

The Banking Law Journal

Established 1889

An A.S. Pratt™ PUBLICATION

November-December 2023

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ISBN: 978-0-7698-7878-2 (print)

ISSN: 0005-5506 (Print)

Cite this publication as:

The Banking Law Journal (LexisNexis A.S. Pratt)

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POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, LexisNexis Matthew Bender, 230 Park Ave, 7th Floor, New York, NY 10169.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, A.S. Pratt & Sons, 805 Fifteenth Street, NW, Third Floor, Washington, DC 20005-2207.

Analysis and Strategic Implications of *Consumer Financial Protection Bureau v. Brown*

By Anthony E. DiResta and Diego J. Troncoso Breton*

The Consumer Financial Protection Bureau (CFPB) brought an action against 18 defendants for engaging in or substantially assisting a fraudulent debt-collection scheme. The district court imposed sanctions against the Bureau. The Bureau appealed, and the U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's sanctions order. The authors of this article discuss the decision, which serves as a reminder to counsel involved in CFPB investigations to challenge misconduct and clarifies that the CFPB does not possess any governmental agency immunity to avoid depositions and obstruct due process.

The Consumer Financial Protection Bureau (CFPB) brought an action against 18 defendants under the Consumer Financial Protection Act (CFPA) and the Fair Debt Collection Practices Act (FDCPA) for engaging in or substantially assisting a fraudulent debt-collection scheme. In *Consumer Financial Protection Bureau v. Brown*, the U.S. District Court for the Northern District of Georgia imposed sanctions against the CFPB – dismissing claims against five defendants – due to a “dramatic abuse of the discovery process [by CFPB]”¹ after being ordered to sit for depositions pursuant to Federal Rule of Civil Procedure 30(b)(6) and repeatedly violating the district court’s order. The CFPB maintained it behaved properly on appeal. The U.S. Court of Appeals for the Eleventh Circuit affirmed the district court’s sanctions order finding that CFPB clearly violated orders from the district court, derailing multiple depositions in “. . . flagrant disregard and willful disobedience of the court’s discovery orders.”²

BACKGROUND

The CFPB alleged that several individuals created limited liability companies in Georgia and New York and perpetrated a debt-collection scheme targeting millions of consumers. Thirteen of the defendants were individuals and their respective companies who allegedly directly participated in the scheme. The other five defendants – respondents in this case – were alleged to have substantially assisted the fraudulent debt-collection scheme by providing services to the individuals that were direct operators of the scheme.

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¹ *Consumer Financial Protection Bureau v. Brown*, No. 21-14468 (11th Cir. June 12, 2023).

² *Id.*

Global Connect LLC allegedly provided the telephone broadcast services used to “broadcast millions of threatening and false statements to consumers.”³ Global Payments Inc., Pathfinder Payment Solutions Inc., Frontline Processing Corp. and Electronic Merchant Systems allegedly provided the processing services used to withdraw funds from consumer accounts. CFPB alleged that these five entities knew or should have known their platforms were advancing unlawful conduct.

The CFPB was served deposition notices pursuant to Federal Rule of Civil Procedure 30(b)(6) at discovery.⁴ The CFPB objected to the deposition notices stating, “(1) it had ‘already . . . provided [the information] to [d]efendants . . . in responses to written interrogatories,’ and ‘(2) [d]efendants inquire[d] into topics within the law enforcement and deliberate process privilege,’ and (3) ‘the depositions [were] an improper attempt to question [CFPB] counsel as to counsel’s mental impressions and analyses.’”⁵ The district court overruled the objections finding that Rule 30(b)(6) applies equally to government agencies and factual matters were subject to inquiry. After the CFPB moved for protective orders to reduce the scope of questioning (relying on the same arguments), the district court granted in part and denied in part the CFPB’s motions, finding that factual questions – including those regarding exculpatory facts – were allowed as opposed to questions about trial strategy.

During the first deposition, the CFPB made more than 70 work-product objections – including objections to fact-based questions that the district court had explicitly ordered it to answer – and instructed its witness “not to answer.”⁶ The CFPB objected to the question, “[a]re you aware of any facts that Global Payments knew that the debt collector defendants were collecting phantom debt?”⁷ Additionally, the CFPB stated that it had not identified any exculpatory facts in the record. Deposing counsel asked the CFPB witness, “[I]n the 300 hours that you spent preparing for [the deposition], you didn’t identify a single fact that was exculpatory as to Global Payments?”⁸ To which the witness answered, “That’s correct.”

³ Id.

