

Non-Judicial Foreclosure Enforcement Not Subject to Full Requirements of FDCPA

In a victory for secured creditors and the law firms representing them, the U.S. Supreme Court resolved a circuit split and unanimously held in [Obduskey v. McCarthy & Holthus LLP](#) that law firms enforcing non-judicial foreclosure remedies are not subject to the full provisions of the Fair Debt Collection Practices Act (FDCPA), but have only limited liability under Section 1692f(6) as businesses "the principal purpose of which is enforcement of security interests." Importantly, even when the law firm sends notices *required by state law* that may otherwise be construed by homeowners as an "attempt to collect a debt," the law firm may use the necessary means to enforce a security interest without transforming itself into a "debt collector" subject to the entirety of the FDCPA.

The Supreme Court's opinion was based in part on the language of the FDCPA itself, which provides both a primary definition of a debt collector and a *separate*, limited-purpose definition solely for purposes of Section 1692f. Giving meaning to each word of the statute and abiding by the principle that "statutes do not contain surplusage," the Court held that the limited-purpose definition must necessarily narrow the primary definition such that the debt-collector provisions of the FDCPA do not apply to those who enforce security interests.

The Supreme Court also ensured that those enforcing security interests under state non-judicial foreclosure schemes would not run afoul of the FDCPA. The Court highlighted the fact that many states allow for non-judicial enforcements and have statutes that safeguard against abusive practices. Finally, the Court reviewed and discussed the legislative history of the FDCPA, which included drafts that subjected those who enforced security interests to the full coverage of the FDCPA and, conversely, drafts that totally excluded those same persons. The language as it exists demonstrates a compromise of the two positions.

The Court stated that Congress could choose to expand the reach of the FDCPA, but the Court was required to enforce the statute as enacted. In her separate concurring opinion, Justice Sonia Sotomayor wrote that the matter was a "close case" and invited Congress to clarify the FDCPA if the Court's interpretation was incorrect. Time will tell if Congress sees a need to revise the FDCPA in light of the Court's ruling but, for now, non-judicial foreclosure remedies will not be deemed a "debt collection" activity subjecting enforcers to full compliance under the FDCPA.

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