WRIGHT, FINLAY & ZAK, LLP

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EVICTION ALERT:
IT MATTERS WHO NOTICES (AND WHEN)
by T. Robert Finlay, Esq.

In 2017, Wright, Finlay & Zak circulated an article explaining the conflicting California opinions on whether a purchaser at the foreclosure sale must record the Trustee's Deed Upon Sale (TDUS) prior to serving its Notice to Quit on the property's occupants. Just before the holidays, the California Supreme Court resolved the question, holding that the TDUS must be recorded prior to servicing the Notice to Quit (*Dr. Leevil, LLC v. Westlake Health Care Center*, 2018 WL 6597341 (Cal. Dec. 17, 2018); 18 Cal. Daily Op. Serv. 11, 775).

Servicers should make sure that your eviction counsel are aware of this decision and handling their evictions accordingly. In addition, Servicers may want to explain to their investors that evictions may be slightly delayed while waiting for the TDUS to record.

Please feel free to email Robert Finlay at rfinlay@wrightlegal.net if you have any questions about the decision or its implications.

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THE (ROCKY) ROAD TO RECOVERY OF FEES
CALIFORNIA COURT OF APPEAL LIMITS LENDER'S RIGHT TO RECOVER ATTORNEY'S FEES AFTER SUCCESSFULLY DEFENDING AGAINST BORROWER'S LAWSUIT CHALLENGING THE FORECLOSURE
by T. Robert Finlay, Esq.

Two recent decisions by the California Court of Appeals have dealt Deed of Trust holders a huge blow in their ability to directly recover attorney's fees after successfully defending challenges to their DOT.[1] In both *Hart v. Clear Recon Corp and Nationstar* and *Chacker v. JPMorgan Chase Bank*, separate panels of the Second Appellate District held that the provisions in the standard form Deed of Trust relied on by the prevailing lender, only allowed the holder to add fees and costs incurred in defending the litigation to the loan balance--the provisions did NOT, however, allow for a separately recoverable fee award against the borrower.

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Recovery of Fees (continued from page 1)

In other words, if the property does not have sufficient equity to cover these amounts, the holder is out of luck. And, even worse, if the defendant assigned away its interest in the DOT prior to judgment, it is completely out of luck as it would not even have the potential for recovering its fees through the foreclosure sale; or, as the Court, quoting the late Justice Scalia in another context, stated in *Chacker,* the assignor "must take the bitter with the sweet."[2]

The facts and ruling of both cases are relatively similar. In *Chacker,* the borrower sued Chase to stop the foreclosure sale. Chase's Demurrer was sustained without leave to amend, and the trial court entered a judgment of dismissal. Chase's attorneys then moved for attorney's fees under the standard language of paragraphs 9 and 14 of the DOT, which was granted by the trial court. The Court of Appeal reversed, vacating the judgement for fees and ordering that Chase's attorney's fees could only be added to the loan balance, not collected directly from the borrower.

The published portion of the appeal did not focus on Chase's right to recover fees or the amount of the fees. Instead, the decision focused on whether paragraphs 9 and 14 of the DOT limit Chase to adding the fees to the amount owed under the DOT or, whether these provisions supported a separate judgment against the borrower, independent of its repayment obligations under the Note and DOT. Paragraph 9 of the relevant DOT provided that the lender may pay reasonable attorney's fees to protect its interest in the property or DOT. However, the plain language of the DOT specifies that "any amounts disbursed by Lender under this Section 9 shall become additional debt of the Borrower secured by this [DOT]." The Court held that the plain language of paragraph 9 did not provide for a separate award of attorney's fees. Likewise, paragraph 14 of the DOT states that the lender may "charge" the borrower fees for services performed in connection with borrower's default, for the purpose of protecting lender's interest in the property or DOT, including attorney's fees. However, again, the plain language of this paragraph provides that the attorney's fees are to be added or "charged" to the loan balance. As a result, paragraph 14 did not permit a freestanding contractual attorney fee award. Paragraphs 9 and 14 of Chase's DOT reflect standard language used by most institutional residential lenders.

Adding insult to injury, and leading to its quote from Justice Scalia, the Court rejected Chase's point that the adding of the fees to the loan balance did nothing to assist Chase in recovering the fees it had incurred because it no longer had any interest in the loan, as the rights had been assigned to another financial institution and therefore would not be paid out of any subsequent foreclosure. The Court observed that Chase could have protected itself against that result by including language in the assignment "to account for how attorney fees may be recovered when a borrower defaults."

