Not so Fast! Why Mortgage Lenders and Servicers May Want to Pump the Brakes on Online and Telephone Payment Convenience Fees

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I. Introduction

Fees for online and pay-by-phone mortgage payments have become a source of big money for mortgage loan servicers and their vendors. Now, they have become a source of significant revenue for the plaintiffs' class action bar as well. Many mortgage lenders and servicers routinely charge

borrowers a fee to use an online or telephonic payment system to make a mortgage payment or to have a payment applied immediately. These "pay-to-pay" fees have come under increased attack by the plaintiffs' class action bar. Nationstar recently settled a Washington case challenging such fees for $4.87 million.[1] Ocwen Loan Servicing settled a case in Alabama challenging its fees for $9.7 million.[2] Just recently, a Florida state court certified a class alleging similar claims concerning pay-to-pay fees.[3] The word is out: sue a mortgage loan servicer for charging allegedly unlawful "pay-to-pay" fees and possibly score a multi-million dollar settlement. Moreover, these fees have recently drawn the scrutiny of the Consumer Financial Protection Bureau.[4]

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1. Garcia v. Nationstar, No. 2:15-cv-01808-TSZ (W.D. Wash. 2015). The *Nationstar* class action was filed in 2015, and the final order approving the class settlement was approved on Oct. 26, 2018. *See* Complaint, Garcia v. Nationstar, No. 2:15-cv-01808-TSZ (W.D. Wash. 2015), Dkt. 1 (class action complaint); Final Order and Judgment, Garcia v. Nationstar, No. 2:15-cv-01808-TSZ (W.D. Wash. 2015), Dkt. 122 (final order approving class action settlement and judgment). The class period was 2014–2018 for Fair Debt Collection Practices Act claims and 2011–2018 for Washington Consumer Protection Act claims, included 188,393 members, and included convenience fees collected of approximately $12 million. Motion for Preliminary Approval of Class Certification and Settlement at p. 11, Garcia v. Nationstar, No. 2:15-cv-01808-TSZ (W.D. Wash. 2015), Dkt. 92 (motion for preliminary approval of class certification and class action settlement) and exhibit 92-1 at ¶ 3.1. The settlement of $3.87 million represented approximately 32% of the fees collected. *Id.* at p. 23. Attorneys' fees and costs awarded were equal to 25% of the class recovery, or approximately $1 million. Final Order and Judgment at ¶ 10, Garcia v. Nationstar, No. 2:15-cv-01808-TSZ (W.D. Wash. 2015), Dkt. 122.
2. McWhorter v. Ocwen Loan Servicing, No. 2:15-cv-01831-MHH (N.D. Ala. 2017). The *McWhorter* class period covers 4.5 years from December 2013 to June 2018, includes 250,940 members, and includes pay-to-pay fees collected of approximately $32.3 million. *See* Amended Complaint, McWhorter v. Ocwen Loan Servicing, No. 2:15-cv-01831-MHH (N.D. Ala. 2017), Dkt. 2 (amended class action complaint); Motion for Settlement Preliminary Approval of Class Settlement at ¶ 2.1.5, McWhorter v. Ocwen Loan Servicing, No. 2:15-cv-01831-MHH (N.D. Ala. 2017), Dkt. 49-1 (stipulation of class settlement and release); Motion for Settlement Final Approval, McWhorter v. Ocwen Loan Servicing, No. 2:15-cv-01831-MHH (N.D. Ala. 2017), Dkt. 66-1 at ECF p. 18 (motion for final approval of class action settlement). The class settlement of $9.7 million represents approximately 30% of the class recovery. *Id.* at p. 46. Final approval and judgment was entered on August 1, 2019. Final Order and Judgment, McWhorter v. Ocwen Loan Servicing, No. 2:15-cv-01831-MHH (N.D. Ala. 2017), Dkt. 71. Attorneys' fees and costs awarded were equal to 33% of the class recovery, or approximately $3.25 million. *Id.*
3. *See* Order Certifying Class, Cibula v. Seterus Inc., Palm Beach County Circuit Case No. 50-2015-CA-01090-XXXX-MB (Fla. Mar. 27, 2019).
4. *See* CFPB Compliance Bulletin 2017-01: Phone Pay Fees (July 31, 2017),

With these recent settlements in the millions and new class actions making similar allegations being filed nationwide at an increasing pace, lenders, creditors, mortgage servicers, and their vendors need to carefully consider whether the juice from collection of such fees is worth the squeeze. Assuming the value of these fees outweighs the cost of defending litigation challenging them, prudent lenders and servicers will take steps today to reduce the likelihood of a successful challenge tomorrow. This article discusses the risks and potential costs of continuing to collect pay-to-pay fees, suggests steps to mitigate those risks and exposures, and provides some insight based on several recent cases. We conclude that any entity collecting pay-to-pay fees may want to pump the brakes and consider the dangers associated with collecting such fees before driving on with business as usual.

