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U.S. Supreme Court Hears Oral Argument on Whether Attorneys Engaged in Non-Judicial Foreclosures are Debt Collectors Subject to the Fair Debt Collection Practices Act

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On January 7, 2019, the U.S. Supreme Court heard oral argument in *Obduskey v. McCarthy & Holthus LLP*. The case began when Dennis Obduskey defaulted on his home mortgage. The holder of Obduskey's mortgage loan retained the law firm of McCarthy Holthus LLP to initiate a non-judicial foreclosure. The law firm sent Obduskey a letter notifying him of the foreclosure, stating the amount owed and the current creditor, and providing a mini-*Miranda* warning and a debt validation notice. The letter did not make any express demands for payment. Obduskey responded by disputing the debt. The law firm foreclosed without responding to Obduskey's dispute. Obduskey sued the law firm, claiming that it violated the Fair Debt Collection Practices Act by not handling his dispute properly.

The law firm moved to dismiss, arguing that it was not a debt collector under the FDCPA and, therefore, did not have to comply with the requirements in the FDCPA for responding to a debtor's dispute. The trial court granted the law firm's motion, agreeing that it was not a debt collector because it was engaged in the enforcement of a security interest. Obduskey appealed, and the U.S. Court of Appeals for the Tenth Circuit affirmed. In doing so, the Tenth Circuit joined the Ninth Circuit in holding that the FDCPA does not apply to non-judicial foreclosures, but it split from the Fourth, Fifth, and Sixth Circuits, which have held that attorneys who foreclose non-judicially are debt collectors subject to the FDCPA. In light of the circuit split, Obduskey petitioned for certiorari to the U.S. Supreme Court, and the high court granted his petition on June 28, 2018, setting oral argument for January 7, 2019.

Circuit courts are split because of an unusual definition of "debt collector" in the FDCPA. For the purpose of one specific section of the FDCPA, persons engaged in a principal business of enforcing security interests are considered debt collectors. In addition, the FDCPA separately excludes from the definition of "debt collector" a variety of entities (but not persons who enforce security interests).

During oral argument, the parties and the justices focused on several issues. Initially, the justices urged the attorneys to explain the distinction, if any, between a repossession company and an attorney foreclosing non-judicially. Obduskey's attorney argued that a

repossession company engaged only in recovering collateral is not a debt collector but is a security interest enforcer captured by the language in the definition of "debt collector." On the other hand, Obduskey's attorney argued that a foreclosure attorney is a debt collector under the FDCPA because he or she engages directly or indirectly in the collection of debts by, for example, sending pre-foreclosure notices. The law firm's attorney argued that there was no distinction between repossession companies and foreclosure attorneys because both enforce security interests. However, several justices seemed to agree with Obduskey's attorney that a warning about a foreclosure, even without an express demand for payment, has the effect (and objective) of ultimately encouraging payment and is arguably "indirect collection," whereas a repossession company's recovery of a vehicle in the dark of night, with no contact with the consumer, is really only an action against collateral.

The next issue was whether the "security interest enforcer" language in the FDCPA excludes a foreclosure attorney because the attorney is enforcing a security interest or whether the language really only captures and brings within the definition of "debt collector," for purposes of one provision of the FDCPA, a subset of persons who enforce security interests against collateral but do not otherwise directly or indirectly engage with consumers. The justices and the parties turned to the text of the statute for this issue. The justices seemed perplexed at why Congress would define "debt collector," then state that, for purposes of one specific provision of the FDCPA, the definition of "debt collector" includes a person whose principal business purpose is enforcing security interests, and then separately list exclusions from the definition of "debt collector." Justices Kagan, Kavanaugh, and Roberts pointed out that this would be an odd way to exclude foreclosure attorneys from the statute. The implication is that they agreed with Obduskey's attorney that the "security interest enforcer" language is really meant to capture persons who are not otherwise "debt collectors" (persons who only pursue collateral and do not indirectly or directly try to get consumers to pay) and subject them to one specific provision of the FDCPA.

Finally, the attorney for the law firm brought up federalism concerns. Specifically, the attorney argued that finding that a foreclosure attorney is a "debt collector" could have the unintended consequence of the foreclosure attorney engaging in a practice expressly allowed (or even required) by state law but prohibited by the FDCPA. The attorney for the law firm gave the example of a foreclosure attorney publishing notice of the foreclosure as required by state law, which could also reveal the existence of the debt, thereby violating the FDCPA. Although the attorney for the law firm spoke at length about federalism, the justices did not interject to probe further on this issue.

The U.S. Solicitor General argued as *amicus curiae* in support of the law firm. A group of Democratic members of Congress, including Senator Elizabeth Warren, filed an *amicus* brief in support of Obduskey.

Oral Argument Transcript

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