaser' rates or payments should address *abusive* practices in advertisements focused on debt consolidation.") (emphasis added).

that “our bankers can help you make an informed decision,” Chase exposed itself to Section 1031(d)(2)(C)’s prohibition on taking unreasonable advantage of a consumer’s reasonable reliance on the bank to act in his interests. Standards for identifying conduct that might constitute taking unreasonable advantage of a consumer’s reliance on his bank may be inferred from the Treasury Department’s Joint Guidance on Overdraft Protection Programs.¹⁹⁸ The document urges banks to adopt several best practices in discussing overdraft protection with their customers. Included among the recommendations are: (1) clearly explaining the discretionary nature of overdraft protection; (2) fairly representing alternatives; (3) clearly disclosing overdraft fees, and; (4) illustrating when multiple fees might be charged.¹⁹⁹ Drawing on its mandate to protect consumers, the CFPB could declare that failing to follow these best practices constitutes taking an unreasonable advantage of a consumer’s reliance on the bank to act in the consumer’s interests. It is unlikely that in honoring their promise to help consumers make “an informed decision,” Chase’s bankers explained the discretionary nature of overdraft fees, the cost of the fees involved, or how and when consumers might incur multiple fees. Accordingly, the CFPB could likely declare that such advertisements and practices are abusive.

The CFPB could alternatively reach Chase’s and Wells Fargo’s marketing efforts by drawing on its powers to address deceptive practices. The banks’ advertisements fit within Congress’s original conception of deception doctrine as “subtle misleading advertisements” made by those seeking to gain an economic advantage by defrauding or misleading consumers.²⁰⁰ Because Congress left deception undefined in Section 1031,²⁰¹ the CFPB could, if it so wished, honor Congress’s original intent and define deception to “cover every form of advertisement deception

---

¹⁹⁸ 70 Fed. Reg. 9127, 9131–32 (Feb. 24, 2005).

¹⁹⁹ *See id.*

²⁰⁰ *See supra* notes 50, 55 and accompanying text.

²⁰¹ *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1031, 124 Stat. 1376, 2005 (codified at 12 U.S.C. § 5531 (Supp. IV 2011)); *supra* Part II.A.

over which it would be humanly practicable to exercise governmental control."²⁰² This prerogative, however, lies with the CFPB, and the remainder of this Section will analyze the CFPB's powers to reach the bank's practices using the FTC's existing conception of deception doctrine. As mentioned, the existing doctrine requires a finding of: (1) a material (2) representation or omission that is (3) likely to mislead the consumer acting reasonably under the circumstances.²⁰³

The *Gutierrez* court itself spoke of Wells Fargo's "misleading marketing materials," characterizing the bank's customers as "deceived" under California's UDAP statute.²⁰⁴ As discussed, Wells Fargo's representations were material under the FTC's understanding of the term.²⁰⁵ Wells Fargo also made relevant representation and omissions regarding its overdraft protection. The court noted that Wells Fargo's marketing materials, including its new customer "Welcome Jacket," stated that deductions from a customer's checking account would happen "immediately" or "automatically."²⁰⁶ The bank failed to mention that it had actually instituted a practice of deducting the highest charges first.²⁰⁷ Finally, Wells Fargo's representations and omissions were likely to mislead consumers acting reasonably under the circumstances. A reasonable consumer, epitomized by the class plaintiff in *Gutierrez*, would believe that his charges were being deducted sequentially. A reasonable consumer would further believe that if he followed the bank's advice and tracked his transactions in a register, it would reflect the actual balance in his account. Thus, even if it were to interpret Section 1031 to mirror existing doctrine, the CFPB could likely declare that Wells Fargo's advertisements were deceptive.

CONCLUSION

In recent years, with devastating consequences, the consumer financial credit industry has managed to evade and undermine Congress's consumer protection laws. Armed with

---

²⁰² See *supra* note 9 and accompanying text.

²⁰³ See *supra* note 56 and accompanying text.

²⁰⁴ See *Gutierrez v. Wells Fargo Bank*, 730 F. Supp. 2d 1080, 1091 (N.D. Cal. 2010).

²⁰⁵ See *supra* note 137 and accompanying text.

²⁰⁶ See *Gutierrez*, 730 F. Supp. 2d at 1128 (internal quotation marks omitted).

²⁰⁷ See *id.* at 1129.

the expansive power to address abusive practices, the Consumer Financial Protection Bureau potentially represents the rising of a new dawn in consumer protection. Interpreted appropriately, Section 1031 stands as a remarkable grant of power to the new Bureau, one that may help finally realize Congress's longstanding goal of providing consumers with the safe and reliable marketplace they deserve.