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Opinion

Regulatory: Liability for foreclosure counsel under the Fair Debt Collection Practices Act

Circuit courts are split on whether foreclosure counsel qualify as debt collectors under the law.

By R. Aaron Chastain

On June 26, the 6th Circuit issued an opinion that further muddied the waters of the Fair Debt Collection Practices Act (FDCPA) and raised the specter of a new avenue of liability for law firms hired to foreclose on residential property. In conjunction with recent decisions from the 11th Circuit, the 6th Circuit's opinion in *Wallace v. Washington Mutual Bank, F.A.* places foreclosure firms on notice that, in some circumstances, slight errors or misstatements in letters to mortgagors could lead to liability under the statute.

The FDCPA only provides liability for debt collectors. The statute defines a debt collector as "any person who [engages] in any business the principal purpose of which is the collection of any debts." Any person meeting this definition is subject to liability for 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.

Courts are generally split on whether foreclosure counsel qualify as debt collectors. Although the 11th Circuit, 6th Circuit and several district courts have held that "an enforcer of a security interest…falls outside the ambit of the FDCPA," the 2nd, 3rd, 4th and 5th Circuits have held that enforcers of security interest, such as lawyers handling foreclosures, are subject to FDCPA liability for false, deceptive or misleading representations. But even in the jurisdictions where foreclosure counsel generally cannot be liable under the FDCPA, courts have ruled that firms make themselves subject to the FDCPA's provisions when they go beyond the minimum for conducting a foreclosure under applicable state law.

Coming within the scope of the FDCPA can have serious ramifications for law firms hired to execute foreclosures. The FDCPA's prohibition on "false, deceptive, or misleading representations" sets a low bar for bringing claims, and most other courts have instituted a scheme of near-strict liability for statements that are technically untrue. This means that if a foreclosure firm sends a resident debtor a notice that misidentifies the firm's client as the creditor when, in fact, the client is the "assignee" or "grantee" of the mortgage, the firm faces FDCPA liability for attorneys' fees and statutory damage despite no proof of actual harm to the debtor. Similarly, in the 6th Circuit's *Wallace* decision, the court held that a debtor had pleaded a valid FDCPA claim against the foreclosure firm that misidentified its client as the "holder" of the note when the client did not actually obtain the note until a later date.

The bottom line is that the FDCPA has expanded to create a new avenue of liability for firms bringing fore-

closure actions on behalf of mortgagees. In the 6th and 11th Circuits, those firms can avoid FDCPA liability by restricting their communications with mortgagors strictly to the communications required by state foreclosure law and thus avoid being deemed debt collectors under the statute. For all other jurisdictions, however, foreclosure firms simply must take extra care to avoid misidentifying their clients as creditors or holders of notes when such representations are technically untrue.

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