CFPB, State Regulators, and Courts Take Aim at Convenience Fees

August 31, 2022 | Anastasia V. Caton and Taylor A. Krowitz

The first half of 2022 has seen a flurry of state and federal activity attempting to reign in "convenience fees"—fees charged by a creditor, debt collector, or third party to a consumer for making a payment via some means other than a check or cash, such as over the phone, online, or in some other expedited manner. Although state and federal regulators have scrutinized convenience fees in the past, the recent overt hostility at the state and federal levels creates a present risk for creditors, servicers, and debt collectors that might ask a customer to pay those fees.

By way of background, the federal Fair Debt Collection Practices Act and its implementing regulation, Regulation F, prohibit a debt collector from collecting any amount (including any interest, fee, charge, or expenses incidental to the principal obligation) unless the amount is expressly authorized by the agreement creating the debt or permitted by law. It is uncommon for credit agreements to expressly provide for convenience fees. Instead, the service of accepting payment over the phone or through means other than a check or recurring automatic debit payment is typically considered a separate service that the creditor or debt collector does not *have* to provide. Providing that service generally costs the creditor or debt collector money, so it is common to seek the consumer's consent to pay a convenience fee and then charge the fee (or allow the third-party payment processor to impose the fee) to accept that payment. Further, most state laws do not expressly authorize (or prohibit) convenience fees.

Many creditors, servicers, and debt collectors have historically operated under the assumption that convenience fees are nonetheless allowed if state law does not expressly prohibit them or, as noted above, because the consumer incurred the fees for a separate transaction, unrelated to the debt and not contemplated by the credit agreement (i.e., the service of providing a "convenient" or expedited means to make a payment when a free method of payment was otherwise available). However, the judicial and regulatory activity this year concerning convenience fees ought to at least give creditors, servicers, and debt collectors pause to review applicable fee authority. We turn now to the substance of these judicial and regulatory holdings.

In January, the U.S. Court of Appeals for the Fourth Circuit, in *Alexander v. Carrington Mortgage Services, LLC*, considered whether a mortgage servicer could charge payment convenience fees. Carrington's standard business practice was to charge borrowers a $5 convenience fee whenever they paid a monthly mortgage bill online or by phone. The fee was not expressly authorized by the loan agreement that created the debt and was not expressly permitted by Maryland law. Alexander sued, claiming that Carrington violated Maryland's Debt Collection Act, which incorporates the federal FDCPA and applies it to, effectively, all persons collecting consumer debt in Maryland. Specifically, Alexander argued that, because neither state law nor the mortgage note expressly authorized convenience fees, Carrington violated the MDCA when it attempted to collect and did collect convenience fees from consumers who made payments online or by phone. Carrington argued that the fees were permitted by law because applicable law did not expressly prohibit the fees and the Maryland law that applied to the mortgage loan was generally fee-permissive (i.e., if a fee is not prohibited, the creditor may charge it). Therefore, Carrington claimed, it did not matter that the agreement creating the debt was silent concerning convenience fees. The court disagreed, instead finding that if a fee is not expressly authorized by law, it is not allowed unless the agreement creating the debt expressly provides for the fee (and it is not otherwise prohibited by law). Because Carrington failed to identify any Maryland law expressly authorizing convenience fees, and the loan agreement did not expressly authorize the fees, the court found that Carrington violated the MDCA when it charged convenience fees to Maryland consumers.

Next, in May, the Maryland Commissioner of Financial Regulation took the baton, formally agreeing with the holding in *Carrington* in an industry advisory — Notice to Lenders and Servicers: Court Decision on So-Called "Convenience Fees" (Fees for Loan Payments Might Not Be Collectable). The advisory made clear that, by incorporating the FDCPA by reference, the MDCA effectively applies the FDCPA to all persons collecting or attempting to collect a debt arising out of a consumer transaction, regardless of whether the person is a "debt collector" under the FDCPA. Citing to *Carrington*, the Commissioner advised that a debt collector, or a creditor or servicer not otherwise subject to the federal FDCPA, cannot collect or attempt to collect a convenience fee unless the credit agreement creating the debt expressly authorizes the fee (the Commissioner seems to take this position because the Commissioner believes no law in Maryland expressly authorizes convenience fees, although the advisory does not explicitly say so). Moreover, the Commissioner was clear that a creditor or servicer would also violate Maryland law if it directed consumers to a payment platform "associated with" (an undefined term) the creditor or servicer that collects a convenience fee or if it required consumers to amend their credit agreements for the purpose of contracting for such fees. Perhaps most significantly, the advisory requested that creditors and servicers conduct a review of their records to determine whether any improper fees have been assessed and "undertake appropriate reimbursements to affected borrowers."

