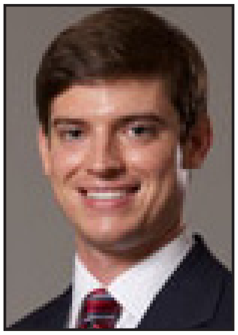

LIABILITY FOR FORECLOSURE COUNSEL UNDER THE FAIR DEBT COLLECTION PRACTICES ACT

By: R. Aaron Chastain

With the huge number of foreclosures across the country, courts have experienced a surge of suits by debtors claiming wrongful foreclosure or otherwise deficient foreclosure procedures. Perhaps one less conventional development that has arisen in foreclosure actions is the rising number of claims under the Fair Debt Collection Practices Act (FDCPA). While the FDCPA might be conventionally considered a law dealing with the collection of consumer debt, mortgagors have increasingly sought to bring FDCPA claims against law firms hired to foreclose on their property due to mortgage default. As a result, courts are struggling with the scope of the FDCPA as it applies to law firms hired to foreclose on residential property.[1]

This article addresses two of the primary questions introduced by the influx of FDCPA claims arising out of foreclosures. First, there is an initial question of whether the FDCPA extends to firms engaged to foreclose on property, which courts have split on. Second, if the FDCPA does indeed apply to foreclosure counsel, how does it shape the counsel's obligations in bringing judicial or non-judicial foreclosure under the relevant state law?

1. Is enforcing a security interest a type of debt collection activity subject to the FDCPA?

The FDCPA defines a "debt collector" generally 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, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."[2] Any person or entity meeting this definition is subject to liability under the FDCPA, including 15 U.S.C. § 1692e's prohibition on using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." The statute provides for either actual or statutory damages (up to $1,000 per violation) for a prevailing plaintiff, as well as attorneys' fees and costs.[3]

From the face of the statute, it's unclear whether the FDCPA's definition of a "debt collector" would include a firm that regularly engages in foreclosure activities. After all, foreclosures are based on a type of debt and constitute a means for "collect[ing]" on them. But enforcing on a security interest is not, in normal parlance, the same as collecting a debt.

Further complicating the inquiry is another provision of the statute that explicitly deals with the enforcement of security interests. The FDCPA prohibits a debt collector from threatening to take a possessory interest in property without a legal right to possess it.[4] For the purposes of this section only, the statute provides an additional definition of "debt collector": "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."[5]

So, the question is, does the definition of "debt collector" as including one who engages in "the enforcement of security interests" for the purposes of § 1692f(6) also apply to the definition of "debt collector" under § 1692a(6), which prohibits false or misleading statements? The most obvious answer might be "no," based on the basic canon of statutory construction *expressio unius est exclusio alterius*—i.e., Congress knew how to define the term "debt collector" as including an enforcer of security interests, yet specifically declined to do so for the purposes of any part of the FDCPA other than § 1692f(6). The Sixth and Eleventh Circuits have followed this interpretation of the statute, as have a number of district courts.[6]

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1 The FDCPA defines "debt" as a consumer's obligation to pay money arising out of a transaction which was "primarily for personal, family, or household purposes." 15 U.S.C. § 1692a(5). Although loans secured by commercial property may fall under the FDCPA's definition of "debt" if the money is used for personal or household purposes, that scenario appears to be rare. This article will accordingly focus on foreclosures of residential property.

2 15 U.S.C. § 1692a(6).

3 15 U.S.C. § 1692k(a).

4 15 U.S.C. § 1692f(6).

5 15 U.S.C. § 1692a(6).

6 *See Warren v. Countryside Home Loans, Inc.*, 342 Fed. App'x 458, 460 (11th Cir. 2009); *Montgomery v. Huntington Bank*, 346 F.3d 693, 699-700 (6th Cir. 2003); *Chomile v. Shapiro, Nordmeyer & Zielke, LLP*, No. 06-3103, 2007 WL 2695795, at *3-*4 (D. Minn. Sept. 12, 2007); *Overton v. Foutty & Foutty, LLP*, No. 1:07-CV-0274, 2007 WL 2413026, at *3-*6 (S.D. Ind. Aug. 21, 2007); *Trent v. Mortgage Elect. Registration Sys., Inc.*, 618 F. Supp. 2d 1356, 1360-62 (M.D. Fla. 2007) (applying Florida law's parallel provision to the FDCPA); *Beadle v. Haughey*, No. 04-CV-272, 2005 WL 300060, at *3 (D.N.H. Feb. 9, 2005); *Rosado v. Taylor*, 324 F. Supp. 2d 917, 924 (N.D. Ind. 2004); *Hulse v. Ocwen Federal Bank, FSB*, 195 F. Supp. 2d 1188, 1203-04 (D. Or. 2002).