II. Claims Related to Pay-to-Pay Fees

Most pay-to-pay claims involve an interplay between the Fair Debt Collection Practices Act (FDCPA) or analogous state statutes and breach of contract principles. The arguments rest on the theory that the fees are not specifically authorized by the loan agreement(s) between borrower and lender, and thus violate consumer protection laws, specifically the FDCPA or state versions of the FDCPA.

The root of the claims is the FDCPA, which provides:

> A debt collector may not use unfair or unconscionable means to collect or attempt to collect a debt. Without limiting the general applicability of the foregoing, the following conduct is a violation of this section:
> (1) 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.[5]

That most mortgage lenders and servicers are not "debt collectors" under the FDCPA is well-established.[6] But many states have adopted their own

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https://files.consumerfinance.gov/f/documents/201707_cfpb_compliance-bulletin-phone-pay-fee.pdf [https://perma.cc/FY5F-VT28].

5. 15 U.S.C. § 1692f.

6. *See e.g.* 15 U.S.C. § 1692a(6)(F)(ii) (excluding from definition of "debt collector" a creditor collecting debts on its own behalf); Obduskey v. Wells Fargo, 879 F.3d 1216, 1219–20 (10th Cir. 2018) ("'[T]he committee does not intend the definition [of debt collector] to cover . . . mortgage service companies and others who service outstanding debts for others, so long as the debts were not in default when taken for servicing.'") (citing S. Rep. No, 95-382 at 3–4 (1977)), aff'd on other grounds in Obduskey v. McCarthy & Holthus LLP, —— U.S. ——, 139 S.Ct. 1029 (2019); *see Afewerki v. Anaya Law Grp.*, 868 F.3d 771, 774 n.1 (9th Cir. 2017) ("Under the FDCPA, a creditor collecting debts on its own behalf is not a 'debt collector'. "); *accord* Davidson v. Capitol One Bank (USA), N.A. 797 F.3d 1309, 1313 (11th Cir. 2015) ("Creditors typically are not subject to the

versions of the FDCPA, and in several of those states, a mortgage lender or servicer will be considered a "debt collector" or otherwise subject to the provisions of those statutes—regardless of whether the lender or servicer owns the debt, and regardless of whether the loan was in default at the time the lender or servicer acquired its interest.[7] Many of these analogous state statutes incorporate the FDCPA's proscription against collecting fees that are not expressly provided for in the parties' agreement.[8]

Under the FDCPA (and many state versions of the FDCPA), a challenged fee must be "incidental to the underlying debt" and not authorized by the

FDCPA"); *accord* Roth v. CitiMortgage Inc., 756 F.3d 178, 183 (2d Cir. 2014) (A loan servicer acting on behalf of the owner of a debt obligation is not a debt collector unless it began its servicing duties after the loan entered default status); Glazer v. Chase Home Fin. LLC, 704 F.3d 453, 457 (6th Cir. 2013) (loan servicer is not a debt collector under the FDCPA if the subject loan was not in default when the servicer acquired the servicing rights to the loan), abrogated on other grounds in Obduskey, —— U.S. ——, 139 S.Ct. at 1038; 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 the consumer's creditors, a mortgage servicing company, or an assignee of a debt, as long as the debt was not in default at the time it was assigned.") (citing S.Rep. No. 95–382, 95th Cong., 1st Sess. 3, reprinted in 1977 U.S.Code Cong. & Ad.News 1695, 1698).

7. *See, e.g.*, North Carolina Debt Collection Act, N.C.Gen.Stat. § 75-50(3) (defining debt collector as "any person engaging, directly or indirectly, in debt collection from a consumer except those persons subject to the provisions of Article 70, Chapter 58 of the General Statutes"); *see also* Cal. Civ. Code §1788.2(c) (defining debt collector as "any person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection"); Iowa Code § 537.7102(5) (defining debt collector as "a person engaging, directly or indirectly, in debt collection, whether for the person, the person's employer, or others"); Tex. Fin. Code § 392.001(6) (defining debt collector as anyone "who directly or indirectly engages in debt collection").

