NBA Nebraska Bankers Association

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Update COMPLIANCE

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CFPB – MITIGATING HARM FROM REPOSSESSION OF AUTOMOBILES

I. INTRODUCTION

The Consumer Financial Protection Bureau (CFPB) has issued a Compliance Bulletin regarding repossession of vehicles, and the potential for violations of Sections 1031 and 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act's (Dodd-Frank Act's) prohibition on engaging in unfair, deceptive, or abusive acts or practices when repossessing vehicles.

The CFPB has issued the Bulletin to remind market participants about certain legal obligations with regard to auto repossession practices under federal consumer financial laws. Loan holders and servicers are responsible for ensuring that their repossession – related practices, and the practices of their service providers, do not violate the law. The CFPB intends to hold loan holders and services accountable for UDAAPs related to the repossession of consumers' vehicles.

The Bulletin became applicable on March 3, 2022.

II. UNFAIR AND DECEPTIVE ACTS OR PRACTICES IN SUPERVISION AND ENFORCEMENT MATTERS

Under the Dodd-Frank Act, all covered persons or service providers are prohibited from committing unfair, deceptive, or abusive acts or practices in violation of the Act. An act or practice is unfair when (i) it causes or is likely to cause substantial injury to consumers; (ii) the injury is not reasonably avoidable by consumers; and (iii) the injury is not outweighed by countervailing benefits to consumers or to competition.

The Dodd-Frank Act prohibits two types of abusive practices. First, materially interfering with the ability of the consumer to understand a term or condition of a product or service is abusive. Second, taking unreasonable advantage of statutorily-specified market imbalances is abusive. Those market imbalances include (1) the consumer's lack of understanding of the material risks, costs or conditions of a product or service, (2) a consumer's inability to protect their interests in selecting or using a product or service, or (3) a consumer's reasonable reliance on a covered person to act in their interests.

A. Unfair or Deceptive Practices During the Repossession Process

In its Supervisory and Enforcement work, the CFPB has found the following conduct related to repossession of automobiles to be UDAAPs.

1. Wrongful Repossession of Consumers' Vehicles

Many auto servicers provide options to borrowers to avoid repossession once a loan is delinquent or in default. Failure to prevent repossession after borrowers complete one of these options, where reasonably practicable given the timing of the borrowers' action, may constitute an unfair act or practice.

The CFPB has found an entity engaged in an unfair act or practice when it wrongfully repossessed consumers' vehicles under the following circumstances:

The servicer told consumers it would not repossess vehicles when they were less than 60 days past due. Additionally, the servicer maintained a policy and told consumers that it would not repossess vehicles of consumers who had entered into an agreement to extend the loan, or who had made a promise to make a payment on a specific date and that date had not passed or who successfully kept a promise to pay. Nevertheless, the servicer wrongfully repossessed vehicles from hundreds of consumers who had:

- Made and kept promises to pay that brought the account current;
- Made payments that decreased the delinquency to less than 60 days past due;
- Made promises to pay where the date had not passed; or
- Agreed to extension agreements.

Supervision observed that violations frequently occurred, after consumers acted to prevent repossession, because of one of the following errors:

- Servicers incorrectly coded consumers as delinquent;
- Servicer representatives failed to cancel repossession orders that had previously been communicated to repossession agents; or
- Repossession agents failed to confirm that the repossession order was still active prior to repossessing a vehicle.

B. Other Practices Causing Wrongful Repossession

Supervision has also identified other practices related to repossession that resulted in unfair acts or practices. For example, the Bankruptcy Code imposes an automatic stay that bars collection activity, including repossession, from the moment a consumer has filed a bankruptcy petition. Supervision found that when servicers received notice that consumers had filed bankruptcy petitions and their accounts were subject to an automatic stay, the servicers committed an unfair act or practice by repossessing vehicles subject to such automatic bankruptcy stays.

Additionally, Supervision has identified that servicers committed an unfair act or practice by wrongfully repossessing vehicles after communicating inaccurate information. For example, Supervision has found that some servicers sent consumers letters stating that loans would not be considered past due if the consumer paid the amount due by a specific date. Consumers reasonably expected the servicers not to repossess before the date listed in the letter. When the servicers repossessed the vehicles prior to that date, they committed an unfair act or practice.

C. Representations of Amounts Owed

Supervision has also identified that servicers committed deceptive acts or practices by failing to provide consumers with accurate information about the amount required to bring their accounts current. For example, when consumers called to determine what amount would bring their accounts current, servicing personnel erroneously represented to consumers an amount due that was less than what was actually owed. As a result of this misrepresentation, consumers paid an amount insufficient to avoid delinquency and the consequences of delinquency. This later led to repossessions that would not have occurred had consumers received accurate information. This conduct was deceptive because the servicer told consumers that an amount would bring their accounts current when, in fact, that amount would not bring their account current.