In *Hart*, two plaintiffs (mother and son) sued Nationstar for wrongful foreclosure. Neither plaintiff was the borrower under the DOT. The sole borrower was not a party to the action. Nationstar obtained summary judgment on the basis that the plaintiffs were not borrowers, and therefore had no rights under the DOT, and had no right to sue to stop the foreclosure. Nationstar's attorneys sought its attorney's fees as a prevailing party under the DOT. Unlike in *Chacker,* Nationstar relied exclusively on the attorney fee language in paragraph 9 of the DOT. Like Chase's DOT, paragraph 9 of Nationstar's DOT provided that, if there is a legal proceeding that might significantly affect the lender's interest in the property or security, the lender may do and pay for whatever is reasonable to protect the lender's interest, including paying attorney's fees to defend itself in a lawsuit. The provision then provides that "[a]ny amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument." Trial Court granted Nationstar's attorney's fees motion, holding that paragraph 9 of the DOT was an attorney's fees provision. The Court of Appeals reversed, holding that paragraph 9 did not permit an award of attorney's fees against the plaintiffs.

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Recovery of Fees (continued from page 2)

On appeal, Nationstar argued that it was entitled to a fee award under paragraphs 9, 14 and 22 of the DOT, as well as the Note. The Court of Appeals refused to consider on appeal whether paragraphs 14 or 22 of the DOT, or the Note itself, justified an award because Nationstar had failed to raise these arguments at the trial court level. Instead, the Court focused exclusively on what was before it – paragraph 9. Like in *Chacker,* the Court concluded that the plain language of paragraph 9 does not provide for an award of attorney's fees. Rather, it is "a provision that attorney's fees, like any other expenses the lender may incur to protect its interest, will be added to the secured debt." The Court did, however, note that the result *may* have been different had Nationstar moved originally under paragraph 22. Likewise, and as discussed more below, we believe the result could be different if the lender had moved for fees under the language in the Note.

What do these decisions mean for a lender or servicer who successfully defends a challenge to the foreclosure or DOT brought by the borrower or a related party? While the *Hart* and *Chacker* decisions are disheartening on their face, there are options for getting around their holdings. In addition, the decisions raise several interesting issues for a lender or loan servicer to consider, including:

1. ***Review your DOT:*** While most institutional lenders use DOTs with similar language to the ones at issue in these two cases, the language in conventional, private party and some older DOTs vary. At the onset of your case, we suggest looking at your specific DOT to determine whether it has language that varies from the language in the Chase and Nationstar DOTs.

2. ***Move for fees under paragraph 22 of the Note:*** Although rejected as not timely raised, Nationstar raised an excellent argument on appeal, *i.e.*, that the language in the acceleration paragraph 22, provided for attorney's fees, but did not restrict the recovery of those fees to adding the fees to the amounts owed under the Note and DOT. Likewise, many Notes contain language providing for attorney's fees to the prevailing lender. If the Note involved in your litigation contains favorable attorney fee language, use that as the basis for your fee motion.

3. ***Post-foreclosure fees:*** While not directly addressed in either of the Court's rulings, without another ground for a fee judgment, lenders are presumably barred from recovering fees post-foreclosure. If the lender's only recourse is to add the fees to the amount owed under the Note and DOT and the foreclosure sale has already occurred, there is no loan to add the fees to!

4. ***Recovering fees post-transfer:*** As Chase found out the hard way, while you may be entitled to add fees to the Note and DOT, that process is complicated if the loan has been sold or service transferred prior to resolving the litigation. Logistically, how can the prior lender add fees to a note they no longer own or service and, even if they could, how would one collect them? It can be done, but will require lots of calls to the new lender or servicer.

5. ***Can a servicer recover fees under the DOT?*** California law is mixed on whether a servicer can recover fees under the DOT. Fortunately, most decisions and courts side with the servicer. While the *Hart* and *Chacker* decisions focused on the successor to the lender's right to recover fees, the rulings will apply similarly to a servicer. Indeed, implicit under *Chacker* was its acceptance that Chase, even as a non-party was entitled, as an agent of the owner, to be paid its fees—it just was limited to doing so by adding them to the loan balance. *Likewise*, the servicer will have the same challenges if actually collecting fees if the servicing of the loan has already transferred to a new servicer.

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Recovery of Fees (continued from page 3)

6. ***Can the foreclosure trustee recover its litigation defense fees?*** Whether a foreclosing trustee named in borrower litigation can recover its litigation defenses fees and costs is a complicated question. Regardless of the recent decisions discussed above, most standard form DOTs do not contain language specifically allowing the trustee to obtain a fee award or add them directly to the loan. It will generally require non-standard language specifically providing that the trustee can recover fees. (Note – the Court did confirm fees for the trustee in the *Chacker* case; however, it appears to have done so without much thought and perhaps was an oversight.)

7. ***Can the borrower still recover fees?*** Unfortunately, yes. While it might seem inequitable, the reciprocal language of Civil Code section 1717 still gives the prevailing borrower the ability to recover a fee award, even if the prevailing lender or servicer is limited to adding the fees to the loan.

