

ALERT

CFPB Enters the Telecom Space with “Cramming” Complaint; Sprint Complaint Makes Novel Legal Claims

December 19, 2014

A new regulator has staked its claim in the telecommunications space. The Consumer Financial Protection Bureau (CFPB) made its first foray into the telecom space on December 17, 2014, filing a “cramming” complaint against Sprint in the United States District Court for the Southern District of New York. The complaint is of interest not just because of CFPB’s interest in telecom, but because it asserts that certain conduct is actionable under the Consumer Financial Protection Act that has not previously been subject to legal challenge, even where identical conduct has been investigated by other federal agencies.

The CFPB’s complaint—which news reports suggest will be accompanied by parallel Federal Communications Commission (FCC) enforcement action—is the third “cramming” enforcement action in 2014 involving a wireless operator. The Federal Trade Commission (FTC) filed a cramming complaint in July, and the FTC, FCC, and a group of state attorneys general joined in a cramming settlement in October. Each of those actions focused on the “unfairness” of charging consumers for purchases they allegedly did not authorize and the “deception” of representing that the charges were, in fact, authorized.

The legal foundation of the CFPB’s Sprint complaint—which focuses on conduct identical to the earlier enforcement actions—is entirely different. The complaint asserts that automatically enrolling consumers in a system that enables third party charges, allegedly without their consent, is itself “unfair,” and thus actionable under the Consumer Financial Protection Act. The focus of this claim is not the

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allegedly unauthorized charges, but the provision of the capability to incur those charges, *i.e.*, enabling consumers to purchase items from third parties and to be billed for those charges on their wireless bill. The CFPB also asserts that not adequately resolving consumer complaints—for example, by referring the complaints to the third party sellers of the purchased goods—is itself actionable. Moreover, the complaint suggests that not tracking discrete categories of complaints—in this case, complaints about “unauthorized charges”—and outsourcing to third parties responsibility for securing “opt-in” consent for purchases charged to a wireless bill are inherently “unfair.”

The enforcement action also marks an aggressive foray into a new area for the agency. The CFPB was set up to regulate retail banks, credit unions, and other consumer finance companies (like credit card companies, debt relief providers, and debt collectors). With this action, the CFPB will be asserting jurisdiction over technology companies that provide platforms for vendors to sell goods and services and for consumers to make payments. The case will serve as a test for whether wireless operators and other firms in the internet marketplaces offer “financial products or services” that are subject to regulation under the Consumer Financial Protection Act.

More immediately though, the complaint strongly suggests that the CFPB looks unfavorably—or at least skeptically—upon third party payment aggregation as a business model.