

THE FDCPA'S APPLICATION TO THE FORECLOSURE PROCESS

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INTRODUCTION

In December 2011, one in every 634 housing units in the United States received a new foreclosure filing.¹ At the end of 2011, approximately 1.4 million homes were involved in the foreclosure process, which represented 3.4 percent of all mortgaged homes.²

While the number of foreclosures is high, the number of complaints regarding consumer debt collection is equally as troubling. The Federal Trade Commission ("FTC"), the nation's consumer protection agency,³ received 140,036 complaints regarding the practices of third-party and in-house debt collectors in 2010.⁴ These complaints range from collectors revealing debts to third parties, such as relatives, employers, and coworkers, to allegations of harassment and threats against debtors if they fail to make payments.

Accordingly, the issues of high foreclosure rates and frequent complaints with respect to debt collection merge when one considers that mortgages account for the largest portion of consumer debt.⁵ In

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¹ *National Real Estate Trends*, REALTYTRAC, <http://www.realtytrac.com/trendcenter/trend.html> (last visited Feb. 9, 2012).

² CoreLogic, *CoreLogic Reports 830,000 Completed Foreclosures Nationally in 2011, a Decrease of 24 Percent from One Year Ago* (Feb. 8, 2012), available at <http://www.corelogic.com/about-us/news/corelogic-reports-830,000-completed-foreclosures-nationally-in-2011,-a-decrease-of-24-percent-from-one-year-ago.aspx>.

³ Fed. Trade Comm'n, *Debt Collection FAQs: A Guide for Consumers*, FTC FACTS FOR CONSUMERS (Feb. 2009), <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre18.pdf> [hereinafter *Debt Collection FAQs*].

⁴ Fed. Trade Comm'n, *Annual Report 2011: Fair Debt Collection Practices Act*, 5 (2011), <http://www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf> [hereinafter *Annual Report*].

⁵ Annalyn Censky, *Household Debt Falls Slightly*, CNN MONEY (Aug. 15, 2011), available at http://money.cnn.com/2011/08/15/news/economy/household_debt/index.htm.

the second quarter of 2011, the total outstanding consumer debt was \$11.4 trillion, while the total outstanding debt relating to home mortgages totaled \$8.5 trillion.⁶ As the number of foreclosures remains high, the Fair Debt Collection Practices Act ("FDCPA"), which aims to eliminate abusive debt collection practices, takes on particular significance.⁷

However, the Circuit Courts of Appeals are currently split over whether the FDCPA applies to those seeking to collect security interests through foreclosure.⁸ This split arises for two reasons: first, it is unclear whether the enforcement of a security interest constitutes a debt collection under the FDCPA, and second, it is unclear whether attorneys and repossession agencies that frequently enforce security interests on behalf of the banks holding the interest constitute debt collectors under the FDCPA.

Consumers will be greatly affected by the outcome of this issue: either the rights provided to them under the Act are at risk, or enforcing the Act against parties pursuing mortgage foreclosures will be allowed. This Note argues that while the FDCPA would benefit debtors, and the Courts of Appeals are currently split over the issue of its application, it does not apply to the foreclosure process under present law, nor would it add any substantial protections that are not already in place through other laws. Part I provides an overview of the foreclosure process and the consumer rights granted under the FDCPA. Part II discusses the split in the Circuit Courts of Appeals over the FDCPA's application to entities pursuing foreclosure. Part III analyzes the FDCPA and the effect its application to foreclosures has on consumers and argues against the application of the Act to foreclosures.

I. BACKGROUND

A basic understanding of both foreclosures and the FDCPA is required to fully understand the Courts of Appeals' split with respect to whether the FDCPA applies to the foreclosure process and provides protection to consumer-debtors undergoing foreclosure.

⁶ *Id.*

⁷ Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (2011).

⁸ See *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006); see also *Piper v. Portnoff Law Assoc.*, 396 F.3d 227 (3rd Cir. 2005); but see *Kaltenbach v. Richards*, 464 F.3d 524, 527 (5th Cir. 2006); see also *Montgomery v. Huntington Bank*, 346 F.3d 693, 700 (6th Cir. 2003); see also *Warren v. Countrywide Home Loans, Inc.*, 342 F. App'x 458, 461 (11th Cir. 2009).

A. The Foreclosure Process

A mortgage is a pledge of interest in real property granted to secure payment of a specific debt and created by a mortgage document.⁹ The pledge becomes void upon debt repayment or performance of any other obligations according to the terms of the mortgage.¹⁰ However, when a mortgagor defaults in the payment or performance, it triggers an acceleration clause, requiring the mortgagor to pay off the entire debt immediately.¹¹ Mortgage acceleration clauses are designed to trigger if the mortgagor misses too many payments, after which the creditor might want to foreclose on the mortgage, thereby allowing the creditor to attempt to recover the entire unpaid value of the mortgage rather than only the value of the missed payments.¹²

Once a mortgagor has defaulted, such that an acceleration clause has caused the entire debt to be immediately due, creditors may begin the foreclosure process.¹³ A foreclosure is a proceeding brought by a creditor to terminate a mortgagor's legal and equitable property interest.¹⁴ The creditor brings the foreclosure either to gain title to the secured property or to force a sale in order to satisfy unpaid debt secured by the property.¹⁵ Typically, mortgage companies begin the foreclosure about three to six months after the first missed mortgage payment.¹⁶ Once the foreclosure has begun, the debtor typically has a right of redemption, which allows the debtor to reclaim his property by paying the unpaid debt in full.¹⁷ This right lasts for a specified time period that typically expires before any

⁹ BRYAN A. GARNER, BLACK'S LAW DICTIONARY POCKET EDITION 466 (3d ed. 2006) [hereinafter BLACK'S LAW DICTIONARY]; Mortgage, 735 ILL. COMP. STAT. ANN. 5/15-1207 (West 2012).

