

TEXAS DEBT COLLECTION ACT CLAIMS NOT LIMITED TO BORROWERS

The United States Court of Appeals for the Fifth Circuit recently analyzed the Texas Debt Collection Act (“TDCA”) and reached a conclusion relating to claims under the TDCA that is significant for lenders and mortgage servicers. The court ruled that the TDCA extends beyond the parties to a consumer transaction and that persons other than a debtor may maintain an action for violations of the TDCA.

In [*McCaig v. Wells Fargo Bank, No. 14-40114 \(June 15, 2015\)*](#), after a borrower died, her son and daughter-in-law, David and Marilyn McCaig (the “McCaigs”), took over her mortgage payments. The loan fell into default, but eventually, the McCaigs and the loan servicer entered into a settlement and forbearance agreement. In that agreement, the parties agreed that the loan “remained in default,” but the servicer agreed not to foreclose on the property so long as the McCaigs followed a 35-month payment plan. The McCaigs adhered to the plan, but the servicer made mistakes in servicing the loan by initiating the foreclosure process, dispatching multiple erroneous notices of default and posting the property for a foreclosure sale. Additionally, the servicer repeatedly sent statements indicating that, notwithstanding the parties’ agreement, it was assessing late fees based on the continued delinquency of the loan. The servicer never consummated a foreclosure sale, and when the McCaigs had finished paying under the payment plan, the servicer brought the loan current and waived all late fees.

Based on these facts, the McCaigs brought suit against the servicer for violation of the TDCA. In particular, the McCaigs asserted that the servicer violated Section 392.301(a) of the Texas Finance Code. The relevant part of this statute provides: “In debt collection, a debt collector may not use threats, coercion, or attempts to coerce that employ any of the following practices:... (7) threatening that nonpayment of a consumer debt will result in the seizure, repossession, or sale of the person’s property without proper court proceedings; or (8) threatening to take an action prohibited by law. Tex. Fin Code § 392.301(a). A jury found that the servicer violated the TDCA and awarded the McCaigs almost \$400,000.

On appeal, the servicer raised several challenges to the judgment entered by the trial court. Among these challenges was the assertion that the plaintiffs lacked standing to bring a claim under the TDCA because they were not

borrowers on the loan. Texas Finance Code Section 392.403 creates a private right of action for TDCA violations and provides: “A person may sue for actual damages sustained as a result of a violation of this chapter.” Tex. Fin. Code § 392.403(a)(2). The servicer argued that the scope of this section was limited to claims asserted by a borrower on a loan transaction. Because the Texas Supreme Court has not defined the scope of Section 392.403(a)(2) and statutory standing to bring TDCA claims, the Fifth Circuit was required to predict how the court would rule based on precedent set by intermediate state appellate courts. In making this prediction, the Fifth Circuit observed that the statute is written broadly and that Texas courts have recognized that Section 392.403’s grant of standing is not limited to debtors. Based on this precedent, the Fifth Circuit found that *any* person that has sustained damages from a TDCA violation has standing to sue.

As a result, lenders and servicers must be mindful of the provisions of the TDCA even when working with third-parties to a loan transaction. The prohibited debt collection methods can be found in [Chapter 392, Subchapter D, Sections 392.301-392.306 of the Texas Finance Code.](#)