

# High court decision on non-judicial foreclosures under FDCPA may have limited impact

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The Supreme Court recently held that entities pursuing nonjudicial foreclosures are not subject to the general provisions of the Fair Debt Collection Practices Act, 15 U.S.C.A. § 1692. The court's unanimous decision in *Obduskey v. McCarthy & Holthus*<sup>1</sup> rests on a statutory distinction between security interest enforcement activity and the more general definition of debt collection under the law.

The ruling resolves a split among lower courts that left mortgage servicers and their law firm agents susceptible to FDCPA liability in connection with nonjudicial foreclosures in some parts of the country but not others.

The high court cabined its ruling somewhat by stressing that the communications from the foreclosure law firm to the consumer (which served as the basis for the consumer's FDCPA claims) all consisted of notices required under state law as part of the nonjudicial foreclosure process.

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And while the decision helpfully clarifies the FDCPA's application to nonjudicial foreclosures, it may have the unintended consequence of muddying the meaning of a business's "principal purpose" under the statute, which could have broad implications for debt collectors and other businesses who regularly face FDCPA claims.

## CASE BACKGROUND

The case began in 2015 in Colorado after Dennis Obduskey defaulted on the mortgage loan secured by his home. His mortgage servicer hired a law firm to begin the nonjudicial foreclosure process allowed under Colorado law. The law firm sent a series of

letter notices to Obduskey conveying information about the loan and the foreclosure process.

In response to these notices, Obduskey disputed the debt with the law firm, invoking the FDCPA provision that gives consumers an opportunity to validate the debt. When the law firm did not respond and instead moved ahead with the nonjudicial foreclosure process, Obduskey sued under the FDCPA.

He alleged violations of a variety of FDCPA provisions, including those governing the debt validation process, communicating with third parties, harassing or abusive tactics, false or misleading representations, and unfair practices.<sup>2</sup>

The trial court dismissed Obduskey's complaint, holding that the enforcement of a security interest through a nonjudicial foreclosure process is not an attempt "to obtain payment on a debt" and therefore does not amount to debt collection under the act.<sup>3</sup>

The 10th U.S. Circuit Court of Appeals affirmed the lower court's dismissal.<sup>4</sup> In an opinion by Justice Stephen G. Breyer, the Supreme Court unanimously affirmed.

## THE COURT'S DECISION

The court based its decision on a textual analysis of the statute. The FDCPA defines a "debt" as an "obligation of a consumer to pay money." The law applies to "debt collectors" — primarily defined as any business whose principal purpose is the collection of debts or that regularly collects, directly or indirectly, debts owed or due another. The act's main provisions — proscribing various misleading, unfair and deceptive practices — all apply to entities meeting the primary definition of a debt collector.

The law contains an additional, limited-purpose definition of a debt collector. For the purpose of Section 1692f(6) — a provision governing "any nonjudicial action to effect dispossession or disablement of property" in limited situations — the term debt collector also includes any business "the principal purpose of which is the enforcement of security interests."

At its core, the *Obduskey* case is about the interplay between the primary definition and the limited purpose definition of a debt collector. Obduskey argued that the foreclosing law firm falls within the primary definition of a debt collector and therefore is

subject to the broad reach of the FDCPA, including the many provisions under which he sued.

Obduskey's suit depended entirely on this argument because he did not allege a violation of Section 1692f(6), the provision applying particularly to security interest enforcement. The law firm argued that if it (or any other entity pursuing nonjudicial foreclosure proceedings) is already covered under the primary definition of a debt collector, then the limited-purpose definition relating to the enforcement of security interests would serve no purpose.

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The trial court dismissed Obduskey's complaint and held that the enforcement of a security interest through a non-judicial foreclosure process is not an attempt "to obtain payment on a debt" and therefore does not amount to debt collection under the act.

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In siding with the law firm the court interpreted the two definitions of a debt collector as binary — that is, it reasoned that whoever falls within the limited-purpose definition must not be a debt collector for the more general purposes of the primary definition.

As the court explained, Congress' inclusion of the word "also" in the limited-purpose definition "strongly suggests that one who does no more than enforce security interests does not fall within the scope of the general definition. Otherwise why add this sentence at all?"