¹⁰ BLACK'S LAW DICTIONARY, *supra* note 9, at 466.

¹¹ *Acceleration Clause*, Cornell University Law School: Legal Information Institute, http://www.law.cornell.edu/wex/acceleration_clause (last visited: Feb. 9, 2012).

¹² *Id.*

¹³ U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, [http://portal.hud.gov/hudportal/HUD?src=/topics/avoiding_foreclosure/foreclosure process](http://portal.hud.gov/hudportal/HUD?src=/topics/avoiding_foreclosure/foreclosure_process) (last visited Feb. 8, 2012) [hereinafter *Foreclosure Process*].

¹⁴ BLACK'S LAW DICTIONARY, *supra* note 9, at 295; 735 ILL. COMP. STAT. ANN. 5/15-1203 (West 2012).

¹⁵ BLACK'S LAW DICTIONARY, *supra* note 9, at 295.

¹⁶ *Foreclosure Process*, *supra* note 13.

¹⁷ *Illinois Foreclosure Laws*, FORECLOSURE.COM, http://www.foreclosure.com/statelaw_IL.html (last visited Feb. 8, 2012).

foreclosure sale occurs.¹⁸ In some states, the debtor has the right of reinstatement for a period between the foreclosure filing and the foreclosure.¹⁹

Each state has its own foreclosure laws and procedures; therefore, foreclosure processes differ from state to state.²⁰ However, there are three types of foreclosure that may be offered in each state: judicial foreclosure, power of sale, and strict foreclosure.²¹ Judicial foreclosure and power of sale are the dominant forms of foreclosure.²² Judicial foreclosure is allowed by all states and required by some;²³ it requires the lender to bring a court action to foreclose on the borrower's mortgaged property.²⁴ Power of sale is allowed in many states if the mortgage contains a power of sale clause;²⁵ this allows a creditor to foreclose on a mortgaged property without court action.²⁶

The typical process for a judicial foreclosure is as follows:

- (i) the lender files a foreclosure complaint and serves the borrower and any other parties required by statute;
- (ii) the lender files a *lis pendens*²⁷ against the property;
- (iii) a court hearing is held, resulting in a judgment of foreclosure;
- (iv) the lender sends borrower and other required parties notice of the sale, and advertises the sale for a certain period of time prior to sale;
- (v) the foreclosure sale of the mortgaged property is

¹⁸ Debra Poggrund Stark, *Facing the Facts: An Empirical Study of the Fairness and Efficiency of Foreclosures and a Proposal for Reform*, 30 U. MICH. J. L. REFORM 639, 643 (1997); see also Reinstatement, 735 ILL. COMP. STAT. ANN. 5/15-1605 (West 2012).

¹⁹ See Reinstatement, 735 ILL. COMP. STAT. ANN. 5/15-1602 (West 2012).

²⁰ *Foreclosure Process*, *supra* note 13.

²¹ *Id.*

²² Stark, *supra* note 18, at 643.

²³ *Foreclosure Process*, *supra* note 13.

²⁴ Stark, *supra* note 18, at 643.

²⁵ *Foreclosure Process*, *supra* note 13.

²⁶ Stark, *supra* note 18, at 643-44.

²⁷ See BLACK'S LAW DICTIONARY, *supra* note 9, at 433; *Lis pendens* is Latin for "suit pending." It is an official notice to the public that certain real property is the subject matter of a lawsuit. If a buyer purchases real property subject to a *lis pendens*, the buyer is then subject to the outcome of the lawsuit.

conducted by the sheriff or other authorized party;

(vi) the winning bidder receives a certificate of sale;

(vii) the court issues an order confirming the sale and after any applicable redemption rights expire, a deed of sale is issued to the winning bidder;

(viii) the borrower relinquishes possession of the property a set period of time after the court issues the order confirming the sale; and

(ix) if the winning bid is less than the final judgment, the lender may seek a deficiency judgment against the borrower following confirmation of the judicial sale.²⁸

The typical process in a power of sale foreclosure is as follows:

(i) the lender or trustee records a notice of default and debt acceleration and sends the notice to the borrower and any other required party;

(ii) if the borrower fails to cure the default within the specified period after the notice, the lender or trustee sends out a notice of sale within the specified period of time before the date of the sale and advertises the sale;

(iii) the foreclosure sale occurs unless the borrower redeems or reinstates the loan.²⁹

Power of sale foreclosures are typically more expedient than judicial foreclosures.³⁰ However, all types of foreclosure require all parties involved to be notified regarding the proceedings.³¹ Further, in all types of foreclosures, once properties are sold, mortgagors are allowed time to find a new residence and move before the sheriff issues an eviction.³²

No matter the type of foreclosure, creditors typically hire third-party law firms to process the foreclosure.³³ These law firms are

²⁸ Stark, *supra* note 18, at 644-45.

²⁹ *Id.* at 645-46.

³⁰ *Foreclosure Process*, *supra* note 13.