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The Federal Trade Commission, the agency with the responsibility of enforcing the FDCPA, has interpreted the statute to mean that entities seeking to enforce security interests—including law firms hired to conduct a foreclosure—are not engaged in debt collection for the purposes of the statute generally.[7] Although the Commission's interpretation is unofficial and non-binding, the courts generally would defer to it under *Skidmore v. Swift*, 323 U.S. 134, 140 (1944), as part of a "body of experience and informed judgment to which courts and litigants may properly resort for guidance."[8]

But in fact, the *majority* rule among the courts of appeals seems to be that attorneys engaging in foreclosures may be subject to the whole gamut of restrictions that apply to "debt collectors" under the FDCPA, including the liability for any "deceptive, false, or misleading" statements.[9] Courts concluding that attorneys attempting to foreclose on secured property interests are debt collectors have reasoned that the separate definition of "debt collector" in the statute as including entities that regularly attempt to enforce a secured interest is not an exclusive provision, but instead should be read as a subset of the more general category.

Even among courts that have concluded that attorneys seeking to foreclose on property are not "debt collectors" for the FDCPA generally, there are open questions about FDCPA liability. For instance, at what point does a firm stop merely "enforc[ing] a security interest" and begin "attempt[ing] to collect a debt"? Can a firm engaged for the purposes of foreclosing on property send a letter to the debt holder saying "pay up, or we will foreclose"?

The Federal Trade Commission's opinion letter in *Novak* appeared to anticipate this sort of issue. As described above, the Commission generally interpreted the FDCPA as not applying to foreclosure actions. However, the Commission was careful to note that if the foreclosure firm "sent [a letter] to a debtor making demand for payment and asserting that certain actions will be taken absent payment, when such actions are not required by [the foreclosure] statute," its communication would be regarded as a conventional form of debt collection and would thus be required to conform with all substantive provisions of the FDCPA.[10]

The U.S. District Court for the Northern District of Georgia recently considered two cases that presented the cutting edge of this issue. In *Bourff v. Rubin Lublin, LLC* and *Shoup v. McCurdy & Candler, LLC*, plaintiffs brought claims under the FDCPA, alleging that the firms hired to foreclose on their property violated the FDCPA.[11] In each case, the Magistrate Judge issued a Report and Recommendation where he recommended that the claims be dismissed as attempts to enforce a security interest and thus not debt collection activities.[12] The district court agreed that the claims should be dismissed, but employed a more nuanced analysis. Noting that the foreclosure firm had in fact gone beyond "merely trying to foreclose on [the] plaintiff's home" and instead "was attempting to collect on the underlying promissory note," the court held that for the purposes of considering the motion to dismiss, the firm was engaged in debt collection activity and subject to the requirements of the FDCPA.[13] Nonetheless, the district court granted dismissal in both cases based on its application of the statute.

Still another point of ambiguity is whether the FDCPA's application depends on whether the foreclosure method employed by the foreclosure firm is judicial or non-judicial. In at least one case, a district court has noted that judicial foreclosures typically include an attempt to recover a personal judgment against the debtor and thus may be more likely to be subject to the FDCPA as "debt collection."[14]

In short, there is a clear and growing circuit split on the issue whether attorneys seeking to enforce security interests—including foreclosure counsel—are subject to the general requirements of the FDCPA. Even within the

7 *See* Federal Trade Commission Staff Opinion Letter to Marty Novak (Oct. 8, 1992), *available at* http://www.ftc.gov/os/statutes/fdcpa/letters/novak.htm (noting that "the Act does not apply" to an attorney's collection letter that only mentions legally required disclosures associated with foreclosure).

8 *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001).

9 *See Katlenbach v. Richards*, 464 F.3d 524 (5th Cir. 2006); *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006); *Piper v. Portnoff Law Assocs.*, 396 F.3d 227 (3d Cir. 2005); *Romea v. Heiberger & Assocs.*, 163 F.3d 111 (2d Cir. 1998).

10 *Novak*, FTC Opinion Letter of Oct. 8, 1992, *available at* http://www.ftc.gov/os/statutes/fdcpa/letters/novak.htm.