The court further observed that anyone meeting the general definition of a debt collector is already subject to the provisions of Section 1692f(6) (to which the limited-purpose definition applies specially). Accordingly, Obduskey's interpretation would merely "emphasize" that security interest enforcers are subject to Section 1692f(6) and render the limited-purpose definition superfluous.

Two other factors supported the court's conclusion. First, the court reasoned that Congress may very well have chosen to treat security interest enforcers differently under the FDCPA in an effort to avoid needless conflicts with state law.

For example, in the mortgage foreclosure context, state laws generally contain a variety of specific notice requirements that might conflict with the FDCPA's restrictions on communications with consumers or third parties.

Second, the court looked to the legislative history of the FDCPA. The history indicated that the limited-purpose definition was a creature of compromise between those who wanted to entirely exclude security enforcement activity and those who wanted it covered under the FDCPA.

IMPACT OF THE DECISION

The court's decision contains three nuanced, and important, restrictions on its potential application in future cases.

First, the court took a very broad view of the statute's primary definition of a debt collector. That definition by itself is, according to the court, "capacious" enough to encompass nonjudicial foreclosure activity, regardless of the fact that nonjudicial foreclosures involve the liquidation of real property and not any "obligation of a consumer to pay money" (as a debt is defined in the law).

The court observed that the primary definition of a debt collector speaks of the "collection of any debts" passively and does not require collection directly from the debtor. It also reasoned that nonjudicial foreclosures are encompassed by the law's application to indirect (and not just direct) attempts to collect a debt.

The court held that nonjudicial foreclosures are immune from general FDCPA liability only when the primary definition is considered alongside the limited-purpose definition relating specifically to security-interest enforcement.

This suggests that in close, future cases where the definition of a debt collector is at issue — and where the defendant's alleged wrongdoing does not involve the enforcement of a security interest — lower courts will read Obduskey to require a broad interpretation of the term debt collector.

Second, the court noted that the parties did not dispute that all the correspondence sent by the law firm to Obduskey was "required under state law." This is an important distinction in the context of the FDCPA.

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Hundreds of FDCPA complaints are filed in federal courts each month, often alleging only minor or technical violations of the law. The court's observation implies that, even in the nonjudicial foreclosure context, any notice to a consumer not strictly required by a state's foreclosure laws could add more grist to the already-prolific FDCPA complaint mill.

Finally, while the decision focused on the limited-purpose definition of a debt collector (applicable to any business "the principal purpose of which is the enforcement of security interests") the court provided no insight or analysis on what amounts to a "principal purpose."

This is a noteworthy omission given the court's 2017 decision in *Henson v. Santander Consumer USA Inc.*<sup>5</sup> In *Henson*, the court drew attention to the dual prongs of the FDCPA's primary definition of a debt collector (as one who regularly collects debts or whose principal purpose is the collection of debts).

That distinction triggered renewed focus on what constitutes a “principal purpose” debt collector under the law, with some lower courts engaging in a careful, multi-pronged analysis of the issue.<sup>6</sup>

By contrast, the high court’s *Obduskey* decision appears to take it for granted that the foreclosure law firm’s principal purpose is the enforcement of security interests because it “engaged in” security interest enforcement. Because the issue was not litigated, *Obduskey* should not carry any precedential weight when it comes to interpreting “principal purpose” under the FDCPA.

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But that likely will not stop future FDCPA plaintiffs from arguing that, under *Obduskey*, a defendant may meet the principal purpose definition of a debt collector by merely being engaged in debt collection at the time of the events allegedly giving rise to a claim.

#### NOTES

1 139 S. Ct. 1029 (2019).

2 See *Obduskey v. Wells Fargo*, 879 F.3d 1216, 1219 n.2 (10th Cir. 2018).

3 *Obduskey v. Wells Fargo*, No. 15-cv-1734, 2016 WL 4091174, at \*3 (D. Colo. July 19, 2016).

4 *Obduskey*, 879 F.3d 1216.

5 137 S. Ct. 1718 (2017).

6 See, e.g., *McAdory v. M.N.S. & Assocs. LLC*, No. 17-cv-777, 2017 WL 5071263, at \*3-4 (D. Or. Nov. 3, 2017); *Barbato v. Greystone All. LLC*, 916 F.3d 260, 267 (3d Cir. 2019).

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#### ABOUT THE AUTHOR



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