8. ***Do you even need to move for fees or can you add them directly to your DOT?*** Even before these decisions, servicers and lenders often asked our firm if they could simply add the attorney's fees and costs directly to the loan like they do with advances for taxes, inspection fees, bankruptcy fees, non-judicial foreclosure fees, etc. The answer was almost uniformly – no. Although the DOT language cited above *appears* to provide that the attorney's fees in defensive litigation with the borrower can be added directly to the loan, *Civil Code* section 1717 provides that only the prevailing party is entitled to fees (and the fees must be reasonable). Therefore, until the lender wins and is awarded "reasonable" fees, the lender cannot simply add them directly to the loan. However, the *Hart* and *Chacker* decisions *appear* to bring into question the traditional approach. Both decisions repeatedly point to the language in the DOT that the fees can be added directly to the loan. In fact, the Court in *Hart* vacated the fee award completely, holding that Nationstar was essentially free to apply the fees directly to the loan. "[Paragraph 9] is, instead, a provision that attorney's fees, like any other expenses the lender may incur to protect its interest, will be added to the secured debt." ***However, there are other issues at play and we strongly recommend consulting with our office or another attorney before adding any litigation-related fees directly to your DOT.***

9. ***Updating the attorney fee language in your DOT:*** While it might be difficult for institutional lenders, private and conventional lenders can revise the language in their DOTs to clearly state that the lender is entitled to add the fees to the loan *or*, at its sole discretion, obtain an attorney fee award. Again, please consult your attorney before revising the provisions in your DOT.

10. ***Why do I even care, the borrower is already in default?*** In most instances where the borrower sues its lender, the loan is in default. If the borrower cannot afford to make his or her mortgage payments, he or she often cannot reimburse a lender for its litigation fees and costs. For the last decade or so, it did not make much sense for a lender to incur the expense of moving for fees; but, with property values in California at or above all-time peaks, many litigious borrowers have equity in their homes. If they chose to sue and are unsuccessful, the prevailing lender may want to consider trying to recover its defense costs from the equity in the property. In addition, with borrowers who are serial litigants, the threat of having to pay fees when they lose might help dissuade them.

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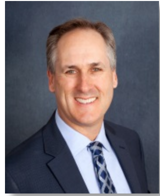
Recovery of Fees (continued from page 4)

As you can see, while the Court's recent decisions seem clear cut, they raise a plethora of issues for a lender, servicer and trustee to consider when moving for fees. We recommend analyzing your DOT at the outset of any litigation to determine whether you can ultimately recover your attorney's should you ultimately prevail. Even if you never end up filing the fee motion, knowing your options is useful when negotiating with the other side or at a mediation.

If you have any questions about these rulings, language in a particular Note or DOT or a particular case, please do not hesitate to contact me. Likewise, if you want to discuss revising the attorney fee language in your loan documents, please feel free to email me at rfinlay@wrightlegal.net.



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[1] Chacker v. JPMorgan Chase Bank, N.A., (Cal. Ct. App., Sept. 19, 2018, No. B281874) 2018 WL 4474732; Hart v. Clear Recon Corp., (Cal. Ct. App., Sept. 18, 2018, No. B283221) 2018 WL 4443242
[2] Bailey v. United States (2013) 568 U.S. 186, 206 (concurring opinion of Scalia, J.)

NINTH CIRCUIT EXPANDS TIME FOR A BORROWER TO SUE TO ENFORCE RESCISSION OF A LOAN UNDER TILA

by Michael S. Kelley, Esq. and T. Robert Finlay, Esq.

For years, mortgage lenders defended TILA rescission actions by arguing that the notice of rescission or action was untimely and/or barred by applicable statute of limitation. In 2015, the U.S. Supreme Court dealt lender's efforts a severe blow when it held that the notice of rescission could be issued at any time within three (3) years after the loan closed, not file suit to rescind within three years, as the industry had argued (*Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790 (2015). Just recently on December 6, 2018, the Ninth Circuit issued an opinion that further weakened the lenders' position (*Hoang v. Bank of America*, N.A., __ F.3d __, Case No. 17-35993, 2018 WL 6367268 (9th Cir. 2018)). Specifically, the Ninth Circuit expanded the time for a borrower to sue to enforce rescission of a loan if a lender fails to wind up the loan after a notice of rescission.

Under the Truth in Lending Action ("TILA"), borrowers have the right to rescind certain loans within three business days after consummation of the loan. 15 U.S.C. § 1635(a). However, if the lender fails to make the required disclosures under TILA, the deadline for borrowers to rescind the loan expands to three years from consummation of the loan. 15 U.S.C. § 1635(f). In its' 2015 *Jesinoski* decision the Supreme Court held that under TILA, a borrower only has to notify a lender of his or her intent to rescind within three years. The borrower is not required to bring suit within the three years to effectuate the rescission. A simple notice is all that is required. The Supreme Court explained, "so long as the borrower notifies within three years after the transaction is consummated, his rescission is timely. The statute does not also require him to sue within three years." *Jesinoski*, 135 S. Ct. at 792.

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Borrower Suit to Enforce Rescission (continued from page 5)

Under TILA, if a borrower provides notice within the three years, a creditor must take steps to "wind up"[1] the loan within 20 days of the notice. 15 U.S.C. § 1635(b). However, as is often the case, what if the lender fails to act to wind up the loan as required by TILA? In *Hoang v. Bank of America*, N.A., __ F.3d __, Case No. 17-35993, 2018 WL 6367268 (9th Cir. 2018), the Ninth Circuit answered the following question: "when a borrower effectively rescinds a loan under TILA, but no steps are taken to wind up the loan, when must suit be brought to enforce that rescission?" *Id.* at *3.

