Payment Convenience Fees: Are Courts Making Loan Servicers Pay for Letting Borrowers Pay?

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I. Introduction

Fees or assessments for expedited or alternative forms of payment of outstanding consumer bills, such as over the phone or an electronic check, are not uncommon. They may be imposed to offset the administrative cost of the payment method and to encourage other more traditional forms of payment. Unfortunately, lawsuits over the propriety of those fees are just as common and becoming more so. While some cases have resolved

through class action settlements, others continue to proceed through the courts with varying results. Although the Consumer Financial Protection Bureau (CFPB) issued guidance in July 2017, new cases against mortgage servicers are now filing apace with judges reaching polar opposite results.

This article will discuss the current legal landscape, including consideration of the latest court decisions. In sum, expect this to remain an unsettled area, with more litigation to come, until more controlling authority is received.

II. Guidance from the Consumer Financial Protection Bureau

As mentioned above, the CFPB issued Compliance Bulletin 2017-01 dated July 31, 2017, to address perceived issues with payment convenience fees, particularly with respect to pay-by-phone fees and fees for payments to debt collectors.[1] In doing so, the CFPB referenced the potential for violations of sections 1031 and 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act's (Dodd-Frank Act) prohibition on engaging in unfair, deceptive, or abusive acts or practices (collectively, UDAAPs).[2] It also addressed the potential for violations of the Fair Debt Collection Practices Act (FDCPA) for debt collectors.

Specifically, the Bulletin, entitled "Phone Pay Fees" was addressed to covered persons and service providers, i.e., those who may impose such fees. The CFPB acknowledged the widespread use of multiple payment options across various consumer financial products and services.[3] Choices often include making payments over the phone through an automated system or speaking with a live representative, making phone payments by using a credit card, debit card, or electronic check, or to have a payment expedited. Sometimes, third-party service providers handle and process these payments.

Some states restrict phone payment fees. In addition, a Credit CARD Act amendment to the Truth In Lending Act, as implemented in Regulation Z, prohibits a separate fee to allow consumers to make a payment by any method (including telephone payments)—unless the payment method involves an expedited service by a service representative of the creditor—for credit card accounts under an open-end consumer credit plan.[4] As for phone payment fees that are not already curtailed by state statutes, the CFPB then considered whether they may appear to be unfair or deceptive.

The Bulletin flagged several issues with phone payment fees, the first being a failure to clearly disclose different fees for alternative pay-

1. Consumer Financial Protection Bureau, Phone Pay Fee Compliance Bulletin 2017-01 (Jul. 27, 2017).
2. *Id*.
3. *Id*.
4. *See* 15 U.S.C. 1637(l); 12 CFR 1026.10(e).

ments.[5] In other words, the disclaimer that "transaction fees may apply" is not enough. Instead, the relevant fees to be charged for those methods must be detailed. The CFPB noted that sometimes phone representatives are expected to disclose the relevant fees to consumers before the charge is imposed, yet material price differences between available options might not be mentioned. The CFPB found that such conduct:

> poses a risk of an unfair practice: it may cause substantial harm to consumers, who are pushed into materially higher-cost options; this harm may not be reasonably avoidable if consumers are unable to select lower-cost alternatives because they do not have the necessary information to know that such options are available; and countervailing benefits to consumers or competition may not warrant the entity's failure to disclose the materially different prices of the available phone pay options to its consumers.[6]

Similarly, the Bureau took issue with a failure to mention free payment options when consumers might be channeled to fee-based methods. The CFPB has filed enforcement actions involving this issue. Likewise, the Bulletin identified a failure to disclose that a phone pay fee will be charged in addition to a consumer's otherwise applicable payment amount, i.e., indications that only the payment amount will be charged when an undisclosed fee will be added can be misleading.[7] Hence, the Bureau noted that detailed call scripts disclosing all fees—without deviation—are critical.

