

FDCPA Does Not Apply to Judicial Foreclosures If No Deficiency Sought

of a borrower's complaint under the federal Fair Debt Collection Practices Act arising from a judicial foreclosure proceeding in Oregon, holding that the defendants were not attempting to collect a debt within the meaning of the FDCPA when only foreclosure was sought and not a deficiency judgment.

A copy of the opinion in *Barnes v. Routh Crabtree Olsen P.C.* is available at: [Link to Opinion.](#)

The borrower defaulted on his mortgage loan and the loan owner, which had acquired the loan from the original lender, filed suit to foreclose the deed of trust on the borrower's home. The state court dismissed the case because the borrower had a pending case against the original lender, which the court deemed "duplicative."

The borrower then filed a complaint in federal court alleging that the mortgage loan owner, its loan servicer and attorneys violated the FDCPA, the Oregon Unlawful Trade Practices Act and engaged in a civil conspiracy by filing an unlawful foreclosure action and failing to make required disclosures.

The federal trial court dismissed the borrower's complaint for failure to state a claim because "none of the defendants had engaged in debt collection by initiating the judicial foreclosure proceeding." The state law claims were also dismissed because "Oregon law provides that compliance with the FDCPA constitutes compliance with the Unlawful Trade Practices Act ... [a]nd under Oregon law, civil conspiracy is a theory of joint liability that depends on an underlying civil violation."

The borrower appealed.

On appeal, the Ninth Circuit affirmed the trial court's dismissal of the complaint, but the borrower petitioned for rehearing. The Court requested "supplemental briefing to discuss the effect (if any) of the Supreme Court's intervening decision in *Obduskey v. McCarthy & Holthus LLP.*"

The Court began by noting that "[t]he crux of the parties' dispute is whether the defendants' pursuit of judicial foreclosure was a form of debt collection." It then explained that **the FDCPA's definition of "debt" boiled down to "a consumer's obligation to 'pay money.'"**

The Ninth Circuit then explained that since **the FDCPA defines “debt collector” as someone “who regularly collects or attempts to collect ... debts owed or due or asserted to be owed or due another[,] ... an entity that collects a debt owed itself—even a debt acquired after default—does not qualify under this definition.”**

The Court reasoned that [t]he key takeaway from these statutory definitions is that the FDCPA regulates people or entities whose principal business is collecting, or who regularly collect, money owed by a consumer to a third party.” The loan owner, however, “could have — but did not — take this approach.”

The Ninth Circuit then concluded that **“[i]n contrast to an action on the note, the enforcement of a security interest does not entail an attempt to collect money from the debtor.”** “Courts have long recognized the ‘very palpable distinction’ between security interests and the debts they secure.”

“While the deed of trust creates a lien on the property to secure the creditor’s right to repayment, the note makes the debtor personally liable for the loan.” The Court likened this to the repossession of a car, where “the repo man who tows a car subject to a security agreement thereby exercise[s] the creditor’s right to retake the property, without attempting to collect on the defaulted loan. ... As we have explained, **the remedy of foreclosure authorizes a creditor ‘to retake and resell the security, not to collect money from the borrower.’”**

The Ninth Circuit rejected the borrower’s argument that “[r]ather than focusing on the distinction between security-interest enforcement and collecting money, ... **the crucial distinction is between judicial and non-judicial foreclosure.”**

The Court reasoned that “[w]e do not agree that, as a categorical matter, a person who initiates a judicial foreclosure proceeding is attempting to collect a debt. Our cases make clear that **a plaintiff must identify something beyond the mere enforcement of a security interest to establish that the defendants are acting as debt collectors subject to the FDCPA’s broad code of conduct.** That additional debt-collection ingredient can be present for judicial foreclosure, provided that state law permits a creditor to recover money from the debtor after foreclosure if the property sells for less than the debt. ... That remedy, called **a deficiency judgment, is often available in judicial foreclosure proceedings (but typically not in non-judicial proceedings).** Because Arizona authorizes deficiency judgments as part of judicial foreclosure, we accordingly held ... that the filing of a foreclosure writ in Arizona can qualify as debt collection. ... But

unless a deficiency judgment is on the table in the proceeding, a person judicially enforcing a deed of trust is seeking only the return or sale of the security, not to collect a debt.”

Having concluded that **the FDCPA “kicks in only once a person does ‘something in addition to the actions required to enforce a security interest[,]”** the Court turned to Oregon law, noting that “[s]tate law provides that ‘a judgment to foreclose residential trust deed ... may not include a money award for the amount of the debt against the grantor.’” Because this provision prohibits deficiency judgments, “[j]udicial foreclosure in Oregon ‘extinguishes the entire debt even if it results in a recovery of less than the amount of the debt.’”

The Court also rejected the borrower’s argument that the loan owner “crossed the line into debt collection by including in its foreclosure complaint a request for a money award...[,]” reasoning that that request “served simply to identify the amount of the debt secured by the property, which authorized a sheriff’s sale to discharge that liability in the same manner as for a typical judgment debtor.”

The Ninth Circuit concluded that **“[a] judicial foreclosure proceeding is not a form of debt collection when the proceeding does not include a request for a deficiency judgment or some other effort to recover the remaining debt.”**

Because the borrower did not plead any conduct by the defendants other than filing the foreclosure action and “actions to effectuate that proceeding[,] ... the trial court properly granted the motion to dismiss.”