³¹ *Id.*

³² *Id.*

³³ Fed. Reserve Sys., Office of the Comptroller of the Currency, and Office of

often essential to the foreclosure; they prepare legal documents, file complaints and pleadings with the courts, and sometimes litigate on the creditor's behalf.³⁴

B. Protections of the Fair Debt Collection Practices Act

The FDCPA is a federal statute that prohibits deceptive, unfair, or abusive practices by third-party debt collectors.³⁵ Congress enacted the FDCPA in 1978 after finding increasing incidents of serious and widespread abuse of consumers.³⁶ This abuse included practices such as: threatening a debtor or debtor's family with death or bodily harm, harassing debtors with incessant phone calls at home or at work, communicating with third parties about debtors' debts, sending debtors fake legal documents threatening judicial action, and impersonating authority figures such as lawyers or police.³⁷ Such practices lead to substantial consumer harm. These practices intimidate debtors and cause them to make payments of amounts not owed or to unintentionally waive their rights.³⁸ In turn, these practices contribute to personal bankruptcies, marital instability, job loss, and invasions of personal privacy.³⁹

In passing the FDCPA, Congress acknowledged that the vast majority of debtors in default had fully intended to pay their debt when obtaining credit.⁴⁰ In effect, they were not deadbeats that willfully refused to pay their debt.⁴¹ Rather, their default was typically due to unforeseen events such as "unemployment, overextension, serious illness, or marital difficulties or divorce."⁴² Given these assertions, most debtors are relatively innocent and the

Thrift Supervision, *Interagency Review of Foreclosure Policies and Practices* (April 2011), <http://www.occ.treas.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf>.

³⁴ *Id.*

³⁵ *Debt Collection FAQs*, *supra* note 3. See also Fair Debt Collection Practices Act, 15 U.S.C. § 1692a (2011); see also 15 U.S.C. § 1692e (2011).

³⁶ Mary L. Azcuenaga, Comm'r, Fed. Trade Comm'n, Remarks Before the California Association of Collectors: The Fair Debt Collection Practices Act at the Federal Trade Commission (May 17, 1994), available at <http://www.ftc.gov/speeches/azcuenaga/cac94.shtm>.

³⁷ *Id.*

³⁸ *Id.*; see also *Annual Report*, *supra* note 4 at 1.

³⁹ 15 U.S.C. § 1692a.

⁴⁰ Azcuenaga, *supra* note 36.

⁴¹ *Id.*

⁴² *Id.*

FDCPA is an important tool necessary to protect them from harm.⁴³ However, the timely payment of debt to creditors is equally important, and the debt collection industry can be valuable in assisting creditors in retrieving what they are owed.⁴⁴ Therefore, nothing in the FDCPA prevents debt collectors from assisting creditors in the reasonable collection of legitimate debt.⁴⁵ Moreover, the FTC aims to ensure FDCPA compliance without unreasonably impeding creditors' rights in the collection process.⁴⁶

With that in mind, the FDCPA accomplishes its prohibition of deceptive, unfair, or abusive debt collection practices by imposing affirmative duties on debt collectors and regulating the number and type of contacts debt collectors can make with consumers.⁴⁷ As such, it provides many important protections to consumer debtors, including those facing foreclosure. In general, the FDCPA protects consumers by prohibiting: certain communications with the debtor and third parties related to the debtor,⁴⁸ harassment or abuse,⁴⁹ false or misleading representations by the debt collector,⁵⁰ and the use of unfair practices to collect debt.⁵¹ Further, debt collectors are required to validate any debt owed.⁵²

These rights under the FDCPA can be enforced in many ways. First, the FTC can sue debt collectors in federal district court, using preliminary injunctions and temporary restraining orders to enjoin violators.⁵³ Further, the Department of Justice can enforce the FDCPA by bringing lawsuits on behalf of the FTC.⁵⁴ However, more than those provided by the FTC, the remedies provided by the DOJ have teeth; the DOJ can seek permanent injunctive relief and civil penalties to punish debt collectors.⁵⁵ Finally, individual consumers victimized by unlawful debt collection practices can bring civil

⁴³ *Id.*

⁴⁴ *Annual Report*, *supra* note 4 at 1.

⁴⁵ *Id.*

⁴⁶ *Annual Report*, *supra* note 4 at 1.

⁴⁷ Azcuenaga, *supra* note 36.

⁴⁸ Fair Debt Collection Practices Act, 15 U.S.C. § 1692c (2011).

⁴⁹ 15 U.S.C. § 1692d.

⁵⁰ 15 U.S.C. § 1692e.

⁵¹ 15 U.S.C. § 1692f.

⁵² 15 U.S.C. § 1692g.

⁵³ Lawrence D. Pew, *Arizona Consumers Use FDCPA to Challenge Debt Collectors*, PEW LAW CENTER (Feb. 10, 2012), <http://www.jdsupra.com/post/documentViewer.aspx?fid=0420173d-83da-4269-ae1d-fc12d00ab21b>.

⁵⁴ *Id.*

⁵⁵ *Id.*

lawsuits against debt collectors under the FDCPA.⁵⁶ The FDCPA is a strict liability law: consumers do not need to prove any negative consequence of debt collectors' unlawful collection practices, proof of an FDCPA violation is sufficient.⁵⁷

However, consumers are only protected by the enforcement mechanisms under the Act if the prima facie elements of an FDCPA violation can be proved. These elements are: "(1) the plaintiff has been the object of collection activity arising from a consumer debt; (2) the defendant is a debt collector as defined by the FDCPA; and (3) the defendant has engaged in an act or omission prohibited by the FDCPA."⁵⁸ Therefore, the third parties hired by lenders to enforce their security interests in foreclosure proceedings must be debt collectors under the Act and the enforcement of security interests must constitute "debt collection" in order for liability to arise under the FDCPA in the foreclosure process.

