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**Expediting Payoff Statement Delivery:
Compensable “Special Service” or Unlawful Fee?**

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Loan servicers face a myriad of inconsistent state requirements on furnishing payoff statements to mortgagors. In periods of high volume refinancing, dealing with payoff statement delivery quickly is essential for both servicers and borrowers, whose new loans cannot be made until prior loans are paid off. A servicer’s leeway to deliver payoff statements is typically restricted by state real property law or by mortgage company licensing acts which establish a time frame for the provision of loan payoff statements. Occasionally, these laws set a ceiling on the fee that may be charged for the statement. This article explores whether the mortgagee may charge the mortgagor a special service fee in connection with the expedited delivery of the payoff statement, and considers the various legal theories that have been put forth as justification for such a fee.

The first line of inquiry in considering any type of mortgage-related fee should be the loan documents themselves; if the documents provide for a particular fee, absent contrary state law, the fee should be permitted as incident to the parties’ freedom to contract. However, most residential loan documents do not address the subject of fax fees. The Fannie Mae/Freddie Mac uniform residential loan note and mortgage neither expressly authorize nor expressly prohibit fees for expedited delivery of payoff statements.

In recent years, borrowers have frequently sued lenders to recover many types of purportedly unlawful fees; many of the cases are class actions. Fax fees associated with document delivery are among the most highly contested fees. The majority of reported cases on fax fees have reached the conclusion that when a lender provides services to the borrower that are outside the scope of the parties’ agreements, charging fees for such services is acceptable if the fees are disclosed to the borrower and the borrower agrees to pay them. The borrower’s actual payment of a fee may allow the lender to take advantage of the “defense of voluntary payment” if the borrower later contests or tries to recover the fee.¹

¹ In *Stone v. Mellon Mortgage Company*, which involved an attempt by a class of borrowers to recover a \$15 fax fee imposed for faxing payoff statements, the Supreme Court of Alabama recited the “defense of voluntary payment” as follows: ‘It has been the law in Alabama for over 150 years that where one party, with full knowledge of all the facts, voluntarily pays money to satisfy the colorable legal demand of another, no action will lie to recover such a voluntary payment, in the absence of fraud, duress or extortion. 771 So.2d 451 at 456.

Most cases involving fax fees for delivery of payoff statements hold that such fees are permitted as a “special service” outside the parties’ contractual obligations in the loan agreement. An often-cited example is *Cappellini v. Mellon Mortgage Co.*, 991 F. Supp. 31 (D. Mass. 1997). In *Cappellini*, the borrower claimed a fax fee for the payoff statement was a prohibited prepayment charge; his claim was dismissed, in part based on testimony that the lender would have provided the payoff statement free by regular mail. When it faxed the payoff statement, said the court, the lender did so for the borrower’s convenience and was therefore entitled to charge a fee.

The *Cappellini* decision upholding the fax fee was made despite the court’s characterization of the lender as being involved in “low grade avarice” and “nickel and diming of consumers.” The Court found that the lender was indeed providing a service to the borrower, albeit at a profit to itself.

“The fax and duplicate statement charges relate to special services outside the scope of the basic services provided by a mortgage servicer... . There are a number of special services that a borrower could ask [a servicer] to provide that are not mentioned in the loan documents but which it appears clear that [the servicer] would have a right to request payment for providing. Included among those would be courier or Federal Express charges, ... fees for requests for certified copies of documents, duplicate payment coupon books, amortization tables or other loan information.”

*Stone v. Mellon Mortgage Company*² also holds that a mortgagee could impose a \$15 fee for faxing a payoff statement where the borrower or his agent could have received the statement free through the mail and the charge was voluntarily incurred. The fax fee imposed was plainly disclosed on the payoff statement and the lender informed the borrower’s mortgage broker that payoff information could be obtained free by mail. Nevertheless, the borrowers claimed that fax fees were not contemplated when they obtained the loan. The court held that it would be unreasonable for a lender to anticipate every kind of special request a borrower might make over an extended loan term, and include fees for all of these in the loan documents.

In *Colangelo v. Norwest Mortgage*,³ the mortgagors challenged a fax transmission fee associated with a payoff statement, arguing that it was a prepayment penalty. However, the Minnesota Appeals Court held the fee to be a “ ‘fee for a special service, the transmittal in an expedited manner’ of payoff statements.”

In *Dwyer v. J.I. Kislak Mortgage Corporation*,⁴ the mortgage servicer’s practice of including the fax fee along with secured amounts due in its payoff statement was held to be a violation of the Washington Consumer Protection Act, however, the Court stated that its holding “does not infringe on [the lender’s] right to charge a fax fee.” In other words, the fax fee itself was permissible but the lender could not include it in the

² 771 So. 2d 451 (Sup. Ct. Ala. 2000).

³ 598 N.W. 2d 14 (Minn. App. 1999).

⁴ 103 Wash. App. 542, 13 P.3d 240 (Wash. App. Div. 1, 2000).

“balance due” category of the payoff statement, because a consumer might be misled into believing that the mortgage would not be released if the fax fee was not paid.

