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***Keeping Up With the Bureau* Episode 4: Hot Topics in Collections: Fees, Reg F Landscape, and What's Next**
Aired: September 22, 2022
Host: Stefanie Jackman
Guests: Jim Trefil and Jonathan Floyd

Stefanie Jackman (00:05):

Hello, and welcome to a special edition of Troutman Pepper's *Consumer Finance Podcast*, The Blitz Package. This is a special four-part series on the latest developments within the CFPB, state attorney general activities and private consumer finance litigation.

This is episode four in our four-part series. And I'm your host, Stefanie Jackman. I'm a partner in the firm's Consumer Finance Practice, and we have a great episode lined up for you today. Joining me are Jim Trefil and Jonathan Floyd, and we are going to explore hot topics and collections, focusing, of course, on current developments with fees and Regulation F, what that landscape looks at.

But before we jump into those topics, let me remind you to please visit and subscribe to our blog, ConsumerFinancialServicesLawMonitor.com. There you can find insightful updates about everything interesting that's happening in the world of consumer financial services. And please don't forget to check out our other podcasts, *FCRA Focus* and *The Crypto Exchange*. You can find those on Troutman.com and all of your regular popular podcast platforms. As I mentioned, joining me on this episode are two of my fellow colleagues, Jim Trefil, Jonathan Floyd, who are experienced seasoned consumer finance attorneys. Gentlemen, welcome to the show and thank you for joining today.

Jim Trefil (01:28):

Thanks Stefanie.

Jonathan Floyd (01:29):

Thank you, Stefanie.

Stefanie Jackman (01:30):

So, let's kick this off. Jonathan, I'm going to start with you. And I want to ask about a really specific topic that I know is getting a lot of attention and a lot of coverage across the entire servicing collections landscape these days. What is going on with convenience fees?

Jonathan Floyd (01:45):

Stephanie, it's funny. There's the common theme today, and that is we spent all this time preparing for Regulation F and then 2022 has been about everything other than Regulation F. And convenience fees are pretty much at the top of the heap right now. There's been a lot of activity and to think about convenience fees, which are the fees that a debt collector may charge to use a payment processor to process a payment. So, a consumer contacts a debt collector, or vice versa, and wants to make a payment. The debt collector takes that payment over the phone or through a web portal or something like that. A payment processor has to transact that payment with the bank. And then there's a fee associated with that payment, usually it's a nominal sum, $4.95, $2.99, something like that. These are the fees that have come under

scrutiny. And if we look at it from purposes of the FDCPA, then we can see that they fit in that in a particular way. And that is the FDCPA and its implementing regulation, Regulation F, prohibited debt collector from collecting any amount, including any interest fee, charge or expense incidental to the principal obligation, unless the amount is expressly authorized by the agreement, creating the debt or otherwise permitted by law.

So, most of these agreements that debt collectors are collecting on are silent as to convenience fees. And the way the industry has operated for many years has been based on consent. If a consumer wants to make a payment to a debt collector, then you just get that consumer's consent to pay the collection fee. And that's the way we've operated. The CFPB actually looked at these fees back in 2017 and put out a compliance bulletin called phone pay fees. And they really were looking at fees there from the idea of really a UDAP standpoint. But really the idea that you can't charge consumers these fees without, one, telling them about them and getting them to, two, consent to them.

So, that's really been the way the industry has operated. And then in 2022 the Fourth Circuit gives us a crazy opinion on a case out of Maryland. In that case, you had a mortgage servicer who was charging a monthly fee to accept mortgage payments online, and a consumer challenged that. The funny thing about the Maryland case is that it's not actually under the FDCPA, it's under Maryland's Debt Collection Act. And what you have to understand about that Act is that in incorporates all the potential violations of the FDCPA, but not the FDCPA's definitions. The FDCPA is limited. For example, under the FDCPA, a mortgage servicer, probably isn't a debt collector and the rules don't apply to them because they're servicing the account before it falls past due. Thus, the FDCPA doesn't apply. In that way the FDCPA is designed to be limited.

