UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:	**ENFORCEMENT COUNSEL'S OPENING APPEAL BRIEF**
INTEGRITY ADVANCE, LLC and JAMES R. CARNES,	
Respondents.	

ENFORCEMENT COUNSEL'S OPENING APPEAL BRIEF

Pursuant to 12 C.F.R. § 1081.402(a)(2), Enforcement Counsel hereby submits its opening appeal brief in the above-captioned matter. In his summary disposition order, Administrative Law Judge Parlen L. McKenna (ALJ) found that Integrity Advance violated the Truth in Lending Act (TILA) from 2008 through 2012. *See* Summary Disp. Order [dkt. 111] at 23, 26-27. In his Recommended Decision, the ALJ found that Enforcement Counsel had proven the appropriate amount of restitution for the violations that occurred after July 21, 2011. *See* Rec. Dec. [dkt. 176] at 64-66. However, the Recommended Decision erroneously found that the Bureau may not grant restitution for Integrity Advance's TILA violations that occurred prior to July 21, 2011 (the transfer date). *Id*. At the time the Recommended Decision issued, the Bureau had its full powers, and was entitled to award any appropriate relief contemplated under 12

U.S.C. § 5565 for TILA violations. Nothing in the Consumer Financial Protection Act (CFPA) precludes the Bureau from granting relief for TILA violations that occurred before the transfer date. Further, the ALJ's concerns about retroactivity are unfounded—imposing TILA liability pursuant to the CFPA does not have an impermissible retroactive impact on Integrity Advance or unfairly sanction the company for acts that were legal when committed. Integrity Advance's loan disclosures were never permissible under TILA, and the FTC could have imposed the same relief for those violations when Integrity Advance committed them. The Recommended Decision also errs in holding that the Bureau could not properly seek restitution as relief for the CFPA violation found under Count II. Enforcement Counsel is not seeking a double recovery for Respondents' violations. However, it is axiomatic that damages for the same injury under different legal theories may give rise to a single recovery.

Enforcement Counsel respectfully requests that the Director issue a Final Decision awarding restitution both for Integrity Advance's pre-transfer date TILA violations and for the company's violation of the CFPA under Count II of the Notice of Charges.

I. Background

For more than four years, Respondents ran an online payday loan operation that misled consumers. *See* Rec. Dec. [dkt. 176] at 14. When originating loans, Integrity Advance provided consumers with disclosures ostensibly stating what the loan would cost if the consumer repaid the loan in full in a single payment. *See* Summary Disp. Order [dkt. 111] at 19. However, under the default terms of the contract, the loans were not paid off in a single payment. The confusing fine print of the loan contract contained a series of terms that caused the loans to roll over automatically. *Id*. As a result, unless

the consumer took affirmative action to change the default terms of the contract, the total cost of the loan was much higher than the amount on the disclosure. *Id*. at 23.

The Administrative Law Judge agreed with Enforcement Counsel and on summary disposition ruled that these facts constituted a violation of the Truth in Lending Act (Count I). Summary Disp. Order [dkt. 111] at 23, 26-27. As a result, Integrity Advance also violated § 1036(a)(1)(A) the CFPA (Count II). *Id*. at 27. These rulings on summary disposition were incorporated into the Administrative Law Judge's Recommended Decision. *See* Rec. Dec. [dkt. 176] at 9.

During and after the hearing, Enforcement Counsel sought restitution pursuant to 12 U.S.C. § 5565(a)(2) for each Integrity Advance loan where the company provided disclosures that violated TILA, including where the violation predated the CFPA 'transfer date,' July 21, 2011. Respondents argued that this violated retroactivity principles outlined in the Supreme Court's *Landgraf* decision. Resp. Post-Hearing Br. [Dkt. 164] at 29. In the Recommended Decision, the ALJ refused to award pre-transfer date restitution to Enforcement Counsel, stating that he did not find any authority for "retroactive relief." Rec. Dec. [dkt. 176] at 65.

During and after the hearing, Enforcement Counsel also sought restitution for Integrity Advance's violation of the CFPA (Count II), in connection with Integrity Advance's TILA violations that occurred on and after July 21, 2011 (Count I). *See* EC Post-Hearing Brief [dkt. 162] at 27. Here, the recommended decision erred in refusing to award this relief and suggesting that Enforcement Counsel was seeking a double recovery that would exceed "the company's actual gain or the consumers' actual loss." Rec. Dec. [dkt. 176] at 67.

II. Restitution for All of Integrity Advance's TILA Violations Can Be Awarded Pursuant to the CFPA

Enforcement Counsel brought this administrative proceeding under the authority of the CFPA. Notice [dkt. 001] at 1. Pursuant to the CFPA, the Bureau has broad authority, in an "adjudication proceeding brought under Federal consumer financial law,"[1] to order "*any appropriate legal or equitable relief* with respect to a violation of Federal consumer financial law." 12 U.S.C. § 5565(a)(1) (emphasis added). This relief includes restitution. *Id*. at § 5565(a)(2)(C).