C. An Analysis of the Fair Debt Collection Practices Act

In considering the extent that the provisions of the FDCPA cover the foreclosure process, it is important to understand the language and structure of the FDCPA.

1. Structure of the Fair Debt Collection Practices Act

The FDCPA begins with Congressional findings and declaration of purpose.⁵⁹ According to the FDCPA, Congress found sufficient evidence that debt collectors used "abusive, deceptive, and unfair debt collection practices."⁶⁰ Further, it concluded that such practices add to many consumer harms such as personal bankruptcy, marital instability, loss of employment, and invasion of personal privacy.⁶¹ Congress enacted the legislation because the existing laws were inadequate to protect consumers against these abuses.⁶² In doing so, its stated purpose was to "eliminate abusive debt collection practices by debt collectors, insure those debt collectors who refrain from using abusive debt collection practices are not competitively

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Koch v. Atkinson, Diner, Stone, Mankuta, & Ploucha, P.A.*, 11-80894-CIV, 2011 WL 4499100 (S.D. Fla. Sept. 27, 2011).

⁵⁹ Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (2011).

⁶⁰ 15 U.S.C. § 1692a.

⁶¹ 15 U.S.C. § 1692a.

⁶² 15 U.S.C. § 1692b.

disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.”⁶³

After providing the Congressional findings and legislative purpose, the FDCPA defines terms used throughout the Act. A few of these terms, such as “creditor,” “debt,” and “debt collector” are of such importance that they are examined separately in the following subsections.

Following the definitions section of the Act are the sections imposing substantive prohibitions and affirmative duties on debt collectors.⁶⁴ These substantive provisions are found in sections 1692b through 1692h and generally provide protections to the “consumer,” which is defined by the statute as any person “obligated or allegedly obligated to pay any debt.”⁶⁵ Further, the substantive provisions are structured in such a way that requires there to be both a debt and a “debt collector.” For example, section 1692d states that “[a] *debt collector* may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the *collection of a debt*.”⁶⁶ Due to these statutory requirements, a *prima facie* case under the FDCPA requires as two of its elements that: “(1) the plaintiff has been the object of *collection activity arising from a consumer debt* [and] (2) the defendant is a *debt collector*.”⁶⁷ As a result, the statutory definition of both debt and debt collector are of the utmost importance.

⁶³ 15 U.S.C. § 1692e.

⁶⁴ See 15 U.S.C. § 1692b (regulating communication of a debt collector for purposes of acquiring location information of a consumer); 15 U.S.C. § 1692c (prohibiting certain communications); 15 U.S.C. § 1692d (prohibiting harassment or abuse); 15 U.S.C. § 1692e (prohibiting false, deceptive or misleading representations); 15 U.S.C. § 1692f (prohibiting the use of unfair practices to collect or attempt to collect any debt); 15 U.S.C. § 1692g (requiring notice of debt and validation of certain disputed debt); 15 U.S.C. § 1692h (prohibiting application of consumer payment to disputed debt in the case consumer owes multiple debts).

⁶⁵ 15 U.S.C. § 1692a(3).

⁶⁶ 15 U.S.C. § 1692d (emphasis added); see also 15 U.S.C. § 1692 (prohibiting certain communications by a *debt collector* in connection with the *collection of a debt*); 15 U.S.C. § 1692e (prohibiting false, deceptive or misleading representations); 15 U.S.C. § 1692f (prohibiting the use of unfair practices by a *debt collector* to collect or attempt to *collect any debt*); 15 U.S.C. § 1692g (requiring *debt collector* to provide notice of debt and validation of certain disputed debt).

⁶⁷ Koch v. Atkinson, Diner, Stone, Mankuta, & Ploucha, P.A., 11-80894-CIV, 2011 WL 4499100 (S.D. Fla. Sept. 27, 2011) (emphasis added).

2. The Statutory Definition of Debt

The FDCPA only imposes liability when an action is performed in connection with the collection of debt.⁶⁸ The statutory term “debt” is defined under 15 U.S.C. § 1692a(5) as “any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.”⁶⁹ At present, the Circuit Courts of Appeals are split over whether a foreclosure, which involves the enforcement of a security interest in property, constitutes the collection of debt as defined by the FDCPA.

3. The Statutory Definition of Debt Collector

Similarly, the FDCPA only imposes liability under its general provisions on those persons that meet the statutory definition of a debt collector.⁷⁰ The term ‘debt collector’ is defined under section 1692a(6). It states that under the FDCPA, a debt collector is “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.”⁷¹ However, it further states that “[f]or the purpose of § 1692f(6) of this title, such term also includes 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.”⁷²

The inclusive language of § 1692a(6) makes it clear that the FDCPA subjects those enforcing security interest to the specific prohibitions of the section. Under § 1692f(6), debt collectors and those enforcing security interests alike are prohibited from:

[Taking or threatening] to take any non-judicial action to

⁶⁸ See *Warren v. Countrywide Home Loans, Inc.*, 342 F. App’x 458 (11th Cir. 2009) (holding that plaintiff could not state a claim under the FDCPA because foreclosure is not debt collection for the purposes of 15 U.S.C. § 1692g).

⁶⁹ 15 U.S.C. § 1692a(5).

⁷⁰ *Montgomery v. Huntington Bank*, 346 F.3d 693, 698 (3d Cir. 2003).

⁷¹ 15 U.S.C. 1692a(6). The statutory definition also includes several exceptions that are not relevant to this discussion.