11 *Shoup*, Case No. 1:09-CV-02598 (N.D. Ga. 2009); *Bourff*, Case No. 1:09-CV-2437 (N.D. Ga. 2009).

12 Final Report and Recommendation, *Shoup*, No. 1:09-CV-02598 (N.D. Ga. Jan. 19, 2010), ECF No. 7; Final Report and Recommendation, *Bourff*, No. 1:09-CV-2437 (N.D. Ga. Aug. 6, 2010), ECF No. 9.

13 Order Granting Motion to Dismiss at 8, *Shoup*, No. 1:09-CV-02598 (N.D. Ga. Sept. 22, 2010), ECF No. 9; Order Granting Motion to Dismiss at 8, *Bourff*, No. 1:09-CV-2437 (N.D. Ga. Sept. 22, 2010), ECF No. 11.

14 *Fouche v. Shapiro & Massey L.L.P.*, 575 F. Supp. 2d 776, 785-86 (S.D. Miss. 2008).

circuits that have held that attorneys enforcing security interests are *not* engaging in debt collection generally, foreclosure counsel may be subject to FDCPA liability if they send any sort of letter or notice that is not strictly required by the state's governing foreclosure law.

2. If a law firm engaging in foreclosure is subject to the FDCPA, what are the ramifications for its practice?

If a law firm is subject to the FDCPA's requirements, it may be open to new forms of liability. First, and most significantly, in circuits that apply all of the FDCPA's substantive provisions to law firms engaged to foreclose on property, law firms attempting to foreclose on a security interest must not only comply with all relevant foreclosure law, but also with all of the notice requirements and restrictions imposed by the FDCPA in all of their communications with the mortgagor.[15] This means, among other things, that the firm must send a timely dunning letter within five days of its first communication with the debtor that validates the debt, the name of the creditor, and provides the other information required by 15 U.S.C. § 1692g(a). Even in jurisdictions where communications required by the state's foreclosure laws are not governed by the FDCPA, any non-conforming communications, no matter how slight the deviance, may trigger the rigors of complying with the FDCPA's notice requirements.

Second, applying the FDCPA to foreclosure activities creates a regime of near-strict liability for any misrepresentation contained in the foreclosing firm's communications, no matter how slight, immaterial, or unintended. The FDCPA prohibits any "false, deceptive, or misleading" statement made in connection with an attempt to collect any debt. That means that if a law firm sends out a letter to a homeowner threatening foreclosure, but misnames the creditor, it may be subject to liability under the FDCPA. Given there is no "materiality" requirement for a misrepresentation, and that the debtor doesn't have to prove actual damages, a law firm might end up liable to debtors for statutory damages and legal fees for a single, harmless misprint or non-material misrepresentation in its letter.

These issues came to a head in the Eleventh Circuit's recent consideration of the *Bourff* and *Shoup* cases discussed above. As noted, in *Bourff* and *Shoup* the district court concluded that because the defendant law firms went beyond "merely foreclosing" on the secured property interests and instead attempted to collect the underlying debt, they qualified as "debt collectors" under the FDCPA. As debt collectors, the firms became subject to 15 U.S.C. § 1692e's prohibition on any "false, deceptive, or misleading" statement in connection with a communication in attempt to enforce a debt.

For the foreclosing firms, this was a problem—in each case, the firm had (apparently unintentionally) represented in its letter to the debtor that its client was the "creditor" on the loan in default. In actuality, the firms' clients were defined as the "assignee" or "grantee" under the mortgage contracts. In fact, under 15 U.S.C. § 1692a(4), "assign[ees]" are specifically excluded from the FDCPA's definition of "creditor[s]." Thus, from a strictly technical perspective, calling the firms' clients the plaintiffs' "creditor[s]" were arguably "false" statements under 15 U.S.C. § 1692e, and the foreclosure firms thus failed to correctly identify to whom the debt was owed under § 1692g(a)(2).

The district court in *Shoup* and *Bourff* declined to allow this technical non-compliance give rise to a claim for FDCPA liability (with the attendant statutory damages and attorneys' fees). Instead, it followed the U.S. District Court for the Middle District of Florida's holding in *Trent v. Mortgage Electronic Registration Systems, Inc.*,[16] which applied the Florida Consumer Collections Practice Act, a state law similar, but not identical, to the FDCPA. The *Trent* court had held that because MERS did have a legal right to foreclose on the plaintiff's property and the plaintiffs failed to articulate a way that MERS's calling itself a "creditor" actually caused them any harm, it did not violate the state law.[17] The court similarly held that calling MERS the lender did not mislead or cause any harm to the plaintiff and thus should not give rise to FDCPA liability.[18]

The plaintiff in *Shoup* and *Bourff* appealed to the Eleventh Circuit, arguing that the district court

15 *See Goodrow v. Friedman & MacFadyen, P.A.*, 788 F. Supp. 2d 464, 471 (E.D.Va. 2011) ("[A] debt collector must comply with the FDCPA while complying with a state foreclosure law."); *Romea v. Heiberger & Assocs.*, 163 F.3d 111, 118 (2d Cir. 1998).

