



## ***The Consumer Financial Protection Bureau Issues a Compliance Bulletin on Pay-by-Phone “Convenience” Fees***

By Scott J. Hyman<sup>i</sup> and Erik Kemp<sup>ii</sup>

On July 25, 2017, the Consumer Financial Protection Bureau issued a compliance bulletin warning companies about tricking consumers into paying expensive pay-by-phone fees. Importantly, the CFPB bulletin does not “mandate any particular way to inform consumers about pay-by-phone options and fees.”<sup>1</sup> The CFPB noted that its UDAAP authority empowered it to regulate misrepresentations or tricks designed to “substantially harm consumers, who are pushed into materially higher-cost options.”<sup>2</sup> The CFPB also noted that it was not prohibiting charging of convenience fees, either. Instead, the CFPB advised that permissibility of charging convenience fees would be a function of federal law, state law, and the instruments creating the financial obligation.

### ***I. The Backdrop***

#### ***A. Omissions and Misrepresentations***

Entities provide various payment options to consumers, including pay-by-phone options that may be available through a live-person or through automated means. Other options include phone payments by means of credit card, debit card, electronic check, or other options to have the payment expedited. Some entities use third party vendors to handle and process payments.

The CFPB noted that state and federal law may restrict fees related to phone payments.<sup>3</sup> The impetus for the CFPB’s Bulletin, however, was instances of failing to disclose all available phone pay fees when different phone pay options carried materially different fees, misrepresenting the available payment options or that a fee is required to pay by phone, failing to disclose that a fee would be added to the consumer’s payment, and lack of employee or vendor supervision to prevent omissions or misrepresentations. The CFPB found evidence of such

---

<sup>1</sup> Bulletin, at pp. 7.

<sup>2</sup> Bulletin, at pp. 3.

<sup>3</sup> Bulletin, at pp. 2, fn. 1(citing Credit CARD Act’s prohibition against imposing a separate fee to allow consumers to make a payment by any method unless the payment method involves an expedited service by a service representative of the creditor).

omissions and commissions through its supervision activities as well as in various public enforcement activities.

## **B. Fair Debt Collection Practices Act Issues**

The CFPB noted that under the FDCPA, a person defined as a “debt collector” is prohibited from charging fees, including phone pay fees, in certain instances. The FDCPA contains a provision prohibiting “[t]he 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.**” 15 U.S.C. § 1692f(1) (emphasis added). Accordingly, the propriety of charging convenience fees turns not only on the language of the instrument creating the obligation itself but also on a hodgepodge of 50 states’ laws and states’ regulators’ opinions.

## **II. Our Take**

### **A. Regulatory and Litigation History**

The CFPB’s Compliance Bulletin should come as little surprise, as it has filed enforcement actions against entities under both its UDAAP authority<sup>4</sup> and under the FDCPA<sup>5</sup> arising out of the charging of convenience fees. Moreover, the propriety of charging convenience fees is no stranger to challenges under the FDCPA. A seminal Second Circuit case distilled three rules from section 1692(f)(1):

If state law expressly permits service charges, a service charge may be imposed even if the contract is silent on the matter;

If state law expressly prohibits service charges, a service charge cannot be imposed even if the contract allows it;

If state law neither affirmatively permits nor expressly prohibits service charges, a service charge can be imposed only if the customer expressly agrees to it in the contract.

*Tuttle v. Equifax Check*, 190 F.3d 9, 13 (2d Cir. 1999).<sup>6</sup>

---

<sup>4</sup> *In re Citibank, N.A. et al.*, No. 2015-CFPB-0015 (July 21, 2015); *FTC and CFPB v Green Tree Servicing, LLC*, No. 15-cv-02064 (April 23, 2015).

<sup>5</sup> Bulletin, at pp. 7, fn. 12 (citing Supervisory Highlights, Fall 2015 edition at pp. 20-21.).