"…under Jesinoski and Hoang, a borrower has up to three years to provide notice of rescission of the loan. If the lender fails to wind up the loan, the borrower has another six years to bring an action to enforce the rescission."

In *Hoang*, the district court ruled that a claim to enforce rescission is governed by the one-year statute of limitations for TILA damages claim. On appeal, the Ninth Circuit rejected the district court's application of the one-year statute of limitations that applies to TILA damage claims. The Ninth Circuit reasoned, "TILA provides for both legal damages and equitable relief but only includes a statute of limitations for legal damages relief. The statute does not suggest that the statute of limitations for legal damages relief is also applicable to claims for equitable remedies. If Congress intended that statute to apply, Congress surely knew how to draft the statute accordingly." *Id*. at *4.

Because TILA does not provide a statute of limitations for rescission enforcement claims, case law requires federal courts to borrow a limitations period from analogous state law. In *Hoang*, the Ninth Circuit looked to its host state, Washington, as a guide. The Ninth Circuit ultimately used Washington's six (6) year statute of limitations for contract actions. The Court reasoned,

> Under Washington's general contract law, the statute of limitations sets forth a six-year limitation period for an "action upon a contract in writing, or liability express or implied arising out of a written agreement." The loan agreement between Hoang and the Bank is a contract in writing. An action to rescind that loan (under TILA or otherwise) arises out of that written agreement. Because TILA rescissions necessarily require a contract to be rescinded, contract law provides the best analogy and we adopt the general contract law statute of limitations.

Id. at *4 (citation omitted). In summary, the Ninth Circuit concluded that "[a]pplication of Washington's longer six-year contract statute of limitations would actually further TILA's purpose, which is to protect consumers from predatory lending practices and promote the informed use of credit." *Id.*

Therefore, under *Jesinoski* and *Hoang*, a borrower has up to three years to provide notice of rescission of the loan. If the lender fails to wind up the loan, the borrower has another six years to bring an action to enforce the rescission. Thus, a borrower can have to up nine years ***from consummation of the loan*** to enforce rescission under TILA. Although this is a decision by the Ninth Circuit, which applied Washington state law, borrowers will certainly rely on *Hoang* and argue that the Ninth Circuit's reasoning should apply to their specific case. The statute of limitations to enforce a rescission claim may be shorter or *longer* than six years depending on the breach of contract statute of limitations for each specific state.

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Borrower Suit to Enforce Rescission (continued from page 6)

There are several take-away from the decisions in *Jesinoski* and *Hoang*. First, a lender/servicer should quickly and carefully review any notice of rescission or even an indication of rescission from the Borrower. Second, if a borrower properly rescinds the loan under TILA, the lender/servicer has twenty days to "wind up" the loan. Third, if there is a question about whether the lender provided the required TILA disclosures or if the borrower timely and properly gave notice of his or her intent to rescind, the lender should consider immediately filing a declaratory relief action to resolve those disputes at that time instead of waiting years for the borrower to file an action to enforce the rescission.

If you have any questions regarding this issue or any other matter, please contact Robert Finlay at rfinlay@wrightlegal.net or Michael Kelley at mkelley@wrightlegal.net.

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[1] 15 U.S.C. § 1635(b) states,

> When an obligor exercises his right to rescind under subsection (a), he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value.

DOES THE NON-JUDICIAL FORECLOSURE PROCESS CONSTITUTE "DEBT COLLECTION" UNDER THE FDCPA?

U.S. SUPREME COURT TO DECIDE!

by Lukasz I. Wozniak, Esq. and T. Robert Finlay, Esq.

In a decision that will be felt throughout the mortgage servicing world, the U.S. Supreme Court will decide whether the non-judicial foreclosure process and the act of conducting a trustee's sale qualify as "debt collection" under the Fair Debt Collection Practices Act ("FDCPA" or the "Act"). *Obduskey v. Wells Fargo* is fully briefed, with amicus efforts on both sides, including briefs by the NAACon, the consumer side, and collaborative efforts by industry firms, including Wright, Finlay & Zak, on the servicer side. With the oral argument set for January 7, 2019, the servicing industry anxiously awaits the Court's ruling, since a finding that the non-judicial foreclosure process – consisting of the issuance, recording, posting, and mailing of foreclosure notices and the conducting of trustee's sale – amounts to debt collection will have a drastic impact on the mortgage industry, as well as on the State law.

Before addressing the potential impact of an adverse decision on the industry, the reader should understand the facts of the case, why the Supreme Court agreed to review the Tenth Circuit's decision, and analyze the likelihood of the adverse ruling by the Supreme Court.

