The Fuss About Junk Fees, Pt. 3: Defending Junk Fees Litigation and Regulatory Oversight

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In this three-part series, we first reviewed the Biden Administration's collaborative efforts with the CFPB and the FTC to regulate "junk fees." We highlighted recent regulatory, enforcement, and private actions and trends in the second piece. In this third and final installment, we will outline a few considerations for financial services companies to consider when navigating the new normal when it comes to challenges to so-called "junk fees" by consumers and regulatory agencies.

Part 3 in our series looks at what arguments and defenses a financial services company can make when confronted with allegations from regulators or private litigants challenging fees and costs charged to a consumer that are incidental to the good or service being offered. While there may be no foolproof way to avoid the filing of a lawsuit or an enforcement action, here are a few considerations when faced with legal challenges related to so-called "junk fees."

Disclose Fees

Perhaps one of the strongest defenses to an attack on alleged "junk fees" is to make clear that the fees were disclosed clearly and conspicuously to the consumer at the outset of the relationship. Parties are assumed to know and understand the terms of a contract they enter into, and a consumer would be hard-pressed to argue that a fee or cost associated with a product or service constitutes an impermissible "junk fee" if they expressly agreed to it upfront.

Follow the Plain Language

Along those same lines, ensure any fee or cost you charge to a consumer comports with the express, plain language of the underlying contract. For instance, if the contract allows you to charge a late fee that is equal to a certain percentage of the consumer's monthly payment, ensure you are charging the fee in that manner, **not** a flat fee across all contracts, as the CFPB has explicitly found such activity constitutes an impermissible junk fee.

Proportionality is Key

A common thread that runs through the various enforcement actions and putative class actions targeting "junk fees" is the allegation that the fee or cost is not proportional to the service being offered. While no agency or

court has yet to define the appropriate balance between a lawful fee and the service being rendered, the more proportional the fee is to the cost of the service being offered, the more likely it will not be considered a "junk fee." Having policies and procedures in place that outline the cost of the product or service being offered can also help refute any claims that the fee is not proportional to the service being offered.

Fees or Costs Outside of the Consumer's Control Are Problematic

Consider whether the fee incurred is a result of something outside of the consumer's control. If so, the fee is more likely to be considered an impermissible "junk fee." As such, consider reviewing policies and procedures with respect to subscriptions, sign-ups, and cancellations, including any obstacles consumers may face in attempting to cancel or unsubscribe. In other words, if these actions trigger mandatory fees/costs, consider whether such a business model could constitute an unlawful "junk fee" and, potentially, grounds for an Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) action and if so, revise as necessary.

Reasonable and Necessary

The CFPB's supervisory findings make clear that it considers an "unnecessary" fee a "junk fee." Having policies in place that explain why a fee is necessary, required, or requested by the consumer may assist in refuting such allegations in the future.

A "Junk Fee" is Not a Per Se UDAAP Violation (Or Is It?)

Most state UDAAP statutes require the defendant to commit an unfair or deceptive act or practice, which typically requires some affirmative act by the business to deceive a consumer. But not all contract breaches rise to this level.[1] Defendants can, and should, argue that even if a fee or cost does constitute an unlawful "junk fee," such an act or practice does not rise to the level of a UDAAP violation, especially when there is no evidence of deception. That distinction is important, especially when faced with a private lawsuit, as ordinarily, a breach of contract does not permit the recovery of attorney's fees, whereas a UDAAP violation typically does. The legal and regulatory focus on consumer fees is ever-evolving, and savvy financial institutions are well advised to stay abreast of updates from the CFPB, FTC, and courts on this topic. As always, McGlinchey's financial services team will publish updated content as developments arise.

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[1] *See Wasserman v. Home Corp*., 8th Dist. Cuyahoga No. 90915, 2008-Ohio-5477, ¶ 13 ("Although there have been circumstances where a breach of contract…has constituted a violation of the []CSPA, not every such breach will constitute a[] []CSPA violation. Indeed, a breach of contract is not necessarily rooted in a deceptive act pursuant to R.C. 1345.02."); *Toth v. Spitzer*, 2nd Dist. No. 17178, 1998 WL 879475, *2 (Dec. 18, 1998) ("Obviously, a contract can be breached in myriad ways that do not involve deception.")

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