FDCPA update: Sixth Circuits takes minority view on foreclosure as debt collection

Dykema Gossett PLLC
Amy R. Jonker

DYKEMA

USA
February 19 2013

Author page »

In Glazer v. Chase Home Finance, LLC, --- F.3d ---, 2013 141699 (6th Cir. 2013), the Sixth Circuit joined the Third and Fourth Circuits in the minority holding that mortgage foreclosure consitutes debt collection under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. ("FDCPA"). Courts across the country are split regarding whether the FDCPA covers foreclosures. Some courts have found that foreclosures, both non-judicial and judicial (or by lawsuit), are not debt collection because they do not attempt to collect funds but to foreclose a security interest in real property. Other courts have found that where a foreclosure, either judicial or non-judicial, attempts to collect funds (for the deficiency, collection costs, or amounts to reinstate the loan) or where the foreclosing entity obfuscates the truth regarding the loan payments or amounts, the FDCPA may apply.

On January 14, 2013, the Sixth Circuit reasoned that mortgage foreclosure is debt collection because, although the FDCPA does not define "debt collection," the definition of the terms "debt" and the FDCPA's substantive provisions governing how debt collection is performed, including §§ 1692(f)(6) (governing security interest enforcement) and 1692i(a)(1) (governing venue for enforcement of security interests in real property), indicate that mortgage foreclosure is debt collection under the FDCPA. Id. At *6.

Some courts have found that inclusion § 1692(f)(6) in the FDCPA logically excludes from the remainder of the FDCPA general enforcement of security interests so that judicial foreclosures are not governed by the FDCPA and non-judicial foreclosures are subject only to § 1692f(6). The FTC Staff Commentary appears to support the majority interpretation: "Security enforcers. Because the FDCPA's definition of 'debt collection' includes parties whose principal business is enforcing security interests only for section 808(6) purposes, such parties (if they do not otherwise fall within the definition) are subject only to this provision and not to the rest of the FDCPA." 53 FR 50097-02, 1988 WL 269068 (F.R.).

The Sixth Circuit countered that interpretation with the explanation that § 1692(f)(6) "does not except from debt collection the enforcement of security interests; it simply makes clears that some persons who would be without the scope of the general definition are to be included where § 1692(f)(6) is concerned." Id. At *8 (citing Piper v. Portnoff Law Assocs., Ltd. 396 F.3d 227 (3rd Cir. 2005). The Sixth Circuit's minority position is notable as it adds not just a flat

ruling but a thoroughly reasoned analysis to the mix of analyses in an area of the FDCPA that is in dispute among various courts around the country and could have far-reaching consequences for anyone dealing with mortgage foreclosures and particularly for those whose handling of them began after the consumer's default.

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