

# The Banking Law Journal

Established 1889

An A.S. Pratt™ PUBLICATION

JULY-AUGUST 2022

**EDITOR'S NOTE: U.S./CHINA FINANCIAL RELATIONS**

Victoria Prussen Spears

**RE-THINKING U.S. POLICY ON ENGAGEMENT WITH CHINESE FINANCIAL INSTITUTIONS**

Connie M. Friesen

**EMERGING DEVELOPMENTS IN FINANCIAL PRODUCTS AVAILABLE THROUGH THE U.S. POSTAL SERVICE**

Elizabeth C. Yen

**AN INCONVENIENT DECISION ON CONVENIENCE FEES**

Thomas J. Cunningham, Regina J. McClendon and Steven J. Brotman

**CFPB REVISES UDAAP MANUAL TO INCLUDE DISCRIMINATORY PRACTICES**

Sasha Leonhardt, Jeffrey P. Naimon and John R. Coleman



# THE BANKING LAW JOURNAL

---

---

VOLUME 139

NUMBER 7

July–August 2022

---

|  |     |
|--|-----|
| <b>Editor’s Note: U.S./China Financial Relations</b><br>Victoria Prussen Spears  | 363 |
| <b>Re-Thinking U.S. Policy on Engagement with Chinese Financial Institutions</b><br>Connie M. Friesen                          | 365 |
| <b>Emerging Developments in Financial Products Available through the U.S. Postal Service</b><br>Elizabeth C. Yen               | 422 |
| <b>An Inconvenient Decision on Convenience Fees</b><br>Thomas J. Cunningham, Regina J. McClendon and Steven J. Brotman         | 427 |
| <b>CFPB Revises UDAAP Manual to Include Discriminatory Practices</b><br>Sasha Leonhardt, Jeffrey P. Naimon and John R. Coleman | 431 |

**QUESTIONS ABOUT THIS PUBLICATION?**

---

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Matthew T. Burke at ..... (800) 252-9257  
Email: ..... matthew.t.burke@lexisnexis.com  
Outside the United States and Canada, please call ..... (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at ..... (800) 833-9844  
Outside the United States and Canada, please call ..... (518) 487-3385  
Fax Number ..... (800) 828-8341  
Customer Service Website ..... <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or ..... (800) 223-1940  
Outside the United States and Canada, please call ..... (937) 247-0293

---

ISBN: 978-0-7698-7878-2 (print)

ISSN: 0005-5506 (Print)

Cite this publication as:

The Banking Law Journal (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

---

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2022 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office  
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862  
[www.lexisnexis.com](http://www.lexisnexis.com)

MATTHEW  BENDER

# *Editor-in-Chief, Editor & Board of Editors*

---

**EDITOR-IN-CHIEF**

**STEVEN A. MEYEROWITZ**

*President, Meyerowitz Communications Inc.*

**EDITOR**

**VICTORIA PRUSSEN SPEARS**

*Senior Vice President, Meyerowitz Communications Inc.*

**BOARD OF EDITORS**

**BARKLEY CLARK**

*Partner, Stinson Leonard Street LLP*

**CARLETON GOSS**

*Counsel, Hunton Andrews Kurth LLP*

**MICHAEL J. HELLER**

*Partner, Rivkin Radler LLP*

**SATISH M. KINI**

*Partner, Debevoise & Plimpton LLP*

**DOUGLAS LANDY**

*White & Case LLP*

**PAUL L. LEE**

*Of Counsel, Debevoise & Plimpton LLP*

**TIMOTHY D. NAEGELE**

*Partner, Timothy D. Naegele & Associates*

**STEPHEN J. NEWMAN**

*Partner, Stroock & Stroock & Lavan LLP*

THE BANKING LAW JOURNAL (ISBN 978-0-76987-878-2) (USPS 003-160) is published ten times a year by Matthew Bender & Company, Inc. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices. Copyright 2022 Reed Elsevier Properties SA., used under license by Matthew Bender & Company, Inc. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204 or e-mail [Customer.Support@lexisnexis.com](mailto:Customer.Support@lexisnexis.com). Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, [smeyerowitz@meyerowitzcommunications.com](mailto:smeyerowitz@meyerowitzcommunications.com), 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to bankers, officers of financial institutions, and their attorneys. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, LexisNexis Matthew Bender, 230 Park Ave, 7th Floor, New York, NY 10169.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, A.S. Pratt & Sons, 805 Fifteenth Street, NW, Third Floor, Washington, DC 20005-2207.

# An Inconvenient Decision on Convenience Fees

*By Thomas J. Cunningham, Regina J. McClendon and Steven J. Brotman\**

*In Alexander v. Carrington Mortgage Services, LLC, the U.S. Court of Appeals for the Fourth Circuit issued a decision regarding convenience fees, which may create problems for loan servicers offering additional, optional payment options to consumers in exchange for a small convenience fee.*

The U.S. Court of Appeals for the Fourth Circuit rendered a decision regarding convenience fees in *Alexander v. Carrington Mortgage Services, LLC*,<sup>1</sup> that potentially spells trouble for loan servicers offering additional, optional payment options to consumers in exchange for a small convenience fee.

## BACKGROUND

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

---

\* Thomas J. Cunningham (tcunningham@lockelord.com), a partner at Locke Lord LLP, is the office managing partner for the firm’s Florida offices and the leader of the firm’s Class Actions Practice Group. He focuses his practice on the representation of clients in consumer-related class action litigation in both state and federal courts. Regina J. McClendon (rmccclendon@lockelord.com) is managing partner of the firm’s San Francisco office, where she concentrates her practice in class actions, business and commercial litigation and financial institution litigation. Steven J. Brotman (steven.brotman@lockelord.com) is an associate at the firm focusing his practice on consumer finance, Telephone Consumer Protection Act class action and business litigation throughout Florida’s state, federal and appellate courts.

<sup>1</sup> 23 F.4th 370 (4th Cir. 2022).

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.

### THE FOURTH CIRCUIT DECISION

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. The court appeared to have some sympathy for the argument that offering additional payment methods 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.

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.”<sup>2</sup> 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.

---

<sup>2</sup> *Turner v. PHH Mortg. Corp.*, No. 8:20-CV-137-T-30SPF (M.D. Fla. Feb. 24, 2020).

This same reasoning was adopted by the U.S. District Court for the Middle District of Florida in *Bardak v. Ocwen Loan Servicing, LLC*,<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup>

## CONCLUSION

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.

<sup>3</sup> No. 8:19-cv-1111-24TGW, slip. Op. at 6–9 (M.D. Fla. August 12, 2020).

<sup>4</sup> See *Lish v. Amerihome Mortgage Co., LLC*, 220CV07147JFWJPRX (C.D. Cal. Nov. 10, 2020).

<sup>5</sup> *Flores v. Collection Consultants of Calif.*, Case No. SACV 14-771-DOC (RNBx) (C.D. Cal. Mar. 20, 2015); see also *Meintzinger v. Sortis Holdings, Inc.*, Case No. 18-cv-2042 (BMC) (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.”).

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.