The Consumer Finance Podcast: Year in Review and a Look Ahead: Navigating the Debt Collection Landscape
Host: Chris Willis
Guests: Stefanie Jackman and Jonathan Floyd
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Chris Willis:

Welcome to *The Consumer Finance Podcast*. I'm Chris Willis, the co-leader of Troutman Pepper's Consumer Financial Services Regulatory Practice. And I'm welcoming you to today's episode, which is another installment in our series of Year in Review and Look Ahead episodes, where we're going to be talking about the world of debt collection. But before we jump into that topic, let me remind you to visit and subscribe to our blogs, TroutmanPepperFinancialServices.com and ConsumerFinancialServicesLawMonitor.com. And don't forget about our other podcasts. We have the *FCRA Focus,* all about credit reporting. We have *The Crypto Exchange* about everything crypto, *Unauthorized Access*, which is our privacy and data security podcast, and our newest podcast, *Payments Pros*, which is all about the payments industry. Those are available on all popular podcast platforms. And speaking of those platforms, if you like this podcast, let us know. Leave us a review on your podcast platform of choice and let us know how we're doing.

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Stefanie Jackman:

Thanks for having me.

Jonathan Floyd:

Absolutely.

Chris Willis:

All right, well, you two live in the world of collections among others, but it's an area that you have lots and lots of insight into, so I appreciate you being on to share that with our listeners today. Let's talk about some stuff that was developing during 2023 and get you not only to summarize it, but to talk about what you think is coming next, in the year ahead. Let's start at the top, Stefanie with you, talking about the Supreme Court because there are some significant Supreme Court cases that are pending that'll be decided this term, that could have significant impacts in the collections world. Can you talk to our listeners about that?

Stefanie Jackman:

Happy to. There's so much happening in the collections world. We'll do our best to cover it in a podcast that doesn't take two hours for all of our listeners. But first, you've got the *CFSA v. CFPB* appeal that I'm sure all of you know about. It's the one that's dealing with whether the CFPB is constitutionally funded with the way that Dodd-Frank has structured that. There was oral argument on that earlier this fall, as I recall, I think it was in October, very early in the court's current term. And we expect an opinion between now and the end of the term, which ends in June of this year, if I remember. It's hard to say where that's going to go. There's lots of people that have prognosticated on how to read the justices and their questions and the fact that they didn't ask about a remedy or the fact that they did ask certain questions, I'm not going to do that today.

Just obviously, if the CFPB is deemed to be unconstitutionally funded, what next? Presumably they'd need to find a way to rectify that or get funding to continue their activities, but I don't think that's going to be the biggest opinion of the term, candidly, as far as impacting people in the collections world and beyond. Instead, I think it's going to be a pair of cases that are dealing with *Chevron* deference, at a high level, and to keep it simple, that's the idea that if you have a federal agency interpreting a provision that is unclear or not clearly defined in a federal statute, that regulator has authority to interpret and they issue regulations like Reg F, Reg X, Reg Z, all these things, courts will defer to those regulations, basically more often than not, almost all the time. The two appeals are called *Loper Bright Enterprises v. Raimondo*, and that is docket number 22-451 on the Supreme Court's docket and *Relentless v. Department of Commerce*, which had cert granted actually during the current term, it's number 22-1219.

It is widely expected that this pair of cases is going to significantly change, some people have said, gut *Chevron* deference when courts defer to Reg F, Reg X, Reg V, all the federal regulations that inform all of the federal consumer protection laws, not just in this context. The reason that is widely expected is that, the majority of the justices on the bench are already on record taking issue with aspects or all of *Chevron* deference. So we are widely expecting, again, we could be wrong, the industry is widely expecting that there will be some change, likely a significant one, and looking at the fact that they granted cert in two cases with this issue for this term. Chris and Jonathan, I'm wondering if they will say it's improper, overturn it, and then use the second to define what they think, if anything, they want to put in its place because the court doesn't have to do that either, so I'm just speculating.