8. *See, e.g.*, Iowa Code § 537.7103(5)(d) (prohibiting debt collectors from collecting or attempting to collect any "interest or other charge, fee or expense incidental to the principal obligation unless the interest or incidental charge, fee, or expense is expressly authorized by the agreement creating the obligation and is legally chargeable to the debtor, or is otherwise legally chargeable"); *see also* Tex. Fin. Code § 392.303(a)(2) (prohibiting a debt collector from "collecting or attempting to collect interest or a charge, fee, or expense incidental to the obligation unless the interest or incidental charge, fee, or expense is expressly authorized by the agreement creating the obligation or legally chargeable to the consumer"); W. Va. Code § 46A-2-128(d) (prohibiting "[t]he collection of or the attempt to collect any interest or other charge, fee[,] or expense incidental to the principal obligation unless . . . expressly authorized by the agreement creating or modifying the obligation and by statute or regulation"). *Compare* N.C. Gen. Stat. § 75-55(2) (prohibiting a debt collector from collecting or attempting to collect any "charge, fee, or expense incidental to the principal debt unless legally entitled to such fee or charge").

parties' agreement or some other law for a plaintiff to prevail.[9] The first question a lender or servicer must consider is whether a "pay to pay" fee is "incidental to the underlying debt." The court examined this question in *Flores v. Collection Consultants of California*, where Judge Carter held that optional transaction fees related to credit card payments were not "incidental" to the underlying debt obligation.[10] *Flores* is the key authority for defendants in "pay to pay" litigation and is frequently the cornerstone of a motion to dismiss.

But *Flores* has been criticized by courts as in *Lindblom v. Santander Consumer USA, Inc.*, which held that Western Union "Speedpay" fees would violate the FDCPA if the lender/servicer received any portion of the fee.[11] In *Lindblom*, the court held that "[t]he only inquiry under § 1692f(1) is whether the amount collected was expressly authorized by the agreement creating the debt or permitted by law."[12] Similarly, in *Muhammad v. PNC Bank, N.A.*, Judge Goodwin in the Southern District of West Virginia concluded that Speedpay fees were "incidental" to the debt by referring to the definition of "incidental" in the Oxford and Webster's dictionaries.[13]

Most notes, standard mortgages, deeds of trust, and other consumer-mortgage loan documents do not contain an express authorization to charge a "pay-to-pay" fee. As a result, a lender or servicer will not typically be able to rely on such authorization to defeat FDCPA or state equivalent claims. For example, in *McWhorter v. Ocwen Loan Servicing, LLC*, the court held that Speedpay fees charged by the servicer violated the FDCPA because the loan agreements did not expressly provide for them, and there was nothing in the applicable state law that permitted them either.[14]

A. Analogous State Statutes Provide Inconsistent Levels of Risk or Protection.

One of the most troubling aspects of the "pay-to-pay" exposure analysis is that it varies by state. Not all states use the same language as the FDCPA

9. 15 U.S.C. § 1692f. A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

> (1) 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.

10. No. SA CV 14-0771-DOC (RNBx), 2015 WL 4254032 (C.D. Cal. Mar. 20, 2015).

11. No. 1:15-CV-990-LJO-BAM, 2016 WL 2841495 (E.D. Cal. May 9, 2016).

12. *Id*.at *6 (quoting Allen ex rel. Martin v. LaSalle Bank, N.A., 629 F.3d 364, 368 (3d Cir. 2011)).

13. No. 2:15-CV-16190, 2016 WL 815289 at *3 (S.D.W.V. Feb. 29, 2016).

14. McWhorter v. Ocwen Loan Servicing LLC, No. 2:15-cv-01831-MHH, 2017 WL 3315375 at *7 (N.D. Ala. Aug. 3, 2017); *see also Lindblom*, 2018 WL 500347 at *6–7.

