

FAIR DEBT COLLECTION PRACTICES ACT EXPANDED TO FORECLOSURE PLEADINGS IN THIRD CIRCUIT DECISION

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In *Kaymark v. Bank of America*, No. 14-1816 (3d Cir. April 7, 2015), the Third Circuit held that a borrower can state a claim for violation of the Fair Debt Collection Practices Act (“FDCPA”) when a foreclosing lender alleges incorrect fees as part of a foreclosure complaint. The upshot of this ruling is that a formal complaint may not be exempt from scrutiny as a debt collection communication under the FDCPA.

In the trial court, Kaymark brought suit against Bank of America after Kaymark was served with a foreclosure complaint demanding, among other things, attorneys’ fees, title report fees and property inspection fees that had not yet been incurred in the amount of \$2,050. Although these fees were later incurred in the foreclosure process, Kaymark’s suit alleged that the demand for these prospective fees violated §§ 1692e(2)(A), (10) and 1692f(1) of the FDCPA. The U.S. District Court for the Western District of Pennsylvania dismissed Kaymark’s FDCPA claims holding that the FDCPA contains no prohibition against claiming prospective fees that are reasonably expected to be incurred.

In reversing the district court’s decision, the Third Circuit concluded that congressional amendments to other sections of the FDCPA, including §§ 1692e(11) and 1692g(d), specifically excluded their application to formal pleadings and therefore implied that Congress intended the remaining sections of the FDCPA to apply to formal pleadings.

Given this decision, with respect to litigation in the Third Circuit, financial service providers must carefully review their foreclosure complaints to ensure that they only allege charges which have already been incurred and do not include amounts that may become due in the future. Notably, this ruling is unique to the Third Circuit and the issue has not been addressed in other jurisdictions. Nonetheless, banks should evaluate the inclusion of prospective expenses in foreclosure pleadings to avoid potential FDCPA claims.