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Locke Lord QuickStudy: CFPB Issues Advisory Opinion ?Regarding Convenience Fees

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On June 29, 2022, the Consumer Financial Protection Bureau ("CFPB") issued an advisory opinion stating its view that the Fair Debt Collection Practices Act ("FDCPA") prohibits debt collectors from collecting any amount, including convenience or pay-to-pay fees, unless expressly authorized by the agreement creating the debt or permitted by law. The advisory opinion also clarified that a debt collector may violate the FDCPA when it collects convenience fees through a third-party payment processor.

The advisory opinion effectively chills the practice of offering additional, optional, payment channels – typically over the internet or over the telephone – in exchange for a small fee. These fees are completely optional, and the fees charged for the extra services are disclosed and paid at the time of the transaction.

Consumers can avoid the convenience fees by simply mailing in their monthly mortgage payments or utilizing other cost-free methods of making their payments. But, online and telephone payment systems allow for same-day payment processing and, as a result, many consumers utilize the system to avoid incurring late fees, negative credit reporting, or even payment defaults.

But the CFPB now opines that these convenience fees violate the FDCPA's prohibition on using "unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. 1692f.

The CFPB's analysis began with the definition of "any amount" under the FDCPA. The CFPB clarified that "pay-to-pay fees charged to consumers for accepting a consumer's payment on a debt through a particular payment channel are an 'amount' within the meaning of FDCPA section 808(1) and Regulation F, 12 CFR 1005.22(b)." The CFPB acknowledged that some courts have held that such fees are not incidental to the underlying debt – because they are paid at the time of transaction and not added to the loan balance – but the CFPB's advisory opinion disregards the argument.

The CFPB then analyzed the FDCPA's exception for amounts "permitted by law." While acknowledging that the "the word 'permit' is susceptible to multiple meanings", the CFPB reads it as referring to an "affirmative authorization." Thus, the CFPB interpreted FDCPA Section 808(1) as prohibiting a debt collector from collecting any amount not *expressly* authorized by the agreement creating the debt or *expressly* permitted by law. Accordingly, the CFPB's interpretation is that "an amount is impermissible if both the agreement creating the debt

and other law are silent." Although some courts have followed well-settled contract principles in finding that convenience fees are essentially a separate agreement created at the time of the payment, the CFPB rejects such an argument, stating it would render Section 808(1) "superfluous."

The CFPB's advisory opinion directly addresses the arguments being litigated in courts around the country – courts that have reached very different results. Recently, the Fourth Circuit Court of Appeals held, with similar reasoning to the CFPB, that convenience fees violated Maryland state statutes which incorporated the FDCPA. *Alexander v. Carrington Mortgage Services, LLC*, 23 F.4th 370 (4th Cir. 2022). In *Alexander,* two consumers filed a putative class action which alleged that their loan servicer violated the Maryland Consumer Debt Collection Act ("MCDCA") and Maryland's Consumer Protection Act ("MCPA") by charging a $5.00 fee to borrowers who paid monthly mortgage bills online or by phone.

Both the MCDCA and MCPA incorporate substantive provisions of the 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."

While the district court dismissed the lawsuit and held that in charging convenience fees, the loan servicer 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, the Fourth Circuit rejected those arguments and overturned the dismissal.

While the Fourth Circuit is not alone in its holdings, district courts around the United States have reached contrary conclusions regarding convenience fees under the FDCPA. For example, the U.S. District Court for Central District of California has found that convenience fees are not a "debt" under the FDCPA. *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)?; *accord ?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").

Ultimately, no good deed goes unpunished. While offering "instant" payment options to consumers is a convenience many consumers prefer and affirmatively agree to, doing so carries the risk of legal or regulatory action. Lenders and loan servicers should carefully examine their practices with regard to charging convenience fees and determine how convenient it actually is to offer additional payment options to consumers.

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