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Consumer Class Action Series: Consumer Financial Fee Litigation

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Introduction

- Increase in state law-based consumer class actions based on a variety of different ancillary fees provided for in contractual agreements
  - E.g., payment convenience fees, default inspection fees
- Mortgage servicers in particular have seen a number of these types of putative class claims arise in the last few years
  - Plaintiffs rely on form Note, Mortgage, and Deed of Trust documents for their class allegations

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What Are the Claims?

- State law Breach of Contract
  - Allege that the contract either does not allow the specific fee to be charged, or that the contract is ambiguous and unclear as to whether the fee can be charged
- State law Consumer Fraud/UDAP analogs
  - Allege that companies ignored conditions precedent to charging the fees, or were willfully ignorant to attempts by the borrower to fix the issues that led to the fees
- Federal Debt Collection Practices Act

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Standing/Jurisdictional Questions

- The majority of these claims are brought by an individual on behalf of consumers in multiple states
- But given that most of the claims we will be discussing are state law claims, it raises important questions regarding standing and jurisdiction
- A class representative must have standing for all claims he or she purports to be a representative for
- Does a court in Wyoming have jurisdiction over Nebraska residents regarding Nebraska claims?

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Standing

- The need for standing "is no less true with respect to class actions than with respect to other suits." Lewis v. Casey, 518 U.S. 343, 357 (1996).
- "[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." Davis v. FEC, 554 U.S. 724, 734 (2008).
  - Article III standing affects the subject matter jurisdiction of the federal courts – i.e., without standing, the court has no subject matter jurisdiction
  - Subject matter jurisdiction is not waivable – it can be raised at any point in a matter, even on appeal for the first time

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Standing vs. Rule 23

District Courts, however, do not apply a direct interpretation of the Supreme Court's standing precedents in class actions. Some courts find that the issue of standing by the named plaintiff in such situations is better suited for the class certification analysis under Fed. R. Civ. P. 23.

- *In re Insulin Pricing Litig.,* 17-cv-699, 2019 U.S. Dist. LEXIS 25185, at *52 (D.N.J. Feb 15, 2019) ("Consistent with [controlling law], district courts within the Third Circuit and throughout the nation have held that named plaintiffs in a class action lack standing to bring claims on behalf of putative classes under the laws of states where no named plaintiff is located and where no named plaintiff purchased the product at issue.")
- *In re: Generic Pharm. Pricing Antitrust Litig*., 368 F. Supp. 814,831 (E.D. Pa. 2019) (rejecting argument that a named plaintiff must have standing for each claim brought, stating that parallel claims are more efficiently covered by a Rule 23 analysis when standing has been demonstrated as to one parallel claim).

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Personal Jurisdiction

- In contrast to standing, which is subject matter jurisdiction of a court, personal jurisdiction can be waived.
  - Generally, a court must have personal jurisdiction over the parties as well as subject matter jurisdiction over the dispute
  - Parties can agree to subject themselves to the personal jurisdiction of any court, and generally making an appearance without objecting to personal jurisdiction waives it
- Personal jurisdiction may be general or specific
  - General jurisdiction applies to a person or company in their state of residence of their principal place of business
  - Specific jurisdiction requires the lawsuit to derive from activity in the jurisdiction

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Does a Court have Jurisdiction over Out of State Claims?

- This is a crucial question in class action practice – one that the Supreme Court appears to have answered with respect to mass action practice
- *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017)
  - Supreme Court held that the trial court lacked specific jurisdiction where there was no nexus between California and the facts underlying the non-California plaintiffs' claims
  - "The relevant plaintiffs are not California residents and do not claim to have suffered harm in that State," and "all the conduct giving rise to the nonresidents' claims occurred elsewhere."

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Courts are Mixed on Jurisdiction

- Courts ruling out of state plaintiffs cannot bring their home state claims in another jurisdiction
  - *Bakov v. Consol. World Travel, Inc.*, 15-cv-2980, 2019 U.S. Dist. LEXIS 46510, at *39-42 (N.D. Ill. Mar. 21, 2019); *In re Dicamba Herbicides Litig.*, MDL 2820, 2019 U.S. Dist. LEXIS 20225, at *28-29 (E.D. Mo. 2019); *America's Health & Res. Ctr., Ltd. v. Promologics, Inc.*, 16-cv-9281, 2018 U.S. Dist. LEXIS 120590, at *5-11 (N.D. Ill. July 19, 2018); *Horowitz v. AT&T Inc.*, 17-cv-4827, 2018 U.S. Dist. LEXIS 69191, at *42-46 (D.N.J. April 25, 2018); *Maclin v. Reliable Reports of Tex., Inc.*, 314 F. Supp. 3d 845, 849-851 (N.D. Ohio 2018); *Wenokur v. AXA Equitable Life Ins. Co.*, 17-cv-165, 2017 U.S. Dist. LEXIS 162812, at *12 n.4 (D. Ariz. Oct. 2, 2017); *In re Dental Supplies Antitrust Litig.*, 16-cv-696, 2017 U.S. Dist. LEXIS 153265, at *35-38 (E.D.N.Y Sept. 20, 2017).