What seems clear from the decisions reached by Alabama, Massachusetts, Minnesota, and Washington courts is that the fax fee, to be supportable, must be charged for a service not contemplated in the original loan agreement, and must be made in response to a borrower’s request, rather than unilaterally imposed by the lender without notice. Fortunately for lenders defending fax fee cases, the cases upholding the fees come from geographically dispersed states -- South, Northeast, Midwest and Western states. This should give other cases guidance when similar claims are made in cases in neighboring states.

The rationale for most requests for faxed payoff statement is timesaving. Since most laws that require lenders to provide payoff statements include a statutory time period for response (usually 10 days), the use of fax should result in a faster response. If a request for a faxed payoff statement resulted in delivery at the same time a free mailed copy would have arrived, the courts in the decisions cited above might have reached different decisions. In other words, the fee appears to be permitted on the assumption that the statement reaches the borrower faster when it is sent by fax than when sent through the mail.

In two cases involving fax charges imposed by federal associations, it was held that state laws limiting fees for payoff statements are preempted by federal law. *Lopez v. World Savings and Loan Association*⁵ holds that California law limiting payoff statement fees to \$60 is preempted by OTS rules for federal associations. The relevant portion of the decision notes that “the deed of trust is silent as to method of transmittal and what will occur if the borrower seeks an ‘expedited delivery’.” The fact that the borrower, not the lender, chose how payoff information would be delivered was essential to the holding that the lender’s failure to disclose the fax fee at loan origination was not unfair or deceptive. The court acknowledged that the lender was obliged to deliver a payoff statement in a “commercially reasonable” manner, but said the loan agreement “requires no more of it, so that the deed of trust does not constrain [the lender] from charging an additional fee for transmitting the statement by some other means...” In other words, the lender was required to do what it had agreed to do in its loan agreement, but not more. The loan documents did not obligate the lender to send a payoff statement by fax.

In *Moskowitz v. Washington Mutual Bank, F.A.*,⁶ an Illinois Appellate Court held that a New York law limiting fees for an initial payoff statement was preempted for a federal association, based on an OTS opinion (“the OTS concluded that a fee charged for faxing a payoff statement is a loan-related fee, and to the extent the New York law would prohibit an association from charging such a fee, federal law preempted the state law as applied to the association”).

⁵ 105 Cal. App. 4th 729 (Cal. App. 1st Dist., Div. 3, 2003).

⁶ 329 Ill. App. 3d 144, 768 N.E.2d 262 (Ill. App., 1st Dist., 6th Div., 2002).

Contrary to the cases discussed above that uphold the fax fee, two New York decisions invalidate such fees. The court in *Negrin v. Norwest Mortgage, Inc.*⁷ noted that it was just as easy for a lender to fax the payoff statement as to mail it (the method required by the New York real property law). The New York statute requires the mortgagee to provide mortgage documents to mortgagors and goes on to state that “the mortgagee shall not charge for providing the mortgage-related documents.” The Court read this language as prohibiting any charge for “providing” the documents, regardless of the method used to provide them, concluding that “mortgagees were not entitled to additional compensation for this ministerial act,” and “mortgagees were not to be rewarded for doing that which was legally required of them anyway.” Likewise, *Dougherty v. North Fork Bank*,⁸ holds that even if a mortgagor voluntarily agrees to pay a fax fee for delivery of a payoff statement, the lender may not charge it, citing *Negrin v. Norwest Mortgage*. The decisions in the New York cases are based on a provision of New York real property law expressly prohibiting any charge for providing payoff information. The activity of “providing” is seen by the courts as encompassing any delivery method, including faxing.

To date, not every state has reported case law on the permissibility of fax fees for payoff statements, but most of the state courts that have considered the issue have concluded that the fax fee is separate and distinct from the fee for the statement itself. Putting together guidance on whether a fax fee may be charged based on the decided cases would lead to the following principles:

- (1) The fee is allowed only if not prohibited by the loan agreement;
- (2) The fee should be charged only if the borrower agrees to pay it;
- (3) The fee should be disclosed in advance;
- (4) The lender should identify the fee as being for a special service provided for the borrower’s convenience, and for services other than those the lender is obliged by law to provide;
- (5) The fee should not be included in the “balance due” column of the payoff statement; and
- (6) The fee should not be charged on a loan secured by New York property unless the loan is made by a federal association.

In addition to case law, one recently adopted state law address whether a fax fee is allowed in connection with providing a payoff statement. This year, Idaho adopted the Home Loan Practices Act (H.B. 1229, effective 1/1/05) which regulates certain lender practices in connection with high cost home loans. Among other things, that law prohibits a creditor from charging a fee for “informing or transmitting” the balance due to pay off a home loan. The creditor must provide a payoff balance not later than ten (10)

⁷ 700 N.Y.S. 2d 184 (App. Div. 1999).

⁸ 753 N.Y.S. 2d 130 (App. Div. 2003).

business days after the request. However, anticipating the possibility of requests for payoff statements in less than 10 business days, the Idaho law goes on to say that the term “fee” as used in the prohibition on fees for payoff statements does not include actual charges of the creditor for express or priority delivery requested by the borrower. Therefore, a lender may charge the borrower for its actual charges incurred when an expedited delivery method is used. The term “actual charges” suggests that lenders cannot mark up or make a profit on these expedited delivery methods, however.

