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Locke Lord QuickStudy: An Inconvenient Decision on ?Convenience Fees?

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Last month, the Fourth Circuit Court of Appeals rendered a decision regarding convenience fees in *Alexander v. Carrington Mortgage Services, LLC*, 23 F.4th 370 (4th Cir. 2022), which potentially spells trouble for loan servicers offering additional, optional payment options to consumers in exchange for a small convenience fee.

In *Alexander,* two consumers filed a putative class action against Carrington Mortgage Services, LLC which alleged that Carrington violated the Maryland Consumer Debt Collection Act ("MCDCA") and Maryland's Consumer Protection Act ("MCPA") by charging a $5.00 convenience fee to borrowers who elected to take advantage of the option to make their monthly mortgage payments online or by phone.

Both the MCDCA and MCPA incorporate substantive provisions of the Fair Debt Collection Practices Act ("FDCPA"), including the FDCPA's proscription on "[t]he 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."

The district court granted Carrington's motion to dismiss the consumers' class action complaint. The court held that in charging convenience fees, Carrington was not acting as a "debt collector", that the optional convenience fees were permitted by law, and that the convenience fees were not "incidental" the underlying mortgage debt. Accordingly, Carrington did not violate the MDCPA by charging them.

But the Fourth Circuit rejected Carrington's arguments, finding that Carrington was a debt collector who charged an amount not expressly authorized by the agreement or permitted by law in violation of the FDCPA and MCDCA.

Specifically, the Fourth Circuit found no distinction between loan servicing and debt collection and no distinction between a challenge to the method of collection and a challenge to the validity of fees. It held that the MCDCA does not require that the debt be in default (as FDCPA requires) for a servicer to be considered a "debt collector" and that this meant that Carrington could be held liable pursuant to the MCDCA even if it would not be liable under the FDCPA. And it held that convenience fees qualify as an "amount" under the FDCPA, that the FDCPA does not only prohibit fees that are incidental to the debt, that "permitted by law" requires an affirmative sanction. The borrowers' consent to the fees did not render the fees permitted by law and therefore was not relevant to the question of whether Carrington violated the MCDCA by charging them. While the court appeared to have some

sympathy for the argument that offering optional payment methods potentially benefits consumers. But that was an issue for the legislature, not the court.

While the Fourth Circuit is not alone in its holdings, district courts around the United States have reached different conclusions regarding convenience fees under the FDCPA.

First, numerous courts that have examined this issue and determined that convenience fees are not a "debt" as contemplated under the FDCPA, because the fees are "incurred in a separate agreement between the parties to ensure same-day posting and processing of [Plaintiff's] mortgage payments – an optional service that [Plaintiff] voluntarily incurred." *Turner v. PHH Mortg. Corp.,* No. 8:20-CV-137-T-30SPF, 2020 WL 1517927 (M.D. Fla. Feb. 24, 2020). In other words, the consumer elects to purchase a service offered by the servicer and pays for that service at the time of the consumer's election. The fee never becomes part of the amount the consumer owes on the underlying debt.

This same reasoning was adopted by the U.S. District Court for the Middle District of Florida in *Bardak v. Ocwen Loan Servicing, LLC*, No. 8:19-cv-1111-24TGW, slip. Op. at 6-9 (M.D. Fla. August 12, 2020), which summarized and confirmed the application of similar decisions in April, May and July 2020. The U.S. District Court for Central District of California has also found that convenience fees are not a debt under the FDCPA. *See Lish v. Amerihome Mortgage Co., LLC*, 220CV07147JFWJPRX, 2020 WL 6688597, at *5 (C.D. Cal. Nov. 10, 2020).

Numerous courts have also found that optional convenience fees are not incidental to the underlying mortgage debt. As one court explained, a convenience charge is not incidental to the underlying debt because the charge is only imposed if the consumer chose to "affirmatively and separately opt in" to the payment method. *Flores v. Collection Consultants of Calif*., Case No. SACV 14-771-DOC (RNBx), 2015 WL ??4254032, *10 (C.D. Cal. Mar. 20, 2015)?; *see also* ?*Meintzinger v. Sortis Holdings, Inc*., Case No. 18-cv-2042 (BMC), 2019 WL 1471338, *3 ??(E.D.N.Y. Apr. 3, 2019) ("Even if viewed as an 'additional charge' – as to which, for the ?reasons set forth above, I cannot see it – there is no provision of state law prohibiting either a ?seller or a collection company from adding a charge for the use of an online payment service, as ?long as the debtor knows of the charge and has the default option to avoid it by paying his bill ?in the usual way – by mailing in a check"); *Veale v. Citibank*, 85 F. 3d 577, 579 (11th Cir. 1996) ("If the borrower can choose to avoid the Federal Express Fee by having the documents sent via regular mail, then the fee is not imposed as an incident to the extension of credit.")

Convenience fees have long been, and will likely continue to be, a hotly litigated issue in both state and Federal courts. States generally enact their own consumer protection statutes, which can vary greatly in their scope and protections, and they often incorporate the FDCPA's protections. Though some, like Maryland MCDCA, may grant yet further protection to consumers than Federal statutes.

The Fourth Circuit's decision in *Alexander* is an unfortunate result for both servicers and consumers. While offering "instant" payment options to consumers so they can avoid incurring late fees or a default on their mortgage loans offers a convenience that many consumers appreciate, if servicers are prohibited from recouping the cost of offering such options, they may simply choose not to offer them at all. Voluntary methods of making payment that come at a cost – to both the servicer and the consumer – provide a benefit to consumers and should not be viewed as some kind of consumer harm. State legislatures should consider expressly permitting such charges, especially when cost-free methods of making mortgage payments are available.

State laws related to convenience fees frequently vary. Such fees may be permissible in some states but not others. Lenders and loan servicers who wish to offer their borrowers the option of making online or telephonic mortgage payments should carefully examine their individual state practices with regard to convenience fees and will likely need to make different decisions on a jurisdiction-by-jurisdiction basis as to how convenient it actually is to offer additional payment options to consumers. Sadly, some lenders and servicers have simply determined that the analysis and varying state requirements impose too high a cost and no longer offer this convenience to their customers in any state.

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