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DEBT COLLECTION, CONVENIENCE FEES, AND THE FDCPA

Mortgage servicers collecting convenience fees are at significant risk of violating the FDCPA. The authors discuss the limits of the statute and related case law, and explores whether (and how) mortgage servicers may collect such fees without running afoul of the law.

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In the era of online banking and the Internet of Things, the ability to pay your mortgage in a manner other than sending in a paper check evidences both convenience and complication. Convenience to the borrower, in that there are many avenues to quickly make a payment, even a late payment, to avoid incurring a late charge. But complication to the servicer, who may wish to charge for that convenience, but would do so in the face of significant compliance risk. This article explores whether (and how) mortgage servicers may collect such convenience fees without running afoul of the Federal Debt Collection Protection Act (“FDCPA”).¹

The FDCPA dictates that “[a] debt collector may not use unfair or unconscionable means to collect or attempt

to collect any debt,” and prohibits a litany of unfair practices, notably including “[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.”² Under the FDCPA, a “debt collector” is “any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”³ However, Section 1692a(6)(F) of the FDCPA provides that an entity that obtains a debt while such debt is not in default is not a debt collector under the Act and, therefore, is not subject to FDCPA liability.

¹ Note that in addition to FDCPA risk, federal and state regulators, enforcement agencies, and plaintiffs have also leveraged prohibitions against unfair, deceptive, and abusive acts and practices (“UDAAP”) to attack the marketing, disclosure, and assessment of convenience fees. While this UDAAP risk must be taken into account in developing any strategy to assess convenience fees, this article focuses on the FDCPA compliance risk applicable to convenience fees.

² 15 U.S.C. § 1692f(1).

³ 15 U.S.C. § 1692a(6).

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