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Non-Judicial Foreclosure Process (continued from page 7)

Background. In *Oduskey*, having defaulted on his mortgage loan obligation, the borrower sued his loan servicer, Wells Fargo Bank, N.A., and the law firm of McCarthy and Holthus, LLP ("McCarthy") – who was retained by Wells Fargo to conduct the non-judicial foreclosure process – for, among other things, violation of the FDCPA. *Obduskey v. Wells Fargo*, 879 F.3d 1216, 1218-19 (10th Cir.) As relevant herein, the Tenth Circuit found that McCarthy did not violate the FDCPA because the Act did not apply to non-judicial foreclosures. *Id.* at 1222-23.The Supreme Court granted Obduskey's Petition for writ of certiorari (138 S.Ct. 2710) in order to finally address the issue, which has thus far split the circuits, resulting in two different legal interpretations of the issue. Compare *Vien-Phuong Thi Ho v. ReconTrust Co., NA*, 858 F.3d 568 (9th Cir., 2017) ("*Ho*") [finding that non-judicial foreclosure proceedings are not covered under the FDCPA] with *Wilson v. Draper & Goldberg, P.L.L.C.,* 443 F.3d 373 (4th Cir. 2006); *Kaltenbach v. Richards,* 464 F.3d 524 (5th Cir. 2006); *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453 (6th Cir. 2013) [finding that the process is covered by the Act].

Language of the FDCPA supports finding that non-judicial foreclosure does not constitute debt collection. Analyzing the purpose of the FDCPA and the Act's pertinent language suggests that the Supreme Court should uphold the Tenth Circuit's decision.

The Act was enacted in 1977 to eliminate abusive debt collection practices by unscrupulous debt collectors while, at the same time, protecting ethical debt collectors from unnecessary restrictions. Senate Report No. 95-382, p.p. *1-2 (Aug. 2, 1977) ("Report"); 15 U.S.C. § 1692(a) and (e).[1] The Act prohibits "'abusive, deceptive, and unfair debt collection practices,' such as late-night phone calls or falsely representing to a consumer the amount of debt owed." *Obduskey*, 879 F.3d 1216, 1219 (10th Cir.) [citing 15 U.S.C. §§ 1692(a), 1692c, and 1692e]. Congress found the legislation was necessary because the existing laws and procedures were inadequate to protect individual consumers from the above-referenced practices. 15 U.S.C. § 1692(b) and (c); Report, p.p. 2-3. These concerns do not apply to non-judicial foreclosure proceedings, as the process does not involve the type of abusive debt collection practices that the Congress sought to curtail. Unlike the above-articulated collection practices, non-judicial foreclosure notices are merely informational in nature, do not demand payment from the consumer borrowers, and are not the type of harassing or abusive communication the FDCPA was designed to protect against. Indeed, they "were designed to *protect* the debtor." *Ho*, at 574 [emphasis in original]. While the issuance of non-judicial foreclosure notices may, of course, induce the defaulted consumer borrower to either cure the deficiency or even pay off the loan completely, that possibility, in and of itself, does not transform a regular non-judicial foreclosure process into "debt collection": "[t]he prospect of having property repossessed may, of course, be an inducement to pay off a debt. But that inducement exists by virtue of the lien, regardless of whether foreclosure proceedings actually commence. The fear of having your car impounded may induce you to pay off a stack of accumulated parking tickets, but that doesn't make the guy with the tow truck a debt collector." *Ho*, at 572.

On its face, the Act does not apply to non-judicial foreclosures. The Act applies only to "debt collectors" who "collect" "debt". *Obduskey,* at 1219. To come within the provisions of the FDCPA, all three prongs must be satisfied. The non-judicial foreclosure activity does not fall squarely within these definitions. First and foremost, the issue of whether mortgage indebtedness falls squarely within the Act's definition of "debt" is not a foregone conclusion. For instance, in Section 1692a(6)(F), Congress excluded from the definition of "debt collector" persons who are foreclosing (whether judicially or non-judicially) on mortgage debt that was not in default when they obtained it, whether it be for purposes of servicing the loan or its collection. *Henson v. Santander Consumer USA Inc.*, 137 S.Ct. 1718, 1723-24 (2017) 1723-24. As a result, a non-judicial foreclosure of a previously performing loan would not fall within the purview of the Act. Moreover, in limiting Section 1692i's venue provision to judicial foreclosures only (*Obduskey*, at 1222 – recognizing that the term "action" applies to a judicial proceeding), Congress – while being well aware of the fact that more than half of the states have laws governing non-judicial foreclosures – appears to have made a conscious decision to exempt or otherwise exclude the non-judicial foreclosure process from the Act's provisions.