⁷² 15 U.S.C. 1692a(6).

effect dispossession or disablement of property if —

there is no present right to possession of the property claimed as collateral through an enforceable security interest;

there is no present intention to take possession of the property; or

the property is exempt by law from such dispossession or disablement.⁷³

What this language does not clarify is whether entities seeking to enforce security interests constitute debt collectors for purposes of the other, general provisions of the FDCPA,⁷⁴ which are not highlighted by the language of § 1692a(6). In the context of foreclosures, the entities seeking to enforce security interests are typically attorneys and repossession agencies hired by creditors. Whether those seeking to enforce security interests constitute debt collectors under the Act is the crux of the Circuit split. Interestingly, both sides of the split cite the inclusionary language of § 1692a(6) as support for their respective holdings. As such, it is considered in detail in the following section.

However, what the courts are not at odds over is whether creditors qualify as debt collectors under the Act.⁷⁵ Creditors are not debt collectors under the Act.⁷⁶ In fact, creditors collecting their own debts rather than using the services of a debt collector are not subject to liability under the Act.⁷⁷ As defined by the FDCPA, a creditor is “any person who offers or extends credit creating a debt or to whom a debt is owed.”⁷⁸ In the context of foreclosures, creditors are often the banks that provide money to consumer-debtors in exchange for a loan and mortgage agreement.⁷⁹

⁷³ 15 U.S.C. § 1692f(6).

⁷⁴ For the remainder of this article the term “general provisions of the FDCPA” will refer to all sections of the FDCPA other than section 1692f(6), the section that clearly applies those entities seeking to enforce security interests.

⁷⁵ *Montgomery*, 346 F.3d at 699.

⁷⁶ *Id.*

⁷⁷ *Azcuenaga*, *supra* note 36.

⁷⁸ 15 U.S.C. § 1692a(4).

⁷⁹ *See Montgomery*, 346 F.3d at 699; BLACK’S LAW DICTIONARY, *supra* note 9, at 295; 735 Ill. Comp. Stat. 5/15-1203 (1987).

II. THE CIRCUIT SPLIT

The Circuit Courts of Appeals are split over whether the general provisions of the FDCPA protect consumers facing foreclosure.⁸⁰ The foreclosure process typically involves a creditor, often with the help of an attorney, enforcing a security interest in a mortgaged property.⁸¹ Further, in order for a debtor to be protected by the FDCPA prohibitions, the defendant must qualify as a debt collector and the debtor must be the object of collection activity arising from consumer debt.⁸²

It is undisputed that creditors collecting their own debts are not debt collectors and, therefore, are exempt from liability under the FDCPA.⁸³ Thus, two main issues arise from the Courts' analyses. First, whether the attorneys that frequently enforce the security interest on behalf of the creditors holding the interest are debt collectors under the FDCPA. Second, whether the enforcement of a security interest constitutes the collection of debt under the FDCPA.

A. The Minority View

The minority view, taken by the Fourth Circuit, holds that the FDCPA applies to foreclosure proceedings. In coming to this conclusion, courts in the Fourth Circuit have held that those undertaking foreclosure proceedings are debt collectors under the Act and that the enforcement of a security interest in a foreclosure proceeding is the collection of debt.⁸⁴

The leading case in the Fourth Circuit is *Wilson v. Draper & Goldberg, P.L.L.C.* In *Wilson*, the plaintiff appealed the district court's grant of summary judgment, which held that because defendant attorneys were seeking to foreclose on a deed of trust as substitute trustees, they could not be debt collectors as defined under

⁸⁰ See *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006). But see *Kaltenbach v. Richards*, 464 F.3d 524, 527 (5th Cir. 2006); *Montgomery*, 346 F.3d at 700; *Warren v. Countrywide Home Loans, Inc.*, 342 F. App'x 458, 461 (11th Cir. 2009).

⁸¹ BLACK'S LAW DICTIONARY, *supra* note 9, at 295; 735 Ill. Comp. Stat. 5/15-1203 (1987); Fed. Reserve Sys., Office of the Comptroller of the Currency, and Office of Thrift Supervision, *Interagency Review of Foreclosure Policies and Practices*, at 9 (April 2011), <http://www.occ.treas.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf>.

⁸² *Koch, v. Atkinson, Diner, Stone, Mankuta, & Ploucha, P.A.*, 11-80894-CIV, 2011 WL 4499100.(S.D. Fla. Sept. 27, 2011).

⁸³ *Montgomery*, 346 F.3d at 698-99.

⁸⁴ *Wilson*, 443 F.3d at 376-78.

the FDCPA.⁸⁵ The defendants were hired by Chase Manhattan Mortgage Corporation (“Chase”) to foreclose on the plaintiff’s property due to her alleged failure to make mortgage payments.⁸⁶

The Court in *Wilson* reversed the district court, first holding that the defendants were acting in connection with a debt, and that the debt remained a debt even after foreclosure proceedings had started.⁸⁷ The Court reasoned that in commencing the foreclosure proceedings, the defendants first informed the plaintiff that her failure to make her mortgage payments entitled Chase to “immediate payment of the balance of her loan, as well as fees, penalties, and interest due,” all of which amounted to debts under the Act.⁸⁸ The Court went on to hold that the defendant’s actions in connection with the foreclosure were attempts to collect the debt.⁸⁹

The Court then held that the defendants met the statutory definition of debt collector and were therefore subject to all sections of the Act, not just section 1692f(6).⁹⁰ The Court rejected the notion that defendants could not be a debt collector for purposes other than section 1692f(6) because they were engaged in a business with the principal purpose of enforcing security interests.⁹¹ The Court reasoned that the language in section 1692a(6), which includes persons enforcing security interests in the definition of debt collector for purposes section 1692f(6), does not create an exception to the term debt collector, but rather is an inclusion to the term debt collector.⁹² In other words, it includes as debt collectors for purposes of section 1692f(6) those who *only* enforce security interests, but does not exclude those who enforce security interests *and* fall under the general definition of debt collector from being debt collectors for purposes of the general provisions of the Act.⁹³

In light of this analysis of the construction of the FDCPA, the Fourth Circuit held that a foreclosure is an attempt to “collect a debt” and attorneys enforcing security interests through foreclosure proceedings may be debt collectors under the Act.⁹⁴ Therefore, under the minority view, foreclosure proceedings may be subject to the

⁸⁵ *Id.* at 374.

