
The Consumer Finance Podcast — The Latest on Junk Fees and New York's Foreclosure Abuse Prevention Act

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Chris Willis:

Welcome to [The Consumer Finance Podcast](#). I'm Chris Willis, the co-leader of Troutman Pepper Locke's Consumer Financial Services Regulatory Practice. Today, we're going to be giving you an update on two important litigation topics, the status of litigation on so-called junk fees and especially convenience fees, and New York's Foreclosure Abuse Prevention Act.

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Now, as I said, today we're going to be talking about some litigation updates about things that I think are pretty important to the industry. Joining me to talk about those are my partners, Jason Manning and Joe DeFazio. Jason, Joe, thanks for being on the podcast today.

Jason Manning:

Thank you, Chris. Glad to be here.

Joseph DeFazio:

Thanks, Chris. Thanks for having us.

Chris Willis:

Jason, let me start with you. One of the most visible things on the regulatory front since at least the beginning of 2022 has been the war declared by the CFPB on so-called junk fees, which then I feel like every other regulator jumped on the bandwagon. But it spilled over into the litigation world, too, especially in the context of convenience fees. In particular, there's a recent 11th Circuit decision that highlighted this issue. Do you mind just talking the audience through kind of the setup of the issue and what happened in the case and what may be next?

Jason Manning:

Yes, happy to. It actually just came out last week on February 4th. The case name is Glover. Really, it's about convenience fees. The back story on this is, as you said, Chris, the CFPB has set out to block all fees that are not expressly authorized in a finance contract or, effectively, affirmatively approved by the law. The de facto result of that is if there's not a law expressly on point authorizing the fee, then it is deemed unlawful if you adopt the CFPB's perspective.

Now, The CFPB came short of actually so regulating, but there's commentary in regulation F, which is relevant to the FDCPA, where effectively that's what the CFPB said. The significance of Glover is that the 11th Circuit relied almost entirely on that exact commentary. What they did in that case was they looked at the FTC, which was the older commentary, and then the CFPB, more recent commentary, and came to the conclusion that there was a consistent and persuasive agency opinion that unless there is a law that expressly authorizes a service fee, such as a mortgage servicer providing a fee, a service for a fee to its customer at the customer's request, then that is an unlawful fee. It's to the level of being per se unlawful, at least according to this most recent opinion.

What's interesting about that is it's the most recent proclamation of it where a court actually said that in the context of having been briefed actual laws that expressly authorize that fee. For example, there was a Mortgage Bankers Association amicus. There was a CFPB amicus, and there were dueling briefs about how both parties agreed VA regulations authorized convenience fees. Yet the court didn't talk about that at all in its opinion. It was briefed. It was ignored in the opinion. Instead the court cited Loper and said, "This is a persuasive agency opinion, and we're going to rely on that."

Chris Willis:

Jason, what's the potential impact of this 11th Circuit decision? Where does that leave the industry, both debt collectors and creditors alike, with respect to the issue of convenience fees?

Jason Manning:

It makes it a more challenging litigation landscape because there are other fees, which I anticipate that enterprising plaintiffs council will attempt to leverage this opinion in support of their position. Really, if it is a service or fee, even if that service was requested by the customer, it's outside of their contract. It arose because the customer wants a special service that the servicer is not required to provide and the servicer says, "Yes, we'll do that for a fee," and the borrower agrees. It's still going to be potentially problematic under this Glover decision. Anything that's not in the finance contract, consider NSF fees, payoff statement fees, expedited delivery fees, I would anticipate that plaintiffs will now argue that Glover supports their position.

Chris Willis:

You mentioned that the source of wisdom for the 11th Circuit in this case was the CFPB's guidance and interpretive opinion that under the FDCPA, you can't charge a convenience fee

unless it's called for in the underlying debt agreement. Are there other cases pending where the CFPB has taken that position?

Jason Manning:

There are, and I'm not going to talk about all of them because I represent clients in some of them. But the short version is the CFPB has been very prolific in filing amicus briefs on anything touching what they deem to be junk fees. As a result, there are several cases where an amicus has been filed, but a decision hasn't been ruled upon. What makes that very interesting is I don't think anybody knows what the CFPB's position is going to be now under the current administration.

Chris Willis:

Yes. It seems like there's an opportunity for the CFPB to reevaluate that position, but it's put this out, as you said, to a whole bunch of courts.