But as you step back and you think about all the federal regulations that we think about in our daily business, in the consumer financial services industry and beyond. EPA, I mean the CFPB is not involved in these, it involves other regulators, the SEC. This could significantly impact how and to what extent, federal and state courts defer to federal agency interpretations of the statutes they're charged with enforcing. Jonathan or Chris, do you have anything to add to that? Because I know these are exciting things that we're all thinking about and talking about.

Jonathan Floyd:

I'll say that I completely agree and I will note that, I think a lot of people in the industry have felt seen by the Fifth Circuit in challenging the CFPB's constitutionality, but I also think it's an easy fix. From my reading of it, I don't know that the Supreme Court really felt all that interested in the argument. It's the idea of overturning *Chevron* deference or reigning in *Chevron* deference, that is actually the line of cases that's really going to affect the industry more than the other, is my opinion. And I think if we see major changes to the CFPB, it's going to come in that route and not the other.

Chris Willis:

I agree with both of you on the importance of it, and I would just caution the audience, that at first blush you might think, oh, doing away with *Chevron* deference is great because I remember something recently that a regulator did that I didn't like, I didn't like their interpretation of the statute, and now I'm going to be able to challenge that. And that's true, but there are plenty of interpretations of not super clear federal consumer financial protection statutes, that are probably actually helpful to the industry, either because they just provide clarity or a safe harbor or whatever.

And the thing is, in a particular case, you don't know how an absence of *Chevron* deference is going to go, it may be helpful to the industry or it may not. Well, having covered the Supreme Court docket, let's talk about some other areas where we saw tons of activity last year and probably continuing into the coming year. Jonathan, let me go to you first with one of those that seems to be in the headlines almost every day, and that's medical debt collection and medical credit reporting. If you don't mind, give the audience just a recap of what's been going on there and what you think is likely to happen next?

Jonathan Floyd:

Medical debt just continues to remain in the cross-hairs of the regulators. We've already seen the credit reporting agencies come together and say that they're not going to report certain levels of medical debt. Then in 2023, we saw an announcement from the White House that said that, we're now going to work towards banning medical debts from credit reports entirely. We know that the CFPB is staffing up with enforcement attorneys. We expect more pressure to be placed on medical debt in 2024 and beyond, and we saw that even in December with a medical debt collector entirely being shut down through an enforcement action by the CFPB.

Medical debt is going to remain in the cross-hairs. It's going to come under a lot of scrutiny, and we're seeing it not only at the federal level but also on the state levels. There are a lot of reasons for that. To a certain extent, I think some people see it as a quick fix for a complicated payor system in the American medical field, in the way that we have with third party-billing. But long story short, pressure is going to continue on medical debt collection, to the extent that we're allowed to continue to collect all medical debts to begin with, which I think we're really moving towards a ban towards, altogether.

Chris Willis:

And in fact, I feel like I've seen some state legislation or state activity on this issue recently, with states moving towards exactly what you were saying, Jonathan. So the actions not just at the federal level, it's very much with the states on this medical issue, I think.

Jonathan Floyd:

I've been telling folks that I think medical debt is a good example of, we're much further away from what I would call a 50-state solution, than we were 10 years ago in the industry, where really, the states have taken so much ownership over a lot of these little nuances of collection now. That it's less about how do I comply with the FDCPA, and more, how do I comply with 50 or 51 or 52 individual collection frameworks because that's the way in which we're moving.

Chris Willis:

Yeah, and that's going to be quite a challenge I think, for the industry, if they're involved in medical debt.

Stefanie Jackman:

Well, and another thing that's difficult in the medical debt space, is discerning what is medical debt? Is it debt that is owed directly to the hospital, incurred from a hospital? What about other types of medical providers that are not always emergent care? And what about debt that's financing healthcare or medical expenses but by third-parties. And to your point, Chris and Jonathan about states, that's where we've seen a lot of state law attention over the past few years. And most recently, it was an area noted of interest and attention by the CFPB. There's a lot of complexity there, and I've been telling clients, don't think just because you don't collect debt on behalf of a healthcare organization or you're not a healthcare organization, a lot of companies provide financing that can be used and sometimes is targeted towards being used to pay for elective surgeries, hearing aids, cosmetic dentistry, things that are outside of an emergent context and we might not think of immediately as healthcare.