III. UNFAIR OR DECEPTIVE PRACTICES THAT MAY LEAD TO REPOSSESSION

The following are examples of practices that lead to repossession of consumers' vehicles that the CFPB has considered to be UDAAPs.

A. Applying Payments in a Different Order Than Disclosed to Consumers, Resulting in Repossession

Payment application for auto loans is governed by the finance agreements between servicers and consumers. Supervision has found that entities engaged in a deceptive act or practice when they made representations to consumers that payments would be applied in a specific order, and then subsequently applied payments in a different order. For example, Supervision found that servicers represented on their websites that payments would be applied to interest, then principal, then past due payments, before being applied to other charges, such as late fees. Instead, the servicers applied partial payments to late fees first, in contravention of the methodology disclosed on the website. Because servicers applied payments to late fees first, some consumers were deemed more delinquent than they would have been under the disclosed payment allocation order, and these servicers repossessed some consumers' vehicles.

Under these circumstances, servicers' websites provided inaccurate information about payment allocation order. In some instances, the underlying contract provided the servicer the right to apply payments in any order, which did not immunize the company from liability for the deceptive website content.

B. Unlawful Fees That Push Consumers into Default and Repossession

The CFPB has found that an entity engaged in an unfair act or practice by operating its force-placed insurance (FPI) program in an unfair manner, in some instances resulting in repossession. The entity purchased duplicative or unnecessary FPI policies and, in some instances, maintained the policies even after consumers had obtained adequate insurance and provided adequate proof of coverage. This conduct caused the entity to charge consumers for unnecessary FPI, resulting in additional fees, and in some instances delinquency or loan default. For some consumers the additional costs of unnecessary FPI contributed to a default that resulted in the repossession of a consumer's vehicle. Charging unnecessary amounts to consumers and subjecting them to default and repossession caused or was likely to cause substantial injury. This injury was not reasonably avoidable and was not outweighed by countervailing benefits.

C. Unfair Practices That May Result in Illegal Fees After Repossession

The following are examples of practices that led to illegal fees after repossession of consumers' vehicles that the Bureau has considered to be UDAAPs.

1. Charging Illegal Personal Property Fees

The CFPB has identified an unfair practice concerning illegal personal property fees. Borrowers often keep personal property in the repossessed vehicles. These items often are not merely incidental but can be of substantial practical importance or emotional attachment to borrowers. State law typically requires auto loan servicers and repossession companies to secure and maintain borrowers' property so that it may be returned to the borrower upon request. Some companies charge borrowers for the cost of retaining the property.

In a public enforcement action, the CFPB found that an entity engaged in an unfair act or practice by withholding consumers' personal property unless the consumers paid an upfront fee to recover the property. Many of the repossession agents employed by the entity imposed fees on consumers for holding personal property in the repossessed vehicles. The agents often refused to return consumers' personal property unless and until the consumers paid the fees. The CFPB found that the servicer was responsible for its agents withholding consumers' personal property unless the consumer paid an upfront fee to recover it and thus caused substantial injury that was not reasonably avoidable and not outweighed by countervailing benefits to consumers or competition. Supervision has also identified this unfair act or practice at other servicers where the servicers withheld consumers' personal property unless they paid an upfront fee.

2. Charging for Collateral Protection Insurance After Repossession

Supervision found that servicers engaged in unfair acts or practices by collecting or attempting to collect force-placed collateral protection insurance (FPI) premiums after repossession even though no actual insurance protection was

provided for those periods. FPI automatically terminates on the date of repossession, and consumers should not be charged after this date. Despite this, servicers charged consumers for FPI after repossession in four different circumstances. First, servicers failed to communicate the date of repossession to the FPI service provider due to system errors. Second, servicers used an incorrect formula to calculate the FPI charges that needed to be removed due to the repossession. Third, servicers' employees entered the wrong repossession date into their system of record, resulting in improper termination dates. Fourth, servicers charged consumers—who had a vehicle repossessed and subsequently reinstated the loan—post-repossession FPI premiums, including for the days the vehicle was in the servicer's possession, despite the automatic termination of the policy on the date of repossession. These errors caused consumers substantial injury because they paid amounts they did not owe or were subject to collection attempts for amounts they did not owe. This injury was not reasonably avoidable because consumers did not control the servicers' cancellation processes. The substantial injury to consumers was not outweighed by any countervailing benefits to consumers or competition.

IV. CONCLUSION

The CFPB will continue to closely review the practices of entities repossessing automobiles for potential UDAAPs, including the practices described above. The CFPB will use all appropriate tools to hold entities accountable if they engage in UDAAPs in connection with these practices.