In addition, the CFPB's Compliance Bulletin considered the application of the FDCPA, which precludes charging fees, including phone pay fees, in certain instances. The Bureau noted that, under section 808(1) of the FDCPA, a debt collector may not collect 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 CFPB then stated that,

> mortgage servicers that met the definition of 'debt collector' under the FDCPA violated the Act when they charged fees for taking mortgage payments over the phone to borrowers whose mortgage instruments did

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5. Consumer Financial Protection Bureau, Phone Pay Fee Compliance Bulletin 2017-01 (Jul. 27, 2017).
6. *Id.* The CFPB recently entered into a Consent Order arising out of an enforcement action with Nissan Motor Acceptance Corporation ("NMAC") based on, among other things, NMAC's failure to disclose the prices of several different telephonic payment options, causing some consumers to unknowingly choose a more expensive option. *In re* Nissan Motor Acceptance Corp., 2020-BCFP-0017 (Consumer Fin. Protection Bureau Oct. 13, 2020) (Stipulation to Consent Order). This demonstrates that the CFPB takes seriously failures to disclose the cost of different phone payment options and will file enforcement actions for violations.
7. *Id.*

> not expressly authorize collecting such fees and who reside in states where applicable law does not expressly permit collecting such fees.[8]

Unfortunately, while the Bulletin may have been intended to provide guidance where convenience fees may be imposed, it may have also served as a roadmap to litigation, particularly against mortgage servicers. While each fee and its attendant circumstances of disclosure should be closely considered within the context of the issues described above, the final adjudication of the many contests of such fees remains to be seen, as discussed below.

III. The Fair Debt Collection Practices Act (FDCPA)

Litigation surrounding the collection of "convenience fees" comes in various shapes and forms. Oftentimes, companion claims are alleged by plaintiffs contending that the collector of these fees has violated both the FDCPA along with various state-law counterparts to the FDCPA that are applicable in the given jurisdictions. The focus of this article is on claims that may fall under the scope of the FDCPA. However, where applicable, state law counterparts should also be considered for their potential application and effect. Indeed, material distinctions may exist between the state and federal statutes, such as the inclusion of creditors in some state debt collection laws.

The FDCPA solely regulates "debt collectors," which are defined as follows:

> [A]ny person who uses any instrumentality of interstate commerce of 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.[9]

Thus, from its plain text, the FDCPA applies only to entities engaged to collect debts on behalf of others. Therefore, creditors seeking to collect their own debts are not debt collectors under the statute.[10]

In addition, the term "debt collector" does not include "any person collecting or attempting to collect any debt owed or due . . . to the extent such activity . . . concerns a debt which was originated by such person" or "concerns a debt which was not in default at the time it was obtained by such person. . . ."[11] Therefore, when evaluating whether an entity is a "debt collector" under the FDCPA, sometimes the determining factor is not the en-

8. *Id*.
9. 15 U.S.C. § 1692a(6).
10. *See* 15 U.S.C. § 1692a(6)(A) ("The term ['debt collector'] does not include . . . any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor."). *See also* Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718, 1724 (2017).
11. 15 U.S.C. § 1692a(6).

tity itself, but rather the status of the debt it is attempting to collect. Moreover, mortgage servicers are generally excluded from the definition of a debt collector so long as the underlying loan was current when servicing began.[12] Conversely, if the mortgage was in default when the servicing began, then the servicer can be a "debt collector" under the FDCPA.[13] Thus, a servicer that acquires servicing rights prior to default is not a debt collector, i.e., is within the section 1692a(6)(F) exception for non-defaulted loans.[14] This circumstance is critical to establish "debt collector" status under the FDCPA to thereby lay the initial brick for a claim against the mortgage servicer.

On the other hand, evaluating whether the "debt" itself falls under the FDCPA is much clearer. The FDCPA solely applies to "consumer debts" which are defined as an obligation to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes.[15] However, excluded from the definition of a "consumer debt" are: (1) commercial/business debts, (2) child support, (3) tort claims, (4) subrogation claims, and (5) personal taxes.[16] Thus, a question can arise when the loan was initially opened for personal reasons, but shifts to an investment, such as a mortgage for a residence that is later converted to a rental property. While the customary debt at issue would clearly fall within the scope of a "consumer debt" under the FDCPA, hybrid situations can occur and may often necessitate a fact intensive analysis to determine whether the debt was incurred "primarily" for personal use or commercial purposes.

Now that we understand the "who" and "what" in the context of the FDCPA, the next consideration is what the Act prohibits. There are essentially three categories of conduct that the FDCPA regulates: (1) communications (both with the debtor and third parties), (2) harassment and abuse, and (3) misrepresentations regarding the amount, character, and status of the debt.[17] While much of the FDCPA governs communications and harassment topics, for purposes of this article we focus on the "misrepresentation" portion as that is the springboard for a lawsuit against convenience fees.

