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9th Circuit Holds Judicial Foreclosure without Deficiency Judgment is NOT Debt Collection

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In the battleground of FDCPA litigation, creditors and creditor attorneys are gaining more clarity in the west coast regarding how to approach the threshold question: **Am I a debt collector when I foreclose on a security interest without seeking a money judgment?**

For anyone tracking the saga, it was clear based on a 2002 Oregon District Court decision, *Hulse v. Ocwen Fed. Bank*[1], that the federal court didn't believe the FDCPA applied to an Oregon non judicial foreclosure because the object of the action is to foreclose interest in real property, not collect a debt. Add to that the 2017 *Ho v. Recontrust*[2] opinion out of the 9th Circuit, which did a similar analysis of the California non judicial foreclosure process and concluded it was not debt collection. Three years later, in the wake of the Supreme Court's opinion in *Obduskey*, we have another ruling reaffirming and extending the simple rule that actions to enforce a security interest, whether judicial or non judicial, are NOT debt collection, if there is no legal request to seek a deficiency judgment. This opinion can be found at *Barnes v. Routh Crabtree Olsen PC,* 963 F.3d 993 (2020). Based on the ruling in *Barnes*, attorneys handling judicial foreclosures on behalf of mortgage secured clients, will not be subject to the FDCPA. This ruling is helpful not just for the outcome, but also because of the rationale used by the court.

Most importantly, the 9th circuit analyzed the legal steps required under state law to effect enforcement of a security instrument (i.e. providing notices of default, notices of sale, etc.) and took a look at the judicial foreclosure regime in Oregon (which is similar to several other states with regards to deficiency judgment process) and opined that "the potential for federal-state conflict is even more fraught for judicial foreclosure which is administered by state judges." The court stated that if a plaintiff doesn't seek to collect a debt in the foreclosure, it would be reluctant to construe the FDCPA in a manner that interferes with state judicial procedures for enforcing security interests. The court acknowledged the federal vs. state role in regulating conduct surrounding foreclosures and debt collection. It drew a clear line in the sand for Oregon cases and opened a window that could be used in other states, certainly within the 9th circuit.

Could this ruling have applicability outside of the 9th circuit? This ruling could be useful when defending FDCPA cases in certain judicial foreclosure actions within the 9th circuit where the creditor wasn't requesting a deficiency judgment and deficiency isn't allowed by operation of law. And in fact, a recent opinion out of the Federal Western District of Washington cited to *Barnes* when dismissing an FDCPA claim made against a firm that had filed a judicial foreclosure complaint. See *Aurora Fin. Group v. Tollefson*, 2020 U.S. Dist. LEXIS 150389. However, in *Tollefson*, the plaintiff had requested a deficiency

[1] 195 F. Supp. 2d 1188. (D. OR. 2002)
[2] 858 F.3d 568 (9th Cir. 2017)

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judgment, but the court dismissed the FDCPA claim due to the lack of facts to support an FDCPA violation; the borrower failed to allege that there was an action taken in violation of the FDCPA outside of the mere filing of the complaint for judicial foreclosure with a deficiency judgment.

The Barnes opinion also cites to the Court's 2018 opinion in *McNair v. Maxwell & Morgan* PC[3] where the court breaks down a homeowner association judicial foreclosure and ultimately concludes it to come within the purview of the FDCPA because the praecipe and writ used to collect on the unpaid assessments and attorneys fees was part of a judicial foreclosure scheme that "in many cases" allowed for deficiency judgments.

What does the Barnes case mean for creditors and their attorneys going forward? Keep in mind most of the foreclosures in the 9th circuit proceed non judicially (except those in Hawaii and Guam) and non judicial foreclosure actions have been covered by the Supreme Court's ruling in *Obduskey* holding those actions are – in and of themselves – not debt collection. That said, if counsel suggests that a judicial foreclosure might be required, servicers and investors will need to be aware of the risks in requesting a deficiency judgment. If there is a request to collect money beyond the enforcement of the security interest, it will place the creditor and its law firm at risk for further FDCPA attack. Those risks might not outweigh the potential ability to recover on the deficiency judgment. Decision making on whether to pursue deficiency will need to be made on the outset of the case, since much of the decision making regarding FDCPA liability will occur based on the complaint itself, especially in the context of a motion to dismiss or motion for summary judgment, where discovery and further evidence is not likely to make its way into the record before the court.

[3] 893 F.3d 680.