The Consumer Finance Podcast – Regulatory Rollback: CFPB's Withdrawal of Informal Guidance Sparks New Litigation Dynamics
Host: Chris Willis
Guests: Jason Manning and Carter Nichols
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Chris Willis:

Welcome to *The Consumer Finance Podcast*. I'm Chris Willis, the co-leader of Troutman Pepper Locke's Consumer Financial Services Regulatory Practice, and today we're going to be talking about the litigation implications of the mass withdrawal of published informal guidance that the CFPB undertook back in May of this year. But before we jump into that topic, let me remind you to visit and subscribe to our blogs, TroutmanFinancialServices.com and ConsumerFinancialServicesLawMonitor.com. And don't forget about all of our other great podcasts, the *FCRA Focus*, *Unauthorized Access*, *The Crypto Exchange*, *Payments Pros*, *and Moving the Metal*. All of 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.

Now, as I said, today we're going to be talking about the guidance that the CFPB withdrew back in May of this year, but today we're going to be taking a different tack on it. How will the withdrawal of these guidance documents affect private litigation instead of regulatory matters, which is what we focused on in past episodes of the podcast? And joining me to talk about that topic are two of our veteran Consumer Financial Services litigators, Jason Manning and Carter Nichols. Jason, Carter, thanks for being on the podcast to talk with me today.

Jason Manning:

Good to be back, Chris.

Carter Nichols:

Thanks so much for having me, Chris.

Chris Willis:

So I think the audience of this podcast knows fairly well what the CFPB did back in May in withdrawing nearly 70 pieces of informal guidance. But if you don't mind, just set the stage for us about the particular pieces of guidance and what the implications are.

Jason Manning:

There are a number of documents that were withdrawn. In high-level, they cover the FDCPA, FCRA, TILA, ECOA, and then some other UDAAP statutes. The significance for us as litigators is, oftentimes, those same policy documents were being cited by our opposition and in some

cases by courts. And so we've been monitoring the development of those policy documents. And as you'd expect, Chris, the withdrawal in mass of them was very significant for purposes of briefing and arguing these issues in front of courts.

Chris Willis:

And in fact, these pieces of guidance, as I said earlier, were informal. These weren't like notice-and-comment rulemaking. These were a grab bag of advisory opinions, and interpretive rules, and bulletins, and blog posts, and things like that. Right, Jason?

Jason Manning:

Yes. And they've provided quite a bit of consternation to financial institution over the years because they were issued without notice or comment. And in many instances were issued in really a manner that was designed to be a war on certain policy issues and mandate compliance without those legislative protections.

Chris Willis:

You mentioned the sort of consternation about these and the use of them by litigants and courts. Are there any examples of this that are particularly pertinent to this conversation?

Jason Manning:

Yeah, good one. One of the documents that was withdrawn, Chris, is called the Debt Collection Practices (Reg F) Pay-to-Pay Fees, and it was back in 2022. So Reg F, formal, final rule went through notice-comment unchanged. But then there's this additional layer being added by the CFPB as an enforcement mechanism that goes beyond Reg F, goes beyond FDCPA. And that specific document has been cited in a number of cases.

The clearest example that's recent is the *Glover* case from the 11th Circuit. In that case, on appeal, the 11th Circuit found that when the borrower requested a payment by phone in exchange for a small disclosed fee, it was a violation of the FDCPA and cited that now withdrawn policy statement from the CFPB.

What's interesting about that decision, and for anybody that's interested, the case number is 23-12578. Look specifically at footnote 14, because for those who are in this area are going to find this very interesting, the court ruled that it was deferring to that document as "consistent with agency guidance". Well, that's a big deal now, Chris, because that's gone, right? I mean, the CFPB has said we withdraw it. Consistency as an undergirding basis for reliance on this document has now been expressly undermined by the CFPB, which calls into question the 11th Circuit's ruling as a whole.

Chris Willis:

Yeah, and in fact, when the CFPB did that withdrawal of those multiple guidance documents back in May, although it didn't give commentary on each one, it did say in general, we're

withdrawing this because it may be in excess of our statutory authority or it may be inconsistent with the underlying law or it may be unnecessary. There's sort of a grab bag explanation associated with withdrawals, if I recall correctly.

Jason Manning:

You're right. And the court in that case obviously didn't have the benefit of the withdrawal. The withdrawal occurred after, and the CFPB was very vague. It didn't stake out a standpoint on each of those policy documents. But in this one in particular, what's interesting, if you go a little bit deeper in the *Glover* decision, the Mortgage Bankers Association actually issued an amicus brief. And it expressly said to the 11th Circuit, "You shouldn't defer to the CFPB now withdrawn policy statement because it's an overreach."

And so to your point Chris, the CFPB did flag that there may be instances where the withdrawn documents are in overreach, and it has not said so as to which ones. But this is an area where I could see the CFPB through official rulemaking, notice-and-comment actually coming out and saying, "Look, what we're talking about here is an additional service, extra contractual requested by a consumer." And in exchange for that, if you elect to provide that additional service, you may charge a reasonable fee. Because the CFPB has said, "Hey, we want to help consumers, and if this is something that consumers want, businesses should be free to do it."

Chris Willis:

Yeah, and that's always how I've thought of convenience fees, too, Jason, is that it's a totally new transaction, not a continuation or a part of the original, for example, consumer credit agreement.

But while we're on the subject of deference and the deference that the 11th Circuit showed in this *Glover* case to the then existing statement of the CFPB, what do you think about what deference, if any, the courts will give to the fact that these guidance documents have now been withdrawn? I mean, what would a court do with that in terms of deference? What do you think?

