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U.S. Supreme Court Holds Foreclosure Firms Conducting Nonjudicial Foreclosures Are Not Debt Collectors Under the FDCPA

Wayne Streibich, Diana M. Eng, Cheryl S. Chang, Jonathan M. Robbin, and Namrata Loomba*

The U.S. Supreme Court recently held that businesses conducting nonjudicial foreclosures are not "debt collectors" under the Fair Debt Collection Practices Act, but lenders and foreclosure firms should take note that the Court specifically chose to leave open the question of whether businesses that conduct judicial foreclosures are "debt collectors" under the statute. The authors of this article explain the decision and its significance.

In *Obduskey v. McCarthy*,[1] the Supreme Court of the United States issued an opinion holding businesses conducting nonjudicial foreclosures are not "debt collectors" under the Fair Debt Collection Practices Act ("FDCPA"). The Supreme Court limited its decision to nonjudicial foreclosures.[2] The Justices ruled 9-0 in the case, with Justice Breyer writing the opinion and Justice Sotomayor concurring.

SUMMARY OF FACTS

In 2007, petitioner Dennis Obduskey ("Obduskey") purchased a home in Colorado with a $329,940 loan secured by the property. Obduskey defaulted on the loan and in 2014, Wells Fargo Bank, N.A. ("Wells Fargo"), hired a law firm, McCarthy & Holthus, LLP ("McCarthy"), to proceed with a nonjudicial foreclosure. McCarthy mailed Obduskey a letter stating it had been "instructed to commence foreclosure" against the property, disclosed the amount outstanding on the loan, and identified the creditor. The letter was sent to Obduskey to provide notice in compliance with both Colorado state law and the FDCPA. Obduskey responded with a letter invoking Section 1692g(b) of the FDCPA,

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[1] *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029 (2019).

[2] "[F]or here we consider nonjudicial foreclosures. And whether those who judicially enforce mortgages fall within the scope of the primary definition is a question we can leave for another day."

stating that since Obduskey, as a consumer, disputes the amount of a debt, the "debt collector," this case, McCarthy, must cease collection until it verifies the debt and mails a copy to the debtor.

THE DISTRICT COURT AND TENTH CIRCUIT DECISIONS

In 2015, Obduskey, sued McCarthy and Wells Fargo in the United States District Court for the District of Colorado, alleging, among other things, that McCarthy violated the FDCPA by failing to comply with the verification of debt procedures. The district court granted McCarthy's motion to dismiss Obduskey's complaint on grounds that McCarthy, was not a debt collector within the meaning of the FDCPA. Obduskey appealed the district court's dismissal to the U.S. Court of Appeals for the Tenth Circuit, which affirmed the dismissal, holding the mere act of enforcing a security interest through a nonjudicial foreclosure proceeding does not fall within the FDCPA. Obduskey petitioned for certiorari.

THE SUPREME COURT'S DECISION

In a 9-0 ruling, the Supreme Court held law firms engaging in nonjudicial foreclosure proceedings are not considered to be "debt collectors" under the FDCPA. In analyzing the statute's definition of a debt collector, the Court held that the primary definition of a debt collector included any person or business 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 asserted to be owed or due another.[3] With respect to Section 1692f(6), however, a debt collector *also* includes any person or business whose principal purpose is the enforcement of security interests. The Court, in analyzing both Sections 1692a(6) and 1692f(6), held that as a result of the distinction between (a)(6) and (f)(6), one principally involved in the enforcement of security interests only is a debt collector for the purposes of Section 1692f(6). In reaching this decision, the Court's rationale was three-fold.

First, in relying on a textual reading of the FDCPA, the Court noted that the FDCPA contains a primary definition of a debt collector under Section 1692a(6) and a limited-purpose definition under Section 1692f(6) that "*also* includes" businesses like McCarthy. In determining congressional intent of the "debt collector" definition under the FDCPA, the Court held if security-interest enforcers were to be covered by the debt collector definition in Section 1692a(6), Congress would not have added a separate provision to include security-interest enforcers in Section 1692f(6).

[3] 15 U.S.C. § 1692a(6).

Second, the Court recognized Congress may have intended to treat security-interest enforcement differently from ordinary debt collection practices to avoid conflicts with state nonjudicial foreclosure schemes.

Third, relying on legislative history, the Court held that Congress considered two versions while drafting the bill, which would have either totally excluded security-interest enforcement from the FDCPA or treated it like ordinary debt collection. The resulting language in the FDCPA reflects a compromise—enforcement of a security interest is not debt collection, but the prohibitions in Section 1692f(6) apply to security-interest enforcements.

In rejecting Obduskey's arguments, the Supreme Court held them to be unconvincing. Obduskey argued the limited purpose definition of security-interest enforcement fits "repo men" who seize automobiles and personal property in response to non-payment, since repossession often entails limited communication with the debtor. The Court rejected this argument, and relying on Section 1692a(6), stated the limited-purpose provision of the FDCPA speaks broadly of "security-enforcement interests" and not enforcement of security interests in personal property. In relying on Section 1692i(a) of the FDCPA, Obduskey also argued that a person who judicially enforces a real-property-related security interest is a debt collector; thus, a person who non-judicially enforces such an interest must also be a debt collector. The Court noted the FDCPA section upon which Obduskey relied did not apply in this case, since the Court would only consider nonjudicial foreclosures in this opinion. Further, Obduskey argued that McCarthy engaged in acts that were beyond security interest enforcement by sending notices that could be perceived as an attempt to collect a debt backed up by a threat of foreclosure. The Court found Obduskey's argument to be unpersuasive because every nonjudicial scheme involves notices to the homeowners.

In issuing this opinion, the Court emphasized nonjudicial foreclosures are not a license to engage in abusive debt collection practices, and would not grant an actor blanket immunity from the FDCPA.

CONCLUSION

Obduskey is significant because it allows law firms and lenders in nonjudicial foreclosures to proceed with enforcement of the security interest without the threat of a FDCPA violation in every step of the foreclosure process. However, the Supreme Court has emphasized that this ruling does not give law firms and lenders the license to engage in abusive debt collection practices. While this decision will significantly lower the number of FDCPA claims filed by debtors in nonjudicial foreclosure proceedings, businesses and law firms alike should

remain cautious of the manner in which they communicate with borrowers in nonjudicial foreclosures to avoid triggering litigation.