⁸⁶ *Id.*

⁸⁷ *Id.* at 376.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 378.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* (emphasis added).

⁹⁴ *Id.* at 379.

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B. The Majority View

The majority, including the Fifth, Sixth, and Eleventh Circuits, hold that the FDCPA does not apply to entities seeking to enforce security interest in real property and, therefore, does not protect consumer-debtors facing foreclosure.⁹⁵ Although the ultimate results in these courts are the same, the Courts have differed in their particular rationale. Nevertheless, the Courts have generally found one or both of the following: (1) defendant is not a debt collector, and (2) the enforcement of a security interest is not the collection of a debt.

1. Third parties enforcing security interests on behalf of creditors holding the interest in property do not constitute debt collectors under the FDCPA

The first way in which the Courts in the majority have reached the conclusion that the FDCPA does not apply to foreclosures is by finding that third parties enforcing security interest on behalf of creditors holding the security interest in property do not constitute debt collectors under the FDCPA.

In *Montgomery v. Huntington Bank*, the Third Circuit considered both the statutory language and legislative intent of the FDCPA in reaching the conclusion that an enforcer of a security interest does not constitute a debt collector under the Act. The plaintiff in *Montgomery* alleged that the repossession agency hired by his creditor violated several provisions of the FDCPA while enforcing a security interest that was collateral for a loan.⁹⁶

In reaching its conclusion, the *Montgomery* court first considered the language of the FDCPA. The court considered the language of section 1692a(6), which states that the term debt collector “for the purposes of section 1692f(6) of this title . . . includes any person who uses any instrumentality of interstate commerce . . . the principal purpose of which is the enforcement of security interests.”⁹⁷ The Court gave deference to *Jordan v. Kent Recovery Services, Inc.*, a district court decision, which found that

⁹⁵ See *Kaltenbach*, 464 F.3d at 527 (5th Cir.); *Montgomery*, 346 F.3d at 700-01 (6th Cir.); *Warren*, F. App'x at 461 (11th Cir.).

⁹⁶ *Montgomery*, 346 F.3d at 695, 698 (6th Cir.).

⁹⁷ *Montgomery*, 346 F.3d at 700 (6th Cir.); Fair Debt Collection Practices Act, 15 U.S.C §1692a(6) (2011).

“such a purposeful inclusion for one section of the FDCPA implies that the term ‘debt collector’ does not include an enforcer of a security interest for any other section of the FDCPA.”⁹⁸

The *Montgomery* Court then considered the FDCPA legislative history. The legislative purpose of the FDCPA was to avoid the “suffering and anguish” that result when a debtor, due to misfortune, does not have the money a debt collector is attempting to collect.⁹⁹ In contrast, the situation involving a debtor facing foreclosure does not implicate this harsh circumstance. In a foreclosure action, a party enforces a security interest in a property of which it has a present right and the debtor is in possession and has control over the property being sought.¹⁰⁰ The only reason a debtor would fail to return the property being sought is his own free will, not the misfortune that the legislature considered when enacting the Act.¹⁰¹

In light of the language and legislative history of the FDCPA, the court held that an enforcer of a security interest, such as a repossession agency, falls outside the definition of a debt collector under the FDCPA, except for the purposes of section 1692f(6).¹⁰²

2. The enforcement of a security interest does not constitute the collection of debt under the FDCPA

Another way in which the majority Courts have reached the conclusion that the FDCPA does not apply to foreclosures is by finding that the enforcement of a mortgage does not constitute “debt collection” activity under the FDCPA.

In *Warren v. Countrywide Home Loans*, the Eleventh Circuit held that “the enforcement of a mortgage through the foreclosure process was not debt collection activity for purposes of the FDCPA.”¹⁰³ The plaintiff in *Warren* brought suit alleging that

⁹⁸ *Montgomery*, 346 F. 3d at 700, quoting *Jordan v. Kent Recovery Services, Inc.*, 731 F. Supp. 652, 657 (D. Del. 1990).

⁹⁹ *Montgomery*, 346 F. 3d at 700.

¹⁰⁰ *Id.*; BLACK’S LAW DICTIONARY, *supra* note 9, at 295.

¹⁰¹ *Montgomery*, 346 F. 3d at 700.

¹⁰² *Id.* at 700-01; See also *Rosado v. Taylor*, 324 F. Supp. 2d 917 (N.D. Ind. 2004) (holding that the FDCPA did not apply to the defendant attorney undertaking a foreclosure lawsuit because it was not an effort to collect debt, only enforce a security interest).

¹⁰³ *Warren v. Countrywide Home Loans, Inc.*, 342 F. App’x 458, 460 (11th Cir. 2009).