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Courts are Mixed on Jurisdiction

- Similar to the standing analysis, courts that reject the application of Bristol Meyers Squibb to class actions subjugate the personal jurisdiction determination to a Rule 23 class certification analysis
- Plaintiffs also argue that, because BMS was a mass action vehicle, and not a class action vehicle, it is inapplicable to class actions
  - *Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc.*, No. 17-00564, 2017 WL 4224723, at *4–6 (N.D. Cal. Sept. 22, 2017); *In re Chinese Manufactured Drywall Products Liab. Litig.*, No. 09-2047, 2017 WL 5971622, at *12-13 (E.D. La. Nov. 30, 2017); *Dennis v. IDT Corp.*, No. 18-2302, 2018 WL 5631102, at *2 (N.D. Ga. Oct. 18, 2018); *Molock v. Whole Foods Mkt., Inc.*, No. 16-2483, 2018 WL 1342470, at *6 (D.D.C. Mar. 15, 2018); *Day v. Air Methods Corp.*, No. 17-183, 2017 WL 4781863, at *4 (E.D. Ky. Oct. 23, 2017); *Sanchez v. Launch Tech. Workforce Sols, LLC*, No. 17-1904, 2018 WL 1875615, at *1 (N.D. Ga. Jan. 26, 2018).

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Why does Jurisdiction Matter?

- Jurisdiction in class actions is hugely important, because it is an issue that is intended to be resolved prior to any other disputes
- If one named plaintiff does not have standing to bring actions on behalf of out-of-state residents for out-of-state claims, then a named plaintiff must be identified and included for each of those claims
- If a court does not have personal jurisdiction over the claims brought against a defendant there, then those claims must be brought independently in a court that does have jurisdiction
- Enforcement of these requirements would make nationwide class claims based on multiple states' laws difficult

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Pay by Phone Fee Claims

- Breach of contract alleges that the contract does not expressly allow the fees to be charged
- State consumer protection statute claims allege that the fees are deceptive and misleading, or violate another state or federal law
- Unjust enrichment – a catch-all for failures on breach of contract claims
- FDCPA – allege that the fees are unauthorized debts being collected

Thomas-Lawson v. Carrington Mortg. Servs., LLC

- No. 2:20-cv-07301, 2021 U.S. Dist. LEXIS 65841 (C.D. Cal. Apr. 5, 2021)
- Plaintiffs brought action against Carrington on behalf of themselves and five putative classes (nationwide, Maryland, Texas, California, and New York classes) to challenge the legality of these "pay-to-pay" fees
  - Carrington allegedly charged a $5 convenience fee to pay online, and it charged a $10 or $20 convenience fee to pay via phone
- While the Court found that the defendant mortgage servicer was a debt collector under the law, and rejected an argument that the fee had to be incidental to the mortgage obligation, the Court dismissed FDCPA claims because it found the plaintiffs had failed to plausibly allege that the fees charged were not permitted by law
- Denied breach of contract and other state law consumer protection claims on similar grounds

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Lish v. AmeriHome Mortg. Co., LLC

- No. 2:20-cv-07147-JFW-JPRx, 2020 U.S. Dist. LEXIS 215172 (C.D. Cal. Nov. 10, 2020)
- Plaintiff was not a California resident, and property at issue was in Miami
- Court found Plaintiff had no standing to assert CA state law claims
  - CA Rosenthal Act claim would fail anyway, because Plaintiff agreed to pay it (Was not forced to do so), and the fee was not incidental to the debt
  - CA UCL claims fails because it is derivative of Rosenthal Act claim
- Convenience fees found not violate Florida's statutory debt collection obligations

Diflauro v. Bank of Am., N.A.

No. CV 20-5692, 2020 U.S. Dist. LEXIS 256467 (C.D. Cal. Dec. 2, 2020)

- Allege that BoA charged Plaintiffs a $6.00 transaction fee each time Plaintiffs made mortgage payments online or by phone.
- Plaintiffs brought class action against BoA alleging that it breached their Deeds of Trust, and violated the Rosenthal Fair Debt Collection Practices Act (Rosenthal Act), Cal. Civ. Code §§ 1788, et seq., the Consumer Legal Remedies Act (CLRA), Cal. Civ. Code §§ 1750, et seq., and California's unfair competition law (UCL), Cal. Bus. & Prof. Code §§ 17200, et seq., by charging "Pay to Pay" convenience fees for online and phone mortgage payments.
- Breach of contract dismissed, but other claims allowed to proceed

Torliatt v. Ocwen Loan Servicing, LLC

No. 19-cv-04303-WHO, 2021 U.S. Dist. LEXIS 131349 (N.D. Cal. July 14, 2021)