<sup>6</sup> See also Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed.Reg. 50,097, 50,108 (FTC 1988) (“A debt collector may attempt to collect a fee or charge in addition to the debt if either (a) the charge is expressly provided for in the contract creating the debt and the charge is not prohibited by state law, or (B) the contract is silent but the charge is otherwise expressly permitted by state law. Conversely, a debt collector may not collect an additional (footnote continued)

Applying these rules, several cases have concluded that convenience fees for optional payment methods can be prohibited by § 1692f(1)—and a debt collector that charges those fees also violates 1692e(2) which prohibits false representations regarding the amount of a debt.<sup>7</sup> For example, in *Quinteros v. MBI Assocs., Inc.*, 999 F. Supp. 2d 434, 438-39 (E.D. N.Y. 2014), the court held the debt collector violated the FDCPA by charging a \$5 processing fee for all credit-card and check-over-the-phone payments. The *Quinteros* decision pointed out that § 1692f(1) prohibits “any” amount incidental to the principal obligation unless authorized by the agreement creating the debt or applicable state law. “Any” is sweepingly broad, encompassing payment processing fees. The *Quinteros* decision also rejected the debt collector’s arguments that the fee was not abusive or the type of fee mentioned in the FDCPA’s legislative history and that the fee was simply a cost that the debtor could elect to pay for the convenience and speed of an expedited payment method.

### ***B. Going Forward***

At least one older decision has held charging a convenience fee does not violate the FDCPA where the fee is optional and the creditor discloses it as such,<sup>8</sup> and a few older decisions have held § 1692f(1) was not violated when the convenience fee was both optional *and* also paid solely to a third party service provider, not the debt collector.<sup>9</sup> Another recent decision held a convenience fee paid to a third party was not incidental to the principal obligation and thus not subject to § 1692f(1)’s prohibition.<sup>10</sup> The FTC (which shares FDCPA enforcement responsibilities with the CFPB) has also given at least some indication in prior enforcement actions that it believes that fully disclosed fees for optional payment methods may not violate § 1692f(1).<sup>11</sup>

---

amount if either (A) state law expressly prohibits collection of the amount or (B) the contract does not provide for collection of the amount and state law is silent”).

<sup>7</sup> *Johnson-Morris v. Santander Consumer USA, Inc.*, 194 F.Supp.3d 757, 765 (N.D.Ill., 2016) (“Nor is Santander’s position strengthened by its repeated insistence that such fees are not “involuntary” and were instead “elected,” because the payment methods that generate such fees are not “the only payment means available”); *see also Lindblom v. Santander Consumer USA, Inc.*, 2016 WL 2841495, at \*6–7 (E.D. Cal. May 9, 2016); *Campbell v. MBI Associates, Inc.*, 98 F. Supp. 3d 568, 579–80 (E.D.N.Y. 2015); *Acosta v. Credit Bureau of Napa Cty.*, No. 14 C 8198, 2015 WL 1943244, at \*2–4 (N.D. Ill. Apr. 29, 2015); *Shami v. Nat’l Enter. Sys.*, No. 09-CV-722 RRM VVP, 2010 WL 3824151, at \*3–4 (E.D.N.Y. Sept. 23, 2010).

<sup>8</sup> *Mann v. Nat’l Ass’n Mgmt. Enters., Inc.*, 2005 U.S. Dist. LEXIS 49552, No. 04–1304 (C.D.Ill. Feb. 23, 2005).

<sup>9</sup> *Lewis v. ACB Bus. Servs., Inc.*, 911 F. Supp. 290 (S.D. Ohio 1996); *Lee v. Main Accounts, Inc.*, 125 F.3d 855 (6th Cir. 1997) (unpublished).

<sup>10</sup> *Flores v. Collection Consultants of California*, No. SACV140771DOCRNBX, 2015 WL 4254032, at \*10 (C.D. Cal. Mar. 20, 2015).

<sup>11</sup> In its Feb. 21, 2014 letter to the CFPB reporting on its FDCPA enforcement activities for the previous fiscal year, the FTC reported that its complaint in *FTC v. Security Credit Servs.*, (footnote continued)

But, the majority of recent cases have held that the charging of convenience fees violates the FDCPA unless the fees are expressly authorized by contract or state law or are mere pass-through charges. The CFPB's Bulletin appears to adopt the reasoning of these cases, noting that its supervisory activity has revealed that "one or more mortgage servicers that met the definition of debt collector under the FDCPA violated the Act ..." by charging fees for telephonic payments that were not expressly permitted by contract or state law.<sup>12</sup> Not only has the charging of convenience fees been widely criticized in the media in recent years,<sup>13</sup> but one survey noted that 79% of debt collection agencies responding to a survey did not charge convenience fees because of "confusing state laws" and "their company just didn't have the appetite for that kind of compliance risk."<sup>14</sup>

Therefore, we expect that the charging of convenience fees will continue to be subject to increased scrutiny from state and federal regulators as well as from the consumer bar. We think that the CFPB's guidance and enforcement positions should be well-heeded, lest compliance counsel commit "compliance malpractice".<sup>15</sup> Specifically, the CFPB's Bulletin warns that entities should

- Review applicable State and Federal laws, including the FDCPA, to confirm whether entities are permitted to charge phone pay fees.
- Review underlying debt agreements to determine whether such fees are authorized by the contract.