Section 5565 became effective on the designated transfer date (July 21, 2011).[2] But, importantly, that effective date is the date that *the Bureau's authority* to award relief took effect. The Bureau's authority, in turn, is in no way limited to awarding relief only for violations that happened on or after that date. As long as the Bureau orders the relief after the transfer date—as would be the case here—the Bureau may do so even if the violation occurred prior to the transfer date, so long as ordering the relief will not have an impermissible retroactive effect. As demonstrated below, granting the relief requested by Enforcement Counsel will not have an impermissible retroactive effect as to Integrity Advance.

III. Retroactivity Doctrine Does Not Bar Pre-Transfer Date Restitution

Under the relevant Supreme Court and circuit case law, awarding relief under § 5565 for all of Integrity Advance's conduct does not have improper retroactive effect. The statute in no way reflects any congressional intent to limit § 5565 to authorize relief only for violations that occurred on or after that provision's effective date, and granting

[1] TILA is a Federal consumer financial law as defined in the CFPA. *See* 12 U.S.C. § 5481(12), (14).

[2] CFPA § 1058, codified at 12 U.S.C. § 5561 note.

relief under the statute for pre-transfer date TILA violations would not have retroactive effect since it would not increase Integrity Advance's liability for prior conduct. For those reasons, the statute permits the Bureau to grant restitution under § 5565 for all of Integrity Advance's TILA violations, including those that occurred prior to July 21, 2011.

A. Congress Did Not Clearly Indicate Whether the CFPA Should Be Applied Retrospectively

When considering whether to apply a current statute to conduct that pre-dates that statute, the Supreme Court has outlined a two-part test. First, a court must determine whether Congress indicated a desire that the statute be applied retrospectively. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994) ("When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach."); *see also Quantum Entm't Ltd. v. U.S.*, 714 F.3d 1338, 1342 (D.C. Cir. 2013); *Brown v. Sec'y of the Army*, 78 F.3d 645, 648 (D.C. Cir. 1996). If Congress indicated a clear position, the courts apply Congress's preference and no further inquiry is required. *See Quantum*, 714 F.3d at 1342.

Here, the statute is silent on whether § 5565 applies retrospectively or only prospectively. As seen above, the statute does specify an effective date for § 5565, but that provision by its terms addresses the Bureau's authority to award relief—and in no way suggests that that authority (which took effect on July 21, 2011) is limited to awarding relief for violations that occurred on or after that date. Indeed, Respondents have raised retroactivity concerns repeatedly in their briefing and oral presentations to the administrative law judge, but have failed to identify any statutory language evincing Congressional intent to only apply the remedies portion of the CFPA prospectively. *See*

Resp. Mot. to Dismiss [dkt. 028a]; Resp. Post-Hearing Br. [dkt. 164]; Resp. Post-Hearing Opp. Br. [dkt. 170]; Hearing Tr. II at 104-107.

B. Application of the CFPA Does Not Have Retroactive Effect

The second portion of the *Landgraf* inquiry concerns whether the statute at issue has retroactive effect. Under Part two of Landgraf's test, "the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. If a statute would have this kind of retroactive effect, there is a presumption against retroactive application. *Quantum*, 714 F.3d at 1342 ("If a statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result"). If there is no retroactive effect, however, the court should apply the law as it currently exists. *See Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711, 94 S. Ct. 2006, 2016, 40 L. Ed. 2d 476 (1974) ("a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary"); *see also, Moore v. Agency for Int'l Dev.*, 994 F.2d 874, 878-79 (D.C. Cir. 1993) (holding that the presumption that a court applies the law as it exists at the time a decision is rendered applies to remedial provisions); *Ibrahim v. D.C.*, 208 F.3d 1032 (D.C. Cir. 2000).

Here, imposing TILA liability against Integrity Advance for conduct prior to July 21, 2011 does not have retroactive effect because it does not increase the company's liability for past conduct. The Truth in Lending Act became law in 1968. Pub. L. No. 90-321, 82 Stat. 146 (1968). There is no plausible argument, and Respondents have not

made one, that Integrity Advance was not subject to TILA during the company's entire existence. In addition, Integrity Advance was subject to TILA enforcement, including being ordered to provide restitution identical to that requested here, prior to July 21, 2011. The Federal Trade Commission was empowered to obtain equitable relief, and in particular restitution, for TILA violations that occurred in the period between 2008 (when Integrity Advance's conduct at issue in this proceeding began) and July 21, 2011. 15 U.S.C. §§ 53(b), 1607(c).[3] As a result, imposing the restitution that Enforcement Counsel sought under 12 U.S.C. 5565(a)(2), would not impose new obligations on Integrity Advance with respect to past transactions or increase its liability for past conduct. Therefore, Enforcement Counsel respectfully requests that the Bureau find that ordering restitution for violations prior to the transfer date does not have an impermissible retroactive effect in this context, and order restitution for all of Integrity Advance's TILA violations.