In states where there is no case law and statutes do not expressly address the issue of fax fees, state regulators are deciding whether such fees are allowed. Virginia’s Bureau of Financial Institutions has cited licensed mortgage lenders with violation of Virginia Code §6.1-330.82 on the basis of their having charged a fax fee to transmit payoff statements. In some instances, the Bureau has demanded that lenders reimburse borrowers who were charged the fax fee and document the refund to the agency.

Virginia Code §6.1-330.82, captioned “Property owner entitled to written statement of payoff amount,” provides that where a lien on real estate is secured by a deed of trust, an owner of the real estate entitled to prepay the mortgage loan is entitled to receive from the loan holder a written payoff statement. The holder must mail or deliver the payoff statement to the property owner or his designee within 10 business days of receipt of a written request. A payoff statement request may be made once in a 12-month period without charge;⁹ a fee up to \$15 may be charged for each additional request made within a 12-month period. The Bureau of Financial Institutions reads these provisions together to mean that because a \$15 fee is expressly authorized by law (Va. Code §6.1-330.82(B)) for second requests (within 12 months), no fee of any kind is allowed in connection with providing the first payoff statement.

This conclusion would be reasonable if the fax charge is considered to be a fee for the payoff statement, which the law requires to be provided free. However, it is not self-evident that it is a reasonable conclusion if one views the fee as a charge imposed for expedited delivery of the payoff statement and not for the payoff statement.

As indicated above, Virginia Code §6.1-330.82(A) permits a note holder to deliver or mail a payoff statement within 10 days of a borrower’s request. However, this provision does not give a borrower the right to a statement delivered in fewer than 10 days. Fax fees are typically charged because the requestor wants the document immediately (*i.e.*, does not want to wait 10 days for it to arrive in the U.S. mail). Therefore, a proper characterization of the charge is that of an “expedited delivery” fee or a “special services” fee, not a payoff statement fee. No Virginia court has considered the fax fee in this context, so it remains to be seen whether the fee will ultimately be upheld along the lines of the cases decided in Alabama, Minnesota, Massachusetts and Washington, or whether the issue will be decided adversely to lenders, following the New York courts.

⁹ Despite the ambiguous wording of the statute, it evidently means that the response to the request must be made once in a 12-month period without charge, not that the request itself may be made without charge (notwithstanding the statute, a borrower can make as many requests in a 12-month period as he chooses, and the phrase “without charge” does not logically refer to the request by the borrower, but to the lender’s response to that request).

With the issue undecided in the most states, lenders and servicers should provide full disclosure to borrowers of the terms and conditions under which faxed documents will be made available prior to imposing a fax fee. If the use of fax is to save time for the borrower, the lender should agree to deliver the payoff statement by an agreed-upon time, so it can be documented that the delivery helped the borrower obtain his statement faster than required by law.

A disclosure similar to the one below should help lenders establish the “defense of voluntary payment” of fax fees:

DISCLOSURE OF FEE FOR SPECIAL SERVICES

IN THIS AGREEMENT, “I” MEANS THE BORROWER; “WE” MEANS THE LENDER OR SERVICER.

I HAVE REQUESTED A PAYOFF STATEMENT BY EXPEDITED DELIVERY. UNDER THE LAW OF _____ [state], I MAY BE ENTITLED TO RECEIVE THIS STATEMENT WITHOUT CHARGE, WITHIN _____ DAYS FROM THE LENDER’S RECEIPT OF MY REQUEST. HOWEVER, I DO NOT WISH TO WAIT FOR _____ DAYS. I REQUEST THAT YOU DELIVER THE PAYOFF STATEMENT TO ME BY _____ [date], USING AN EXPEDITED DELIVERY METHOD (*e.g.*, OVERNIGHT MAIL, FAX, EMAIL). THE FAX NUMBER IS _____ [fax number including area code]. I UNDERSTAND THAT IF YOU USE EXPEDITED DELIVERY TO PROVIDE THE PAYOFF STATEMENT TO ME OR A PERSON ACTING ON MY BEHALF (INCLUDING A TITLE COMPANY OR SETTLEMENT AGENT) THERE WILL BE A CHARGE FOR THIS SERVICE, WHICH IS \$_____. I VOLUNTARILY AGREE TO PAY THIS CHARGE. TO AVOID THIS CHARGE, I MAY OBTAIN THE PAYOFF STATEMENT BY U.S. MAIL.

SIGN AND DATE ONE OF THE TWO CHOICES BELOW:

I REQUEST A PAYOFF STATEMENT BY EXPEDITED DELIVERY AND AGREE TO PAY THE CHARGE ABOVE: _____

Signature of Borrower / Date

I REQUEST A PAYOFF STATEMENT BY U.S. MAIL AND ACKNOWLEDGE THE LENDER HAS _____ DAYS TO PROVIDE IT. THERE WILL BE NO CHARGE:

Signature of Borrower / Date

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