

[Banking and Finance Law Daily Wrap Up, TOP STORY—9th Cir.: Nonjudicial mortgage foreclosure process not debt collection activity in California, \(Oct. 20, 2016\)](#)

Banking and Finance Law Daily Wrap Up

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

A mortgage trustee using California's nonjudicial foreclosure process was not engaged in debt collection activities, according to a majority of a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit. The trustee's notices to the homeowner did not demand any payment, and state law prohibited deficiency judgments after nonjudicial foreclosures. As a result, the trustee had not attempted to collect a debt from the homeowner, making the Fair Debt Collection Practices Act inapplicable (*Ho v. ReconTrust Co., NA*, Oct. 19, 2016, Kozinski, A.).

Nonjudicial foreclosure process. When the homeowner fell behind in her mortgage loan payments, ReconTrust, trustee under the trust deed that secured the mortgage, took the first step in the nonjudicial foreclosure process—recording a notice of default and mailing the notice to the homeowner. When the homeowner did not cure the deficiency, ReconTrust took the second step—recording a notice of sale and mailing the notice to the homeowner.

Both notices were required by California law. Neither explicitly asked for any payments, but both warned the homeowner that her home could be sold at auction if she did not cure the default.

Rather than bringing her mortgage current, the homeowner sued ReconTrust, as well as Countrywide Home Loans, the creditor. The suit alleged a number of violations of federal law, among them being that ReconTrust had violated the FDCPA by sending notices that misrepresented the amount the homeowner owed. This claim was dismissed by the federal district court judge after he decided that ReconTrust was not a debt collector.

What's a debt collector? Under the FDCPA, a debt collector is a person that "regularly collects or attempts to collect, directly or indirectly, debts owed" to someone else (15 U.S.C. §1692a). A debt is "an obligation . . . of a consumer to pay money." Applying these definitions, the majority said that ReconTrust would be a debt collector only if it attempted to collect money from the homeowner.

The majority noted that there was a second definition of "debt collector" that applied specifically to persons who were enforcing security interests. However, that narrower definition only was relevant if the putative debt collector violated a foreclosure-specific provision of the FDCPA, and there was no claim that ReconTrust had done so. Only the general definition mattered.

No collection attempt. ReconTrust never attempted to collect any money from the homeowner, either directly or indirectly, the majority said.

In California, a nonjudicial foreclosure sells the property and collects money from the buyer, not from the homeowner, the majority said. No deficiency judgment was permitted after the sale, meaning the debt was extinguished and no money could be collected from the homeowner.

Yes, the majority conceded, the threat of a foreclosure could be "an inducement to pay off a debt." That inducement, however, arose from the lien and would be present regardless of whether foreclosure proceedings took place.

The enforcement of a security interest could be debt collection activity, but is not necessarily debt collection activity, the majority summarized. The notices sent by ReconTrust were not debt collection activity.

Broader "activities." Everything that ReconTrust did constituted enforcing a security interest without crossing over the line to being debt collection, according to the majority. ReconTrust could not conduct a trustee's sale until it sent the required notices. "The right to 'enforce' the security interest necessarily implies the right to send the required notices; to hold otherwise would divorce the notices from their context," the majority said.

Federal-state conflict. Deciding that the nonjudicial foreclosure process constituted debt collection would subject trustees to FDCPA duties that would frustrate their ability to comply with California law, the majority also said. State law required the trustee to send notices directly to homeowners that might be banned by the FDCPA, and it also required that notices be published in ways that the FDCPA might deem to be illegal communications with third parties. The FDCPA debt verification rights also could conflict with state law notice deadlines, the majority warned.

If there was a choice between two reasonable interpretations of federal law, one that would conflict with state law and one that would not, principles of federalism counseled selecting the latter, the majority said.

Dissenting opinion. Judge Korman dissented from the majority opinion, arguing that considering ReconTrust to be a debt collector was "the only reasonable reading" of the FDCPA. A foreclosure proceeding forecloses the homeowner's interest in the property and uses the proceeds to pay off some or all of the homeowner's debt, with any excess being paid to the homeowner.

There was no question that the purpose of a foreclosure is the payment of money, the dissenter said. Moreover, since the FDCPA includes among debt collectors those who collect indirectly, the act clearly applies to trustees who carry out foreclosure sales.

Judge Korman also asserted that there were no significant conflicts between the California foreclosure law and the FDCPA. The state and federal laws could both operate without exempting all trustees engaged in foreclosures.

He noted that the FDCPA preempts only state laws that are inconsistent with the federal law. The homeowner's FDCPA claim was that ReconTrust sent notices that misstated the amount due, and providing a remedy for that would not conflict with California nonjudicial foreclosure laws.

The case is [No. 10-56884](#).

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Companies: Bank of America, N.A.; Countrywide Home Loans, Inc.; ReconTrust Company, NA

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