But what happened in the Maryland case is that the state said, we accept all the violations that are possible under the FDCPA, but none of its limitations. And so, our law in Maryland applies to mortgage servicers and it incorporates all the potential violations of the FDCPA, which would not apply to those mortgage servicers otherwise. And in doing so, they found it a violation because one, the mortgage agreement didn't allow for a convenience fee. But two, Maryland law did not expressly allow for a convenience fee to be charged. The real mind-blowing piece here is that the prevailing industry idea, the operating theory has always been, if the law doesn't prohibit a convenience fee and the consumer consents to pay it, it's okay. But the Maryland court found differently, and the Fourth Circuit upheld that. Which is almost a sea change in that regard when it comes to the application of convenience fees.

And then, we're already talking about a Fourth Circuit case here. On the heels of that, then in May the Maryland Commission of Financial Regulation steps in with an industry advisory and completely agrees with this. Moreover, the commissioner says they make clear that a creditor or servicer would also violate the Maryland law if it directed consumers to a payment platform associated with the creditor or servicer that charges a convenience fee. So even if you were to send the consumer to a third-party website and say, "Pay these people and they can pay us." Even that would be a violation.

So, convenience fees in Maryland are obviously a concern. That leads us to June, when the CFPB then puts out an additional advisory opinion that says, Maryland's law applies to essentially everyone, not just debt collectors under the FDCPA. But as far as it concerns debt collectors, we completely agree with this holding, as well. And so now what we've found is, those who are collecting payments over the phone or through a payment portal are really in limbo, particularly in states that don't directly address convenience fees. Some states may have banned them and that's fine because at least we know what the law is. But states that are silent

to it, it's now in question whether or not a debt collector could actually charge fees in those states.

Stefanie Jackman (07:26):

You know it's interesting because I think you did an excellent job recapping all the developments of the last almost nine months, and there have been many. The CFPB's advisory opinion that you mentioned in June struck me as not really shocking, except the questions that started coming in. I hear you that for first party, this is definitely a sea change. But for third party, my perception was most third-party debt collectors already didn't charge those types of fees directly. But that a number of them work with outside companies who facilitate and provide portals and options and technology for consumers to have the option of different payment methods. And that's helpful to the debt collector, because they don't have to build that functionality and support it on their own.

So, I've had a lot of questions about, wait, can I still, as a third-party debt collector or as a servicer, as you pointed out, somebody else that maybe is subject to one of these state laws, can I use a third-party payment processor? And I want to get your thoughts, but for our listeners, I was at the RMAI Executive Summit last week and John McNamara, who isn't in supervision or enforcement, he's in markets and research, but was one of the architects of the rule and gathering information there and engaging with interested stakeholders. What he said is certainly not binding or has the force of law, I want to be clear about that. But it was curious that when we were talking about this, he did make a comment that we didn't say in our advisory opinion, you can't use a third party. We just said, you as a debt collector, can't essentially make revenue from that. Jonathan, what are their options? Can we still partner with a third party, if we're not sharing the revenue? What does that mean? I'd love to hear your thoughts on it.

Jonathan Floyd (09:08):

It's a great question. And I'll note, there's a concern here not only for debt collectors, subject to the CFPB. But kind of implicit in what the CFPB is saying is not only could this be a problem for debt collectors, this could also be a problem for the servicers themselves. And it wouldn't be through the FDCPA, which wouldn't apply to servicers in most case. But it could be under UDAP. There's a UDAP risk at the federal level for creditors and servicers that are not debt collectors under the FDCPA. And so, it really puts everyone in a difficult position right here. How do we resolve this? Or how do we fix it? Or how do we proceed?

I think the first step is for creditors and debt collectors and servicers to review the underlying credit agreements on the front end. And to determine whether or not those agreements expressly authorized convenience fees. The second piece of that analysis is to look at the state in which you're operating and see, does that state have any laws regarding convenience fees? For example, is there a cap? You may have an authorized convenience fee per the agreement, but that authorized fee may be in excess of the cap that state has set on convenience fees. Or as we had in the Maryland case, the state may be completely silent as to convenience fees which calls into question whether you can charge a fee even if it's been previously agreed on.