12. *See, e.g.*, Beard v. Ocwen Loan Servicing, LLC, 2018 WL 638455 at *3 (M.D. Pa. Jan. 31, 2018). *See also* Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir. 1985) ("The legislative history of section 1692a(6) indicates conclusively that a debt collector does not include . . . a mortgage servicing company . . . as long as the debt was not in default at the time it was assigned.").

13. *See, e.g.*, Ayres v. Ocwen Loan Servicing, LLC, 129 F. Supp. 3d 249, 277 (D. Md. 2015).

14. *See, e.g.*, Thomas v. Ocwen Loan Servicing, 2018 WL 3608398 at *4 (W.D. Wash. July 26, 2018).

15. *See* 15 U.S.C. § 1692(a)(5).

16. *Id.*

17. *See generally id.* § 1692.

There are many categories of information that debt collectors cannot misstate, but the relevant section for our purposes is section 1692(f)(1). This section prohibits "the collection of 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."[18] In other words, if a "debt collector" as defined in the Act is going to add fees for any reason, including as a convenience fee, it must be permitted under the terms of the underlying agreement or state law. If there is any ambiguity or silence in either respect (or if the fee is not otherwise clearly disclosed and voluntarily accepted), a claim could arise that the fee conflicts with the FDCPA.

Indeed, silence is often the case with commonly used Fannie Mae and Freddie Mac uniform first lien loan instruments, which do not expressly permit such fees. As such, consideration may need to be given to state law. In this regard, a Second Circuit decision, *Tuttle v. Equifax Check*,[19] provides the commonly applied guidance:

1. If state law expressly permits service charges, a service charge may be imposed even if the contract is silent on the matter;
2. If state law expressly prohibits service charges, a service charge cannot be imposed even if the contract allows it;
3. If state law neither affirmatively permits nor expressly prohibits service charges, a service charge can be imposed only if the customer expressly agrees to it in the contract.[20]

The first consideration is whether state law expressly permits the charge. If it is silent (and not prohibited), the fee must be expressly included in the contract.

A complicated analysis must be undertaken involving applicable state law and the explicit terms of the contractual documents. Moreover, consideration must be given to "debt collector" status under the FDCPA to trigger its application. In addition, as explained further below, another consideration is whether the fee is a "debt" as defined by the FDCPA or a charge incidental to the debt. And in that regard, very recent judicial decisions are reaching completely opposite results.

IV. Judicial Trends

The current split in the state of the law regarding the legality of so-called "pay-to-pay fees" is best demonstrated by a series of lawsuits filed against Ocwen Loan Servicing, LLC and PHH Mortgage Corporation in the United States District Courts for the Middle and Southern Districts of Florida. The

18. *Id.* § 1692(f)(1).
19. 190 F.3d 9 (2d Cir. 1999).
20. *Id.* at 13.

leading issue in these cases is whether the fee is "incidental" to the debt to fall within the scope of section 1692f(1).

In one line of cases, judges faced with motions to dismiss found that "pay-to-pay fees" are expenses incidental to a debt within the meaning of the FDCPA and are therefore covered by the Act.[21] These judges then went on to conclude that the "pay-to-pay fees" are not expressly authorized by the underlying mortgages or permitted by law and therefore violate the FDCPA. In another line of cases, judges faced with motions to dismiss have determined the opposite. There, courts found that "pay-to-pay fees" are not debts owed to another or incidental to such a debt, but rather are fees incurred in a separate agreement between the parties for an optional service that the plaintiffs voluntarily incurred. Thus, the fees are not covered by the Act.[22] These very different applications of the FDCPA to virtually identical factual scenarios have led these judges to reach opposing decisions on similar motions to dismiss.

The Honorable Donald M. Middlebrooks's decision in *Booze v. Ocwen Loan Servicing, LLC*,[23] is the best representation of the analysis adopted by judges determining that "pay-to-pay fees" are covered by the FDCPA. Essentially, the logic here is that the convenience fee is "incidental" to the mortgage debt under FDCPA section 1692(f)(1).