⁴ Id. “[T]he service-providing entities sought to use 30(b)(6) depositions to uncover the factual bases for the CFPB’s claims against them.”

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Id.

The CFPB gave its witness “memory aids.”⁹ The witnesses read verbatim for extended periods of time. One witness read from a memory aid for 58 minutes. Defendants had expressed concern with the CFPB’s strategic and evasive behavior, prompting the district court to conduct a telephone hearing with the parties where the district court reemphasized the guidelines of its previous order.

Despite being reminded of the district court’s orders, the CFPB continued to object on work-product grounds, and its witness continued to only use memory aids, not answering fact-based, yes-or-no and follow-up questions. During a subsequent deposition, when the CFPB witness continued to read directly from memory aids, “[deposing] counsel resorted to incorporating into the record the portions that the witness would have otherwise read aloud.”¹⁰ More than 50 pages were incorporated into the record during this particular deposition.¹¹

Because of the CFPB’s continued obstructions during the following four depositions, the district court granted the defendants’ motion for sanctions pursuant to Federal Rule of Civil Procedure 37(b) and 37(d), requesting that the district court dismiss the CFPB’s claims against the five defendants. The district court found that the CFPB “put up as much opposition as possible at every turn[.]”¹² The district court found that the CFPB demonstrated willful disregard of the court’s instructions allowing for sanctions under Rule 37(b) and that the CFPB witness, even though he was present, “failed to appear” under Rule 37(d). The district court struck all claims against the five service-providing defendants and dismissed them from the case.

ISSUE

Whether the Northern District of Georgia abused its discretion when it dismissed the CFPB’s claims against five defendants based on CFPB’s conduct during Federal Rule of Civil Procedure 30(b)(6) depositions.

HOLDING

The Eleventh Circuit affirmed the district court’s sanctions order dismissing the CFPB’s claims against the five respondents finding that the district court did not abuse its discretion.¹³

REASONING

- The CFPB repeatedly disobeyed the district court’s instructions and

⁹ *Id.* “Memory aids” were lawyer-prepared scripts hundreds of pages in length.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

orders regarding Federal Rule of Civil Procedure 30(b)(6) depositions.

- District judges have broad discretion to fashion appropriate sanctions for a violation of discovery orders.¹⁴
- “[T]he district court’s instructions and orders were clear . . . the CFPB did not misunderstand – it disagreed.”¹⁵
- The district court repeatedly emphasized that factual matters were subject to inquiry and the CFPB refused to respond properly to these inquiries.
- Continued refusal to adhere to the district court’s order undermines the very purpose of Federal Rule of Civil Procedure 30(b)(6) depositions.
- “The CFPB does not have the power to decide which discovery rules it will abide by and which it will ignore.”¹⁶
- The CFPB continued to use work-product objections to fact-based questions even after the district court had reemphasized its orders to answer these questions.
- The CFPB continued to take the “incredible position”¹⁷ that exculpatory facts did not exist as to any defendant in the case.
- “[T]he district court retains the discretion to dismiss a complaint where the party’s conduct amounts to flagrant disregard and willful disobedience of the court’s discovery orders.”¹⁸
- The district court dismissed the claims against respondents only after determining that reopening the depositions would not be fruitful – the Eleventh Circuit agreed and found no abuse of discretion.
- “[The Court] believe[s] the record . . . speaks for itself in refuting [the contention that dismissal was improper because the CFPB claimed defendants were not prejudiced by its conduct].”¹⁹

¹⁴ *Malautea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536, 1542 (11th Cir. 1993).

¹⁵ *Consumer Financial Protection Bureau v. Brown*, No. 21-14468 (11th Cir. 2023).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* (quoting *Hashemi v. Campaigner Publ’ns Inc.*, 737 F.2d 1538, 1539 (11th Cir. 1984)).

¹⁹ *Id.*

STRATEGIC IMPLICATIONS

Here, the CFPB's elusive and "filibuster-style"²⁰ behavior was appropriately sanctioned by the district court and further reprimanded by the Eleventh Circuit through its holding. The CFPB was informed of the effects of its problematic behavior and, when given an opportunity to correct its course, continued to display evasive and strategic tactics in opposition of the district court's order.

Even governmental agencies must remember that the Federal Rules of Civil Procedure are an integral part of the legal system and adherence to them is fundamental to the guarantee of procedural due process rights. This decision serves as a reminder to counsel involved in CFPB investigations to challenge misconduct and clarifies that the CFPB does not possess any governmental agency immunity to avoid depositions and obstruct due process.

²⁰ Id.