No. 17-1307

IN THE
SUPREME COURT OF THE UNITED STATES

DENNIS OBDUSKEY,
Petitioner,
v.
MCCARTHY & HOLTHUS LLP, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMICUS BRIEF OF LEGAL LEAGUE 100 IN SUPPORT OF RESPONDENTS

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The Legal League 100 ("Legal League") is a national professional association comprised of more than 100 financial services law firms that are committed to supporting the mortgage servicing industry through education, communication, relationship development, and advisory services.[1] Legal League is a driving force for industry standards, market research and policy change, holding annual summits and frequent webinars to educate its members on trending issues in the mortgage servicing industry. Most recently, the Legal League hosted a webinar titled Complex Default Litigation focusing on issues being litigated under the Unfair, Deceptive, or Abusive Acts or Practices ("UDAAP"), Fair Debt Collection Practices Act ("FDCPA"), Real Estate Settlement Procedures Act ("RESPA"), and complex foreclosure rules. FDCPA application remains a focus for the mortgage servicing industry in trying to navigate the non-judicial foreclosure process.

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[1]Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The counsel of record received timely notice of the intent to file the brief under this Rule and consent was granted.

SUMMARY OF THE ARGUMENT

Debt collection is the collection of debts, by anyone who regularly collects or attempts to collect, debts owed to another. Debt is an obligation of a consumer to pay money. Law firms that engage in non-judicial foreclosures do not collect a debt as defined by the FDCPA. These firms' issue, record, post, publish foreclosure notices and conduct a foreclosure sale all of which are activities that do not fall under the scope of the FDCPA. The FDCPA, under 15 USC §1692 (e) serves three purposes: a) to eliminate abusive debt collection practices by debt collectors; b) insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged; and c) to promote consistent State action to protect consumers against debt collection abuses. Law firms that engage in non-judicial foreclosures do not seek to collect money from the consumers. Simply put, these firms seek to collect proceeds from the trustee sale.

Non-judicial foreclosures, unlike judicial foreclosures, eliminate deficiency judgments wherein a court mandates the borrower to pay the lender any remaining balance due on the note after the foreclosure sale has concluded. Additionally, judicial foreclosures can take years upon which to foreclose versus non-judicial foreclosures that can take between three and six months. The time saved by lenders that utilize the non-judicial foreclosure process ultimately results in savings to the borrower. In a non-judicial foreclosure, there are limited costs, absent the court's involvement.

In a non-judicial foreclosure, the third party who normally handles the foreclosure process is commonly known as the foreclosure trustee or the

foreclosure attorney. While each state is different, a foreclosure trustee can be an attorney, or a business entity. The goal of the foreclosure trustee is to manage the foreclosure process by maintaining impartiality and not representing either side. The state of North Carolina went so far as to prohibit attorneys, who act as a trustee, from also representing lenders while initiating a foreclosure proceeding. In essence, the requirement that the foreclosure trustee or attorney remains neutral is paramount.

Law firms that engage in non-judicial foreclosures are tasked with pursuing proceeds from a trustee sale which are used to reduce the debt owed on the mortgage. Issuing, recording, mailing, publishing, posting and conducting a foreclosure sale do not induce payment from a consumer. These law firms operate in accordance with state laws to manage the foreclosure process. This practice is not debt collection under FDCPA, wherein the interpretation of debt collection, according to case law, rests on seeking payment from a consumer. In this case, the Petitioner alleges he was attempting to obtain information from the foreclosure attorney regarding the facts about the status of his mortgage account, alleging that the McCarthy law firm, in its trustee role, should have complied with FDCPA. However, FDCPA does not apply to non-judicial foreclosure activities because the activities themselves do not constitute debt collection. The intent of enacting FDCPA was not to run contrary with state laws.

In most states, it is impossible for foreclosure trustees or attorneys *not* to violate FDCPA when state laws requirements for managing the

foreclosure process require disclosure of certain account information of the mortgaged debt to the general public. Public policy considerations should focus on the possibility of opening the flood gates to a plethora of lawsuits against law firms that engage in non-judicial foreclosures for complying with state laws that contradict FDCPA regulation.

ARGUMENT

I. Introduction Non-Judicial Foreclosures and FDCPA

At issue in this action is whether the non-judicial foreclosure process and the act of conducting a trustee's sale qualify as "debt collection" under the Fair Debt Collection Practices Act ("FDCPA" or the "Act"). To fully understand this issue, one must have a general understanding about the non-judicial foreclosure process. While the laws governing the process vary from state to state, the foreclosure process generally commences with the issuance of the first foreclosure notice following the borrower's default under the Note[2] and Deed of Trust,[3] commonly referred to as the Notice of Default. The Notice of Default is recorded in the appropriate county by the entity responsible for conducting the foreclosure process – commonly known as the foreclosure trustee or the foreclosure attorney (hereinafter the "trustee"). Following the issuance of the Notice of Default, as a rule, the trustee issues, mails, records, publishes and posts on the property a second foreclosure notice, commonly referred to as the Notice of Sale. If the sale is not subsequently postponed, on the date listed in the Notice of Sale,

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[2] The Note is a contract that represents a personal promise of a borrower to repay a loan. A non-judicial foreclosure is not in any way seeking the enforcement (or collection) of this personal obligation.

