

[Banking and Finance Law Daily Wrap Up, DEBT COLLECTION—9th Cir.: Judicial foreclosure to collect unpaid HOA fees is debt collection, \(Jun. 26, 2018\)](#)

Banking and Finance Law Daily Wrap Up

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

A law firm that began judicial foreclosure proceedings to collect delinquent assessments and other charges that were owed to the homeowners association it represented was engaged in debt collection, according to the U.S. Court of Appeals for the Ninth Circuit. The court drew a distinction between judicial foreclosures and nonjudicial foreclosures, which are not debt collection, in ordering a summary judgment in favor of the homeowner's Fair Debt Collection Practices Act claim ([McNair v. Maxwell & Morgan PC](#), June 25, 2018, Arterton, J.)

Over a four-year term, the homeowner and the HOA engaged in two suits over unpaid assessments. Both suits were settled, but the homeowner defaulted on both settlement agreements. The second agreement included the homeowner's explicit acknowledgement that the HOA could enforce it by foreclosing on and selling her property.

After the second default, the law firm obtained from the state court a writ of special execution that allowed it to foreclose. After the foreclosure, the homeowner sued the firm in federal court, claiming that it had misrepresented the amount of the debt and sought attorney fees that were not permitted in violation of the FDCPA. These claims were rejected by the U.S. district judge, who decided that first, foreclosure was not debt collection, and second, the state court's subsequent approval of the requested attorney fees meant the FDCPA had not been violated.

Debt collection. The money owed to the HOA was a consumer's obligation to pay money arising from a transaction for personal, family, or household purposes, the appellate court began. That made the obligation a debt under the FDCPA. Since the law firm regularly collected debts owed to others, it was a debt collector, the court said. The district court judge's contrary decision "cannot be reconciled with the language of the FDCPA," the court continued.

The law firm argued that foreclosing to enforce a security interest does not constitute debt collection under *Ho v. ReconTrust Co., NA* (see [Banking and Finance Law Daily](#), Oct. 20, 2016). *Ho* was inapplicable, the court replied. *Ho* involved a nonjudicial foreclosure in which there was no possibility of a deficiency judgment against the homeowner, the court pointed out. The nonjudicial foreclosure would use the sale proceeds to reduce the debt, but would not recover anything from the homeowner. In fact, since state law prohibited a deficiency judgment after a nonjudicial foreclosure, the homeowner's entire debt was effectively extinguished even if the sale proceeds were insufficient to repay the debt in full.

The judicial foreclosure process used by the law firm in this case did not have that effect, the court said. A deficiency judgment against the homeowner, and subsequent collection of money from her, was possible. That made the foreclosure debt collection.

Impermissible fees. The law firm's application for the writ of special execution included attorney fees that had been agreed to as well as "accruing attorney fees" that were not included in the settlement agreement. Moreover, state law required court approval of any post-judgment fees. The homeowner asserted that, as a result, the law firm had misrepresented the legal status of the debt by implying the accruing fees had judicial approval.

The appellate court agreed with the homeowner's position and decided that the FDCPA had been violated. The state court's subsequent approval of the fee request did not mean the representation was accurate when it was made.

However, the basis for the district court judge's summary judgment order meant he had not considered whether the homeowner had suffered any damages from the misrepresentation. The later approval of the fee request might mean that the homeowner had not been harmed, the appellate court observed. The suit was remanded so the judge could decide what damages, if any, were due the homeowner.

The case is [No. 15-17383](#).

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Companies: Maxwell & Morgan PC

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