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Consumer Finance Litigation

Ninth Circuit Holds Non-Judicial Foreclosure of Deed of Trust Is Not Debt Collection under the FDCPA

Action Item: The United States Court of Appeals for the Ninth Circuit affirms that activities incident to the non-judicial foreclosure of a deed of trust under California state law is not “debt collection” within the scope of the Fair Debt Collection Practices Act.

In *Vien-Phuong Thi Ho v. ReconTrust Co., N.A.*, No. 10-56884, 2016 U.S. App. LEXIS 18836 (9th Cir. Oct. 19, 2016), the United States Court of Appeals for the Ninth Circuit affirmed the dismissal of plaintiff Vien-Phuong Thi Ho’s (“Thi Ho”) claim that the substitute trustee under her Deed of Trust—ReconTrust Company, N.A. (“ReconTrust”)—violated the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et al.* (the “FDCPA”), while pursuing the non-judicial foreclosure of her home.

Thi Ho alleged that ReconTrust was a “debt collector” because it “regularly collects or attempts to collect, directly or indirectly, *debts* owed or due or asserted to be owed or due [to] another.” *See id.* at 7-8 (emphasis added). The Ninth Circuit began its analysis by noting that the FDCPA applies only to those who collect “debts,” which under the statute “is synonymous with ‘money.’” *Id.* at *8 (citing 15 U.S.C. § 1692a(5)). Thus, ReconTrust

could only be liable under the FDCPA if it attempted to collect money from Thi Ho. This, the Ninth Circuit held, ReconTrust did not do. *Id.*

In arriving at its decision, the Ninth Circuit affirmed the distinction between foreclosing on a deed of trust (i.e., enforcing a security interest) and collecting funds from a debtor (i.e., debt collection) as it pertains to FDCPA liability. This distinction, the Ninth Circuit noted, is embodied in the FDCPA’s plain text which, in addition to the general definition of “debt collector,” also includes a separate and more narrow definition of “debt collector,” applicable only to a subset of claims under section 1962f(6), that “also includes” entities whose principal business purpose is “the enforcement of security interests.” *Id.* at *11-12 (quoting 15 U.S.C. § 1692a(6)).

The Ninth Circuit stated that the object of a non-judicial foreclosure “is to retake and resell security, not to collect money from the borrower.” *Id.* at *8. In fact, the Court observed that in the context of a trustee’s sale, the trustee collects money only from the home’s purchaser, not the borrower herself, which does not implicate the collection of a “debt” under the FDCPA. *Id.*

at *9 (“[T]he FDCPA defines debt as an ‘obligation of a *consumer* to pay money.’”) (quoting 15 U.S.C. § 1692a(5)) (emphasis in original). Because all of ReconTrust’s activities in connection with the foreclosure of Thi Ho’s property, including the sending of statutory notices of default and trustee’s sale, fell “under the umbrella of ‘enforcement of a security interest[.]’” the Ninth Circuit determined that ReconTrust was not subject to liability under the FDCPA and affirmed the dismissal of that claim.

The *Thi Ho* decision is significant in several respects. First, it breaks with decisions from both the Fourth and Sixth Circuits, which previously found actions to enforce a security interest to be subject to the FDCPA. While those cases did not arise in the

non-judicial foreclosure context, this presents a possible conflict between the Circuits which could ultimately place the issue before the United States Supreme Court. Second, by ruling that the non-judicial foreclosure of a deed of trust *and* any statutorily-required steps incident thereto do not amount to debt collection, the Ninth Circuit has established a potentially viable defense for servicers who face FDCPA claims in non-judicial foreclosure jurisdictions based on foreclosure-related notices and other disclosures required by state law.

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