

CFPB's first jury trial to test agency overreach

By **Kate Berry**

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The Consumer Financial Protection Bureau is set to face its first jury trial in April in what is shaping up to be a critical test of the agency's authority.

The CFPB [sued Nationwide Biweekly Administration](#), in Xenia, Ohio, and its founder Daniel Lipsky in 2015 for allegedly making misleading claims about a program to help consumers pay off their mortgage faster and reduce interest payments. But Nationwide has countered that the CFPB used tactics that resemble Operation Choke Point, a 2013 Justice Department initiative that critics say was overzealous and captured legitimate businesses in addition to shady ones.

The case marks the first time in the CFPB's six-year history that it is a plaintiff in a jury trial. But it also raises questions about how the bureau enforces rules barring unfair, deceptive and abusive acts or practices, known as UDAAP. Critics of the CFPB are likely to seize on the case as an example of the bureau being a "rogue agency," [a term repeatedly used](#) by House Financial Services Committee Chairman Jeb Hensarling, R-Texas.



The CFPB went "out of its way" to name Nationwide Biweekly Administration's bank partners, forcing them to sever ties, according to a lawyer for Daniel Lipsky, the firm's founder.

The company argues that the CFPB's actions led to its downfall. According to Sean Ponist, Lipsky's attorney, the CFPB named Nationwide's four bank partners — Bank of America, BMO Harris, TD Bank and U.S. Bank — in court filings. After being named, the four banks told Nationwide that it could no longer request new ACH debits for its 135,000 customers, effectively forcing the company to suspend its operations, Ponist said.

"The CFPB went out of its way to name each of [Nationwide's] banking partners and shortly after that is when the bottom fell out for the company and the banks terminated their relationships," Ponist said.

Lipsky said he was forced to lay off 140 employees and shut down a company he founded 2002 that grew to be the largest biweekly mortgage payment administrator, arguably a niche market. [He has denied allegations](#) that Nationwide misled consumers about the cost of its Interest Minimizer mortgage program. He also denies that the company misrepresented the amount of interest consumers could save by making biweekly, rather than monthly, mortgage payments.

At issue is whether the CFPB overstepped a line by involving Nationwide's bank partners rather than just focusing on the company itself. The Justice Department was similarly accused

pornographers and others.

The CFPB [first issued guidance in 2012](#) on its expectations that supervised banks and nonbanks manage the risks of service providers, which may be unfamiliar with the law or may have weak internal controls that can harm consumers.

The CFPB declined to comment, citing ongoing litigation.

In a six-page order on Feb. 6, District Court Judge Robert Seeborg allowed the case to proceed to trial, citing Nationwide's "allegations of an 'extrajudicial' effort by the CFPB to interfere with the defendant's banking relationships." The judge also refused the CFPB's request to extend the trial date, now set for April 24.

But the judge also provided a caveat, stating in the order, "At this point, the direct evidence tying the CFPB to any actionable wrongs remains thin."

The CFPB alleged that Nationwide falsely promised immediate savings to consumers who enrolled in its automated biweekly mortgage program.

The company charged customers a \$995 setup fee and a \$3.50 biweekly processing fee. By making biweekly mortgage payments, the consumer is making 26 payments a year, or one extra annual payment, something any consumer could do on his own to accelerate paying off a loan. The CFPB also alleged that Nationwide misled customers about the cost of the program, that it claimed consumers could achieve savings without paying more and that it was affiliated with mortgage lenders or servicers.

The company has laid out [an extensive defense on its website](#). It claims that 1,000 customers who had been in the program for more than 10 years saved \$34.5 million in interest over the life of their loans. Lipsky said he has saved his customers a total of \$3 billion in interest charges since 2003.

company's bank partners.

Ponist said he hoped to put the bureau's Choke Point tactics on trial, and prove that the CFPB failed to provide Nationwide with the opportunity to respond to the allegations before it filed its lawsuit.