Carter Nichols:

I'll pick this one up. I think it's really going to depend on the circumstance and likely the court. When the Supreme Court, for example, decided *Loper*, it pushed forward this idea that courts should use the best reading of statutes when determining whether or not agency action reaches the correct conclusion. Basically, what the Supreme Court was saying is, if there was no agency action at all, the court should reach the same conclusion that a valid agency action does, right?

And so I think what you might see in a lot of these instances is courts taking up these issues where the withdrawn guidance previously spoke to a particular issue such as pay-to-pay fees and having to do the legwork, so to speak, of determining whether or not those pay-to-pay fees or other previous guidance that the CFPB had given on various issues, whether the courts reached the same conclusions that the now withdrawn guidance did.

Obviously, the courts no longer have that CFPB guidance that's been withdrawn to lean on in the way we saw it with *Glover*. And so the courts are going to have to reach those decisions on their own. But as we know, depending on what court you are in and sometimes which judge you're in front of, you can reach different results.

Chris Willis:

That's for sure. And I mean, Carter, it seems very sensible to me, your point, which is, it seems unlikely to me that a court would say, "Oh, the CFPB withdrew this guidance." That means they're taking a position that it was wrong, that this is not the right answer under whatever the statute is, because that seems like a strange thing for a court to rely on, don't you think?

Carter Nichols:

Definitely. I totally agree with that. I think, here, the CFPB in withdrawing this guidance is not taking an affirmative position that, for example, the underlying logic with that guidance or the conclusions that it reached was wrong necessarily. I view it as more of a broader policy step back from the CFPB taking the position that we are not going to get into the weeds on some of these issues.

And sort of in the way, the Supreme Court with *Loper* puts the onus back on courts to do the legwork, the CFPB in its own right is saying, "We're also putting the onus back on courts to interpret laws, and we're not going to, as an administrative agency, interject ourselves into that system."

With that said, though, there are cases, *Glover* being an example, where the courts rely heavily on this CFPB guidance. And to the extent that some of those decisions sort of hang their hat on that now withdrawn CFPB guidance, I think that there could be either litigants or maybe lower courts who come along and say, well, the reasoning that you gave for this decision, *Glover* as an example, was this now withdrawn CFPB guidance. That calls into question sort of the precedential value, I think, of some of those cases.

And while a court might ultimately reach the same conclusion, I do think it opens the door for, for example, lower courts in the 11th Circuit to say we're not bound by, for example, *Glover* and can look at this issue anew. Whereas, prior to this withdrawal, you might have had lower courts saying, "Well, this issue's been decided and we're bound by what the 11th Circuit said."

Chris Willis:

That makes sense. What do you gentlemen think the sort of game plan is now for litigation that involves one of these subjects, where the CFPB had taken a position in a piece of guidance that's now been withdrawn? I mean, what does that do in terms of your tactics and strategy in terms of arguing the issue?

Jason Manning:

I think a lot of the analysis can still be used. If it's favorable, you can identify it. If it's unfavorable, you may want to be anticipating it and rebutting it, but you're not going to cite to it. I think it causes more of a distraction if you cite to it, because then the court's like, "Well, what's the relevance of that?" You become an easy target for your opponent. But I similarly could see courts essentially recycling some of the logic of it if they want to use it to support a result-oriented decision. And vice versa, if they're like, "Hey, this is an overreach," they're going to, I believe, anticipate the need to dispel some of the persuasive value of that logic.

It's just part of a general overall, I think, cautionary measure in relying on agency decisions. More recently, you've got the *McLaughlin Chiropractic* decision just last month, where the Supreme Court said, “Look, in the past, the FCC was dispositive in its interpretation of the TCPA.” That's not right. Don't do that, right? You courts have to go and look at it yourselves. And that really does – again, we're going to see how that plays out in that context. But similarly, it gets both sides a new shot at making a precedential case for new decisions and new results.

Chris Willis:

Yeah, and I guess it means everybody has to brush up on their canons of statutory construction, right?

Jason Manning:

That's right.

Chris Willis:

All those fun Latin phrases.

Carter Nichols:

Obviously, it depends case to case, I think. But I think there are also times where we saw in some of these sort of informal guidance documents, they're not always necessarily fully fleshed out, the logic or the reasoning behind it. Sometimes you saw sort of an appeal to authority of, for example, "We're the CFPB, we interpret this statute, and we think that this conclusion is consistent with how we've previously interpreted it."

Chris Willis:

Yeah, they would cite to their own consent orders.

Carter Nichols:

Exactly. In that sense, there's uncharted territory for some of these issues where previously there were times where consumers or their attorneys could cite to the informal guidance, which was sort of self-perpetuating. And now they're really going to have to explain and get in the

weeds as to why their interpretation of the statute is correct or why it should be expanded to cover issues that, frankly, the statutes don't talk about.

And so in that sense, I think kind of circling back to the reason why the CFPB says it withdrew this guidance, we're really going to get to a point of deciding whether or not that previous guidance was consistent with the relevant statute and regulation, which presents opportunities for litigants on both sides.

Chris Willis:

Yeah, for sure. But I feel like from the defense standpoint, it's a whole lot nicer not to have it out there when it's adverse to us.

Jason Manning:

Agreed.

Carter Nichols:

Yes, we certainly aren't losing any sleep over the withdrawal of all of these opinions.

Chris Willis:

No, no, I would think it's time for a little celebration, actually. Are there any parting thoughts you want to leave the audience with about the litigation landscape as it's been impacted by this event?

Jason Manning:

More interesting things to come. Stay tuned.

Chris Willis:

Yeah, absolutely. The gates have been thrown open to sort of arguments on both sides. Well, gentlemen, thank you very much for being on the podcast today. It's always great being able to showcase our very extensive Consumer Finance Litigation practice here on the podcast, so I'm glad you were able to do that. And of course, thanks to our audience for listening today as well.

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