You need to understand those two pieces of information first. If you find that a convenience fee is not expressly permitted by the contract or an applicable law, then you should probably stop charging the fee right now. That's what we learned in the Maryland case. And for creditors, there's the trickle-down fix here, which is, if you're the one creating these agreements, we can start to build convenience fees into those agreements. Now again, I call that the trickle-down theory because that affects debt collectors down the road. Once those agreements go into

arrears or are charged off and finally placed with debt collectors, that'll benefit the collectors but it's going to take some time to get there.

In terms of using third parties, I think one of the other options is if you're using a payment processor, which is largely a consent-based transaction with consumers, have a conversation with that payment processor because we found that payment processors are very sophisticated and look to create options and ways to make things work. I worked with payment processors on some *Hunstein* amicus briefing. They have less of a *Hunstein* problem because it's a transaction based on consent with the consumer. But still, they have a great industry presence, they're very thoughtful, work with your payment processors and be thoughtful about what you're doing. But ultimately, if it's not authorized in your agreement, if your state has either put limitations on it or is silent as to convenience fees, you really need to stop and make a thoughtful approach to whether or not you're actually going to charge those fees.

Stefanie Jackman (12:00):

Completely agree. I think that there's still some uncertainty and it's likely an area we're going to continue to see built out through litigation and different interactions, which is a really good segue to you, Jim. Speaking more broadly, Jonathan and I are anticipating some uptick and continued attention to convenience fees. But we have Reg F, I'm not up all day and all-night handling Reg F litigation right now. And my perception is most other on the defense side, aren't either. Which is great, right? But surprising, I think a lot of us last fall we're predicting there'd be a really big upswing. Is that your perception? The regulation's been in effect since last November. What are you seeing? What are your clients seeing with regard to litigation and what Reg F revised and interpreted within the FDCPA?

Jim Trefil (12:48):

Stephanie, I have not personally dealt with any Reg F specific litigation. We have seen some come across our radar in the last couple of months. There was a case out of Florida filed in April of this year, *Ortiz v. Helvey*. It was challenging the itemization dates used on a model validation notice. That you recall, Reg F provides four, five itemization dates you can use on a validation notice to determine the amount due to the consumer - last statement date, last payment date, charge off date, judgment date, and transaction date.

This complaint alleged that the collector messed up and didn't use any of the proper ones. That case was dismissed in July. We've seen a couple of others. It was a case *Jaramillo v. National Credit Systems,* out of Western District in Texas. That got filed in January of this year. This was a credit reporting FDCPA case and essentially what the Reg F mentioned that showed up and the complaint was basically just piling on, it was using Section 1006.18(b)(ii), just adding onto the falsely representing the character amount or legal status of the debt. The underlying allegation, being that the plaintiff had paid off the debt and was complaining that it was still being reported. So that was using Reg F as co-extensive with 1692e. So, it's not really a Reg F specific claim.

One of the earliest ones we saw was out of the Eastern District of California, *Militiev v. Wakefield & Associates*. That was a text case making mini-Miranda and validation claim arguments. And again, that was more along the lines of generally referring to Reg F requiring disclosures in addition to the requirements of 1692e. So that was not really a Reg F specific kind of complaint. The only one I'm really aware of is the *Ortiz* one I mentioned previously.

All these cases have been resolved. So, we don't anticipate any guidance from any of these courts addressing these two cases. So generally, my answer to that question is no, we haven't seen a lot of Reg F specific litigation. One thing I have noticed since November is I can see the impact of Reg F on some of the FDCPA cases that come across my desk. I'm not seeing any pure call volume cases anymore. The 7-in-7 rule from Reg F provides enough clarity that I think is a deterrent to a pure call volume case from a plaintiff counsel's point of view. Although we haven't seen that many cases directly applying Reg F, we have started to see the impact of Reg F on the case that plaintiff's counsel are bringing.