in their debt collection statutes. Some states may allow the lender or servicer to rely on an agreement other than the one creating the debt to authorize a "pay-to-pay" fee. For example, while the FDCPA prohibits incidental fees unless expressly permitted under the agreement *creating the underlying debt* (i.e. the note and mortgage/deed of trust), some analogous state debt collection statutes are more broadly worded to allow fees permitted by a contract in general—and not just the underlying debt agreement.[15] In states with such statutes, a lender or servicer might argue that an agreement to pay the fee was formed when it was disclosed to the borrower and the borrower used the online or telephonic payment system knowing he/she would be charged, and thus the fee is "permitted by law."[16] That said, some courts have found that a lender/servicer cannot sidestep the prohibition against fees by claiming that the debtor/plaintiff voluntarily entered into a separate oral agreement to pay the debt, as any such argument would cut against the purpose of the fee prohibition.[17]

Plaintiffs may also seek to bring claims under applicable state unfair and deceptive trade practices statutes on the grounds that pay-to-pay fees are inherently unfair and/or deceptive, particularly if the fee was not disclosed in advance or sufficiently conspicuous.[18]

B. The National Bank Act and/or Preemption May Apply.

A national bank might argue that the National Bank Act and the associated Office of Comptroller of Currency ("OCC") regulations permit it to charge such fees.[19] Even if a state statute would otherwise prohibit the fee,

15. *See*, *e.g.*, N.C.Gen. Stat. § 75-55(2) ("No debt collector shall collect or attempt to collect . . . any . . . fee or expense incidental to the principal debt *unless legally entitled* to such fee or charge.") (emphasis added).

16. *See e.g.*, Cappellini v. Mellon Mortg. Co., 991 F. Supp. 31, 39 (D. Mass. 1997) ("There are a number of special services that a borrower could ask [lender] to provide that are not mentioned in the loan documents but which it appears clear that [lender] would have a right to request payment for providing.").

17. *See e.g.*, Quinteros v. MBI Associates, Inc., 999 F. Supp. 2d 434, 438 (E.D. N.Y. Feb. 28, 2014) (rejecting defendant's argument that the borrower entered into a voluntary side agreement to pay the fee at issue); *see also* Lindblom v. Santander Consumer USA, Inc., Case No. 1:15-cv-990-LJO-BAM, 2016 WL 2841495, *5 (E.D. Cal. May 9, 2016) (indicating that the fact that a borrower voluntarily paid the fee is not a defense to a FDCPA claim).

18. *See* N.C. Gen. Stat. § 75–1.1 ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."); Cal. Bus. & Prof. Code § 17200 (prohibiting unlawful, unfair, or fraudulent business practices); *see also Cibula v. Seterus Inc.*, No. 50-2015-CA-01090-XXXX-MB at *14 (Fla. 15th Cir. 2019) (finding a "deceptive" act was stated under Florida's UDTPA where the servicer created a "profit center" through the pay-to-pay fees at issue).

19. 12 C.F.R. § 7.4002(b)(2) ("A national bank may charge its customers non-interest charges and fees. . . .").

a national bank can argue that the state statute is pre-empted by the National Bank Act, which provides that when a state law "significantly impair[s] the exercise of authority, enumerated or incidental under the NBA, the [s]tate's regulations must give way."[20] Unfortunately, at least one court has rejected this argument as it related to escrow fees.[21] That said, another court—while not directly adopting a preemption stance as to the collection of such fees—has stated that the national banks are legally entitled to collect such fees.[22]

C. Defenses.

There are several potential defenses available to lenders and servicers if they are sued for a violation of either the FDCPA or an analogous state statute for charging pay-to-pay fees that a borrower contends were unlawful. The first defense is to argue that the defendant does not constitute a "debt collector" as defined by the statute.[23] Several state statutes, such as California's Rosenthal Fair Debt Collection Practices Act, expand the FDCPA's definition of "debt collector" so as to include mortgage loan servicers generally, so this defense may not be available depending on the state and the basis for the claim.[24] But a claim based on the FDCPA itself would be subject to this defense.

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20. Watters v. Wachovia Bank, N.A., 500 U.S. 1, 12 (2007). *But see* Lusnak v. Bank of America, *N.A.*, 883 F.3d 1185, 1197 (9th Cir. 2018) ("[S]tate statute requiring payment of interest on escrow accounts was not preempted by the NBA.").

21. *See e.g., Lusnak*, 883 F.3d at 1197 ("[C]laims for violation of state law statute requiring payment of interest on escrow accounts was not preempted by the NBA.").

