Next Possible CFPB Targets: Foreclosures And Law Firms

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When Congress enacted the Fair Debt Collection Practices Act in 1977, its intent was to protect consumers from "abusive, deceptive, and unfair debt collection practices."[1] At the time, Congress had in mind the reported, harassing practices of the debt collectors, such as calls to borrowers at work, threats to throw borrowers in jail over unpaid debts, impersonations of law enforcement officials, false pretenses and the like.[2] In the 35 years since then, the FDCPA's reach extends to all types of consumer transactions and it has become a mainstay in consumer protection law.[3]

And now the FDCPA has found a new champion: the Consumer Finance Protection Bureau. Dodd-Frank made the CFPB the primary regulator of the FDCPA. Not surprisingly, the number of FDCPA cases has increased significantly in the last few years and is likely to increase even more.[4] In 2013, more than 10,000 FDCPA cases were filed, representing a 300 percent increase from 2007.[5]

Banks and their foreclosure legal counsel are at the center of the CFPB's FDCPA regulatory expansion. Under Dodd-Frank, the CFPB was charged with implementing reforms for the financial services industry, including the mortgage servicing and foreclosure industry.[6] The CFPB enacted a number of reforms in 2014, requiring banks and their foreclosure legal counsel to make certain affirmative disclosures to the borrower prior to and during the foreclosure, including providing the borrower information about the date the borrower became delinquent, the amount required to bring the loan current and "the risks of failing to do so."[7] Banks and the foreclosure law firms must also provide borrowers "continuity of contact" and giving the borrower "easy, ongoing access to personnel," who must be equipped to provide the borrower at any request the status of their foreclosure.

These affirmative disclosure and communication requirements are ripe for FDCPA litigation. For example, the FDCPA prohibits a "debt collector" from making any "false, deceptive, or misleading representation" regarding the character, amount or legal status of the debt, any actions that can be taken as a result of the failure to pay the debt and any communications regarding how the debt may be disputed.[8]

Whether an individual or entity is a "debt collector" is determinative of whether they can be prosecuted under the FDCPA. Confusingly, the FDCPA has two definitions of "debt collector." Section (a)(6) defines 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."[9] The key aspect of this definition is the "collection of any debts," which is not otherwise defined in the FDCPA and is up to the courts to decide what constitutes a "debt." An individual

who meets this definition of debt collector can be liable for a range of misconduct, including misrepresentations and omissions.

Foreclosure attorneys instead argue they fall within the second, more narrow definition of "debt collector" provided under Section (f)(6), defined as "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."[10] Section (f)(6) prohibits a much narrower set of activity than Section (a)(6), limited to prohibiting a debt collector from taking or threatening to take nonjudicial action where the individual or entity has: (1) no present right to the collateral; (2) there is no present intent to exercise such rights; or (3) the property is exempt by law.[11] Crucially, Section (f)(6) does not prohibit misrepresentations and omissions.

Seeing the threat of litigation (and the FDCPA's mandatory fines and attorneys' fee provisions), foreclosure attorneys have argued that they do not meet the FDCPA's general definition of "debt collector" because a foreclosure is the enforcement of a security interest and not the collection of debt. As they argue, at the conclusion of a foreclosure, the lender has only foreclosed on the security interest of the debtor's property and the debtor does not owe any additional money to satisfy the loan. Foreclosure attorneys further point to the fact that in the event there is a deficiency between the sale price of the home and the underlying mortgage loan, such that the borrower owes additional money to the lender, the lender has to convert that deficiency into a judgment in a separate legal proceeding.[12]

Notably, some courts have relied on this distinction and dismissed misrepresentation claims against foreclosure attorneys, finding that foreclosure attorneys do not meet the general definition of "debt collector."[13] For example, in 2013, the Tenth Circuit tossed out an FDCPA claim against Mortgage Electronic Registration Systems Inc., the servicer of the plaintiff's loan, and MERS' foreclosure counsel, stating (in dicta) that they supported the argument that a foreclosure attorney is not a debt collector under Section (a)(6) because a foreclosure does not result in a personal judgment against the mortgagor.[14] In so doing, the court stated, "[b]y the plain language of the statute, therefore, a person whose business has the principal purpose of enforcing security interests but who does not otherwise satisfy the definition of a debt collector is subject only to [15 U.S.C.] § 1692f."