Countrywide violated the FDCPA by failing to verify his debt according to section 1692g.¹⁰⁴ Under this provision, if a consumer disputes his debt in writing to the debt collector, the collector cannot collect on the debt until he verifies the debt and mails a copy of the verification to the consumer.¹⁰⁵ However, because the court found that foreclosing on a home does not constitute debt collection, it held that the consumer could not state a claim under the FDCPA.¹⁰⁶

The court in *Warren* acknowledged that the FDCPA does not define debt collection and looked to the plain language of the FDCPA in concluding that foreclosing on a security interest is not debt collection activity under the general provisions of the FDCPA.¹⁰⁷ Again, the court looked to the language of section 1692a(6), which defines the term debt collector.¹⁰⁸ It states that the term debt collector: “for the purposes of section 1692f(6) of this title . . . includes any person who uses any instrumentality of interstate commerce . . . the principal purpose of which is the enforcement of security interests.”¹⁰⁹ The court reasoned that this definition reasonably suggests that a person in the business of enforcing a security interest is only a debt collector for purposes of section 1692f(6) and is not a debt collector for purposes of other sections of the Act.¹¹⁰ In effect, the court reasoned, because a person enforcing a security interest is not a debt collector, it follows that the enforcement of a security interest is not debt collection under the Act.¹¹¹

III. ANALYSIS

This part first explores the value of the FDCPA to the typical mortgagor involved in the foreclosure process and quickly considers economic justification for the application of the Act to third persons involved in the foreclosure industry. This part then argues that majority holding is correct; under the current legislation, the FDCPA simply cannot apply to the foreclosure industry, no matter the benefit that it may have.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*; Fair Debt Collection Practices Act, 15 U.S.C. § 1692g(b) (2011).

¹⁰⁶ *Warren*, 342 F. App'x at 460.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ 15 U.S.C. § 1692a(6).

¹¹⁰ *Warren*, 342 F. App'x at 460.

¹¹¹ *Id.*

A. Value of the FDCPA to Mortgagor

The FDCPA is extremely valuable to the typical debtor; it imposes strict prohibition and affirmative duties on third-party debt collectors in order to ensure that debtors without the cash to pay their debts are not treated abusively in the debt collection process. While the debtors undergoing foreclosure are not pressed to make payments with cash they do not have because there is property which they own securing their debt, many protections of the FDCPA would be especially valuable to mortgage debtors as well. These include the prohibition against certain communications on the part of third parties with respect to debtor's foreclosure under section 1692c, as well as affirmative duties of third parties to send notice of the debt to the debtor and validate the debt upon debtor's request under section 1692g.

First, the limitation of certain communications by third parties under section 1692c prevents potential embarrassment and undue anxiety on behalf of the debtor. Section 1692c(a) would prevent third parties enforcing the foreclosure from contacting the debtor at any unusual time place or at their place of employment. This prevents potential anxiety and embarrassment that can arise from employers and co-workers learning of the foreclosure proceedings and other anxiety that can arise from being reminded of the foreclosure at unexpected times. Further, it prevents the third parties from speaking with the debtor if the third party knows the consumer is represented by an attorney. This protects the debtor from making any accidental admissions or decisions that would be against his or her interest. Finally, section 1692c(b) would prevent the third party enforcing the security interest from communicating with any party other than the debtor, his or her attorney, and the creditor regarding the debt. This protects the debtor from the embarrassment of acquaintances learning of the debt when the debtor does not want them to.

Second, the right of notice to the debtor, which requires written notice to the debtor stating the amount owed, the creditor's name, and the right to dispute the debt within thirty days of notice under section 1692g would ensure that the debtor has knowledge of the action being taken against him and that the debt is in fact real and his own. The right to dispute the debt also provides the debtor with additional time to consider his options in the foreclosure proceeding, because the third party would not be able to take further action until it has verified the debt.

The FDCPA would also provide the debtor with other benefits, such as protection from harassment in collecting the debt

and protection from false or misleading representations. However, these protections are less important to the debtor because their debt is secured by their property. As a result, there is less motivation to harass a debtor into making cash payments. Further, prohibitions on making false or misleading statements, such as threatening false judicial action and falsely representing oneself as an attorney, are less relevant in foreclosures, because an attorney often represents a creditor in bringing foreclosure proceedings, making these statements true. Nevertheless, the FDCPA is of some benefit to the debtor. For this reason, the next section considers exactly how much benefit the mortgage debtor receives, and the costs of receiving that benefit.

B. A Quick Economic Analysis

One way to look at the issue of whether the FDCPA should apply to foreclosure proceedings undertaken by third parties on behalf of creditors is by considering the relevant economics. As made clear in the previous section, it is obvious that the application of the FDCPA to foreclosures would have some benefit to the debtor. However, whether the Act should apply to foreclosures extends beyond the inherent benefit that the debtor will experience. It is also important to explore the costs of the Act's application on third parties. Another way to look at the situation is to analyze whether the marginal benefit to debtors outweighs the marginal cost to debt collectors of enforcing the FDCPA through litigation. It only makes economic sense to apply the FDCPA to the foreclosure process if the marginal benefit to debtors outweighs the marginal cost of enforcement.

First, the marginal cost of enforcement is high because of the risks of litigation for debt collectors. While the Act clearly has benefit to debtors, it also imposes a cost on attorneys and other third parties that must abide by the Act. These costs include the cost of time spent to fully understand the Act and how to comply with it, the cost of increased oversight to ensure compliance, and the cost of each person's excess care to abide by the rules, none of which would exist if the Act did not apply to the foreclosure process.