22. *See* Order Granting Motion to Dismiss, Waddell v. U.S. Bank National Association, —— F.Supp.3d —— 2019 WL 3423472, at *4 (E.D.N.C. July 29, 2019) (finding that national banks are authorized to collect such fees under 12 C.F.R. § 7.4002(a), (b)(2)). Notably, while the *Waddell* court did not rely upon preemption, it cited several cases which specifically found that state law claims were preempted by the authority to collect such fees found in the National Bank Act. *See id.* (citing Gutierrez v. Wells Fargo Bank, NA, 704 F.3d 712, 724 (9th Cir. 2012) (vacating a district court injunction based on pre-emption and citing cases finding pre-emption applied to banks' decisions to charge fees)); Baptista v. JPMorgan Chase Bank, *N.A.*, 640 F.3d 1194, 1196–97 (11th Cir. 2011); Monroe Retail, Inc. v. RBS Citizens, N.A., 589 F.3d 274, 280–81 (6th Cir. 2009); Murphy v. Nat'l City Bank, 560 F.3d 530, 532 n.3 (6th Cir. 2009); Wells Fargo Bank of Tex. N.A. v. James, 321 F.3d 488, 491–95 (5th Cir. 2003); Bank of Am. v. City & Cty. of San Francisco, 309 F.3d 551, 562–66 (9th Cir. 2002)).

23. Under the FDCPA, a loan servicer is not a "debt collector" if the subject loan was not in default at the time servicing was acquired. 15 U.S.C. § 1692(6)(F)(iii). The FDCPA also excludes the creditor itself (the owner of the loan) from the definition of "debt collector." 15 U.S.C. § 1692.

24. Cal. Civ. Code § 1788.1; *see also* Davidson v. Seterus, Inc., 21 Cal. App. 5th 283, 303 (2018) ("[T]he Rosenthal Act considers anyone who regularly engages

Another defense that can be successful in some states is an argument that the plaintiff's claim is barred by the "voluntary payment doctrine." The "voluntary payment doctrine" precludes recovery of money where the complaining party voluntarily paid a fee with full knowledge of the facts and without protest.[25] Some state courts have entirely exempted consumer claims from the voluntary payment doctrine based on liberal interpretations of state consumer protection laws.[26] Other state legislatures have completely disposed of the defense in cases involving payments made pursuant to a contract.[27] But some states continue to recognize the defense by statute, and importantly, in connection with consumer complaints.[28] Unfortunately, in many cases the defense of voluntary payment will be insufficient at the motion to dismiss, or even motion for summary judgment phase, because the defense's application "'is generally [a question] of fact, to be judged in light of all circumstances surrounding a given transaction[,]' [and] the doctrine could not be applied in a motion to dismiss context."[29]

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in the act or practice of collecting money, property or their equivalent that is due or owing by a natural person as a result of a transaction between that person and another person in which the natural person acquired property, services, or money on credit, primarily for personal, family, or household purposes to be a 'debt collector.'").

25. Boydell v. Wells Fargo Bank, N.A., No. 2:12-CV-000035-MR, 2013 WL 5462255, at *1 (W.D.N.C. Sept. 30, 2013) ("[A] payment cannot be recovered if it is voluntarily made by a person with full knowledge of all facts relevant to the payment.") (citing Johnson v. Sprint Solutions, Inc., 357 F. App'x 561, 563 n. 1 (4th Cir. 2009) (per curiam)). Further, a payment cannot be recovered if it is "made in ignorance or mistake of fact where the means of knowledge or information is in reach of the paying party but the party neglects to obtain it. . . ." Johnson v. Sprint Solutions, Inc., No. 3:08-CV-00054, 2008 WL 2949253, at *2 (W.D.N.C. July 29, 2008).

26. *See e.g.*, Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc., 170 P.3d 10, 23 (Wash. 2007) ("We agree with Indoor Billboard that the voluntary payment doctrine is inappropriate as an affirmative defense in the CPA context, as a matter of law, because we construe the CPA liberally in favor of plaintiffs.").

27. *See, e.g.*, Fla. Stat. § 725.04. "When a suit is instituted by a party to a contract to recover a payment made pursuant to the contract and by the terms of the contract there was no enforceable obligation to make the payment or the making of the payment was excused, the defense of voluntary payment may not be interposed by the person receiving payment to defeat recovery of the payment." Fla. Stat. § 725.04.

28. *See* Ga. Code Ann. § 13-1-13 (2012); *see also* Anthony v. Am Gen. Fin. Servs., 626 F.3d 1318, 1322 (11th Cir. 2010).