Chris Willis:

You're right to point out, that the attack on medical debt could be much broader than we might conventionally think about, Stefanie. And Stephanie, let me stay with you because one of the other areas that was so much in focus in 2023, was the issue of fees in general and in collections, convenience fees in particular. Can you bring us up to speed on where we stand on that?

Stefanie Jackman:

Yes. If anybody listening thinks that fees are favored by the regulators, federal and state, let me let you know and disabuse you of that notion. They are continuing to be under intense scrutiny by the White House, by Congress, by states, and in litigation, if it looks, smells, feels, whispers the word fee, it will be scrutinized. And the thing I want you to understand is, at least in my experience, Jonathan, I don't know if you've seen anything different. FDCPA subject collectors have been used to this for a long time, right? There's been a lot of litigation about attorney's fees and court costs and other fees. Creditors, it's a newer area, and you are not subject to the FDCPA across the nation because you're a creditor or servicer that's been handling pre-default.

But about 20 states, as I recall, maybe one or two more, could be 20 to 25, about half the states, have state collection laws that apply more broadly to the first-party creditor context and expressly incorporate verbatim, the language from the FDCPA about, you are not authorized to seek to recover a fee that isn't expressly disclosed as a fee, that the consumer could be charged and you could seek to collect in the underlying agreement. And, I'll say and or because the FDCPA takes the position, it's an and, as to some state regulators but law, I would say, is still or, or expressly authorized under state law, at least not expressly prohibited. So you need to be continuing to be attentive to that. And I just like to flag for our creditor side clients, this can have real impacts for you because of course, states that have provisions like this, are litigious ones in the creditor space, like California and Florida, among others. Jonathan, have you seen anything else in the fee world? I know you litigate a lot of these things.

Jonathan Floyd:

We've seen it coming up and you raised such a great point. We're going to talk about it again here when we talk about time of day and inconvenient times of communication restrictions. But we're seeing these huge problems of companies who are not traditionally subject to the FDCPA, operating in states which say, we incorporate all the potential violations of the FDCPA, but we do not incorporate the limitations to debt collectors. That we're going to apply this to first-party, we're going to apply this to residential landlord tenant law. We've seen a huge rise in fee claims there, which are brought under, essentially the FDCPA or some state law equivalent of it, which typically would have never been the case but we've had these new state laws that are bringing this in. And that's where we're now seeing people who are essentially complying with the FDCPA, solely because its states have incorporated that into state statutes, that are now bringing them kind of under that umbrella. So a real big problem, but something we have to manage.

Chris Willis:

Stefanie mentioned the word litigation, and I don't think we would have a complete Year in Review and Look Ahead without talking about litigation because after all, the Fair Debt Collection Practices Act is one of the most sued on federal statutes in the whole federal court system, and it remains an area of very high litigation demand by plaintiff's lawyers. So let's run through some of the sort of significant issues and evolving theories. Jonathan, you just alluded to some of them, but let's start with the elephant in the room of, where are we with standing, in debt collection related litigation, after cases like the Supreme Court's decision in *Ramirez*?