In *Booze*, Judge Middlebrooks concluded that such fees are most appropriately characterized as an expense incidental to a debt because "they are dependent on the payment of Plaintiff's debt; there could be no [pay-to-pay fee] without a payment to make more 'speedy.'"[24] Judge Middlebrooks compared the "pay-to-pay fees" to fees charged for dishonored checks, finding "no appreciable difference" between them.[25] The Staff Commentary on the Fair Debt Collection Practices Act[26] necessarily assumed that fees for dishonored checks are expenses incidental to a debt, because the Staff

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21. Booze v. Ocwen Loan Servicing, LLC, 9:20-cv-80135-DMM (S.D. Fla. Mar. 2, 2020); Fox v. Ocwen Loan Servicing, LLC, 9:20-cv-80060-DMM (S.D. Fla. Mar. 2, 2020); Fusco v. Ocwen Loan Servicing, LLC, 9:20-cv-80090-DMM (S.D. Fla. Mar. 2, 2020); Glover v. Ocwen Loan Servicing, LLC, 9:20-cv-80053-DMM (S.D. Fla. Mar. 2, 2020); Webster v. Ocwen Loan Servicing, LLC, 0:20-cv-60117-WPD (S.D. Fla. Apr. 30, 2020).
22. Turner v. PHH Mortgage Corporation as successor by merger to Ocwen Loan Servicing, LLC, 8:20-cv-00137-JSM-SPF (M.D. Fla. Feb. 24, 2020); Estate of Derrick Campbell v. Ocwen Loan Servicing, LLC, 9:20-cv-80057-AHS (S.D. Fla. Apr. 30, 2020); Reid v. Ocwen Loan Servicing, LLC, 9:20-cv-80130-AHS (S.D. Fla. May 4, 2020); Lang v. Ocwen Loan Servicing, LLC, 3:20-cv-00081-HES-MCR (M.D. Fla. July 17, 2020); Kelly v. Ocwen Loan Servicing, LLC, 3:20-cv-00050-TJC-JRK (M.D. Fla. July 31, 2020); Bardak v. Ocwen Loan Servicing, LLC, 8:19-cv-01111-SCB-TGW (M.D. Fla. Aug. 12, 2020); Garbutt v. Ocwen Loan Servicing, LLC, 2020 WL 1476159 (M.D. Fla. March 26, 2020).
23. 9:20-cv-80135-DMM (S.D. Fla. Mar. 2020).
24. *Id.* at 4.
25. *Id.*
26. 53 FR 50097-02.

Commentary provided guidance on when such fees can be charged, which it only could have done if such fees are expenses incidental to a debt regulated by the FDCPA.[27] Judge Middlebrooks concluded that if fees charged for dishonored checks are expenses incidental to a debt covered by the FDCPA, "pay-to-pay fees" must also be, as "[b]oth are charges that are incurred in the process of paying the debt, and could not be incurred independently."[28] Judge Middlebrooks rejected the argument that "pay-to-pay fees" are not expenses incidental to a debt because they are optional, reasoning that fees for dishonored checks are also essentially optional, since they can be avoided by not paying with a bounced check.[29]

After concluding that "pay-to-pay fees" are expenses incidental to a debt regulated by the FDCPA, Judge Middlebrooks next reviewed whether the fees are permitted by law.[30] Judge Middlebrooks noted that courts have disagreed as to the meaning of the phrase permitted by law, with some concluding that permitted by law means expressly permitted by law and others concluding that permitted by law means not expressly prohibited by law.[31] Judge Middlebrooks concluded that the plain language of the FDCPA demonstrates that permitted by law means expressly permitted by law, but recognized that "a statute may authorize conduct in more general terms" and need only make clear that "pay-to-pay fees" are permitted to support a finding that the fees do not violate the FDCPA.[32] Judge Middlebrooks determined that no authority was presented that expressly permits "pay-to-pay fees," meaning they are not permitted by law.[33]

Judge Middlebrooks noted that no argument was made that the underlying mortgage permits the "pay-to-pay fees" and rejected any contention that a contract formed at the time the "pay-to-pay fees" were incurred renders the fees permissible, since the plain language of the FDCPA requires the fees to be "expressly authorized by the agreement creating the debt," not by a contract formed later.[34] Judge Middlebrooks pointed out that if Congress intended to say that the FDCPA permitted charges that are authorized by an agreement formed at any time, not just in the agreement creating the debt, it could have said so, but it did not.[35] Therefore, Judge Middlebrooks concluded that the "pay-to-pay fees" at issue in the case were not expressly authorized by the agreement creating the debt or permitted by law, and thus violated the FDCPA.[36] Judge Middlebrooks accordingly denied the motion to dismiss.[37]

27. *Booze*, 9:20-cv-80135-DMM, at 4 (S.D. Fla. Mar. 2020).
28. *Id.*
29. *Id.* at 4–5.
30. *Id.* at 5–7.
31. *Id.* at 5.
32. *Id.* at 5–6.
33. *Id.* at 6–7.
34. *Id.* at 7–8.
35. *Id.* at 7.
36. *Id.* at 8.
37. *Id.*

