Obduskey v. McCarthy

A look at when an entity is a “debt collector” in the foreclosure context
Panelists

- Moderator – Caren Enloe, Smith Debnam Narron Drake Saintsing & Myers, LLP
- Masha Hansford, Williams & Connolly LLP
- Jennifer Wagner, Mountain State Justice, Inc.
- Sumeet Chugani, Citizens Financial Group, Inc.
What *Obduskey*?

- After Obduskey defaulted on his loan, Wells Fargo initiated non-judicial foreclosure proceedings.

- In August 2015, Obduskey filed suit in the District of Colorado asserting a claim under the FDCPA.

- The District Court dismissed. Noting that not all courts agree, the Court held that “the FDCPA does not apply to non-judicial foreclosures.”

- A unanimous panel of the 10th Circuit affirmed.
What is a “debt collector”?

“[A]ny person 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.” 15 U.S.C. 1692a(6).
The Circuit Split

- In reaching its conclusion, the 10th Circuit acknowledged that whether the FDCPA applies to foreclosure proceedings has “divided the circuits.”

- The 9th Circuit (and now the 10th Circuit) holds that non-judicial foreclosures are not subject to the FDCPA.

- The 3rd, 4th, 5th, and 6th Circuits have reached the opposition conclusion.

- The 11th Circuit has taken a hybrid approach, holding that foreclosure-related notices may trigger FDCPA liability even if the foreclosure itself does not.
The Rationale – FDCPA Does Not Apply

- The FDCPA has a narrow definition of what it takes to be a debt collector, and extending this definition would render that statutory definition superfluous.

- Debt is synonymous with money, and non-judicial foreclosures do not require the consumer to pay money.
  - Non-judicial foreclosure does not permit collection against the borrower personally; therefore, it is not a direct or indirect attempt to collect a debt.

- Although the FDCPA references “legal actions by debt collectors,” it does so only in the context of judicial proceedings, not “non-judicial” foreclosures.

- Applying the FDCPA in this context would conflict with some state foreclosure laws, and there is no clear intention by Congress to supplant state non-judicial foreclosure law.
The Rationale – FDCPA Applies

- Every foreclosure (judicial or non-judicial) is initiated for the purpose of obtaining payment. “Foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt.”
  - “There can be no serious doubt that the ultimate purpose of foreclosure is the payment of money.”

- The FDCPA expressly references “legal actions by debt collectors.”

- Allowing an entity to avoid FDCPA liability (and thus FDCPA compliance) by choosing to proceed in rem rather than in personam, would undermine the FDCPA’s stated purpose.

- The FDCPA is designed to prevent deceptive and harassing practices, which are just as common in communications regarding non-judicial foreclosure as they are in other types of debt collection communications.
Other Cases to Consider


- After law firm initiated non-judicial foreclosure, homeowner sent a letter challenging the debt.

- The 6th Circuit held that the FDCPA applied, and the homeowner’s letter required the foreclosing entity to cease all collection actions until after verification of the debt. The Court rejected the law firm’s argument that it had taken no actual steps to foreclose since receipt of the homeowner’s letter – the newspaper advertisements and posting of notices related to a sale were ordered before the letter was received and merely published after. The Court held that the attorney should have intervened to stop the actions after receiving the dispute letter.
Other Cases to Consider

Maxwell & Morgan, P.C. v. McNair

Plaintiff obtained writ of special execution allowing it to foreclose on two agreed orders regarding HOA dues. After the foreclosure, she sued the law firm claiming it violated the FDCPA.

The law firm argued that foreclosing to enforce a security interest is not debt collection. The Ninth Circuit rejected that argument and limited its prior holdings to nonjudicial foreclosures.

A petition for certiorari has been filed with the Supreme Court, asking it to consider the narrow question: does the FDCPA apply to foreclosures that do not seek any payment from a consumer?