"Our position is that it's not fair, it's just not right that the federal government came up with a way to pressure businesses that they do not like, for their own reasons, by putting pressure on their banking partners," Ponist said. "Rather than giving companies their day in court, what they do instead is threaten [their bank partners] with subpoenas, an investigation, an audit, if they don't comply."

A further wrinkle in the case is that Nationwide was the subject of an enforcement action in 2008 when Richard Cordray, the CFPB's director, was attorney general of Ohio. The company worked with the Ohio attorney general's office for two years to negotiate a settlement and made small changes to its marketing letters and sales scripts as a result.

The company was regulated by 40 states and claimed in court filings that it "had absolutely no reason to believe that its marketing materials violated any deception or unfairness standards and, indeed, received assurances to the contrary."

Still, many nonbank financial firms run into trouble by thinking a passing grade by state regulators shields them from a CFPB action.

"One of the mistakes people and companies make is that if they're in compliance with state law they think that somehow protects them from federal UDAAP claims and it does not," said Lucy Morris, a partner at Hudson Cook and a former deputy enforcement director at the CFPB. "Compliance with state law is not an absolute defense to a federal UDAAP violation."

The case still could be settled. The CFPB is seeking compensation for harmed consumers, a civil penalty and an injunction against the company and Lipsky.

and unit of Western Union. Paymap agreed to return \$33.4 million in fees to 125,000 customers who had enrolled in its Equity Accelerator program, and paid a \$5 million penalty.

There are other companies that offer similar services to help consumers pay down their home loan. The goal is to hack away at the interest and principal on a loan, though making just one extra payment a year can only go so far.

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Separately, Nationwide is contesting allegations by California's Department of Business Oversight that it charged consumers excessive fees and operated without a license. Nationwide got a license in 2004 by the California Bureau of Real Estate and claims it disclosed its fees, said a company attorney, Barbara Jacobson.

"The California Department of Business Oversight came along years later and claims that a different license applied," Jacobson said. "This really leaves Nationwide in the middle between two state agencies."

A separate jury trial for the California case is scheduled for June 23.

Kate Berry

Kate Berry covers the Consumer Financial Protection Bureau for American Banker.



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By Ian McKendry

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WASHINGTON — Sen. Pat Toomey, R-Pa., on Friday sent letters to the Government Accountability Office asking for a ruling on whether two instances of bank regulatory guidance each constitutes a rule for the purposes of the Congressional Review Act.

The Congressional Review Act allows Congress to reject rules finalized within the prior 60 legislative days. In the early days of the Trump administration, Republicans in Congress have already used the statute to roll back certain regulations, including environmental rules. It takes only a simple majority of lawmakers to vote to reverse a rule.

Although the legislative clock for Congress to roll back any banking rules finalized at the end of last year has almost run out, Toomey has sought to include regulatory guidance among the policies Congress can target. In a speech Thursday, Toomey said the congressional review statute "is very clear" that it can also be used for guidance and letters issued by the independent regulators.



Sen. Pat Toomey, R-Pa., asked the Government Accountability Office to determine whether two pieces of regulatory guidance from 2013 amounted to rules that would fall under the Congressional Review Act.

Bloomberg News

Toomey asked the GAO to rule on two pieces of guidance from 2013 — the Consumer Financial Protection Bureau's indirect auto lending bulletin and the prudential bank regulators' guidance on leveraged lending. A determination that they are rules for the purposes of the statute could mean the regulators have to resubmit the policies to Congress for review, resetting the 60-day clock.

In both the case of the CFPB bulletin and the regulators' guidelines on leveraged lending, Toomey said, "the Guidance appears to be generally applicable and prescribes detailed policy."

"For these reasons, I respectfully request that you evaluate whether or not the Guidance is a 'rule' under the CRA," he wrote in the letters.

reversing agency policies.

"If he gets a GAO opinion, then that is pretty helpful to him in arguing that the agency shouldn't enforce it until it is sent up to Congress and it should have been sent up and he thinks there is a good chance that when it is sent up, he and his colleagues can get the necessary bare majority in each house to kill it," Gaziano said.

Ian McKendry

Ian McKendry is the Congress reporter for American Banker.



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