

LEAVE THE “TOW TRUCK GUY” ALONE: THE NINTH CIRCUIT RULES FORECLOSURE OF A DEED OF TRUST IS NOT DEBT COLLECTION

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The Ninth Circuit recently clarified when a trustee of a deed of trust acts as a debt collector under the Fair Debt Collection Practices Act ("FDCPA").^[1] In a break from other courts of appeal, the Ninth Circuit held that when a trustee carries out the contractual and statutory requirements for foreclosing property subject to the deed of trust, the trustee does not act as a debt collector.^[2] The Ninth Circuit reasoned that in so acting, the trustee does not seek to collect monetary debt from the debtor. In so holding, the court broke with other courts of appeals.

BACKGROUND

In *Ho v. ReconTrust Co., N.A.*, the defendant-trustee initiated a non-judicial foreclosure on the plaintiff's residence under California law. The trustee's only actions were to record and send to the plaintiff legally required notices, namely the notice of default and notice of sale. The plaintiff brought suit alleging that the notices violated the FDCPA by misrepresenting the amount she owed on the mortgage loan. The district court granted the trustee's motion to dismiss, and the plaintiff appealed.

DISCUSSION

The Ninth Circuit reviewed whether, under the circumstances presented, the trustee was a "debt collector" subject to the FDCPA.^[3] In particular, the court examined whether the trustee was subject to FDCPA prohibitions on making false representations to a debtor in connection with the collection of a debt.

In a two-to-one decision, the Ninth Circuit affirmed the dismissal, concluding that the trustee was not a debt collector.^[4] The Ninth Circuit first distinguished between a debt and a security interest. The FDCPA defines "debt" as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes."^[5] According to the Ninth Circuit, "debt is synonymous with money."^[6]

The court found, however, that the trustee did not attempt to recover money but merely to retake and resell the property serving as collateral for the loan. The Ninth Circuit relied on the specifics of the California non-judicial foreclosure procedure to articulate the difference. For example, a non-judicial foreclosure extinguishes the entire debt and does not allow for recovery of any deficiency, meaning that the trustee could recover only the security interest itself with no right to any money if the security interest did not otherwise cover the unpaid loan amount. Thus, the court reasoned that although foreclosure notices from a trustee may induce a debtor to pay the debt, or at least that portion of it required to become current, this does not make the trustee a debt

collector. According to the Ninth Circuit, a contrary result would allow "fear of having your car impounded [due] to a stack of accumulated parking tickets" turning "the guy with the tow truck [into] a debt collector."^[7] That is because "inducement to pay off a debt" as a result of threatened foreclosure "exists by virtue of the lien" and not the obligation to repay the loan.^[8]

Additionally, the court relied on the fact that the FDCPA specifically discusses "security interests"^[9] and contains particular provisions governing when those who seek to enforce them come within the statutory definition of "debt collector."^[10] Thus, the court held that Congress intended a narrower definition to apply to those seeking to enforce a security interest rather than the general definition of debt collector. Otherwise, the provision containing the narrower definition would be rendered superfluous.

In reaching its conclusion, the Ninth Circuit adopted the reasoning of one district court within the circuit^[11] and chose not to follow the Fourth and Sixth Circuits.^[12] Those circuits had held that when an entity acts to carry out a foreclosure—including sending out statutory notices required by non-judicial foreclosure law—that entity acts as a debt collector under the FDCPA. The Ninth Circuit rejected this view and held that all of the trustee's conduct could fall under the "umbrella of 'enforcement of a security interest,'" such that the trustee was subject only to the narrower prohibitions of § 1692f(6).^[13] Yet, the court limited its holding, noting that "[i]f entities that enforce security interests engage in activities that constitute debt collection, they are debt collectors."^[14]

CONCLUSION

The issue of whether taking the contractual and statutory steps required to foreclose a mortgage or deed of trust constitutes the collection of debt under the FDCPA now appears subject to a circuit split. It remains to be seen whether the issue will make its way to the Supreme Court, and whether the reasoning of the Ninth Circuit or that of the Fourth and Sixth Circuits predominates among other courts.

Notes:

^[1] 15 U.S.C. §§ 1692, *et seq.*

^[2] *Ho v. ReconTrust Co., N.A.*, --- F.3d ---, No. 10-56884, 2016 WL 6091564 (9th Cir. Oct. 19, 2016).

^[3] The FDCPA defines a debt collector as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due [to] another.... For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." 15 U.S.C. § 1692a(6).

^[4] Senior District Judge Edward Korman of the Eastern District of New York, sitting by designation, dissented.

^[5] 15 U.S.C. § 1692a(5).

^[6] *ReconTrust*, 2016 WL 6091564, at *3 (citing 15 U.S.C. § 1692a(5)).

^[7] *Id.*

^[8] *Id.*

[9] 15 U.S.C. § 1692f(6). Section 1692f(6) provides liability for "unfair practices" including "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property if (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest." *Id.* Although the parties agreed that the trustee was a debt collector for the purposes of § 1692f(6), the plaintiff did not allege that the trustee had engaged in any conduct that violates that subsection.

[10] *See, supra*, note 3.

[11] *Hulse v. Ocwen Fed. Bank*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002).

[12] *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 461 (6th Cir. 2013); *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 378–79 (4th Cir. 2006).

[13] *ReconTrust*, 2016 WL 6091564, at *4.

[14] *Id.*

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