29. *See, e.g.*, Shaw v. Marriott Int'l, Inc., 474 F. Supp. 2d 141, 151 (D.D.C. 2010) (quoting Randazzo v. Harris Bank Palatine, N.A., 262 F.3d 663, 669 n.1 (7th Cir. 2001)), *rev'd in part on other grounds*, 605 F.3d 1039 (D.C. Cir. 2010); *see* also City of Scottsbluff v. Waste Connections of Neb., Inc., 809 N.W.2d 725, 745 (Neb. 2011) (denying summary judgment motion because "[w]hether a plaintiff voluntarily or involuntarily made a payment under a claim of right is a question of fact").

Lenders and servicers should ensure that "pay-to-pay" fees are clearly disclosed to borrowers before they are assessed. The more evidence the lender or servicer can provide that the borrower was made aware of the fee, elected to use an online or telephone payment service, and thereby incurred the fee, the more likely the lender is to succeed with an argument based upon the voluntary payment doctrine.

Another potential way to avoid liability is to simply not retain any portion of a fee that is passed along to a vendor who provides the service. For example, if the entire fee is transmitted to a third-party vendor, such as Western Union, the lender can argue that it did not charge a fee but rather passed along the expense of a third-party service from whom the borrower voluntarily sought a service. Some courts have held that servicers and lenders are not liable under these circumstances.[30]

Finally, many mortgages and deeds of trust, as well as other types of consumer credit agreements, contain a "notice and cure" provision. Typically these provisions require the borrower to give written notice of any breach of the agreement and provide the lender or servicer with an opportunity to cure any breach prior to filing a lawsuit. Courts have dismissed entire lawsuits based on a borrower's failure to comply with such notice and cure provisions.[31] Moreover, the existence of such provisions create good arguments for opposing class certification, where the named plaintiff cannot give notice on behalf of absent class members and therefore the claims of those absent class members are not ripe.

III. Government Agency Interest in "Pay-to-Pay" Fees

In July 2017, the CFPB issued a compliance bulletin that addressed the practice of charging "pay-to-pay" fees.[32] The 2017 bulletin largely discussed instances where the fees at issue were not adequately disclosed to the borrower and/or alternative free payment options were not available. However, the CFPB indicated that it intended to "closely review conduct related to phone pay fees for potential violations of Federal consumer financial laws."[33] It is possible that the CFPB will find that pay-to-pay fees generally

30. *See* Flores v. Collection Consultants of California, No. SA CV 14-0771-DOC (RNBx), 2015 WL 4254032 at *9 (C.D. Cal. Mar. 20, 2015) (holding that pay-to-pay fees did not violate the FDCPA where the fees did not inure to the benefit of the servicer); Lindblom v. Santander Consumer USA, Inc., Case No. 1:15-cv-990-LJO-BAM, 2016 WL 2841495, *7 (E.D. Cal. May 9, 2016) ("[T]he Court agrees with Plaintiff that . . . if it turns out Santander did not collect any portion of the Speedpay fee, her § 1692f(1) claim fails.").

31. *See, e.g.*, Giotta v. Ocwen Loan Servicing, LLC, 706 Fed. Appx. 421 (9th Cir. 2017) (holding that failure to allege compliance with notice and cure provision in deed of trust was fatal to FDCPA claim).

32. *See* CFPB Compliance Bulletin 2017-01: Phone Pay Fees (July 31, 2017), https://files.consumerfinance.gov/f/documents/201707_cfpb_compliance-bulletin-phone-pay-fee.pdf [https://perma.cc/FY5F-VT28].

33. *Id.*

violate consumer protection laws—regardless of whether the borrower is advised of the fee upfront and/or whether alternative free payment options are available.

The Federal Trade Commission also weighed in on the question of whether fees such as "pay-to-pay" fees may be lawfully collected. In a staff commentary from 1988, it said that a debt collector may not collect a fee if "the contract does not provide for collection of the amount and state law is silent."[34]

IV. Mitigating Risk & Exposure

Lenders and servicers are not required to accept payments online or by telephone. It is certainly fair for a lender or servicer to offer a service to a borrower that it is not obligated to offer in exchange for payment of a fee, or reimbursement of the cost of providing that service.[35] But even in jurisdictions where the fee is not required to be expressly provided for in the agreement creating the underlying debt, courts are consistent in their determination that such a fee must be disclosed to the borrower before the borrower elects to take advantage of the expedited processing system.[36]

