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Counsel's Corner: Does the CFPB Really Understand Non-Judicial Foreclosures?

Posted By *Brian Honea* On August 28, 2015 @ 12:01 pm In Commentary, Daily Dose, Foreclosure, News | [No Comments](#)

Angela Kleine is a partner with [Morrison & Foerster](#) [2]'s San Francisco office. She is member of the firm's Financial Services Litigation Group and her practice focuses on complex civil litigation and enforcement. She has experience litigating and advising on matters under the Fair Housing Act, Equal Credit Opportunity Act, Fair Credit Reporting Act, Fair Debt Collection Practices Act and state equivalents, Real Estate Settlement Procedures Act, Truth in Lending Act, and state unfair practices statutes. In 2014, she was named to MReport magazine's "Thirty-five Under 35" list, recognizing 35 women under the age of 35 as rising stars in the mortgage banking industry.



*Angela recently spoke with DS News about the Consumer Financial Protection Bureau (CFPB) [3] filing an [amicus curiae brief](#) [4] in the Ninth Circuit case of *Ho v. ReconTrust*; the brief argued that a trustee is engaging in debt collection by sending consumers notices stating that non-judicial foreclosure will occur if the borrower does not pay off his or her debt. The U.S. District Court for the Central District of California ruled in favor of ReconTrust that trustees who regularly foreclose non-judicially on deeds of trust in California should not be defined as debt collectors subject to the entire Fair Debt Collection Practices Act (FDCPA); plaintiff Vien-Phuong Thi Ho appealed the verdict and the case is currently pending in the Ninth Circuit Court of Appeals.*

[1]

Angela Kleine

What is the CFPB's stake in this issue?

The FDCPA is a very powerful statute. It touches a lot of areas of consumer protection. The CFPB is really just exploring it and flexing its muscles in that area. It's working on rule-making for the statute, which it is in power to do under Dodd-Frank, and it's taking its time doing that. The CFPB recently put up a complaints database and has been trumpeting data that it received about complaints, which not surprisingly was largely one-sided. Consumers complain about debt collection a lot because it's a difficult situation to be in. In the meantime, the FTC has really continued to dominate the enforcement in this area. So I think in the long term, we see the CFPB moving more aggressively into the space and wielding the

tool that is powerful, especially once it implements rules, in part because the penalties that are available under the FDCPA can be significant.

So how does that relate to the more specific issue and technical issue of a trustee in a non-judicial foreclosure? The specific issue could arguably be seen as relatively minor in comparison by trustee, because the CFPB has targeted lenders and servicers more forcefully. But it's an important position statement because the CFPB has taken a broad approach that has broad impacts for other entities. Also, (the CFPB's filing of the amicus brief) reflects a lack of understanding of state foreclosure law that is somewhat disturbing and doesn't bode well for the CFPB's rule-making and enforcement efforts in that area.

Has there ever been any question as to whether this violates the FDCPA prior to the CFPB filing this amicus brief, or is this the first time this issue has come up?

On the specific question of trustees' provision of notices in non-judicial states, the trustee practice is very standard. Many state laws, including California, have very specific requirements about what the trustee under the deed of trust must send out and when. The law has been relatively clear that trustees aren't within the purview of the FDCPA, especially when they're the original trustee under the deed of trust, as the trustee was here. Otherwise, it really doesn't make sense in the context of the statute that is aimed at debt collectors and not trustees that are enforcing security interest in the way that trustees are.

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There is a second and related issue that is trickier, which is that many courts have held that anyone conducting a non-judicial foreclosure, whether you're a trustee or someone else, is in debt collection under the statute. There is a carve-out for security interest in the FDCPA that is written in an unclear way. So there's some debate about whether foreclosure in the non-judicial foreclosure is or is not covered. I think the right answer in California is that it shouldn't be, because non-judicial foreclosure is completely distinct from collecting on the loan. So for example, if you go bankrupt and your loan is extinguished, the security interest remains, and if you conversely go through non-judicial foreclosure, you can't seek a deficiency judgment, so whatever you owe on your loan is wiped out. So it's really very distinctly different from debt collection in California. The CFPB is looking at states and cases that involve judicial foreclosure, which is a completely different scenario, and again I think

misinterprets the law that applies in California.

If the Ninth Circuit Court reverses the district court's decision as the CFPB is asking for and rules that trustees are defined as debt collectors under the FDCPA, what affect will it have on the mortgage industry in non-judicial foreclosure states?

This might sound like a niche-technical issue, but it's not, because what the CFPB is advocating for puts trustees and servicers in non-judicial foreclosure states in an impossible position. They have to choose between violating state law or violating the FDCPA as interpreted by the Bureau. That was pointed out by amici, who submitted very well-written and cogent briefs, and the CFPB's response was that to the extent that it conflicts, state laws are pre-empted. That is a convenient position for them to take, but I somewhat doubt that state regulators would necessarily agree, and it's certainly not a settled issue of law. So you're really between a rock and a hard place. And I don't think it really solves the problem because it doesn't appreciate the really fundamental conflicts that would be created. You're grafting requirements of a federal statute about debt collection onto a non-judicial foreclosure in a way that makes the process untenable. For example, all of the initial communications that you have to send out under the FDCPA are inconsistent with what's required in California. You're then prohibited from communicating with third parties, whereas California law requires that you send a notice at various stages to third parties. It goes on and on and on. . . every single step of the process is inconsistent. So the really complex compliance and operational programs businesses have in place to comply with the state law of every state, and every state is different, wouldn't work. Of course, either way, whichever law you do not comply with, you face stiff penalties and private causes of action for failure to comply.

Editor's note: [Click here](#) ^[4] to view a copy of the CFPB's amicus brief.

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[4] amicus curiae brief: http://files.consumerfinance.gov/f/201508_cfpb_amicus-brief_ho-v-recontrust-n.pdf

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