

A Narrow Victory for Lawyers Engaged in Non-Judicial Foreclosures

Alice Sherren, *Minnesota Lawyers Mutual Insurance Company*

Donald Patrick Eckler, *Pretzel & Stouffer, Chartered*

The Fair Debt Collection Practices Act (“FDCPA”) is frequently used to sue attorneys involved in the collection of debts. In the textually based opinion of *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, the United States Supreme Court unanimously held that the FDCPA does not apply to the conduct of an attorney involved in a non-judicial foreclosure. While this appears to be great news for attorneys engaged in debt collection activities, Justice Sotomayor’s concurring opinion signals that the holding may be limited to specific fact patterns. As always, attorneys engaged in debt collection activities should continue to tread carefully.

Underlying Facts and Procedure

The petitioner, Dennis Obduskey, bought a home in Colorado with a loan from Wells Fargo. Obduskey defaulted on the mortgage and Wells Fargo engaged McCarthy & Holthus to enforce its interest in the home through a judicial foreclosure. The defendant attorneys sent notice of the default and other notices required under the FDCPA and Colorado state law. Obduskey responded by disputing the debt.

Under the FDCPA §1692g(b), if a consumer disputes the amount of the debt, the debt collector is to cease collection, obtain verification, and mail a copy to the debtor. The defendant attorneys did not do that, but instead proceeded with a foreclosure. Like many other states, Colorado law allows a lender to foreclose on property without filing an action in court—a non-judicial foreclosure—if the mortgage agreement has a “power of sale” clause giving the lender such right.

Obduskey filed a federal lawsuit against the defendant attorneys claiming that they had violated the FDCPA by failing to comply with the verification procedure. The district court dismissed the complaint and the Tenth Circuit affirmed, finding that “the mere act of enforcing a security interest through a non-judicial foreclosure proceeding does not fall under” the FDCPA. Given the split in the circuits on the application of the FDCPA to non-judicial foreclosures, the Supreme Court granted Obduskey’s petition for certiorari.

Applicable Statute

The *Obduskey* Court relied heavily on the text of the statute in coming to its decision that the FDCPA does not apply to non-judicial foreclosures. The FDCPA defines a “debt” as:

“any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes.” §1692a(5).

The FDCPA goes on to say that “debt” collector :

“means any person . . . 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.” §1692a(6).

The FDCPA further clarifies the definition of “debt collector” in the context of non-judicial actions by prohibiting a “debt collector” from:

Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—
(A) there is no present right to possession of the property . . . ;
(B) there is no present intention to take possession of the property; or
(C) the property is exempt by law from such dispossession or disablement. §1692f(6).

The definition of “debt collector” references subsection §1692f(6) when further clarifying its definition:

“For the purpose of section 1692f(6) [the] term [debt collector] **also** includes any person . . . in any business the principal purpose of which is the enforcement of security interests.” §1692a(6) (emphasis added).

By its plain language, the statute regulates “debt collectors” under the FDCPA would seem to include those that engage in non-judicial foreclosures.

The *Obduskey* Court considered whether debt collectors are “enforcing security interests,” and determined that under the facts presented the FDCPA did not apply to the defendant attorneys’ actions.

The Court’s Analysis

The Court’s primary reason for concluding that non-judicial foreclosure is not included within the ambit of “debt collector” is the creation of a separate class of debt collectors involved in the enforcement of security interests. A non-judicial foreclosure does not seek money from the debtor; it seeks the sale of the property securing the debt itself. Since the principal definition of “debt collector” includes the indirect collection of a debt, the Court did not find this distinction important. Instead, the Court focused on the use of the word “also” in the definition, and noted that such language assumes there is a subset of debt collectors to which the other provisions of the FDCPA do not apply.

The Court also wanted to ensure that the FDCPA does not interfere with state non-judicial foreclosure procedures. If the full panoply of protections provided under the FDCPA were applicable, it would potentially preempt state law schemes and create confusion for debtors, creditors, their respective counsel, and the courts, both state and federal.

The Court further considered that the legislative history of the FDCPA indicates that security interest enforcers were outside of the full effect of the statute. The original version included security interest enforcers, another version excepted them altogether, but the version of the bill that passed into law created this exception.

As a result of all of these considerations, the Court concluded that those engaged in non-judicial foreclosures are not debt collectors within the meaning of the FDCPA.

The Court also rejected *Obduskey*'s arguments that the limited definition of security interest enforcers is not surplusage because it is meant to apply to "repo men." The court first found that the exception does not only apply to "repo men" who enforce interests in personal property because the statute applies to all security interests, not just those related to personal property. The Court further held that *Obduskey*'s concerns that creating a loophole in the statute would allow debt collectors to engage in abusive conduct are unfounded given that states can and do regulate abusive behavior.

The Concurrence

The concurrence, authored by Justice Sotomayor, goes to great lengths to articulate the limitations of the decision and invites Congress to make legislative changes if it disagrees with the Court's analysis of the FDCPA. Specifically, Justice Sotomayor emphasized language from the opinion that "enforcing a security interest does not grant an actor blanket immunity from the" FDCPA and does not authorize "abusive debt collection practices like repetitive nighttime phone calls." She characterized the actions of the defendant attorneys in *Obduskey* as good faith actions in accord with Colorado state law that were not abusive, and noted it was a close question whether the FDCPA applied to their conduct. The concurring opinion in *Obduskey* illustrates that the majority holding may be limited to specific fact patterns.

Conclusion

The *Obduskey* decision can be read as a victory for attorneys and others involved in activities related to debt collection to the extent it exempts non-judicial foreclosures from the reach of the FDCPA. However, the clear signal from Justice Sotomayor's concurrence is that she is wary of expanding this decision to facts beyond those here and, more importantly to debt collection activities that are abusive. The takeaway for attorneys engaged in debt collection activities is to be careful to not engage in collection procedures that might be viewed as abusive, even if they believe their activities should be exempt from the FDCPA.

About the Authors

Alice M. Sherren is a Claim Attorney with *Minnesota Lawyers Mutual Insurance Company*. Ms. Sherren directs the defense of LPL claims and speaks on risk management and ethics matters. She may be reached at asherren@mlmins.com.

Donald Patrick Eckler is a partner at *Pretzel & Stouffer, Chartered*, in Chicago. Mr. Eckler defends doctors, lawyers, architects, engineers, appraisers, accountants, mortgage and insurance brokers, surveyors and others. He may be reached at deckler@pretzel-stouffer.com.

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