

**CALIFORNIA COURT OF APPEAL HOLDS NOTICES OF DEFAULT
AND SALE DO NOT CONSTITUTE DEBT COLLECTION BUT
BORROWER MAY ENJOIN FORECLOSURE IF FHA LENDER FAILED
TO COMPLY WITH HUD SERVICING REQUIREMENTS**

In *Pfeifer v. Countrywide Home Loans* (2012) 211 Cal.App.4th 1250, 150 Cal.Rptr.3d 673, the California Court of Appeal held that giving notices of default and of a foreclosure sale to a borrower as required by the Civil Code does not constitute debt collection activity under the Fair Debt Collection Practices Act ("FDCPA"). Following the lead of the Virginia Supreme Court in *Mathews v. PHH Mortgage Corp.* (2012) 724 S.E.2d 196, the court also held that borrowers with a loan insured by the Federal Housing Administration ("FHA") stated a claim to enjoin their lender from proceeding with a non-judicial foreclosure on their home where the lenders failed to comply with Department of Housing and Urban Development ("HUD") loan servicing requirements, including carrying out a face-to-face interview prior to foreclosure, because the HUD requirements were incorporated by reference in Section 9 of the standard form Deed of Trust. The court held that the borrowers had no private right of action to sue for breach of the HUD requirements or for breach of contract on that basis.

The borrowers sued the lender and its foreclosure service after a non-judicial foreclosure was commenced against their property by the serving of notices of default and sale, but before the sale took place. They alleged breach of contract and of the implied covenant of good faith and fair dealing and sought declaratory relief and an injunction against foreclosure by the lender arising from its failure to afford them a face-to-face interview prior to foreclosure. They also alleged a violation of the FDCPA against the lender's foreclosure service.

The court of appeal held that a foreclosure sale notice issued in compliance with Civ. Code §2924 et seq. does not seek collection of a debt and is not the type of conduct forbidden by the FDCPA. It also held that the lender's foreclosure service was not a "debt collector" within the meaning of the FDCPA. Thus, the borrowers could not state a claim under the FDCPA.

The court also concluded that the standard form deed of trust incorporated by reference the HUD servicing regulations, at 24 C.F.R. §203.500 et seq., including the requirement of a face-to-face interview, and that the lender had to comply with those servicing requirements, as conditions precedent, prior to conducting a valid nonjudicial foreclosure. The principal purpose of HUD regulations is to benefit HUD, with the result that borrowers do not have a private right of action or a claim

for damages against their lenders for failure to comply with HUD regulations. But another goal of HUD servicing regulations is to prevent foreclosure of HUD mortgages, which also benefits the borrower. Therefore borrowers can raise the failure to comply with HUD regulations against the acceleration of their debt and foreclosure and enjoin their lender from proceeding with a non-judicial foreclosure based on the lender's failure to perform a HUD servicing requirement.

The court also concluded that the borrowers' failure to allege tender of the full amount owed on their mortgage did not bar their claim for declaratory relief or their request for injunctive relief based on wrongful foreclosure, because the lenders had not yet foreclosed and compliance with the HUD servicing regulations is a condition precedent to foreclosure under the Deed of Trust.