Second, while the marginal benefits to debtors due to the protections of the FDCPA are difficult to quantify, it is clear that the marginal benefits are small because the protections provided by the FDCPA are already in place in the foreclosure process. Much of the harm experienced by debtors is purely emotional, such as the anxiety and embarrassment associated with foreclosures. These harms are nearly impossible to quantify economically. Although they may

cause pain, it is hard to compare them to the economic costs faced by third parties subject to the FDCPA. First, the harm associated with the debtor making accidental admissions or decisions against his or her interest when speaking with the third party are eliminated where the mortgagor has attorney representation because all attorneys, regardless of this FDCPA provision, are prohibited from speaking with the clients of opposing parties.¹¹² Further, the benefit provided by the section 1692g notice requirement is already accomplished by the foreclosure process, which – in both judicial foreclosure and power of sale jurisdictions – requires the creditor to file a complaint and serve the mortgagor. Therefore, because these potential risks faced by the debtor are eliminated regardless of the application of the FDCPA to foreclosures, they should not be included in the potential harm that debtors face without the FDCPA.

In effect, we know that the marginal benefits realized by debtors are low, with the exception of the emotional costs, because many of the FDCPA protections are already in place through the foreclosure process. In addition, it is clear that requiring all lawyers and other third parties to abide by the FDCPA will impose large costs of compliance on these entities. Therefore, the FDCPA should not apply to the foreclosure process because the marginal cost, which is the cost third parties undertake in abiding by the FDCPA, is not outweighed by the marginal benefits of the protections of the FDCPA to debtors.

C. Statutory Breakdown

In addition to it being economically sound to deny the application of the FDCPA to the foreclosure process, the use of the correct statutory interpretation also reaches the conclusion that the FDCPA does not apply to the foreclosure process. In interpreting a

¹¹² ABA Model Rule 4.2 (“In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”). However, it should be noted that model rule does bar a non-attorney third party from contacting the debtor, unless that third party is being used as an intermediary to contact directly with the debtor for the lawyer. See Formal Opinion 11-461, American Bar Association Standing Committee on Ethics and Professional Responsibility, *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_11_461_nm.authcheckdam.pdf. Also, a violation of the rules of professional conduct doesn’t give the consumer a cause of action against the attorney, whereas the FDCPA would. See ABA Model Rules, Preamble.

statute, the starting point is the statutory language itself.¹¹³ Under the plain meaning rule, if the language of the statute is clear, then the search stops there in interpreting the statute's meaning.¹¹⁴ However, if the language of the statute is unclear, then it is proper to look outside the statute to the legislative history to ascertain the statute's meaning.¹¹⁵ In the case of the FDCPA, both the statutory language and legislative history make it clear that the FDCPA does not apply to foreclosures.

To begin, the language of the FDCPA states that the general provisions of the FDCPA are not to apply to those that enforce security interests, which are those involved in the foreclosure process. The statute reads: "for the purposes of section 1692f(6) of this title . . . [the term debt collector] includes any person who uses any instrumentality of interstate commerce . . . the principal purpose of which is the enforcement of security interests."¹¹⁶ In *Russello v. United States*, the Supreme Court stated: "When Congress includes language in one section of a statute but omits it from other sections of the same Act, it should be presumed that the disparate inclusion or exclusion was intentional"¹¹⁷ Such a purposeful inclusion of those who enforce security interests in the definition of debt collector for one section of the Act implies that the term debt collector does not include those who enforce security interests for any other provisions of the Act. This broader exclusion further implies that the enforcement of security interests does not constitute "debt collection" under the general provisions of the FDCPA. Because either the failure to meet the definition of debt collector or "debt collection" prohibits liability under the FDCPA, it is clear that the foreclosure process is not subject to liability under the FDCPA.

Moreover, the legislative purpose of the FDCPA further backs this conclusion. The legislative purpose of the FDCPA was to avoid the "suffering and anguish" that result when a debtor, due to misfortune, does not have the money a debt collector is attempting to collect.¹¹⁸ However, a debtor facing a foreclosure is not subject to that same "suffering and anguish" that the FDCPA purports to avoid. As opposed to the typical debtor, a debtor facing foreclosure is not being pursued in an attempt to collect cash that he does not have.

¹¹³ Yule Kim, *CRS Report for Congress: Statutory Interpretation*, at 2 (Aug. 31, 2008), available at <http://www.fas.org/sgp/crs/misc/97-589.pdf>.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Fair Debt Collection Practices Act, 15 U.S.C. § 1692a(6) (2011).

¹¹⁷ See generally *Russello v. United States*, 464 U.S. 16, 23 (1983).

¹¹⁸ *Id.*

Rather, the third party hired by the lender is acting to enforce a security interest in a property of which it has a present right and of which the debtor has possession and control.

Both the language and the legislative purpose of the statute lend weight to the conclusion that the FDCPA should not apply to the foreclosure process. Therefore, the law should be followed as Congress intended, and the Courts of Appeals should reach an agreement that the FDCPA does not apply to the third parties seeking to enforce security interests subject to the foreclosure process.

IV. CONCLUSION

In conclusion, while there exists an argument that debtors benefit from the application of the FDCPA to the foreclosure process, the likelihood of realizing these benefits is outweighed by the costs of imposing the FDCPA on third parties. Moreover, it is clear by the statutory language and legislative history of the FDCPA that the FDCPA is not to apply to third parties seeking to enforce security interests subject to the foreclosure process. As such, it should be unanimously held by the Courts of Appeals that the FDCPA does not apply to the foreclosure process.