Stefanie Jackman (15:18):

I agree. That's what I've been seeing. We just had a case come in the other day, it's a pre-suit demand alleging that sending just shy, if you did the average, of two emails a day in a seven-day period is harassing and abusive. So, we're thinking through that. Seeing the debt validation notice and the date, was it sent sufficiently in advance or not? I know some industry colleagues have seen some kind of ticky tacky stuff within the notice itself. I've had different questions. Haven't seen litigation relating to certain things on the validation notice. And then as you noted, I've seen ... and I think it's going to continue, what I would normally think of as credit reporting related issues also being brought under the FDCPA because they don't necessarily preempt each other in the way that state laws can sometimes be preempted by the FCRA.

It continues to surprise me. Jim, do you have any thoughts on why ... Reg F litigation is ticking up slowly, we're seeing that. And I'm seeing it a little bit consistently, and that's the perception I have from some of the industry groups I'm in. But why it hasn't it just exploded like we were expecting?

Jim Trefil (16:22):

It's funny. Sometimes statutes and regulations actually work. One older example that springs to my mind is the TCPA. You don't see anybody calling random or sequentially generated telephone numbers anymore, it's not done. That's one example of the statute actually doing its job.

Here, Reg F provides more clarity than we've seen in the FDCPA space, basically ever. You actually have a rule on how many calls you can make in a week. You have a notice that if you follow it and use it correctly, gives you a safe harbor. You have provisions on limited content voicemails that you can lead where if you follow the regulations again, you have a safe harbor. These are all presumptions, it's not a definitive answer, it does not guarantee that you won't find yourself in litigation if you follow these rules.

But plaintiff's counsel, they thrive on ambiguity. They need something that's unclear and raise that issue in a complaint. And when they do that, the defendants are not going to be certain what the results are going to be. So that allows them to apply settlement leverage, and keep their cash flow going as they're pursuing these cases. When you have bright-line rule, even if it's only a presumption, it makes it that much harder for them to get the result they're looking for. They will often choose to use their resources in terms of time and expense elsewhere, rather than to attack a bright-line rule.

So, if I'm a plaintiff's counsel and a consumer walks in my door and is complaining about being called incessantly by a major debt collector, I'm going to look at that and I'm going to think to myself, those guys have to have a compliance department. I'll bet you anything that they've got a system in place, and they're probably following 7-in-7. Just bringing a pure call volume case

isn't going to cut it for me. I'm going to spend my time doing that, they're going to give me their call logs, and I'm going to wind up with nothing. So, they're going to look elsewhere. They're either going to try to find ways to add other contacts for a total volume kind of case, or they're going to look for other avenues in the FDCPA to bring a claim. But they're not going to tack what they think is likely going to be collector conduct that comes within the confines of the safe harbors.

Stefanie Jackman (18:35):

That makes perfect sense to me, Jim. I mean, I think that's exactly why I'm seeing a push on this recent case with email frequency. Because that's kind of uncharted territory and you noted that texts and things getting mixed up there. So, I think you're exactly right. Places where there's more of an opportunity to make them case law. Whereas there are places that, although it may not answer all our questions, Reg F attempted to put some kind of rules of the road in or some guardrails. And I share your perception that a lot of companies that have had time to adapt are doing that and doing that effectively.

What are your thoughts though on *Hunstein*? It's the case that shall not be named and we're all waiting with bated breath. But it seems like maybe that's been an easier consistent cash cow right now.

Jim Trefil (19:16):

Well, in addition to Reg F actually providing some clarity and at least for now, doing its job. There are a couple of other things going on in the FDCPA space and in the collection space, in general. You mentioned *Hunstein*, I would combine *Hunstein* with *Ramirez* as the two cases that might explain why we're not seeing a lot of activity. *Hunstein*, you recall, Eleventh Circuit panel decision interpreting the defined term communication literally and applying it to contacts between collectors and their letter vendors, which creates the possibility of a third-party disclosure claim. That made all the rounds, it was very big news.