Jonathan Floyd:

I think that we're now to the point where courts of appeal are starting to address these standing decisions, that we've been getting over the past two years from district courts. And ultimately, I think if we wanted to make some general observations, I would say under the broader statutes, such as the FDCPA, courts expect to see a more significant, actual injury. They want to see that a consumer made a payment on an account. They want to see that a consumer hired a third-party, other than an attorney on an account. An interesting case out of the Seventh Circuit recently said, hiring an attorney, even if you had to pay an appearance fee to have that attorney defend a debt collection claim, is not enough to establish standing. The Third Circuit rejected an informational injury, recently on an FDCPA claim. Where courts are struggling, and we're seeing this in the Third Circuit, particularly in the Pennsylvania District Courts are, with the more specific statutes, the TCPA and the FCRA is a single unwanted call. A TCPA violation that can establish Article III standing, courts are still struggling with that, and we're going to have to wait for more courts of appeal to put out opinions. But generally speaking, we're seeing a lot of FDCPA claims wind up in state court, which at one point, some folks thought would be a great thing but really what it means is, there's a lot less visibility as to what's going on within the FDCPA litigation right now and there's a lot more variability.

Because instead of a small handful of federal judges handling these cases, they're now spread across states, across judges who have very little experience with the FDCPA, and a lot of them are kind of sitting in stasis, just waiting for either the parties to begin some state court discovery procedures or for the judge to make a move and bring the parties in to figure out what's going on with these cases. And in my experience, the judges are really not interested in learning the FDCPA in these circumstances, they are not happy to have all of these new cases thrust upon their docket in state court.

Chris Willis:

Stefanie, let's talk about another commonplace issue under the FDCPA and that's permissible time of day to communicate in connection with debt collection. Where are we, in terms of litigation on that?

Stefanie Jackman:

There's a lot of litigation going on, both in the first-party creditor space and third-party FDCPA collector space, across multiple states. Obviously, debt collectors under the FDCPA are subject to a requirement as a result of the Fair Debt Collection Practices Act, to not communicate with consumers at inconvenient times or places. And Reg F has, presumptively said, before 8:00 AM or after 9:00 PM in the consumer's time zone, is presumptively inconvenient. There are about 20 states that incorporate that exact same provision. And of course, some of those states are litigious states, like California and Florida. And to that point, on January 8th, there was a report in law.com or an article that said, this is going to lead to a lot more lawsuits. New litigation trend emerging. It's all about this and it featured not just some members of the defense bar that are handling these types of cases, and Jonathan and I have both been handling them, but also some of the plaintiff's attorneys who are bringing them.

And one of the people that gave some quotes was Jibrael Hindi in Florida. And I like to flag for people that, even if you have arbitration and class action waivers, he was talking about bringing these through mass arbitration actions. I've seen that and helped some clients with some of those matters. I'm sure Jonathan has too. And also, he takes the position, that it doesn't have to be what we necessarily think of as a collection communication, something saying, you're past due and you need to pay us. And demanding payment and the hallmarks of collection communications. But that the statute is broadly worded enough that it would be any communication, especially on a past due account, but possibly even on a performing account that's sent before 8:00 AM or 9:00 PM in Florida, that would be Eastern Standard Time, because those are communications on an account, that he believes is covered and believes there's case law to support.

And Florida's not the only state that has broad language in the provisions that relate to this and broadly defines communications and we can all have lots of discussions about what's collection communication and what's not. And there's also been comments, some of the comments in this article by the plaintiff's bar, that even after bringing a lawsuit, even after reaching a resolution, the same parties are continuing to have these issues. When I look into it, it's usually because some sort of control is broken or a service provider who's assisting had not been looped in on the need to address this issue. But I would just remind everybody, to continue to be very mindful of this check, make sure your controls are working for time of day, and I as a best practice, think you should implement those controls even if a state doesn't require it under a state law. But it continues to be a very lucrative area for plaintiff's lawyers bringing claims and an area that many creditors and servicers and collectors continue to step in, inadvertently, nationwide.

Chris Willis:

Shifting to another topic, I feel like prior to Regulation F, there was all this litigation over the proper form and content of validation notices, under 1692g, but then Regulation F came along and gave us a model form of a validation notice. So Jonathan, has that resulted in a lot fewer litigation matters over validation notices?

