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Insights

CFPB GUIDANCE ON PAY-TO-PAY FEES IMPACTS CONSUMER LOAN AGREEMENTS

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SUMMARY

Consumer debt collectors may not be permitted to charge consumers "convenience fees" for card payments, which the Consumer Financial Protection Board (the "CFPB") calls "pay-to-pay" fees, unless the underlying loan agreement expressly provides that such fees may be charged. Such language may also lessen exposure to UDAAP enforcement.

Consumer lenders may want to review their loan agreements as a result of a recent Advisory Opinion[1] issued by the CFPB and determine whether additional language would enhance the ability of debt collectors to charge convenience fees for card payments. Debt collectors may want to determine whether the existing loan agreements they are seeking to enforce are sufficiently worded to support charging convenience fees to consumer debtors from whom they collecting payments on defaulted loans.

CFPB guidance regarding the Fair Debt Collection Practices Act.

The Advisory Opinion casts doubt over the ability of debt collectors to charge convenience fees when debtors make payments by debit or credit cards when such convenience fees are not expressly called out in the loan agreement from which the debt arises. Interpreting the Fair Debt Collection Practices Act[1] (the "FDCPA"), the CFPB's Advisory Opinion states that, if not expressly authorized in the loan agreement, convenience fees may not be collected on payments covered by the FDCPA unless a law affirmatively provides that convenience fees are permitted. Specifically, the CFPB clarifies its position that the mere absence of a legal prohibition is not sufficient to meet the FDCPA's statutory requirement that such a fee be "permitted by law."[2] This restriction on collection fees is expressed in Section 808(1) of the FDCPA[3], and implemented by Section 1006.22(b) of Regulation F, which generally regulates Debt Collection Practices.[4]

Scope of application of FDCPA

The Advisory Opinion would apply to collection of debts that are within the coverage of the FDCPA. Coverage is determined by application of the statutory definitions of terms used in the FDCPA's substantive provisions. Section 808 of the FDCPA provides that:

- A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: …
- (1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law. …[5]

"Debt" is defined as "any obligation …of a consumer … arising out of a transaction … primarily for personal, family, of household purposes … ."[6]

The definition of "debt collector" limits coverage of the FDCPA to third parties who collect debts owed to others, but provides that it applies also to a creditor who collects debts owed to itself using a name other than the creditor's name :

> *Debt collector means any person who uses any instrumentality of interstate commerce or mail in any business the principal purpose of which is the collection of debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due, or asserted to be owed or due, to another. Notwithstanding paragraph (i)(2)(vi) of this section, the term debt collector includes any creditor that, in the process of collecting its own debts, uses any name other than its own that would indicate that a third person is collecting or attempting to collect such debts.* [7]

Therefore a party collecting its own debt under a different name would be included within the prohibition of the FDCPA whereas a third party debt collector collecting the same debt would not be covered if the debt was not in default at the time the debt collector obtained it.

Exceptions

Some complex exceptions to the definition of "debt collector" may apply, which would exempt the debt collection activity from this restriction on convenience fees.

One group of exemptions would apply unless the creditor is collecting the debt owed to it under another name, as discussed above. Otherwise, third parties are not covered if the debt collection activity:

- Is incidental to a fiduciary obligation or escrow arrangement;
- Concerns a debt originated by the entity collecting it;

- Concerns a debt not in default when it was obtained by the collector;
- Concerns a debt acquired by the collector as a secured party in a commercial transaction involving the creditor; or
- Is performed by a private entity pursuant to a bad check enforcement program that otherwise complies with the FDCPA.[8]

Another group of exclusions from the definition of "debt collector" would apply to all debt collection activity, including activity by a creditor collecting its own debt under a different name. For example, most relevantly, an entity is not within the definition of "debt collector" if the entity collecting the debt is "related by common ownership" or "affiliated by corporate control" so long as the collection activity concerns debts owed to the related entity and the related creditor is not principally a debt collector.[9] Another example excludes a non-profit organization performing consumer credit counselling services.[10] The FDCPA states additional exemptions as well.

