U.S. SUPREME COURT RULES THAT ENTITIES CONDUCTING NONJUDICIAL FORECLOSURES ARE NOT DEBT COLLECTORS UNDER THE FDCPA

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U.S. Financial Institutions and Services Litigation Alert

In *Obduskey v. McCarthy & Holthus LLP*,[1] the U.S. Supreme Court held unanimously that entities engaged in no more than security-interest enforcement (here, nonjudicial foreclosure) are not debt collectors under the Fair Debt Collection Practices Act ("FDCPA" or the "Act") and are not subject to the FDCPA's debt-collector-related prohibitions with the exception of specific prohibitions relating to nonjudicial foreclosures.[2] The Court noted that its ruling applied to businesses' conduct confined to the state laws governing such proceedings.

BACKGROUND

In 2009, Dennis Obduskey defaulted on his residential mortgage loan. He received a letter from a law firm notifying him that the firm had been "instructed to commence foreclosure" on behalf of the mortgage loan servicer. Obduskey requested verification of the debt under the FDCPA. The firm allegedly did not do so and moved forward with nonjudicial foreclosure. Obduskey then sued for violation of the FDCPA. The district court ruled that the firm was not a "debt collector" under the FDCPA and thus that Obduskey could not maintain suit. On appeal, the court of appeals affirmed the dismissal.[3]

ANALYSIS

The Supreme Court granted certiorari to resolve a circuit split regarding the application of the FDCPA to nonjudicial foreclosure proceedings.[4] The Court examined whether an entity seeking to enforce a security interest in property through a nonjudicial foreclosure falls within the FDCPA's overarching definition of "debt collector." The Court began by noting that the "primary definition" of debt collector is "any person who 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."[5] The Court highlighted the Act's treatment of "nonjudicial action" taken to "effect dispossession of property under Section 1692f(6)," where the term debt collector "also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests."[6]

The Court considered whether this "limited-purpose definition" stands alone or if those principally involved in "the enforcement of security interests" are included in the FDCPA's broader "debt collector" category. Separate treatment would render many provisions of the FDCPA inapplicable, including those relating to debt verification at issue in Obduskey's dispute.[7]

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Relying on the statutory text, congressional intent, and legislative history for guidance, the Court held that "those who engage in only nonjudicial foreclosure proceedings are not debt collectors within the meaning of the Act."[8] Starting with the text of the FDCPA, the Court noted that it presumes all parts of a statute are present for a purpose. The Court ruled that the limited-purpose definition of debt collector would be rendered unnecessary if it did not operate to narrow the primary definition. The Court emphasized the Act's use of "also" in the limited-purpose definition indicated separate treatment in concluding that "debt-collector-related prohibitions of the FDCPA (with the exception of § 1692f(6)) do *not* apply to those … engaged in no more than security-interest enforcement."[9]

The Court examined Congress's intent in enacting the FDCPA, which it perceived to include avoiding conflict with state nonjudicial foreclosure laws. As explained in an example, "the FDCPA broadly limits debt collectors from communicating with third parties 'in connection with the collection of any debt,'" but "[i]f this rule were applied to nonjudicial foreclosure proceedings, then advertising a foreclosure sale—an essential element of such schemes—might run afoul of the FDCPA."[10] In the Court's view, it is possible that "Congress wanted to avoid the risk of such conflicts altogether" through exempting entities engaged in enforcing security interests from the FDCPA's debt-collector-related prohibitions (with the exception of Section 1692f(6)).[11]

Finally, the Court found the legislative history of the FDCPA supported its interpretation. The Court explained that Congress had considered competing versions of the FDCPA where one "would have subjected security-interest enforcement to the full coverage of the Act" and the other would have "totally excluded" it.[12] The Court envisioned the FDCPA's final language as a compromise between the two bills.[13]

Nevertheless, the Court drew boundaries to its holding. The Court explained that it "assume[d] that the notices sent by [the firm] were antecedent steps required under state law to enforce a security interest" because "every nonjudicial foreclosure scheme of which [the Court was] aware involves notices to the homeowner."[14] The Court also clarified that "[t]his is not to suggest that pursuing nonjudicial foreclosure is a license to engage in abusive debt collection practices like repetitive nighttime phone calls" because "enforcing a security interest does not grant an actor blanket immunity from the Act."[15] Because the Court believed it "confront[ed] only steps required by state law" in the case at hand, however, it did "not consider what *other* conduct (related to, but not required for, enforcement of a security interest) might transform a security-interest enforcer into a debt collector subject to the main coverage of the Act" under its primary definition.[16]

CONCLUSION

The Supreme Court has set a clear—if narrowly drawn—rule regarding businesses that conduct nonjudicial foreclosure proceedings: except with respect to the provisions of Section 1692f(6), a business is not a "debt collector" under the FDCPA if its conduct is confined to conducting a nonjudicial foreclosure under state law. It will be up to Congress to provide further clarification for the Act's definition of debt collector.

NOTES

[1] 586 U.S. ---, --- S. Ct. ----, 2019 WL 1264579 (Mar. 20, 2019).

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[2] 15 U.S.C. §§ 1692-1692p.

[3] 2019 WL 1264579, at *3—4.

[4] *Id*. at *4.

[5] 15 U.S.C. § 1692a(6); see *Obduskey*, 2019 WL 1264579, at *4.

[6] 15 U.S.C. § 1692a(6); see *Obduskey*, 2019 WL 1264579, at *4. Section 1692f(6) of the FDCPA provides that a debt collector shall not "tak[e] or threaten[] to take any nonjudicial action to effect dispossession or disablement of property if—(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest; (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." 15 U.S.C. § 1692f(6).

[7] *Id*. at *6.

[8] *See id*. at *3, *5—6.

[9] *Id.*

[10] *Id.* at *6.

[11] *Id.*

[12] *Id.*

[13] *Id*. In her concurring opinion, Justice Sotomayor pondered whether the Court's perception of Congress's intent was possibly at odds with what Congress actually intended. See id. at *8 (Sotomayor, J., concurring).

[14] *Id*. at *7.

[15] *Id.*

[16] *Id.*

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