- Plaintiff sued defendants alleging that they violated the Rosenthal Fair Debt Collection Practices Act ("Rosenthal Act") and the California Unfair Competition Law ("UCL") by charging "pay-to-pay" convenience fees for paying his mortgage payments online or over the phone.
- In this opinion, the Court denied a stay based on the appeal of the Carrington decision to the Ninth Circuit
- Court had previously denied a motion to dismiss CA Rosenthal Act and CA UCL claims, for substantially similar reasons as the Diflauro matter

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4th Circuit Weighs In

- *Alexander v. Carrington Mortgage Services, LLC,* 2022 U.S. App. LEXIS 1549 (4th Cir. Jan. 19, 2022)
  - Plaintiffs brought this case as a class action alleging that Carrington violated the Maryland Consumer Debt Collection Act and the Maryland Consumer Protection Act by charging $5 convenience fees to borrowers who paid monthly mortgage bills online or by phone.
  - The district court dismissed the claim holding that Carrington was not a "collector" for the MCDCA claims and not a "debt collector" under FDCPA.
  - The 4th Circuit reviewed the claim de novo and reversed in part holding that Carrington does not need to be a "debt collector" under federal standards for plaintiffs' state claims to proceed.

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Default Inspection Fees

- Most mortgages and deeds of trust require inspections of properties upon default
  - Helps ensure no degradation of property, no vacatur of property, etc.
- These inspections and the fees associated with them are often specifically allowed for in the agreement, allowing the lender to charge fees in connection with a default by the borrower, including inspections
- But most mortgages and deeds of trust also have a separate provision, allowing fees that are reasonable and appropriate

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Default Inspection Fee Claims

- Plaintiffs attorneys have seized on the difference in these two provisions, alleging that inspection fees are not reasonable or appropriate
- Breach of contract claims flow from this reasonable and appropriate language
- Similarly, these claims alleges violations of state consumer protection statutes on the basis that they are misleading, and purposefully conducted to drive revenue
- Debt collection claims derive from these allegations in a similar way to the phone convenience claims

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Kirchner v. Ocwen Loan Servicing, LLC

- 257 F. Supp. 3d 1314, 1323 (S.D. Fla. 2017)
- "[C]ontrary to Plaintiffs' arguments, Defendants disclosed in Plaintiffs' mortgage agreements that they had the authority to order property inspections, the cost of which would be charged to borrowers' mortgage accounts, in the event of a default."
- "there is no question that when a borrower defaults under the terms of the loan, Defendants have discretion to order property inspections and recover the amount of the property inspection fees from their borrowers in Defendants' discretion"

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Vega v. Ocwen Fin. Corp

- 14-cv-4408, 2015 U.S. Dist. LEXIS 37079, at *11-12 (C.D. Cal. Mar. 24, 2015)
- "When Paragraphs 9 and 14 are read together, it appears that Vega's mortgage *defines* property inspections as reasonable acts. The 'reasonable or appropriate' language in Paragraph 9 is not a qualifying condition for property inspections."
- Affirmed by unpublished opinion in the Ninth Circuit - 676 Fed. App'x 647 (9th Cir. 2017).

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Not all Mortgages are the Same

- Certain other default inspection fee cases survived motions to dismiss because they involved a different standardized agreement which required that fees be "*needed* … to protect or defend" the lender's interest.
  - *See Tardibuono-Quigley v. HSBC Mortg. Corp. (USA)*, 15-cv-6940, 2017 U.S. Dist. LEXIS 47982, at *5 (S.D.N.Y. Mar. 30, 2017) (emphasis added).
- The "needed" standard in those other cases is a more demanding standard than the "reasonable or appropriate" standard. *See Stitt v. Citibank, Nat'l Ass'n*, 12-cv-3892, 2015 U.S. Dist. LEXIS 169070, at *13-14 (N.D. Cal. Dec. 17, 2015).

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7th Circuit Weighs In

- Leszanczuk v. Carrington Mortgage Services, LLC, 2021 U.S. App. LEXIS 38436 (7th Cir. Dec. 28, 2021)
- Plaintiff brought this case alleging that Carrington breached her mortgage contract and violated the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA") by charging a $20.00 fee for inspecting her residence as her mortgage servicer.
- Plaintiff alleged that HUD regulation limits the fees Carrington may charge under the contract and that the inspection fee was an unfair practice. The district court dismissed the complaint with prejudice for failure to state plausible claims and the 7th Circuit affirmed.
- 7th Circuit held that the plain language of the contract does not prohibit Carrington from charging inspection fees. The court then held that plaintiff failed to adequately allege that the inspection fee offended public policy, was oppressive, or caused her substantial injury.
  - *See also Pfendler v. PNC Bank*, No. 18-2501, 2019 U.S. App. LEXIS 8581, at *6 (3d Cir. Mar. 21, 2019)

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Questions?

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