SCOTUS took a potshot at the Eleventh Circuit in *Ramirez* in a footnote, so the panel vacated its earlier decision and reissued it with some very specific standing language. *Ramirez* is an FCRA case and it's a standing case. And it stands for the proposition that Congress can tell the courts what is a violation of the law, but it can't create out of thin air a concrete real world injury sufficient to confer jurisdiction on the courts. That's the court's job to figure out and that's going to be based on the facts of the case.

In *Hunstein*, what we've seen is plaintiff's bar devoting a lot of resources to bringing *Hunstein* claims. There was a huge flurry of them, some are still coming in, a lot of them are getting stayed because in the Eleventh Circuit we're pending an en banc decision. There was an oral argument back in February, it's on the standing issue alone and we're waiting on the Eleventh Circuit to issue its opinion. So, while that's going on, there's still uncertainty about exactly what's going to happen with that claim, at least in the Eleventh Circuit, definitely. But all over the country, generally. And while there's uncertainty, plaintiffs are still going to be putting resources into bringing those claims. That takes away resources from attacks on Reg F.

So, you're seeing *Hunstein* claims, which aren't covered by Reg F still coming through. And *Hunstein*'s not going to go away for a while. After the en banc and the Eleventh Circuit issues its decision, it's going to be a standing decision, it's not reaching the merits. So, we won't know whether or not the Eleventh Circuit is really signed off on whether or not third-party vendor communications are communications under the FDCPA. So that's still going to be lingering. And

even after the Eleventh Circuit gives us its final decision on what that is, that doesn't cover the other circuits. We're going to see *Hunstein* soak up a lot of plaintiff's resources for a long time to come.

The other reason we might not be seeing a lot or we might not be aware of a lot of the Reg F litigation is, I mentioned the *Ramirez* case. *Ramirez* has had, at least in my practice, I've seen a major impact on a lot of FDCPA litigation. And that's because to a large extent, FDCPA litigation is plaintiff's counsel finding ambiguities that only plaintiff's counsel would love. And their little nitpicky technical complaints about letters or about any communications with the consumer that are almost completely lacking in any concrete real-world injury.

Probably first out of the gates in dealing with this were a couple of districts in New York, Southern District and the Eastern District. And a couple of judges in those jurisdictions went on a campaign clearing their dockets of FDCPA cases. We personally saw multiple sua sponte show cause orders issued to the parties to brief the issue of whether or not the courts had Article III standing for the claims that were being raised. And uniformly the courts took the briefing and then promptly remanded the case back to state court or dismissed without prejudice for refiling.

And that has started to spread. Outside of New York, we've seen a couple cases. The case recently, *Ghazaly v. First National Collection Bureau* out of Eastern District of North Carolina remanded a *Hunstein* claim. *Pruitt v. Resurgent Capital Services*, a Maryland case involving a rather common allegation, which is I got a letter that was confusing and it caused me some kind of emotional harm. We see that kind of allegation all the time and the Maryland court said, nope, that's not enough. We're kicking this back to state court.

When that happens, you're essentially driving the FDCPA litigation underground. Which makes it less visible from our perspective. So, there may be more Reg F litigation than we're aware of, it may just be sitting in state court and we can't track down those cases as well as we can the federal courts. The combination of *Hunstein* and *Ramirez* together with the clarity that Reg F has provided has generally put a damper on Reg F litigation, at least as far as we've seen. What I would anticipate is we're going to start seeing increases. People are going to start attacking the edges and finding the gaps in Reg F.

For example, we're going to see cases where people are challenging the contours of the safe harbor provisions. The 7-in-7 rule may well apply, but that is just for phone calls. So, if you start adding in texts and emails and letters and put everything together, you can go to the court and say, yeah, I got seven calls in seven days, but I also got 50 emails, texts and letters. That is harassing, it's a d(5) claim and it would almost certainly survive motion to dismiss with that, even if you were compliant with Reg F as far as the calls were concerned. That gets you outside of the safe harbor presumption.

