4th Cir Holds Foreclosure is FDCPA 'Debt Collection,' Mere Servicer Need Not Provide TILA Notice of Assignment of Loan

The U.S. Court of Appeals for the Fourth Circuit recently confirmed that **a law firm and its employees, who pursued foreclosure on behalf of creditors, were acting as "debt collectors" under the federal Fair Debt Collection Practices Act (FDCPA) when they pursued foreclosure proceedings against a borrower.** In so ruling, the Court also confirmed that a servicer that does not also own the mortgage loan does not have a duty to provide notice of the sale and assignment of a loan to itself under the federal Truth in Lending Act (TILA) merely because it accepts the assignment of the deed of trust.

A copy of the opinion in *McCray v. Federal Home Loan Mortgage Corp.* is available at: **Link to Opinion.**

After obtaining a mortgage loan, the borrower sent her servicer a written request for information about the fees and costs that it was charging and how it was maintaining the escrow account on the loan. The servicer allegedly failed to respond or responded inadequately to her request and her follow-up inquiries. The borrower stopped making payments on her mortgage loan, and went into default. The servicer retained a law firm to pursue foreclosure. The law firm informed the borrower that the firm had been instructed to initiate foreclosure proceedings on her property.

Several of the law firm's employees were substituted as trustees on the deed of trust to facilitate foreclosure, and the substitute trustees filed a foreclosure action. The borrower brought an action for damages against the mortgagee, the servicer, and the law firm and its employees, alleging that they violated the FDCPA and TILA, by failing to provide her with required notices and information.

The district court granted the mortgagee, the servicer, and the law firm's motions to dismiss the borrower's FDCPA and TILA claims.

On appeal, the borrower argued that the district court erred in concluding that her complaint failed to allege sufficient facts to establish that the law firm and its employees were "debt collectors" subject to the FDCPA's regulation.

As you may recall, the FDCPA defines the term "debt collector" to include "any person [1] 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 [2] who

regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."

The law firm and its employees argued that the borrower failed to plead any facts indicating that they had made any demands for payment, or communicated deadlines and penalties for the borrower's failure to make any payment.

They also argued that the actions occurred in connection with the enforcement of security interests in real property, which were distinct from debt collection activity under the FDCPA. They further argued that a foreclosure action was not designed to obtain payment on an underlying debt, but to terminate the borrower's ownership interests of the mortgagor in the property. Finally, they argued that their activity was only incidental to a bona fide fiduciary obligation and therefore was excluded from regulation by an exception contained in the FDCPA's definition of "debt collector."

The Fourth Circuit disagreed with the law firm, noting that it had already decided this issue in *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 375-77 (4th Cir. 2006), where it held that **a law firm that provided notice that it was preparing foreclosure papers and thereafter initiated foreclosure proceedings could be a debt collector as defined by the FDCPA.**

The Court reversed the district court, holding that the borrower's debt remained a debt even after foreclosure proceedings commenced and the law firm's actions surrounding the foreclosure proceeding were attempts to collect that debt. The Fourth Circuit also held that foreclosure was not excluded from the FDCPA because it was central to the mortgagee's fiduciary obligation under the deed of trust.

In sum, the Fourth Circuit held that borrower's complaint adequately alleged that **the law firm and its employees were debt collectors under the FDCPA, and that their actions in pursuing foreclosure constituted a step in collecting debt and thus was debt collection activity that is regulated by the FDCPA.** The Court noted, however, that its conclusion was not to be construed to indicate, one way or the other, whether the law firm and its employees, as debt collectors, violated the FDCPA.

The borrower next argued that the district court erred in dismissing her claim that the mortgagee violated TILA by failing to give her notice of its purchase of her loan.

As you may recall, TILA at 15 U.S.C. § 1641(g) provides that the new owner or assignee of a mortgage loan must provide written notice to a borrower no later than 30 days after the date on which it is sold or otherwise transferred or assigned. The Fourth Circuit disagreed with the borrower, affirming the district court's dismissal of the TILA claims against the mortgagee, because Congress added this provision to TILA in 2009, and **the borrower failed to allege that the sale and transfer of the mortgage loan to the mortgagee occurred after 2009.**

Because the borrower seemed to concede that at least as of December 2011, she had notice that the mortgagee was the owner of her loan, the Court also affirmed the district court's alternative conclusion that **the claim was barred by TILA's one-year statute of limitations.**

Finally, the borrower contended that the district court erred in dismissing her claim against the servicer for failing to give her notice of the assignment of the deed of trust to it, in supposed violation of TILA, 15 U.S.C. § 1641(g). The district court had dismissed her claim because it concluded that the servicer received only a beneficial interest, not legal title, in order to service the loan.

On appeal, the borrower conceded that the statute is usually interpreted to mean **THAT NOTICE IS REQUIRED ONLY WHEN LEGAL TITLE TO THE DEBT OBLIGATION IS TRANSFERRED**, but she argued that, in addition to receiving a beneficial interest, the servicer also received an ownership interest based on a line in the deed of trust that read, "The Note or a partial interest in the Note (together with this Security Instrument) can be sold."

The Fourth Circuit disagreed with the borrower, holding that **the statement only indicated that the note could be sold.** Additionally, the Court noted that the inference would be inconsistent with the borrower's assertion that the mortgagee was in fact the owner and failed to give her timely notice of its ownership. In short, the Court concluded that the district court did not err in dismissing this claim.

Accordingly, the Fourth Circuit affirmed in part the district court's judgment, reversed in part, and remanded. The Court reversed the order of dismissal of the borrower's FDCPA claims against the law firm and its employees and remanded for further proceedings, without suggesting whether or not those defendants violated the FDCPA. As to the TILA claims, the Court affirmed.