

THE INCONVENIEN OF CONVENIENCE FEES





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Fees can offset the administrative costs of debt collection, but they can also expose your company to potential liability. Proceed with caution.

By David N. Anthony and Jonathan P. Floyd

Convenience fees have emerged as a prominent topic in the accounts receivable management (ARM) industry as creditors and debt collectors look to defray the expense of payment processing and the Consumer Financial Protection Bureau continues to signal that such fees are appropriate, so long as they comply with applicable laws and regulations.

Although the ability to charge fees associated with credit card and debit card transactions is born out of the specific rules of each credit card company as outlined in the cardmember agreement, the ability for third-party debt collectors to charge fees associated with credit card and debit card transactions is further regulated by state law, the Fair Debt Collection Practices Act and consent orders and guidance bulletins published by CFPB.

As attractive as convenience fees are, this convoluted web of legal and regulatory obstructions is enough to give any industry participants pause as they consider whether to risk an increase in both litigation and regulatory oversight.

We'll take a look at the ways in which various courts have treated convenience fees under the FDCPA as well as general guidance currently available from the CFPB. State-specific regulations may also affect the ability to charge convenience fees.



CONSIDER: FEDERAL AND STATE LAWS

Section 1692f of the FDCPA prohibits a debt collector from collecting “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.”

The FDCPA defines “debt collector” to mean “any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”

Under that definition, traditional third-party debt collectors, but not mere payment processors, are considered “debt collectors.” However, although they are not typically considered debt collectors under the FDCPA, payment processors have been charged with violating the unfair acts or practices prong of the Consumer Financial Protection Act for allegedly ignoring warning signs that their clients were violating the FDCPA.

In interpreting these provisions, several federal courts have found that a convenience fee for processing a debt collection payment

of a third-party debt collector does not fall within the boundaries of the FDCPA when no part of the convenience fee is retained by the debt collector. The most prominent theory in this line of cases is known as the “pass-through” defense, where the debt collector passes the entire convenience fee to its payment processor, creating a third-party charge triggered by the consumer’s choice to pay by credit card.

For example, as the district court held in *Lee v. Main Accounts*, and the 6th Circuit affirmed, a 5% charge imposed on credit card payments did not violate the FDCPA because the defendant debt collector would not have received any additional compensation from the convenience fee. Other courts have either applied, or at least recognized, the pass-through defense.

Further, state laws in at least a dozen states call into question whether a surcharge, including one in the form of a convenience fee, may be imposed on payments to debt collectors in any case. For example, Connecticut prohibits sellers (an undefined term) from charging a surcharge fee on a buyer who uses any method of payment, including cash, check, credit card or electronic means in “any sales transaction.”

While there is room for debate whether convenience fees are barred in Connecticut,

North Carolina state law expressly provides that it is an unfair practice for a collection agency to “collect[] or attempt[] to collect from the consumer all or any part of the collection agency’s fee or charge for services rendered, collecting or attempting to collect any interest or other charge, fee or expense incidental to the principal debt unless legally entitled to such fee or charge.”

The North Carolina Department of Insurance has issued a guidance document cautioning that “all collection agencies subject to licensure under Article 70 of Chapter 58 [of North Carolina General Laws] ensure that they do not demand, collect, or attempt to collect a ‘convenience fee’ or other prohibited fees from North Carolina consumers.”

Simply stated, debt collectors should be wary of charging any convenience fees to consumers without first analyzing both the FDCPA and state law implications of doing so.

CONSIDER: THE CONSUMER FINANCIAL PROTECTION BUREAU

The CFPB has sole authority to “prescribe rules with respect to the collection of debt by debt collectors.” Through a variety of publications discussed here, the bureau has suggested that Section 1692f of the FDCPA does not prohibit a payment processor from charging a convenience fee when processing a payment on behalf of a debt collector so long as the fee is not shared or split with the debt collector.

For example, in November 2013, the CFPB issued an Advance Notice of Proposed Rulemaking suggesting that it intended to adopt debt collection rules under the FDCPA. Subsequently, in July 2016, the CFPB published an outline of the proposals under consideration. The outline expressly stated that:

“The Bureau is considering clarifying that incidental fees, including payment method convenience fees, that are collected either directly or indirectly are permissible only if: (1) state law expressly permits them; or (2) the consumer expressly agreed to them in the contract that created the underlying debt and state



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law neither permits nor prohibits such fees. Incidental fees expressly permitted by contract would be impermissible if prohibited under state law ...

“The proposals under consideration would specify that a debt collector charges convenience fees indirectly when, for example, a third party charges the fee but the collector receives a portion through a fee-splitting arrangement. *Fees charged in full by, and paid in full directly to a third-party payment processor, would not be collected directly or indirectly by the collector and would not be covered under the regulation.* (Whether such fees could be charged also could depend, however, on the contract establishing the debt or other laws.)”

Although not an official advisory opinion, the CFPB’s suggestion that Section 1692f does not prohibit a payment processor from charging a convenience fee when the fee is not shared or split with the debt collector is in line with its subsequent Compliance Bulletin 2017-01: Phone Pay Fees.

Bulletin 2017-01 addresses pay-by-phone services, defined to include (1) providing consumers with the option of making payments over the phone by using an automated system or speaking with a live representative; (2) providing consumers the option to make payments by using a credit card, debit card, or electronic check or to have their payment expedited; and (3) third-party service providers that handle and process payments on behalf of entities.

The bulletin generally allows pay-by-phone fees but cautions companies to

beware of unfair, deceptive, or abusive acts or practices (UDAAPs) that may potentially result from such fees or at least be identified as such.

In sum, even though the CFPB has not prohibited the use of convenience fees, it has identified their problematic nature as an issue that it will monitor and, if necessary, seek to enforce. Debt collectors should continue to monitor what the CFPB has to say on the subject.

BEST PRACTICES

Convenience fees can help defray the administrative cost of debt collection but they also expose debt collectors, and perhaps even payment processors, to potential liability. As a best practice, if any debt collector charges consumers a convenience fee, the debt collector should clearly disclose that a fee will be charged and the amount of the fee. The fee itself should be limited to that actual cost of processing the payment and not shared or split with the debt collector.

Further, it is advised that the debt collector offer the consumer at least one payment option that does not impose a fee (e.g., sending a payment by mail). When the consumer chooses a payment method with a fee option, you should retain evidence of the consumer’s authorization and agreement to pay the fee, as well as any fee-free alternatives that existed. ❖

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KEYNOTES

1 Debt collectors should be wary of charging any convenience fees to consumers without first analyzing the FDCPA and state law implications.

2 A CFPB bulletin allows pay-by-phone fees but cautions companies to beware of unfair, deceptive, or abusive acts or practices (UDAAPs) that may potentially result.

3 Offer consumers at least one payment option that does not impose a fee.