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Non-Judicial Foreclosure Process (continued from page 8)

Second, non-judicial foreclosure activities do not qualify as "debt collection". While the Act did not define the term "debt collection", case law interpreted it to mean the "activity undertaken for the general purpose of inducing payment". *McLaughlin v. Phelan Hallinan & Schmieg, LLP*, 756 F.3d 240, 245 (3d Cir. 2014). There is a caveat to this definition however. When reviewing Section 1692a(5)'s definition of "debt", it stands out that Congress has elected to limit it to an "obligation … of a consumer to pay money", which limitation is significant. Based on this limitation, in order for the activity to fall within the definition of "debt collection", it must be aimed or directed at collecting money from the consumer and not from *any* other person. *Ho*, at 572 ["debt collection" necessarily involves collection of money from the consumer, as "debt" is "synonymous with 'money'". *Id.* at 571]; *Molina v. F.D.I.C.*, 870 F.Supp.2d 123, 133 (D.D.C. 2012), aff'd in part sub nom. *Molina v. Ocwen Loan Servicing*, 545 F.App'x 1 (D.C. Cir. 2013) [holding that the plaintiff failed to state a claim for violation of FDCPA where he failed to allege that the defendant attempted to collect money from him].

The non-judicial foreclosure activity does not involve collection of money from the consumer. The Ninth Circuit, which is the first Circuit that has thus far recognized that the "debt collection" is limited to activity designed to induce payment from the consumer (and construed this limitation in the context of a non-judicial foreclosure), explained that, while different courts have come to different conclusions regarding the purpose of a non-judicial foreclosure sale,[2] the undeniable effect of the non-judicial foreclosure sale is collection of money from the purchaser of the property and not from the delinquent consumer/borrower. *Ho*, at 572. In *Obduskey,* the Tenth Circuit agreed with the Ninth Circuit's reasoning, explaining that, unlike judicial foreclosure, which permits recovery of deficiency judgments from the defaulted borrowers, non-judicial foreclosure activity does not provide for recovery of such deficiency. *Obduskey*, at 1221-22 ["non-judicial foreclosure proceeding … only allows 'the trustee to obtain proceeds from the sale of the foreclosed property, and no more.'"]; *see also*, *Ho*, at 571 [under California law, non-judicial foreclosure sale extinguishes the entire debt and the borrower is not subjected to a deficiency judgment].

Third and finally, the provisions of 15 U.S.C. § 1692f(6) do not in any way alter the conclusion reached in *Ho* and *Obduskey*. While the Circuits disagree as to whether the non-judicial foreclosure process and the entities involved in it are subject to the provisions of Section 1692(f)(6),[3] that divergence does not affect the determination of the underlying issue of whether non-judicial foreclosure activities amount to "debt collection". Even if the provisions of Section 1692f(6) were applicable to the non-judicial foreclosure process, they would only impose limits on the activities prohibited thereunder, *i.e.*, commencing or threatening the non-judicial foreclosure "to effect dispossession… of property if - (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest; (B) there is no present intention to take possession of the property; or (C) the property is exempt by law from such dispossession or disablement." *Ho*, at 573; 15 U.S.C. § 1692f(6). They have no impact on the general classification of the non-judicial foreclosure activity as "debt collection".

The potential impact of an adverse ruling on the mortgage industry and State laws. If the Supreme Court agrees with Mr. Obduskey, finding that the non-judicial foreclosure process falls within the provisions of the Act, that ruling will have drastic effect on State laws and the mortgage industry. Such ruling would interfere with State foreclosure laws, requiring States to re-write their foreclosure statutes.

For example, 15 U.S.C. § 1692g, requires that the initial communication between a debt collector and a consumer (or subsequent communication made within five days thereafter) include notice of the consumer's right to request the debt collector to obtain validation of the debt. The form Notice of Default currently prescribed by California *Civil Code* § 2924c, as well as the additional "Summary of Key Information" now required by California *Civil Code* § 2923.3, both refer the consumer directly to the trust deed beneficiary or loan servicer. The Notice of Default forms, which must be mailed to the consumer at the inception of the foreclosure, and which would constitute the initial communication to the consumer, could be attacked in many respects as "overshadowing" the verification notice, which is a violation of FDCPA section 1692g.

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Non-Judicial Foreclosure Process (continued from page 9)

15 U.S.C. § 1692g also requires that if the consumer contacts the debt collector, requesting verification of the debt, all collection activities must cease until such verification is provided. However, during the thirty day period following the recording of the Notice of Default, trustees are required under California *Civil Code* § 2924b(b)(1) and 2924b(c)(1) to make two separate mailings. Should a notice of dispute be received during that initial thirty day period, the trustee *could* be prevented from complying with the State's foreclosure requirements. The validity of the foreclosure would thus be called into question, requiring the entire process to be started anew, including the purchase of a new title report (called the "trustee's sale guaranty") and new recording and mailing expenses, with no guidance as to who would be responsible to pay these expenses.