One key to mitigating the risk of liability for charging "pay-to-pay" fees is disclosure. Lenders and servicers should clearly disclose that a fee will be charged for making an online or telephonic payment. Failing to meaningfully disclose such fees before they are incurred increases the risk that the lender or servicer will be liable for a deceptive act or practice or subject it to CFPB scrutiny. Such disclosures should identify alternative free and/or lower cost payment options available to the customer.[37] Another consideration is how and when the fees are presented. In some cases, collection of such fees when borrowers who are in default or under a loss mitigation

34. Fed. Trade Commission, *Staff Commentary on the Fair Debt Collection Practices Act*, 53 Fed. Reg. 50097-50110 (Dec. 13, 1988).
35. *See* CFPB Compliance Bulletin 2017-01: Phone Pay Fees (July 31, 2017), https://files.consumerfinance.gov/f/documents/201707_cfpb_compliance-bulletin-phone-pay-fee.pdf [https://perma.cc/FY5F-VT28].
36. *See, e.g.*, Cappellini v. Mellon Mortg. Co., 991 F. Supp. 31, 39–40 (D. Mass. 1997) (denying breach of contract claim regarding convenience fees that were not included in the loan agreement and noting that "there are a number of special services that a borrower could ask [lender] to provide that are not mentioned in the loan documents but which it appears clear that [lender] would have a right to request payment for providing").
37. *See e.g.* Meintzinger v. Sortis Holdings, Inc., 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 a pay-by-phone service, as long as the debtor knows of the charge and has the default option to avoid it by paying her bill in the usual way—by mailing in a check").

plan are *required* to utilize pay-to-pay systems has resulted in substantial payouts by servicers to settle.[38] In those cases, the availability of alternative no-cost payment options may prove illusory and will afford no safe harbor for even the most detailed fee disclosures.[39]

Finally, in some cases, plaintiffs' attorneys have argued that failing to inform the borrower that the fee is not authorized under the relevant mortgage instruments is deceptive *per se*. [40] Thus, including a notice that the fee is not specifically authorized under the borrower's note or mortgage, but instead is being offered solely for the borrower's convenience, separately and completely apart from his or her loan, may be advisable. Such a disclaimer may also assist at the summary judgment stage in an argument that the fee collected was not incidental to the underlying debt. In other words, the convenience fee is simply a point of service charge that is collected immediately when the borrower elects to use the optional convenience service and is not added to the loan debt or in any way measured by or incidental to any provision of the note or deed of trust.

V. Conclusion

In light of these recent cases and high dollar settlements, lenders and servicers should carefully consider whether providing online or telephonic payment systems and charging a fee for their use is worth the risk of exposure. At a minimum, lenders and servicers need to understand which states pose the greatest risk and should consider the discontinuation of such fees in those states unless the fees are explicitly provided for in the debt agreement. A lender or servicer who elects to continue charging such fees, absent an express provision in the agreement creating the debt, should ensure that the fees are disclosed fully before a borrower pays them, including the disclosure of free or less costly options available to the borrower for making payment. Use of a third-party vendor and not retaining any portion of the fee paid to process the payment or limiting the amount of the fee to the actual, demonstrable additional cost of processing the payment on an expedited basis, may also help protect against liability.

38. *See* Complaint, Garcia v. Nationstar Mortgage, LLC, No. 2:15-cv-01808-TSZ (W.D. Wash. 2018) (Dkt. 1).

39. *Compare* Order Granting Motion to Dismiss, Waddell v. U.S. Bank National Association, —— F.Supp.3d —— 2019 WL 3423472, at *4 (E.D.N.C. July 29, 2019) (stating that there was nothing deceptive when the fee was collected and the borrower had other available cost-free options for payment), *with* Complaint, No. 2:15-cv-01808-TSZ (W.D. Wash. 2018) (alleging that when borrowers become late they are locked out of the ability to pay online and forced to pay by other fee-imposed methods, such as by phone) (Dkt. 1).

40. *See* First Amended Complaint, Waddell v. U.S. Bank National Association, No. 7:19-cv-00010-D (E.D. N.C. 2019) (Dkt. 27).

One thing is for certain: there is now blood in the water, and there will be sharks. Lenders and servicers will see more of these cases, and there will likely be more settlements, resulting in even more cases. Analyzing risk and proceeding cautiously are the only ways to minimize or eliminate the risk of costly class action litigation.