Enforcement

In addition to administrative enforcement,[11] the FDCPA provides for private rights of action against debt collectors, and permits debtors to recover actual damages, statutory damages, and attorneys' fees and costs for violations of its terms.[12] The statute limits damages to $1,000 per individual plaintiff. The statute expressly authorizes class actions, limiting damages to the amounts awarded to each named plaintiff plus up to $500,000 for the unnamed class participants, plus costs of suit and reasonable attorney's fees.[13] However, the statute provides a defence, which may be relevant here, particular in relation to loan agreements drafted prior to publication of the Advisory Opinion. The FDCPA provides a defence if the debt collector can show that the violation was unintentional:

> *"A Debt Collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."* [14]

The debt collector might argue that they reasonably relied on common practice to charge fees unless fees are expressly prohibited by law, whereas the Advisory Opinion reverses that assumption.

Lenders might be concerned about exposure to claims, including class actions, under the FDCPA pursuant to the "false name" exception to the limitation of the act to third party debt collectors. As noted above, the statute's definitions apply liability to a lender who uses another name to collect its debts.[15] Also, creditors may be exposed to claims pursuant to a theory of vicarious liability for a debt collector's violations of the FDCPA, depending on the extent to which the factual basis for such liability can be shown in a particular fact situation. However a persistent line of cases has held that

the statutory language of the FDCPA prevents imposing vicarious liability on lenders for violations committed solely by a debt collector unless one of the exceptions to the coverage provision is evident.[16] In addition to judicially imposed "vicarious" liability, a lender's exposure might arise contractually from its agreements with debt collectors. Such liability might arise, for example, through indemnity provisions for damages arising from violations of representations and warranties, if representations and warranties regarding legal compliance are drafted broadly enough to be construed to apply to the omission of specific authorization of convenience fees. It is noteworthy, however, that a consumer loan agreement would not necessarily violate applicable laws because it does not enable the debt collector to collect convenience fees. There may be other contractual clauses in the lender's agreement with the debt collector that contemplate that convenience fees would be collected. Each such case would turn on its particular facts and terms of the agreement.

Since a creditor may not always know when entering into a consumer loan agreement how the loan in default would be collected, and given the highly complex analysis required to determine whether an entity is covered by the FDCPA, creditors may choose to include language authorizing collection of convenience fees in all of its consumer loan agreements. However, inclusion of such language may not be sufficient to enable the collection of convenience fees. Because of other restrictions that may apply, as discussed below, the credit agreement language authorizing convenience fees should be permissive rather than mandatory, to permit debt collectors to comply with other applicable restrictions.

Other Restrictions on "Pay-to-Pay" Fees

While inclusion of contract wording providing the authority for charging convenience fees would avoid the fees being prohibited by the Fair Debt Collection Practices Act, such wording would not necessarily suffice to enable the collection of such fees in the collection process. Convenience fees may be limited by state laws or by payment network rules. "Pay-to-pay" fees covered by the FDCPA may be called surcharges under state laws and may be regulated as either surcharges or convenience fees under payment network rules.

Regarding state laws, the FDCPA provides that state laws are not pre-empted except to the extent that that they are inconsistent with the FDCPA and provides further that state law is not inconsistent if it affords a consumer greater protection.[17] For example, several states have legislation prohibiting or restricting surcharges on credit cards, although most of those prohibitive laws have been judicially invalidated on U.S. Constitution First Amendment grounds.

Payment network rules limit collection of convenience fees with respect to transactions on cards using their respective brands. For example, Visa rules regulate surcharges and convenience fees by restricting the circumstances in which such fees may be charged, limiting the amounts of such fees

and prescribing the timing and content of disclosures that must be given to cardholders when such fees are charged.[18] The MasterCard Rules impose similar restrictions and requirements.[19]