15 U.S.C. § 1692c(b) generally prohibits a debt collector from communicating with third parties concerning the subject debt. Yet, the trustee is required by California statute to record notices in the public records, mail them to junior lienholders and others, and finally to post them on the property and publish them in the newspaper. These third party communications are vital to advertise the foreclosure, in part for the benefit of the consumer, as well as to provide a warning, consistent with the requirements of due process, to those whose junior liens would be extinguished by the foreclosure. All of these communications *could* become illegal if the FDCPA were applied to non-judicial foreclosures in California.[4]

In conclusion, most loan servicers, their foreclosure trustees and law firms, have historically treated the non-judicial foreclosure process, consisting of the issuance, recording, posting, and mailing of foreclosure notices and the conducting of trustee's sale, as falling outside of the Act. But, with recent conflicting decisions between the 4th, 6th, 9th and 10th Circuits, the U.S. Supreme Court will attempt to resolve the issue once and for all, in the *Obduskey* case. While the industry is optimistic that the Supreme Court will agree with the 9th and 10th Circuits, a negative decision could have significant impacts on the servicing and non-judicial foreclosure industries.[5]

If you have any questions regarding this issue or any other matter, please contact Robert Finlay at rfinlay@wrightlegal.net or Luke Wozniak at lwozniak@wrightlegal.net.

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[1] The Act reasoned that the legislation was necessary because the abusive debt collection practices – such as "[d]isruptive dinnertime calls, downright deceit, and more", including "obscene or profane language, threats of violence, … misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process…" – all contributed to "personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." *Henson v. Santander Consumer USA Inc.*, 137 S.Ct. 1718, 1720, 198 L.Ed.2d (2017); Senate Report No. 95-382, *supra*, p.2; 15 U.S.C. § 1692(a).

[2] *See*, *Ho*, at 572 [citing to *Burnett* v. *Mortg. Elec. Registration Sys., Inc.*, 706 F.3d 1231, 1239 (10th Cir. 2013) and *Alaska Tr., LLC* v. *Ambridge*, 372 P.3d 207, 228 (Alaska 2016) (Winfree, J., dissenting) for the proposition that non-judicial foreclosure does not involve collection of money but merely sale or real estate and *Glazer* v. *Chase Home Fin. LLC*, 704 F.3d 453, 463 (6th Cir. 2013) for the proposition that "the ultimate purpose of foreclosure is the payment of money".]

[3] *See, e.g.*, *Obduskey*, at 1221, fn. 4 [holding that non-judicial foreclosure actions do not fall within the provisions of Section 1692f(6)]; and *Ho*, at 572-73 [finding that a foreclosure trustee falls under the definition of "debt collector" under the provisions of Section 1692f(6).]

[4] A negative ruling could also create conflict with Nevada, Washington and Oregon's mandatory non-judicial foreclosure mediation programs, e.g., Washington's RCW 61.24.163 and Oregon's ORS 86.726.

[5] For copies of Wright, Finlay & Zak's amicus brief or, for any of the other briefs, please feel free to contact Luke Wozniak or Robert Finlay.

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Appellate Court Confirms HOBR Compliance and Rejects New Theories on Appeal

by Ruby J. Chavez, Esq.

In a published opinion, the Fourth Appellate District of the State of California affirmed judgment in favor of our clients, Select Portfolio Servicing, Inc. and Wilmington Trust, NA, successor trustee to Citibank, N.A., as Trustee (collectively, "Respondents"), against the borrowers on a loan, following the grant of our summary judgment motion.

Borrowers had sued Respondents for allegedly violating the Homeowner's Bill of Rights ("HOBR") and the Business & Professions Code section 17200, et seq. ("B&P 17200") but Respondents prevailed on a motion for summary judgment and Borrowers appealed. On appeal, Borrowers argued that triable issues of fact remain regarding their causes of action for violation of the HOBR and the B&P 17200. While the operative complaint alleged that Respondents never made an attempt to contact Borrowers prior to recording the Notice of Default, the Court found that the evidence demonstrated many attempts to contact the Borrowers and that Respondents had made actual contact in compliance with Civil Code section 2923.55. Borrowers' failure to recall the calls and conversations was not enough to show that a triable issue remains on the issue of whether these contact were made. Also, the fact that calls were initiated by the Borrowers would still constitute compliance with Civil Code section 2923.55. Significantly, the Court rejected Borrowers' argument that contacts initiated by the Borrowers would not satisfy Section 2923.55, stating that any contacts sufficed, regardless of who initiated them.

Although the opinion noted that Respondents had raised an issue as to the effect of the sunset provisions in HOBR, it determined that the issue was unnecessary to the resolution of the appeal, though it did note some of the provisions that had been sunsetted were carried forward in other statutes. In any event, more recent amendments to HOBR, effective January 1, 2019 now moot the argument.

Appellants also attempted to create a triable issue of fact by arguing new theories on appeal, such as insufficiencies in the loan modification denial letter; however, the Court would not consider these new claims made outside of the operative complaint and found that Respondents did not violate the provisions of Civil Code section 2923.6 alleged in the operative complaint.

The Court also found, contrary to Borrowers' claim, that the lower court had properly overruled Borrowers' objections to the Declaration submitted by Respondents in support of the Motion for Summary Judgment. The Court held that the lower court had acted within its discretion because the objections did not comply with California Rules of Court, Rule 3.1354(b)(3), which requires that the a litigant quote or set forth the objectionable statement or material to which objection is made.