---

*LLC*, N.D. Ga. No. 1:13-cv-799, alleged that the company violated the FTC Act and the FDCPA "by deceiving consumers into using a payment method that required a substantial 'convenience fee.'" The stipulated judgment in that case, however, does not prohibit the defendant from charging any convenience fee, but rather only from failing to disclose the fact that a fee will be charged, the amount and number of times it will be charged, the reason for the fee and how consumers can avoid paying it. *Id.*, Dkt. #6, p. 5.

<sup>12</sup> Bulletin at p. 6 (citing Supervisory Highlights, Fall 2015 edition at pp. 20-21).

<sup>13</sup> See Jeremy R. McClane, *Class Action in the Age of Twitter: A Dispute Systems Approach*, 19 Harv. Negot. L. Rev. 213, 248 (2014) (discussing widespread criticism of Verizon Wireless's December 2011 announcement that it would begin charging its customers an additional \$2 convenience fee for one-time bill payments made by phone and online.)

<sup>14</sup> <https://www.insidearm.com/news/00043157-cfpb-issues-compliance-bulletin-pay-phone/> ("For the 79 percent who did not, the main apprehension was around confusing state laws, with most also saying their company just didn't have the appetite for that kind of compliance risk").

<sup>15</sup> E.g. Kate Berry, *Cordray: CFPB Is Right to Use Enforcement Actions to Craft Policy*, <http://www.americanbanker.com/news/law-regulation/cordray-cfpb-is-right-to-use-enforcement-actions-to-craft-policy-1079823-1.html> (Mar. 9, 2016) ("Financial industry executives would be engaging in "compliance malpractice" if they did not glean information from consent orders and respond by cleaning up their own practices, says CFPB Director Richard Cordray").

- Review internal and service providers' policies and procedures on phone pay fees, including call scripts and employee training materials, and revise policies and procedures to address any concerns identified during the review, as appropriate.
- Review whether information on phone pay fees is shared in account disclosures, loan agreements, periodic statements, payment coupon books, on the company's website, over the phone, or through other mechanisms.
- Incorporate pay-by-phone issues in regular monitoring or audits of calls with consumers.
- Review consumer complaints regarding phone pay fees.
- Perform regular reviews of service providers as to their pertinent practices.
- Review that the entity has a corrective action program to address any violations identified and to reimburse consumers when appropriate.
- Consider reviewing employee and service provider production incentive programs to see if there are incentives to steer borrowers to certain payment types or to avoid disclosures.

For further information regarding federal and state laws and the propriety of charging convenience fees, please contact Scott J. Hyman (sjh@severson.com) or Erik Kemp (ek@severson.com)

---

<sup>i</sup> Scott J. Hyman is a member of the Texas and California State Bars, is the Member-in-Charge of Severson & Werson's Orange County, California office, and is a Governing Member of the Conference on Consumer Finance Law. Mr. Hyman has published a number of articles on the FDCPA, FCRA, and TCPA and, for the last 18 years, has authored *The Fair Debt Collection Practices Act* and, since 2013, has co-authored *The Telephone Consumer Protection Act* in DEBT COLLECTION PRACTICES IN CALIFORNIA (CEB 2016). Mr. Hyman authors Severson & Werson's consumer finance weblog, to which he has posted summaries of over 2,000 consumer finance decisions. (www.calautofinance.com) Mr. Hyman received his B.A. with Honors from the Schreyer Honors College of The Pennsylvania State University, and his J.D. with Distinction from the University of the Pacific, McGeorge School of Law.

<sup>ii</sup> Erik Kemp is a member of Severson & Werson's San Francisco office, specializing in financial services litigation. His practice emphasizes class action defense and the appellate courts. He also regularly counsels clients on compliance issues. Mr. Kemp defends clients against class actions in state and federal courts based on alleged violations of consumer protection statutes and common law claims. He has defended dozens of lawsuits asserting violations of California's Unfair Competition Law and Automobile Sales Finance Act. Mr. Kemp has also defended a number of class actions challenging late fee assessment, loan origination disclosures, and lender-placed insurance. Mr. Kemp earned his J.D. from the University of California, Hastings College of the Law, graduating magna cum laude and Order of the Coif. Mr. Kemp earned his B.A. in political science from the University of California, Berkeley, graduating with high distinction in general scholarship and Phi Beta Kappa honors.