Other courts have agreed, finding an individual or entity that falls within the more narrow definition of Section (f)(6) cannot be pursued under the broader provisions of FDCPA. In Jordan v. Kent Recovery Services Inc.,[15] the U.S. District Court of Delaware rejected an FDCPA action against a repossession agency, stating:

The legislative history of the FDCPA thus indicates that the FDCPA was enacted in order to prevent the "suffering and anguish" which occur when a debt collector attempts to collect money which the debtor, through no fault of his own, does not have. In contrast to a debt collector, an enforcer of a security interest with a "present right" to a piece of secured property attempts to retrieve something which another person possesses but which the holder of the security interest still owns. Unlike the debtor who lacks the money sought, the possessor of secured property

still has control of the property. ... Accordingly, the evil sought to be regulated by the FDCPA, i.e., harassing attempts to collect money which the debtor does not have due to misfortune, is not implicated by the actions of an enforcer of a security interest with a "present right" to the secured property.[16]

The Fifth, Ninth and Eleventh Circuits as well as other state courts also take the position that the enforcement of a security interest alone, with no effort to collect money from the debtor, does not meet the definition of "debt collection," except for the purposes under the more limited Section 1692(f)(6).[17]

Other courts, however, find that foreclosure attorneys fall within the broad definition of debt collector because they are in the business of foreclosures and foreclosures are the collection of mortgage debt.[18] For example, the Sixth Circuit held that the definition of "debt collector" in subsection (f)(6) should not be read to exclude actions against foreclosure lawyers, finding, "the existence of redemption rights and the potential for deficiency judgments demonstrate that the purpose of foreclosure is to obtain payment on the underlying home loan. Such remedies would not exist if foreclosure were not undertaken for the purpose of obtaining payment."[19] Courts in the Third and Fourth Circuits agree.[20] Further, these courts and others have found that the mere communication regarding the foreclosure is made with the intent to collect a debt, even if the foreclosure itself results in the enforcement of a security interest.[21]

Not to cede potential, fruitful enforcement turf, the CFPB recently took an official position that foreclosure attorneys fall within the general definition of "debt collector" under the FDCPA. In responding to requests for clarification on this issue, the CFPB stated:

Regardless of whether enforcing a security interest can, on its own, qualify as collecting debt under the FDCPA, the Bureau does not deem a person who only enforces a security interest, and does not seek payment of money or transfer of assets that are not designated as collateral for the note or instrument, to be, on that basis, a part of the consumer debt collection market defined by the Final Consumer Debt Collection Rule. However, when a person both seeks payment of money and enforces a security interest, that person can qualify as a debt collector for purposes of the Final Consumer Debt Collection Rule.[22]

The CFPB has also filed amicus briefs in support of this interpretation.[23] The CFPB therefore stands at the threshold of a circuit split regarding the scope of the FDCPA. For now, foreclosure entities may continue to enjoy an exemption from CFPB FDCPA enforcement. Whether they continue to enjoy that exemption in the future, only time will tell.

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[1] 15 U.S.C. §§ 1692 et seq.

[2] A Bill to Amend the Consumer Credit Protection Act to Prohibit Abusive Practices by Debt Collectors: H.R. 29 Before the Subcommittee on Consumer Affairs of the Committee on Banking, Finance and Urban Affairs, House of Representatives (March 8-10, 1977) (testimony of William R. Mann, MD.).

[3] 15 U.S.C. §§ 1692 et seq.

[4] Fair Debt Collections Practices Act, CFPB Annual Report (March 20, 2013), 6.

[5] http://www.fdcpacases.org/page/page/4544578.htm

[6] http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-rules-establish-strong-protections-for-homeowners-facing-foreclosure/

[7] "CFPB Rules Establish Strong Protections for Homeowners Facing Foreclosure," (Jan. 17, 2013) (hereinafter "Final Rule").

[8] 15 U.S.C. § 1692(e).

[9] 15 U.S.C. § 1692(a)(6).