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WFZ PROFILE:
LESLIE G. BAIRD, ESQ.
OF COUNSEL

Leslie G. Baird, Esq.
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Leslie G. Baird recently joined Wright, Finlay, and Zak's Compliance, Licensing, and Regulatory Division as Of Counsel. Her practice focuses on state and federal regulatory compliance matters related to mortgage origination. She has extensive experience advising businesses of all sizes on licensing, operational compliance, and regulatory examinations.

Ms. Baird's professional experience has given her insight into various matters associated with regulatory compliance including, but not limited to, the development of policies and procedures designed to comply with state and federal regulations; the review and overhaul of company operations to increase both efficiency and compliance with state and federal regulations; the management of and response to regulatory examinations; the preparation and evaluation of data to comply with regulatory reporting requirements; and the management of all aspects of licensing.

Ms. Baird is from Las Vegas, NV. She earned her B.S. from Brigham Young University in 2008. She later returned to Brigham Young University and earned her J.D. from the J. Reuben Clark Law School in 2012. During her graduate career, Ms. Baird became a Utah Court Roster Mediator, worked as a Dean's Fellow in the Academic Success Program, was an Associate Editor of the International Law and Management Review, and was regularly on the Dean's List. After graduation, she clerked for the Honorable Todd Shaughnessy, Robin Reese, Katie Bernards-Goodman, and Elizabeth Hruby-Mills of the Utah Third District Court. Upon completion of her clerkship, she took a position as in-house counsel with a mortgage originator.

Ms. Baird takes great pride in her practice and in developing relationships with her clients. She seeks to develop creative solutions that meet clients' varied needs and ensure compliance with state and federal regulations. Ms. Baird also strives to be involved in the compliance community and is an active member of the Utah MBA Operational and Compliance Forum.

When Ms. Baird is not working, she enjoys spending time in the gorgeous Utah mountains with her growing family. She and her husband will welcome their third girl in early 2019. She enjoys traveling, baking, and rock climbing.

UPCOMING INDUSTRY EVENTS

Date	Organization	Event	Location
January 16-18	IMN	16th Annual Winter Forum on Real Estate Opportunity & Private Fund Investing	Laguna Beach, CA
January 28-31	MBA	Independent Mortgage Bankers Conference	San Francisco, CA
February 3-5	WBA	32nd Annual Lenders and Credit Officers Conference	Dana Point, CA
February 6-8	CMA	2019 Winter Seminar	Newport Beach, CA
February 7-8	IMN	3rd Annual The NPL Notes & Default Servicing Forum (East)	Fort Lauderdale, FL
February 10-13	ABA	National Conference for Community Bankers	San Diego, CA
February 10-13	MBA	CREF/Multifamily Housing Convention & Expo	San Diego, CA
February 11-12	IMN	9th Annual Bank Special Assets & Credit Officer's Forum	Miami, FL
February 13-15	CREW	2019 CREW Network Winter Leadership Summit	New Orleans, LA
February 25-28	MBA	National Mortgage Servicing Conference & Expo	Orlando, FL

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WFZ FIRM NEWS

WFZ WELCOMES ITS NEW ATTORNEYS!

NICHOLAS G. HOOD
Mr. Hood joins our Newport Beach office as Senior Counsel. He has significant litigation experience concerning contracts, real estate, partnerships, and business matters. Prior to joining the firm, Mr. Hood served as vice president and in-house counsel for a large construction company. Mr. Hood has represented clients in matters totaling hundreds of millions of dollars in real estate and business assets. He is a published author in numerous industry and trade journals and often speaks on real estate and other business topics. Mr. Hood is licensed to practice in California.

POOJA KUMAR
Ms. Kumar joins our Las Vegas office as an Associate. Prior to joining the firm, Ms. Kumar practiced in premises liability for three years, was Managing Attorney at a busy plaintiff personal injury law firm, and worked in construction defect and general liability litigation. Since joining Wright, Finlay & Zak, Ms. Kumar has focused primarily on consumer finance litigation. She was named one of the 10 Best Attorneys in Client Satisfaction by the American Institute of Personal Injury Attorneys for 2018. Ms. Kumar is licensed to practice in Nevada.

LESLIE G. BAIRD
Ms. Baird joins WFZ's Compliance, Licensing and Regulatory Division as Of Counsel. Her practice focuses on state and federal regulatory compliance matters related to mortgage origination. Prior to joining WFZ, Ms. Baird was an in-house counsel for a residential mortgage company in its regulatory and compliance division. Ms. Baird has extensive experience with licensing, operational compliance, and regulatory examinations throughout the country. Ms. Baird is licensed to practice in Utah.

AMY J. SMITH
Ms. Smith joins our Las Vegas office as an Associate. Her prior experience included criminal defense, criminal prosecution, and workers' compensation defense. Since joining Wright, Finlay & Zak, Ms. Smith has focused primarily on real estate litigation, including lender and servicer liability defense, wrongful foreclosure defense, title curative matters and title disputes. Ms. Smith is a member of the Howard D. McKibben American Inn of Court and is licensed to practice in Nevada.

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