16 618 F. Supp. 2d 1356 (M.D. Fla. 2007), *aff'd* 299 Fed. App'x 571 (11th Cir. 2008).

17 *Trent*, 618 F. Supp. 2d at 1362.

18 Order Granting Motion to Dismiss at 9-10, *Shoup*, No. 1:09-CV-02598 (N.D. Ga. Sept. 22, 2010), ECF No. 9; Order Granting Motion to Dismiss at 9-10, *Bourff*, No. 1:09-CV-2437 (N.D. Ga. Sept. 22, 2010), ECF No. 11.

impermissibly applied a judicially created "honest mistake" defense for misrepresentations under the FDCPA and thus erred by granting the defendants' motions to dismiss.[19] On March 15, 2012, the court issued a published opinion substantively agreeing with the plaintiffs' arguments and vacating and remanding the case.[20] Assuming without discussing that the defendant foreclosure firm was subject to the FDCPA, the court concluded that the plaintiffs stated a plausible claim that the defendants violated the FDCPA's prohibition on false representations by calling their clients the plaintiffs' "creditor[s]." The court noted that the plain language in the definition of "creditor" under the statute excluded assignees, and that the fact that the error was arguably harmless did not call for dismissal given that the FDCPA provides for statutory damages.[21]

Shoup and *Bourff* provide a shot across the bow for lawyers hired as foreclosure counsel. Despite practicing in a circuit that appears to hold that the FDCPA does not extend to communications made in the course of an attempt to foreclose on a security interest, the firms involved in the cases opened themselves up to liability by sending a letter that went beyond the necessary steps for foreclosure and misidentifying their clients as the plaintiff's "creditor[s]." The Court of Appeals rejected the firms' arguments that the claims should be dismissed nonetheless because the communications were not misleading and did not cause any harm to the plaintiffs. Foreclosure counsel in the Eleventh Circuit—and possibly other jurisdictions as well—are now on notice that even the most insignificant mistakes in communications with debtors may invite liability under the FDCPA.

Conclusion

The circuit split regarding the FDCPA's application to firms hired to enforce a security interest has created an odd patchwork of federal law that has varying implications for foreclosure firms. In the Sixth Circuit, at least, and likely in the Eleventh Circuit, firms have a safe harbor from FDCPA liability so long as they strictly comply with the terms of governing state foreclosure law and make no further attempts to collect on the underlying debts. In the Second, Third, Fourth, and Fifth Circuit, in addition to complying with state foreclosure law, foreclosure counsel must be careful to comply with *all* governing FDCPA provisions, including sending timely notice of default and providing proof of the debt if asked by the debtor. In either case, a firm that falls under the scope of "debt collection" under the FDCPA must take special care not to misidentify the entity it represents or the actual holder of the debt, as those misstatements, no matter how innocent, may give rise to liability under the statute.

Ideally, further guidance from the Federal Trade Commission, Congress, or the Supreme Court will break down some of the large legal discrepancies among the circuits. Until then, FDCPA litigation will vary quite a bit from state to state, creating incentives for very contentious jurisdictional and venue battles from the start.

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19 *See* Appellant's Brief at iii, *Shoup v. McCurdy & Candler, LLC*, No. 10-14619, 2010 WL 5622272 (11th Cir. 2010); Appellant's Brief at 8-9, *Bourff v. Rubin Lublin, LLC*, No. 10-14618, 2010 WL 5622270 (11th Cir. 2010).

20 *Bourff v. Rubin Lublin*, 674 F.3d 1238 (11th Cir. Mar. 15, 2012). The court released an unpublished opinion in *Shoup* on March 30, 2012, that followed *Bourff*'s reasoning and reversed and remanded the district court's judgment. *Shoup v. McCurdy & Candler, LLC*, No. 10-14619, 2012 WL 1071196 (11th Cir. Mar. 30, 2012).

21 *Bourff*, 674 F.3d 1238; *Shoup*, slip op. at 5-6.