Jonathan Floyd:

I'll say this, it's hard to know because of this push to state courts that has happened due to questions regarding Article III standing. But what I can tell you is this, the model form I've seen is a positive thing. And we've often said this, if there's a rule, CFPB, tell us the rule and we'll do it. If you want a particular form, give us the form. And they did. And there's an interesting line of cases over the substance of the form, which does not include a date in which the letter was sent, the date of the letter, there's no space for that on the model form. There's the itemization date, you have five dates to choose from, but there's no place to actually put the date of the letter and that has caused some confusion and led to lawsuits.

And what's interesting about those lawsuits and something we're monitoring closely, and we're going to have to wait and see how it shakes out in 2024 is, as debt collectors have gone to the courts and said, we're relying on the safe harbor created by use of the model validation notice. Please don't hold us liable under the FDCPA. Some courts have said, well, that safe harbor only applies to compliance with Regulation F and doesn't apply to the FDCPA itself. Which is an interpretation that essentially makes the safe harbor all but meaningless. And so it makes perfect sense to me, that companies would continue to use the model validation notice.

It's by far, your best bet, if you're adding a date to it or if you're using words like, "Now." Or the phrase, "As of today." You should consider making that letter more specific or incorporating in some clever fashion, the day on which the letter was sent, because that's where these lawsuits are ultimately coming from. It'll say, "As of now, your balance is blank." But there's no date on the letter. Or, "Now is your opportunity to take advantage of a savings plan." Or something along those lines. So even though there's still litigation over the validation notice, my biggest concern has been this idea that the safe harbor provided by Reg F, only applies to compliance with Reg F and not the FDCPA, which is our primary concern in litigation.

Chris Willis:

Yeah, obviously, and that does seem like a crazy rationale. But let me hit one more issue with you, Jonathan, before we wrap up, and that is, the issue of what to do with credit reporting when there's a dispute and the choice between different Metro 2 codes associated with disputes, which I would think is an FCRA issue, but I think you're here to tell me that it's not just an FCRA issue?

Jonathan Floyd:

Stefanie talked earlier about these time of day restriction cases. We're seeing that coupled with disputes, with validation requests and with requests to limit communication to certain manners of communication, such as, communicate with me only by email. The issue with direct disputes is, we typically don't think of them as an FCRA issue, and they're not. An FCRA dispute needs to go through the credit reporting agency, but there is a line of cases out there, consumers have a theory of liability that says, I make a direct dispute with the debt collector. So an FDCPA type dispute. Well, that needs to go on my credit report. The Metro 2 guidelines tell us that an FDCPA dispute should be logged as an XB while it's being investigated. The problem is that they don't also tell us how to take that dispute off. Traditionally, we think about the investigation has resolved, and so I'm going to change that to an XH or an XC, but the problem is, those are one, FCRA specific, and two, they don't necessarily reflect if there's a continuing dispute by the consumer, which is very common under the FDCPA. So we're seeing a line of cases like that. It's very early within this theory of liability. Not a lot of cases to go on right now, just a small handful, two or three cases. But if you're dealing with multiple direct disputes from consumers, you really need to take a look at your credit reporting strategy because it's those subsequent disputes that are really causing problems for furnishers right now.

Chris Willis:

Jonathan, that's great advice and insight, and thanks very much for sharing that with our audience. And of course, thanks to Stefanie too for joining us and sharing her insights and knowledge on today's podcast. Be sure to stay tuned for the rest of our Year in Review and Look Ahead series, as well as the publication itself, because I think it'll be very useful to you. And of course, don't forget to visit and subscribe to our blogs, ConsumerFinancialServicesLawMonitor.com and TroutmanPepperFinancialServices.com. And while you're at it, why not head on over to Troutman.com and add yourself to our Consumer Financial Services email list, that way we can send you copies of our alerts and advisories that we send out and invitations to our industry only webinars. And of course, don't forget to check out our handy mobile app. It's available for both iOS or Android. Just search for Troutman Pepper in your app store. And of course, stay tuned for a great new episode of this program every Thursday afternoon. Thank you all for listening.