The Recommended Decision appeared to mistake Enforcement Counsel's reference to the FTC Act as an attempt to use that agency's powers as its own. *See* Rec. Dec. [dkt. 176] at 65 ("it is clear that the CFPB may not rely on the provisions of the

[3] Pursuant to the version of TILA in effect at the time of Integrity Advance's conduct, a violation of TILA constitutes a violation of the FTC Act. 15 U.S.C. § 1607(c). Section 13(b) of the FTC Act, which also was in effect at the time in question, authorizes the FTC to seek injunctive and other equitable relief, including disgorgement and restitution, for violations of "any provision of law enforced by the [FTC]," including TILA. 15 U.S.C. § 53(b). *See also, e.g.*, *F.T.C. v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016) (holding that 15 U.S.C. § 53(b) authorizes "any ancillary relief necessary to accomplish complete justice, including restitution" (quotations omitted)); *F.T.C. v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996) (holding that section 13(b) permits court "to order a defendant to disgorge illegally obtained funds"); *F.T.C. v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571 (7th Cir. 1989) (holding that "section 13(b) [15 U.S.C. § 53(b)] grants the authority to issue other necessary equitable relief," including "[r]escission and restitution").

FTCA to justify its damages calculations"). This conclusion misconstrues Enforcement Counsel's argument. Instead, as seen above, Enforcement Counsel only seeks to apply the Bureau's authority. The references to the FTC Act only relate to the retroactivity analysis, not to the Bureau's powers.

IV. Integrity Advance Is Liable for Damages Pursuant to Count II (CFPA)

The Recommended Decision erred in asserting that restitution is not a proper remedy for Count II (CFPA), because it would amount to a double-recovery for the same post-transfer date conduct as Count I (TILA). *See* Rec. Dec. [dkt. 176] at 66-67.

To be clear, Enforcement Counsel has never sought and is not now seeking double recovery for Integrity Advance's post-transfer-date violations under Counts I and II.[4] However, it is well-settled that damages for the same injury under different legal theories may give rise to a single recovery. *See, e.g.*, *Medina v. D.C.*, 643, F.3d 323, 326-27 (D.C. Cir. 2006) ("[A] jury is not prohibited from allocating a single damages award between two distinct theories of liability."); *see also, e.g., Indu Craft, Inc. v. Bank of Baroda,* 47 F.3d 490, 497 (2d Cir. 1995) ("A jury's award is not duplicative simply because it allocates damages under two distinct causes of action."); *Dammarell v. Islamic Republic of Iran,* 404 F. Supp. 2d 261, 291–92 and n.15 (D.D.C. 2005) (where a victim has a cause of action pursuant to the tort of battery and the tort of intentional inflection of emotional distress, he or she may recover fully under either theory). Indeed, the Recommended Decision expressly found that a "reasonable approximation of the restitution due to consumers for the practices described in Count[] . . . II . . . is

[4] *See* EC Post-Hearing Brief [dkt. 162] at 28 n.9 (indicating that the restitution amount for Count II is a subset of the harm identified for Count I).

$38,164,153.31." Rec. Dec. [dkt. 176] at 80 (Conclusion of Law #6). As such, Enforcement Counsel respectfully requests that the Bureau order that Integrity Advance is liable for $38,164,153.31 in restitution for post-transfer-date conduct under Count II as well as Count I, and thus allocate a single damages award of $38,164,153.31 between the two counts for the post-transfer date violations. While such a holding would not change the total amount that Integrity Advance owes for its post-transfer date TILA (Count I) and CFPA (Count II) violations, it would effectively hold Integrity Advance accountable for this damages award under both theories of liability.

V. Conclusion

For the foregoing reasons, Enforcement Counsel respectfully requests that the Director issue a final decision: 1) awarding full restitution of $131,433,343.47 for the entirety of Integrity Advance's violations of TILA; and 2) holding Integrity Advance liable for restitution of $38,164,153.31 for Integrity Advance's post-transfer date violations of Count II.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of November 2016, I caused a copy of the foregoing Enforcement Counsel's Opening Appeal Brief to be filed by electronic transmission (e-mail) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), the U.S. Coast Guard Hearing Docket Clerk (aljdocketcenter@uscg.mil), Administrative Law Judge Parlen L. McKenna (cindy.j.melendres@uscg.mil), Heather L. MacClintock (Heather.L. MacClintock@uscg.mil), and served by email on the Respondents' counsel at the following addresses:

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