Jason Manning:

That's right. It's an opportunity really to rebalance. That's the way I look at it. This premise that an agency commentary somehow is elevated to the effect of law, I think, is fundamentally undemocratic and contrary to our Constitution. I know that not everybody's going to agree with me on that. But even if you don't agree with me on that, I think it's contrary to the fundamental right of parties to contract. Here, what we're really talking about is customers who have requested a special service that that servicer doesn't have to provide but is willing to for a reasonable fee.

If the CFPB took this as the opportunity to rebalance its approach and say, "Look, all we care about is that this is actually a service that is rendered at the request of the customer, and the fee was reasonable for the service that was actually performed." There's nothing controversial about that. I think in fairness to the CFPB's former intent, I think originally that may have been what they intended. It's just been misconstrued through a variety of additional position statements over the years.

Chris Willis:

From a litigation standpoint, we have this 11th Circuit decision now. Is there any possibility of getting the Supreme Court to look at this issue to try to rein in court's potentially over-reliance on an agency interpretation like this? It seems like something the Supreme Court's been interested in.

Jason Manning:

I do think that this case will likely petition for the Supreme Court to hear. Whether it be granted or not, I don't know. But I do think that odds are better than a typical case because, as you point out, it is an issue that gets to some of the core bedrock principles that this court has been interested in hearing. In the meantime, there's a lot of uncertainty at the CFPB, and our group

has a lot of deep connections there which we're continuing to maintain. We're all waiting, frankly, with bated breaths to see how this transitional period plays out. But it wouldn't take an advisory opinion to change course here. There's a couple of small steps that the CFPB could make to forecast that it is taking a more balanced approach.

For example, Chris, you asked about these other cases with the amicus briefs. The CFPB could now, in those cases, file a notice of withdrawal. All that notice would need to say is this filing, referring to the amicus brief, no longer is consistent with the position of the CFPB. I mean, literally one sentence. That would send the signal that I believe at least the current administration wants to see, which is to rebalance. Whether that's possible to obtain in the short term, I don't know. But I do know that we're making efforts to try to effectuate change with the CFPB after this transitional period.

Chris Willis:

Yes, it makes sense. Certainly, the agency seems to be in a mode of re-evaluating some of the positions that were taken under the prior administration with this being in that group. There seems like there would be an opportunity for an appeal to the CFPB to revisit and perhaps step away from the controversial position that it took in 2022 on convenience fees. Okay, Jason, thanks for talking to me about that.

Joe, let's go to you now, and we're going to talk about the New York State statute called the Foreclosure Abuse and Prevention Act, which some people refer to by the acronym FAPA. That sounds funny to say, but I guess I'm just going to say it because that's what it is. If you don't mind, just start off by introducing this to the audience. What is it?

Joseph DeFazio:

Thanks, Chris. Yes. FAPA is the Foreclosure Abuse and Prevention Act, which is what you already said. But it's kind of a controversial law in New York, and I certainly think lenders and servicers feel that it is. To tell you what it is, I think we have to take a little bit of a step back in history. About a little more than 10 years ago or so, there was a lot of litigation involving whether or not a loan had been properly accelerated and around the statute of limitations for foreclosures in New York, which is six years. There was a whole bunch of case law related to what was a proper acceleration, what was a proper de-acceleration.

For years, the New York Court of Appeals, which is our highest court here, didn't weigh in. For, I would say, the better part of that 10 years, there was a lot of case law in the lower departments. New York has four appellate division departments, and different departments would weigh in differently on those issues. Ultimately, the Court of Appeals finally weighed in in 2021, and they did that through a case everybody calls Engel. They said that if a loan was properly accelerated, which usually is done through filing a full collusion complaint, the action of withdrawing that complaint had the effect of replicating the acceleration, meaning that you could restart the statute of limitations again if you needed to file a subsequent foreclosure.

The New York legislature for a variety of reasons didn't like that, and they put into place this law, FAPA, that everybody refers to it as, and effectively overturned Engel. At the time, for proper context, a lot of litigators especially thought that Governor Hochul, who signed this law, would

not sign it as is because it also contained a retroactive portion to it. There was a lot of controversy around that, but she went and signed the law as is, and that's the law as it stands today.

Chris Willis:

Okay. You've told us that FAPA was a response to this decision in this Engel case, and you've given a little bit of context for what the law does. Can you sort of spell out the precise parameters of now like what is the law in New York with respect to this issue?

