

[Banking and Finance Law Daily Wrap Up, TOP STORY—10th Cir.: Nonjudicial mortgage foreclosure not debt collection in Colorado, \(Jan. 22, 2018\)](#)

Banking and Finance Law Daily Wrap Up

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By [Richard A. Roth, J.D.](#)

The Fair Debt Collection Practices Act does not apply to nonjudicial mortgage foreclosures under Colorado law, according to the U.S. Court of Appeals for the Tenth Circuit. Nonjudicial foreclosures are not debt collection, the court said. The mortgage servicing company was not a debt collector because the mortgage was not in default when it was transferred for servicing, the opinion added ([Obduskey v. Wells Fargo](#), Jan. 19, 2018, Kelly, P.).

As outlined by the opinion, Wells Fargo began servicing the homeowner's mortgage while it was still current. After the mortgage fell into default, the company started, but halted, foreclosures several times over a six-year span. In 2014, the company hired a law firm, McCarthy & Holthus, to initiate a nonjudicial foreclosure. That process was started by a letter to the homeowner in which the firm said that it had been instructed to begin foreclosure and that it "may be considered to be a debt collector attempting to collect a debt." The homeowner responded with a suit claiming FDCPA violations.

The appellate court had little difficulty deciding that Wells Fargo was not a debt collector because it had begun servicing the mortgage when it was not in default. The principal question was whether the law firm was attempting to collect a debt. If not, it was not a debt collector, and the provisions of the FDCPA were irrelevant to it.

Nonjudicial foreclosures. There is considerable disagreement among the courts about whether nonjudicial mortgage foreclosure is debt collection, the court first noted. Three U.S. appellate courts and the Colorado Supreme Court have decided that nonjudicial foreclosures constitute debt collection, while one appellate court—the Ninth Circuit—and "numerous" U.S. district courts have determined that the FDCPA is not implicated.

The Tenth Circuit decided that nonjudicial foreclosures are not debt collection as contemplated by the FDCPA, at least under Colorado law. The salient fact was that the law firm had not demanded any payment from the homeowner.

"[E]nforcing a security interest is not an attempt to collect money from the debtor," the court said. It disregarded the homeowner's argument that the end goal of any foreclosure is obtaining payment on the debt.

A judicial foreclosure suit allows the creditor to obtain a deficiency judgment against the debtor if the sale proceeds do not pay the debt in full, the court pointed out. A nonjudicial foreclosure gives the creditor only the sale proceeds and requires a creditor that wants a deficiency judgment to file a separate suit after the sale. Since the law firm's communications with the homeowner had never included any demand for payment, there was no effort to collect a debt, the appellate court concluded.

Other considerations. Two points bear noting. First, the FDCPA does not define explicitly what constitutes debt collection. However, it does define "debt collector" as anyone who collects or attempts to collect "debts owed or due or asserted to be owed or due another." It does not explicitly say that a debt collector must be collecting or attempting to collect money directly from the debtor (15 U.S.C. §1692a).

Second, the Tenth Circuit's decision conflicts with a Colorado Supreme Court decision on whether Colorado nonjudicial foreclosures constitute debt collection ([Shapiro & Meinhold v. Zartman](#), 823 P.2d 120 (1992)).

Generally, it might be thought that the state court would be the authority when the interpretation of state law is in

question. The apparent conflict could be resolved by remembering that the Tenth Circuit viewed the issue as the interpretation of the FDCPA, not Colorado state law.

The case is [No. 16-1330](#).

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Companies: McCarthy & Holthus, L.L.P.; Wells Fargo, Wells Fargo Bank, Wells Fargo Bank, N.A.; Wells Fargo & Co.; Wells Fargo Home Mortgage

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