NONJUDICIAL FORECLOSURE NOT REGULATED BY THE FDCPA

On March 20, 2019, the U.S. Supreme Court ruled unanimously in *Obduskey v. McCarthy & Holthus LLP*, 17-1307, 2019 WL 1264579 (U.S. Mar. 20, 2019), that nonjudicial foreclosure is not subject to regulation under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p (the "FDCPA").

The FDCPA applies to a "debt collector," which is defined in section 1692a(6) as any person or entity who "regularly collects or attempts to collect, directly or indirectly, debts owed . . . or due another." Section 1692a(6) provides that the "term [debt collector] also includes any person who uses [the mail or interstate commerce] in any business the principal purpose of which is the enforcement of security interests."

Another section of the FDCPA, section 1692f(6), governs the conduct of a debt collector in repossessing property nonjudicially. Although section 1692f(6) applies to nonjudicial foreclosure, it does not impose all of the FDCPA's regulations on those who merely enforce security interests. Instead, section 1692f(6) prohibits only certain activities, such as threatening to repossess without any intention of actually doing so, or in cases when the party threatening to repossess has no right to do so.

In *Obduskey*, a lender retained a law firm to conduct a nonjudicial foreclosure on Colorado residential property after the homeowner defaulted on the mortgage secured by the property. In response to the foreclosure notice, the homeowner attempted to invoke rights under section 1692h, which obligates a debt collector to "cease collection" activities until it provides the debtor with a "verification of the debt." The law firm proceeded with the nonjudicial foreclosure and the homeowner sued in federal court, claiming that the law firm failed to comply with the FDCPA's verification procedure. The district court dismissed the complaint on the ground that the law firm was not a debt collector within the meaning of the FDCPA. The U.S. Court of Appeals for the Tenth Circuit affirmed on appeal, holding that merely enforcing a security interest through nonjudicial foreclosure is not governed by the FDCPA.

The Supreme Court agreed to hear the case to resolve a circuit split on the issue. The Fourth, Fifth and Sixth Circuits had ruled that the FDCPA applies to nonjudicial foreclosures, while the Ninth Circuit (in addition to the Tenth Circuit) had concluded that it does not.

Writing for the unanimous Court, Justice Breyer explained that, by including the phrase "[f]or the purpose of section 1692f(6)," the express language of section 1692a(6) "strongly suggests that one who does no more than enforce security interests does *not* fall within the scope of the general definition [of debt collector]." He also reasoned that Congress did not intend for the FDCPA to be generally applicable to nonjudicial foreclosure "to avoid conflicts with state nonjudicial foreclosure schemes." He accordingly concluded that the prohibitions contained in section 1692f(6) cover security-interest enforcers, but the other "debt collector" provisions in the FDCPA do not.

Justice Breyer observed that the creditor's collection activities were subject to potential regulation, including possibly under section 1692f. He noted that it is "at least plausible that 'threatening' to foreclose on a consumer's home without having legal entitlement to do so is the kind of 'nonjudicial action' without 'present right to possession' prohibited by [section 1692f(6)]." He also wrote that "[t]his is not to suggest that pursuing nonjudicial foreclosure is a license to engage in abusive debt collection practices like repetitive nighttime phone calls . . . ." However, because the case involved "only steps required by state law," Justice Breyer stated that "we need not consider what *other* conduct (related to, but not required for, enforcement of a security interest) might transform a security-interest enforcer into a debt collector subject to the main coverage of the Act."

Justice Sotomayor concurred in the opinion. She called it "a close case," but stated that she agreed with Justice Breyer's interpretation of the statutory language.

On April 24, 2019, the Supreme Court heard argument in *Taggart v. Lorenzen*, No. 18-489 (petition for writ of *certiorari* granted on Jan. 4, 2019), in which it is considering whether, under section 524 of the Bankruptcy Code, a creditor's good-faith belief that the discharge injunction does not apply precludes a finding of civil contempt.