Joseph DeFazio:

Sure. There's a couple things that it's effectively done. The biggest ones are it overturned Engel, which a lot of lenders and servicers were relying on when they restarted foreclosure actions related to the Engel decision coming out. It retroactively applies to any pending foreclosure before December 30th, 2022, where a final judgment of foreclosure and sale has not been entered. It amended New York Real Property and Proceeding Law 1301. It severely limited what we call the New York Savings Clause for recommencing a dismissed foreclosure action. It basically revived a lot of litigation that most people thought was a done issue after Engel came out.

Chris Willis:

Okay. What are the consequences of FAPA now being the law on mortgage lenders and servicers?

Joseph DeFazio:

FAPA applies to all foreclosures that's residential or commercial. Again, it applies to all that a final judgment of foreclosure and sale had not been enforced prior to FAPA's enactment. One of the big consequences is we've gone back to this pre-Engel phase where there's a lot of uncertainty. There's conflicting conclusions regarding FAPA, including its retroactive impact and the constitutionality of the law as well. We've gone back to reviving the old litigation I was talking about previously.

Chris Willis:

I assume it was relatively controversial, the law in general, but particularly this whole retroactive application of it. Has anybody challenged the law from the standpoint of constitutionality or otherwise, and what have been the outcomes of those?

Joseph DeFazio:

Yes. They have. It's been ongoing in the lower courts. The trial courts have reached conflicting conclusions. There's been arguments in the second department and third department. For the most part, there's been some conflicting decisions, but the lower appellate courts, I'll say, have ultimately held, though, that it is constitutional. A lot of lenders and servicers, I think, I feel, at

least, thought that on the retroactive part, they had a really good shot at the constitutionality arguments. But the lower courts, the second and third departments, have basically gone the way of upholding FAPA, at least for now until maybe the Court of Appeals weighs in at some point.

Chris Willis:

Yes. In fact, didn't the Second Circuit recently give the New York Court of Appeals the opportunity to weigh in? What happened there?

Joseph DeFazio:

Yes. I'm glad you asked that because everybody thought, "Okay, here it goes. Now, the Court of Appeals has its chance to weigh in finally." But they punted on it, and that was interesting because I'm speculating here, but it's possible the Court of Appeals declined to answer it because the possibility that the Second Circuit could resolve the questions without addressing FAPA and its constitutionality. I think that's ultimately why they probably punted and also because Engel and the backlash from it and I want to say the political issues with this law. I think they wanted to stay away from it if they could.

Chris Willis:

Okay. We didn't get any help from that opportunity because the New York Court of Appeals declined to answer the certified question from the Second Circuit. We're stuck with this law, at least for now. What should lenders and servicers do in response to it?

Joseph DeFazio:

That's a great question, and there's several things that they could do in response to it. One of the first things they should do is have a good understanding of where their loans are in their portfolio. In relation to FAPA's retroactive application, they should – given the current legal landscape, I think it's prudent for them to consider language in their mortgage contracts that address the issue of discontinuing a foreclosure. We have advised clients on these issues ever since FAPA has passed, and there's a lot of different ways that lenders can go about trying to navigate the landmines of FAPA.

Fannie Mae recently came out with guidance not long ago about specific language that should be in loan modifications. Obviously, lenders, if they're not Fannie Mae-backed loans, you should take a look at that language and think about instituting it in their own loan modifications. They should think about entering into agreements where the borrower is expressly extending the statute of limitations. But even with such an agreement, generally lenders can only limit it to a term less than six years. Those are some of the things that a lender or servicers can do. But one of the more important things is take a look at your portfolios, see which loans may be impacted by it, and then make a plan either in-house or with your councils to determine how you're going to tackle it.

Chris Willis:

Let's say I'm a mortgage lender or servicer, and I want to continue to follow what's going on with FAPA and see about any new developments that may occur. Where's a good place that I can go to do that, Joe?

Joseph DeFazio:

We have a blog here at Troutman Pepper Locke, the Consumer Law Monitor blog. I've written several articles about FAPA since its passing in 2022, and we continue to keep readers updated on developments. Certainly, with FAPA and the case law that is continually evolving in this space, we'll continue to keep all our readers updated on it, and that's where they should look for any advice.

Chris Willis:

Okay, yet another reason to read the [ConsumerFinancialServicesLawMonitor.com](https://www.consumerfinancialserviceslawmonitor.com). Thank you for that plug. I'm normally the one to plug the other podcast, but now I'm glad you joined me in doing it, Joe.

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