[10] 15 U.S.C. § 1692(f)(6).

[11] Transamerica Fin. Services Inc. v. Sykes, 171 F.3d 553, 555 (7th Cir. 1999).

[12] C.R.S. § 38-38-106.

[13] Burnett v. Mortgage Elec. Registration Systems Inc., 706 F.3d 1231, 1236 (10th Cir. 2013) (citing Kaltenbach v. Richards, 464 F.3d 524, 527 (5th Cir.2006)).

[14] Burnett v. Mortgage Electronic Registration Systems Inc., 706 F.3d 1231, 1239 (2013).

[15] Jordan v. Kent Recovery Services Inc., 731 F.Supp. 652, 656 (D. Del. 1990).

[16] Id. at 657-58.

[17] Kaltenbach v. Richards, 464 F.3d 524, 527 (5th Cir. 2006); Diessner v. Mortgage Electronic Registration Systems Inc., 2010 WL 2464899, 1 (9th Cir. 2010); Ausar-El ex rel. Small, Jr. v. BAC (Bank of America) Home Loans Servicing LP, 2011 WL 4375971*1 (11th Cir. 2011); Jordan v. Kent Recovery Services Inc., 731 F.Supp. 652, 657 (D.Del. 1990); Hulse v. Ocwen Federal Bank FSB, 195 F.Supp.2d 1188, 1203 -1204 (D.Or., 2002); Rosado v. Taylor, 324 F.Supp.2d 917, 924 (N.D.Ind.2004); Sweet v. Wachovia Bank & Trust Co., N.A., 2004 WL 1238180, at *2 (N.D.Tex. Feb.26, 2004); Bergs v. Hoover Bax & Slovacek LLP, 2003 WL 22255679, *4 (N.D.Tex.2003); Beadle v. Haughey, 2005 WL 300060 at *2 -4 (D.N.H. 2005); Purdy v. Aegis Wholesale Corp., 2012 WL 4470945*9 (D.Idaho 2012); Rinegard-Guirma v. Bank of America NA, 2012 WL 1110071*6 (D.Or. 2012); Odinma v. Aurora Loan Services, 2010 WL 2232169 *12 (N.D.Cal. 2010); Gray v. Four Oak Court Association Inc., 580 F.Supp.2d 883, 887 (D.Minn. 2008); Garfinkle v. JPMorgan Chase Bank, 2011 WL 3157157, at *3 (N.D.Cal. 2011); Weahunt v. California Reconveyance Co., 2012 WL 1594212* 6 -7 (E.D.Cal. 2012); Boyd v. J.E. Robert Co., 2013 WL 5436969* 9 (E.D.N.Y., 2013).

[18] See Glazer v. Chase Home Finance LLC, et al., 704 F.3d 453 (6th Cir. 2013) ("The view adopted

by a majority of district courts, and the one followed below, is that mortgage foreclosure is not debt collection. This view follows from the premise that the enforcement of a security interest, which is precisely what mortgage foreclosure is, is not debt collection.")

[19] Glazer v. Chase Home Finance LLC, et al., 704 F.3d 453 (6th Cir. 2013).

[20] See Wilson v. Draper & Goldberg PLLC, 443 F.3d 373 (4th Cir.2006); Piper v. Portnoff Law Associates Ltd., 396 F.3d 227 (3d Cir.2005).

[21] See e.g. Huckfeldt v. BAC Home Loans Servicing LP, 10–cv–01072–MSK–CBS, 2011 WL 4502036, at *5 (D.Colo. Sept. 29, 2011).

[22] Final Rule, 30.

[23] Amicus Brief of the Consumer Finance Protection Bureau, Birster v. American Home Mortgage Servicing Inc., 481 Fed.Appx. 579 (11th Cir., Dec. 2011). The court neither expressly adopted or rejected the CFPB's argument, finding instead that an individual could meet both definitions of debt collector when he or she sends a letter attempting to collect the mortgage debt, which meets the definition of (a)(6), and initiates the foreclosure, which meets the definition of (f)(6). Birster v. American Home Mortgage Servicing Inc., 481 Fed.Appx. 579 (11th Cir. 2012).