Supreme Court opens door (a bit) to argument that in rem foreclosures not covered by FDCPA

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On March 20, 2019 in *Obduskey v. McCarthy & Holthus LLP*, a unanimous U.S. Supreme Court held that the primary definition of a "debt collector" under the Fair Debt Collection Practices Act (FDCPA) does not apply to an entity that engages in no more than security-interest enforcement. As a result, most of the debt-collector-related prohibitions of the FDCPA (besides the limited prohibitions of Section 1692f(6)) do not apply to such an entity.

Obduskey involved a defendant law firm who had been hired by Wells Fargo Bank, N.A. to carry out a Colorado nonjudicial foreclosure in regard to a home loan on which the plaintiff had defaulted. The defendant law firm first sent the plaintiff a letter setting forth that it had been instructed to commence foreclosure against the property, disclosing the amount owed and identifying the creditor. The letter purported to provide notice pursuant to and in compliance with both the FDCPA and Colorado law.

In response to the letter, the plaintiff invoked § 1692g(b) of the FDCPA and disputed the debt. Under the FDCPA, that would typically mean that a "debt collector" would need to cease collection until obtaining verification of the debt and mailing a copy to the debtor. Instead, the defendant law firm proceeded with the nonjudicial foreclosure.

The plaintiff filed suit in federal court alleging that the defendant had violated the FDCPA. The district court dismissed on the grounds that the law firm was not a "debt collector" within the meaning of the FDCPA. The Tenth Circuit affirmed on appeal. The U.S. Supreme granted certiorari.

The Court's analysis focused on the definition of "debt collector" under the FDCPA, found at 15 U.S.C. § 1692a(6). The first sentence of the section contains the following primary definition:

> The term "debt collector" means 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.

If this were the only definition in the section, the Court would have held that the defendant law firm was a "debt collector." But, § 1692a(6) also contains the following limited purpose definition:

> For the purpose of section 1692f(6) of this title, such term [*i.e.*, "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.

This phrase, and in particular its use of the word "also," led the Court to conclude that one who does no more than enforce security interests does not fall within the scope of the primary definition and thus is not subject to the debt-collector-related prohibitions of the Act (besides § 1692f(6)).

The Court expressly stated that it was not deciding whether one who *judicially* enforces mortgages falls within the scope of the primary definition. However, the Court did note that the availability of a deficiency judgment was a potentially relevant distinction between *judicial* and nonjudicial foreclosures.

The Court's short reference to *judicial* foreclosures does beg the question: Would the Court's reasoning in *Obduskey* apply to *judicial* foreclosures if the availability of a deficiency judgment is off the table?

At first blush, it would certainly seem like a solid argument. If no deficiency is being sought, then the *judicial* foreclosure would solely involve the enforcement of a security interest.

However, the Court also noted in its opinion that an entity can qualify as a "debt collector" under the FDCPA based on *other* activities unrelated to the specific debt being collected at the time. For instance, an entity pursuing a nonjudicial foreclosure could still be considered a "debt collector" if it regularly collects or attempts to collect unsecured credit card debt. And, at least as it pertains to law firms, it seems likely that any firm that regularly files in rem foreclosures is also engaging in other conduct that would make it a "debt collector" under the Act.

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