Potential for UDAAP Enforcement

Furthermore, the Advisory Opinion gives added importance to the inclusion of express permissive language in consumer loan agreements. Without such language, collection of convenience fees may constitute an Unfair, Deceptive or Abusive Act or Practice ("UDAAP") under the Dodd Frank Act.[20] The CFPB has long specifically included in its list of practices that could constitute UDAAPs "[c]ollecting … additional amounts … not expressly authorized by the agreement creating the debt or permitted by law."[21] The prohibition on collection of convenience fees that is the subject of the Advisory Opinion appears in Section 1692f of the FDCPA, which is entitled "Unfair practices" and states that a debt collector "may not use unfair or unconscionable means to collect …" any debt.[22] Inclusion of the prohibition of convenience fees in this list of "unfair and unconscionable means" suggests that the collection of fees might be subject to enforcement under the CFPB's UDAAP authority unless the express permissive language is included in the debt agreement (or is affirmatively permitted by law).[23] Pursuant to the Advisory Opinion, creditors and debt collectors who previously have relied on the "permitted by law" exception to the FDCPA prohibition to collect convenience fees that are not expressly authorized by the underlying loan agreement may be exposed to UDAAP enforcement as well as exposure for violation of the FDCPA.

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[1] Debt collection Practices (Regulation F), Advisory Opinion, June 29, 2022, 87 FR 39733-35 (eff. July 5, 2022). https://www.federalregister.gov/documents/2022/07/05/2022-14230/debt-collection-practices-regulation-f-pay-to-pay-fees

[1] 15 U.S.C. §1692 et seq. (Pub. L. 90–321, title VIII, § 808, as added Pub. L. 95–109, Sept. 20, 1977, 91 Stat. 879.)

[2] 87 FR 39734.

[3] 15 U.S.C. §1692f.

[4] 12 CFR §1006.22(b).

[5] 15 U.S.C. §1692f(1); See 12 CFR §1006.2(b)

[6] 15 U.S.C. §1692a(5); 12 CFR §1006.2(h)

[7] 15 U.S.C. §1692a(6); 12 CFR §1006.2(i)(1).

[8] 12 U.S.C. §1692a(6)(F); 12 CFR §1006.2(i)(2)(vi)

[9] 15 U.S.C §1692a(6)(B); 12 CFR §1006.2(i)(2)(ii).

[10] 15 U.S.C. §1692a(6)(E); 12 CFR §1006.2(i)(2)(v).

[11] 15 U.S.C. § 1692l

[12] 15 U.S.C. § 1692k(a).

[13] 15 U.S.C. § 1692k(b)(2).

[14] U.S. Code, 15 U.S.C. § 1692k(c).

[15] *See Vincent v. The Money Store*, 736 F.3d 88, 91 (2d Cir. 2013) Where a creditor, in the process of collecting its own debts, hires a third party for the express purpose of representing to its debtors that the third party is collecting the creditor's debts, and the third party engages in no *bona fide* efforts to collect those debts, the false name exception exposes the creditor to FDCPA liability.

[16] *See Wadlington, et al. v. Credit Acceptance Corp. et al.,* 76 F 3d. 103,108 "We do not think it would accord with the intent of Congress, as manifested in the terms of the Act, for a company that is not a debt collector to be held vicariously liable for a collection suit filing that violates the Act *only* because the filing attorney is a 'debt collector.'" (emphasis added). See also

[17] 15 U.S.C. §1692n; 12 CFR §1006.104.; See *LeBlanc v. Unifund CCR Partners*, No. 08-16031, 2010 WL 1200691 (11th Cir. Mar. 30, 2010).

[18] §5.5 *Visa Product and Service Rules*, pp. 351-366 (23 April 2022)

[19] §5.12.2 *Mastercard Rules*, p. 114; §5.12.2 "Additional U.S. Region and U.S. Territory Rules", *Mastercard Rules* pp. 323-329 (7 June 2022)

[20] P. L. 111-203, Title X, Sec. 1031, July 21, 2010, 124 Stat.2005; 12 U.S.C. 5531

[21] "Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts" CFPB Bulletin 2013-07 (July 10, 2013, p.5. https://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf

[22] 15 U.S.C. §1692f(1)

[23] See 12 U.S.C. §5531(c)(2). See also "Phone Pay Fees" CFPB Compliance Bulletin 2017-01(July 31, 2017) describing fee disclosure failures that may constitute unfair or deceptive practices. https://files.consumerfinance.gov/f/documents/201707_cfpb_compliance-bulletin-phone-pay-fee.pdf

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