So, we're going to see cases like that. We'll probably see a case, I would imagine at some point, we see a call only case where a consumer had multiple accounts and a collector didn't have proper controls in its system. And so, a consumer with five accounts gets seven calls on each account in a week, that's 35 calls. That's going to be a claim, too. So, we're going to start seeing attacks on the edges, but for the time being, it's been fairly quiet.

Stefanie Jackman (24:57):

I think you've done a really great job of predicting some of the things we're going to see next. And in our last couple of minutes together, that's what I'm looking for. Just 30 seconds, I'll start

with you, Jonathan. What do you thinks coming next in the collections world, as we look forward in the next 12 months?

Jonathan Floyd (25:10):

We've already talked about convenience fees. We've been watching those for a long time. I've got an article along with David Anthony in the 2020 ACA Collector Magazine out of August called, "*The Inconvenience of Convenience Fees*." We were really concerned about it back then. We're going to see litigation come up on that, I think, in a variety of jurisdictions.

And then I've been trying to explain this to our clients. And a lot of people in the industry understand this, an opinion in *Hunstein* is not going to resolve pretty much anything. Because we have to remember, *Hunstein* got to where it is now on a motion to dismiss. That case never even saw discovery. And at oral argument, plaintiff's counsel admitted to the court, this is an inartfully pleaded complaint. Please give me a chance to fix it. And so, if the en banc panel doesn't find standing, well, then we're just going to have all these same problems of *Hunstein* in state courts. If they do find standing, it's very well likely they're going to send it back and then the case is going to have to be litigated.

And it'll probably be the most watched district court case ever in the history of the collections industry. And there's the rare off chance that the panel could decide to make a ruling both on standing and the merits. That's a very, very, very narrow chance of that happening. And the court actually directed when they set the en banc hearing, they actually directed the parties to focus their briefing on the standing issue. Because *Ramirez* came out in the middle of kind of the appellate process for *Hunstein*, a lot of these *Hunstein* cases have been stayed. I just don't think there's any result from the Eleventh Circuit en banc panel that just resolves everything in one fell swoop. We're really holding our breath to see what the panel says is going to happen next. But we're nowhere near the end of that journey. That's what I foresee in the near future.

Stefanie Jackman (27:13):

Jim, what about you?

Jim Trefil (27:14):

If I had to pick one area where I would expect to see the most action in the future, it would be texts, for a couple of reasons. It really is, in my mind, the mode of communication that collectors are going to be going to just for purely practical reasons. People don't pick up their phone anymore, they don't open letters. But they'll pay attention to a text when it pops up on their phone. It's an easy, relatively costless way to communicate. Collectors are going to be going that direction, we've already seen it and we're going to see that continue.

It's also an area that's a gap in Reg F. The 7-in-7 rule applies only to calls, does not apply to texts. And we haven't had any court linking the two. Say for example, the TCPA context, texts are treated identically to calls. That's not the case in Reg F. So, what you have is a combination of increased activity on the collections side, in the text arena, with a lack of clarity and the regulations on the Reg F side. And I would anticipate that's going to be the most likely area of increased growth going forward.

Stefanie Jackman (28:16):

I share your thoughts. It's certainly going to be a road that continues and a story that is being written and it'll continue to be written. I'm so excited to have colleagues like you, that we can all

work together in helping the industry face those challenges in a way that helps them to achieve the outcomes that they want, that also support the consumers they're working with, and hopefully keep them out of court and other areas where they could be making payments if they get something wrong. So, I know you two will be helping lead the charge in counseling there. Thank you so much for joining today.

Thank you to our listeners, as well. I hope that you have enjoyed this four-part series attempting to give you a quick update and rapid-fire overview of everything that's happening in these areas, that are going to continue to evolve in the next 12 to 24 months in different ways. As we close out, I just want to remind you, you can check our blog at the ConsumerFinanceLawMonitor.com. Subscribe there. Please sign up for our distribution list, you can customize the information you receive from us as broadly or narrowly as you'd like. To ensure you receive our alerts, advisories, webinar invitations, and other special content. From all your friends at Troutman Pepper and our team, thank you very much for joining us. Have a great day.

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