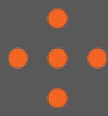
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Supreme Court Finds that Foreclosure Firms Are Not Debt Collectors

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On March, 20, 2019, in a 9-0 ruling, the Supreme Court ruled that firms that conduct nonjudicial foreclosure proceedings are not generally considered to be debt collectors under the Fair Debt Collection Practices Act ("FDCPA" or "Act"). The Court's decision in *Obduskey v. McCarthy & Holthus, LLP*, No. 17-1307, slip op. (S. Ct. Mar. 20, 2019) found that a law firm whose sole practice was enforcing mortgage foreclosures outside of the judicial system did not need to follow the procedures established by the FDCPA when attempting to foreclose.

In the decision, Justice Breyer found that while the main definition of "debt collector" under the FDCPA appears broad enough to encompass a foreclosure firm under a loose reading, the inclusion of specific limiting language in the Act shows that Congress intended to exclude firms engaged in "the enforcement of security interests."

The dispute arose from a lawsuit brought by Dennis Obduskey—a Colorado citizen who brought suit against Wells Fargo Bank, N.A. and McCarthy & Holthus LLP when Wells Fargo hired McCarthy to carry out a nonjudicial foreclosure. Obduskey alleged that McCarthy failed to follow certain requirements of the FDCPA in foreclosing on his home. Particularly, Obduskey said that McCarthy failed to "cease collection" until it "obtains verification of the debt" and mailed a copy to the debtor—a provision required by the FDCPA.

The District Court dismissed the suit and found that the law firm did not meet the requirements of a "debt collector" under the Act, so the Act was not relevant to the matter. On appeal to the Court of Appeals for the Tenth Circuit, the issue was affirmed, and the Tenth Circuit stated that the "mere act of enforcing a security interest through a non-judicial foreclosure proceeding does not fall under" the FDCPA. In response, Obduskey petitioned the Supreme Court for writ of certiorari. The Supreme Court said it was necessary to hear the case to resolve a circuit split.

The FDCPA was passed by Congress in order to limit the abusive debt collection practices of "debt collectors." The Act defines debt collectors as anyone "who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." The Act also has what the Supreme Court called "the limited-purpose definition," which states, "For the purpose of section 1692f(6) [the] term [debt collector] also includes any person . . . in any business the principal purpose of which is the enforcement of security interests." It was this sentence that led the Supreme Court to find that for three reasons, McCarthy was not subject to the general definition of the FDCPA.

First, the Court evaluated the language of the Act itself, holding that language, "For the purpose of section 1692f(6)" is limiting language. Further, the use of the word "also" led the Court to hold that someone who does nothing more than enforce security interests would not fall under the broad definition of "debt collector," but would only be subject to the requirements of section 1692f(6).

Second, the Court surmised that Congress's intent might have been to avoid conflicts with the states nonjudicial foreclosure laws. Finally, the Court found that, when looking at the legislative history, the fact that security interest enforcers were both fully covered and fully excluded in earlier drafts of the FDCPA shows a potential intentional compromise by Congress.

Justice Sotomayor wrote a separate, concurring opinion expressing that the case was "close" and doubted whether Congress foresaw the FDCPA to generally exclude nonjudicial foreclosures. In her concurrence, Justice Sotomayor appears to request Congress to clarify the terms and stated that the Court was "bound to apply Congress's statutes as best we can understand them." Finally, she reinforced Justice Breyer's warning that foreclosure firms do not have free rein to engage in abusive practices.

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