Finally, in June, the Consumer Financial Protection Bureau weighed in, putting "debt collectors" nationwide on notice that it also agrees with the holding in *Carrington*. In its Advisory Opinion on Debt Collectors' Collection of Pay-to-Pay Fees, the CFPB cites to *Carrington* and effectively adopts the same reasoning and outcome: a debt collector may not attempt to collect any convenience fees unless: (1) the agreement creating the debt expressly authorizes the fees (and no other law prohibits the fees); or (2) applicable law expressly authorizes the fees. Like the Fourth Circuit, the CFPB reasoned that convenience fees are an "amount" within the meaning of the FDCPA and subject to its prohibition on unauthorized fees, regardless of whether they are "incidental" to the principal obligation. And, like the Fourth Circuit, the CFPB also reasoned that a debt collector may only collect or attempt to collect such fees if they are expressly authorized by the agreement creating the debt or applicable law. Silence in the law, even if the state otherwise interprets that silence as permission, and in the agreement is insufficient, according to the CFPB. Finally, the advisory clarified that debt collectors may violate the FDCPA if they receive any portion of the convenience fees that are collected by a third-party payment processor.

As mentioned above, many creditors, servicers, and debt collectors have operated under the assumption that they may charge convenience fees, even if the credit agreement is silent, as long as state law does not specifically prohibit the fees. But, the Fourth Circuit's decision and the guidance from the CFPB and the Maryland Commissioner make clear that silence in the credit agreement and in the law (again, even if that silence with respect to the convenience fee and other fees not enumerated as permissible fees otherwise means the fees are allowed) is insufficient authorization to charge convenience fees, at least for "debt collectors" under the FDCPA (and, in Maryland, for creditors, servicers, and collection agencies subject to the MDCA). The case and the regulators' guidance also make clear that the "separate transaction" argument—that a creditor, servicer, or debt collector may agree with the consumer to pay a fee specifically to make a payment by some means other than a check—is not a sufficient basis to claim that the fee is expressly allowed by contract or applicable law. The emphasis in these recent developments on the apparent requirement that state law specifically allow a fee by name, not just allow it by silent permissiveness, before it can be charged may also create federal and state compliance risk for creditors and servicers operating outside of Maryland that are not "debt collectors" under the FDCPA.

First, despite the CFPB saying that the prohibition only applies to "debt collectors" as defined by the FDCPA, the agency has historically applied many provisions of the FDCPA to creditors and servicers that are not "debt collectors" under an unfair, deceptive, or abusive acts or practices theory. Therefore, there is UDAAP risk at the federal level for creditors and servicers that are not "debt collectors" under the FDCPA. Charging these fees (or receiving any portion of these fees from a third-party payment processor) if they are not expressly authorized by the agreement creating the debt or applicable law could result in a federal UDAAP claim.

Second, as demonstrated by the *Carrington* case and the Maryland Commissioner's advisory, there is also state law risk for creditors and servicers (not only in Maryland). Many states, like Maryland, have "mini-FDCPA" laws that regulate the collection practices of creditors, servicers, or both (that are not otherwise "debt collectors" under the FDCPA). Some states expressly incorporate the federal FDCPA into their statute (e.g., Maryland and California), while other states have laws that mimic (either exactly or closely) the federal FDCPA's prohibition on imposing fees not expressly authorized in the credit agreement or state law. In these states, there is a risk that a court or regulator will take the same position as the Fourth Circuit, the CFPB, and the Maryland Commissioner have taken with respect to convenience fees. Even in states without an express statutory provision that either incorporates the federal FDCPA and applies it to creditors and servicers or a provision that mimics the FDCPA's prohibition on collecting an amount that is not expressly authorized by the agreement creating the debt or permitted by law, there is still some risk that a state regulator could take the position that it is an unfair, deceptive, abusive, or unconscionable act or practice (under the state's unfair trade practices law or "mini-FTC Act") for creditors and servicers to charge convenience fees when the contract and applicable law do not expressly authorize such fees.

Creditors and servicers have a few options to mitigate their risk. Creditors and servicers ought to first review the credit agreements they hold or are servicing to determine whether the agreements expressly authorize convenience fees. Creditors and servicers also ought to review state law to determine whether state law expressly authorizes convenience fees (or expressly prohibits convenience fees). If a creditor or servicer finds that convenience fees are not expressly permitted by the contract or applicable law, the creditor or servicer probably ought to stop charging the fees. Finally, creditors should consider (if state law does not otherwise prohibit convenience fees) expressly contracting for convenience fees in future credit agreements. It is important to note that it would likely be inappropriate to modify existing credit agreements for the sole purpose of contracting for convenience fees (the Commissioner made clear that this would be inappropriate in Maryland).

In summary, with the rise in alternate payment methods, convenience fees have become ubiquitous as a way to cover the payee's cost of using payment processors. However, the credit industry must now reckon with the possibility that the collection (or receipt from a third party) of these fees may create legal risk under state and federal law. Creditors, servicers, and debt collectors may also need to consider taking remedial steps to correct any improper collection of convenience fees in the past (particularly in Maryland) as well as proactive measures to ensure that the collection of convenience fees in the future complies with the CFPB's, Fourth Circuit's, and Maryland Commissioner's interpretation of the FDCPA.

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