Likewise, the court in *Glover v. Owen Loan Servicing, LLC*,[38] found that the convenience fees were not permitted by Florida law because the court could not identify any statute or law expressly permitting such fees, nor were they explicitly allowed by the mortgage agreement. Other courts have employed similar reasoning and refused to dismiss these claims under equivalent state statutes.[39]

By contrast, the Honorable James S. Moody, Jr.'s decision in *Turner v. PHH Mortgage Corporation*,[40] is the best representation of the analysis adopted by judges determining that "pay-to-pay fees" are not covered by the FDCPA. Judge Moody determined that the fees cannot be considered expenses incidental to a debt because they originated with the mortgage loan servicer, not the holder of the mortgage.[41] Therefore, they are more properly characterized as a convenience fee paid in exchange for an entirely separate service—same-day posting and processing of mortgage payments.[42] Under this analysis, the collection of "pay-to-pay fees" cannot be considered debt collection activity regulated by the FDCPA because the fees are not owed to another party. Instead, they are owed to the loan servicer that charges for them and the fees cannot possibly be in default at the time they are charged.[43] Judge Moody concluded that the "pay-to-pay fees" at issue in the case were not regulated by the FDCPA and accordingly granted the motion to dismiss.[44] Other courts have applied this reasoning and acted similarly.[45] As the judges deciding these cases have recognized, these very different applications of the FDCPA to virtually identical factual scenarios cannot be reconciled. In the absence of clear and controlling authority, the issue—and its attendant liability risk—may need to be resolved through appeals to a higher court. However, in the meantime, litigation will continue, with new lawsuits against mortgage servicers continuously arriving.[46]

38. 2020 U.S. Dist. LEXIS 38701 (S.D. Fla. Mar. 2, 2020).
39. *See, e.g.*, Torliatt v. Ocwen Loan Serv., No. 19-cv-04303-WHO, 2020 WL 4495480 (N.D. Cal. Jun. 22, 2020) (California Rosenthal Fair Debt Collection Practices Act and California Unfair Competition Law); Caldwell v. Freedom Mortg. Corp., No. 3:19-cv-02193-N (N.D. Tex. Aug. 14, 2020) (Texas Debt Collection Act).
40. 8:20-cv-00137-JSM-SPF (M.D. Fla. Feb. 24, 2020).
41. *Id.* at 5.
42. *Id.*
43. *Id.*
44. *Id.* at 6.
45. *See, e.g.* Estate of Derrick Campbell v. Ocwen Loan Serv., LLC, No. 20-CV-80057-AHS, slip op. at 5 (S.D. Fla. Apr. 30, 2020); Reid v. Ocwen Loan Serv., LLC, No. 20-CV-80130-AHS, 2017 WL 3475676 (S.D. Fla. May 4, 2020); Bardak v. Ocwen Loan Serv., 2020 WL 5104523 (M.D. Fla. Aug. 12, 2020).
46. *See, e.g.*, Alexander v. Carrington Mort. Serv., LLC, No. 1:20-cv-2369 (D. Md.), and class action settlements ongoing, *see, e.g.*, Morris v. PHH Mortgage Corp., No. 0:20-cv-60633 (S.D. Fla. Mar 25, 2020).

V. Conclusion

Continuing litigation over these fees offers no consensus and significant risk remains for such fees, particularly in the context of mortgage servicing. Indeed, even when given the same set of facts and circumstances, courts may reach entirely different results under the present state of the law. While the CFPB did offer factors to consider in its guidance from 2017 to facilitate compliance, the latest decisions in ongoing lawsuits demonstrate they do not necessarily insulate a mortgage servicer from litigation risk. One way to mitigate this risk is to ensure that the amount of the fees match the actual cost of its administration, i.e., a mere "pass through" cost without any mark-up or profit.[47] Yet, the difficulty with documenting these costs, and applying them uniformly to a standard fee, may be overly unwieldly. An alternative is to abolish the alternative forms of payment, but that means less choice—and convenience—for consumers who may need these options for many important or personal reasons. Unfortunately, the risk of ongoing lawsuits adds another layer of complexity to an already complicated area of the law.

47. *See* Acosta v. Credit Bureau of Napa County, 2015 WL 1943244 at *2 (N.D. Ill. Apr. 29, 2015).