[3] The Deed of Trust is a contract wherein a borrower conveys a security interest (lien) to the lender. The enforcement of the terms of the Deed of Trust against the real property does not give rise to any personal liability or personal obligation of the borrower.

the trustee sells the property at an auction to the highest bidder.

Based on this brief explanation and for the reasons explained below, the Legal League amicus submits that the process of non-judicially foreclosing on real property – *i.e.*, the issuance, recording, posting, and publication of foreclosure notices and the act of conducting the sale – does not fall within the provisions of the FDCPA. Legal League's position is predicated on the analysis of two issues: (1) whether mortgage loans qualify as debt under the Act – likely; and (2) whether non-judicial foreclosure amounts to "collection" of that debt – no.

II. Rationale Behind Enactment of the FDCPA

In 1977, based on the "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors," Congress enacted the FDCPA to eliminate abusive debt collection practices by unscrupulous debt collectors while, at the same time, protecting ethical debt collectors from unnecessary restrictions. Senate Report No. 95-382, p.p. *1-2 (Aug. 2, 1977); 15 U.S.C. § 1692(a) and (e). Congress reasoned that the legislation was necessary because the abusive debt collection practices – such as "[d]isruptive dinnertime calls, downright deceit, and more," including "obscene or profane language, threats of violence, … misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process…" – all contributed to "personal bankruptcies, to marital instability, to the

loss of jobs, and to invasions of individual privacy." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1720, 198 L.Ed.2d (2017); Senate Report No. 95-382, *supra*, p.2; 15 U.S.C. § 1692(a).

Most notably, Congress found the legislation was necessary because the existing laws and procedures were inadequate to protect individual consumers from the above-referenced practices and that the debts could be adequately collected through means other than abusive collection practices. 15 U.S.C. § 1692(b) and (c); Report No. 95-382, p.p. 2-3. As such, the Act prohibits "'abusive, deceptive, and unfair debt collection practices,' such as late-night phone calls or falsely representing to a consumer the amount of debt owed." *Obduskey v. Wells Fargo*, 879 F.3d 1216, 1219 (10th Cir.) [citing 15 U.S.C. §§ 1692(a), 1692c, and 1692e]; *see also*, *Heintz v. Jenkins*, 514 U.S. 291, 292, 115 S. Ct. 1489, 131 L.Ed.2d 395 (1995) ["The Act says, for example, that a 'debt collector' may not use violence, obscenity, or repeated annoying phone calls, 15 U.S.C. § 1692d; may not falsely represent 'the character, amount, or legal status of any debt,' § 1692e(2)(A); and may not use various 'unfair or unconscionable means to collect or attempt to collect' a consumer debt, § 1692f."]

As discussed below, the process of non-judicially foreclosing does not involve the type of abusive debt collection practices that Congress sought to curtail. Moreover, Congress's reservations concerning inadequacy of the state-specific laws at the time of passing of the FDCPA are unfounded, as each of the non-judicial foreclosure states enacted laws which protect individual borrowers. *See, e.g., Yvanova v. New Century Mortg. Corp.*, 62 Cal.4th 919, 926-27,

365 P.3d 845 (2016) [providing an overview of protections afforded to the borrowers under California non-judicial foreclosure laws and explaining that "[t]he nonjudicial foreclosure system is designed to provide the lender-beneficiary with an inexpensive and efficient remedy against a defaulting borrower, while protecting the borrower from wrongful loss of the property"]; *U.S. Bank Nat. Ass'n v. Castro*, 131 Haw. 28, 39, 313 P.3d 717 (2013) [explaining that "the nonjudicial foreclosure process should protect the debtor from a wrongful loss of property"]; *Bain v. Metro. Mortg. Grp., Inc.,* 175 Wn.2d 83, 93-94, 285 P.3d 34 (2012) [providing an overview of protections afforded to the borrowers under Washington non-judicial foreclosure laws]; *Brandrup v. ReconTrust Co.*, 353 Or. 668, 677-78, 303 P.3d 301 (2013) [same under Oregon laws]; *Patton v. First Fed. Sav. & Loan Ass'n of Phoenix*, 118 Az. 473, 477, 578 P.2d 152 (1978) [explaining that under Arizona law, "lenders must strictly comply with the Deed of Trust statutes, and the statutes and Deeds of Trust must be strictly construed in favor of the borrower"].

III. On Its Face, the Act Does Not Apply to Non-Judicial Foreclosures.

In their respective briefs, the Members of Congress and the National Consumer Law Center *amici* (collectively, "NCLC *amici*") and the Petitioner argued that the FDCPA applies to non-judicial foreclosures because the act of selling the collateral serving as security for a mortgage loan at a private foreclosure sale in order to satisfy the delinquent borrower's mortgage loan constitutes either *direct* or *indirect* collection of the debt. (NCLC *amici* and Petitioner are collectively referred to as the

"Petitioners".) Petitioners' interpretation of the Act is incorrect. The Act applies only to "debt collectors" who "collect" "debt." *Obduskey,* at 1219. Thus, to come within the provisions of the FDCPA, all three prongs must be satisfied – the underlying obligation must qualify as "debt," the entity/person trying to obtain it must be a "debt collector" and the activity must qualify as "collection" of the debt. Contrary to the Petitioners' argument, non-judicial foreclosure activity – which, again, consists of mailing, service, recording, and publication of foreclosure notices (and/or postponements) and, ultimately, conducting of the sale – does not fall squarely within these definitions.

A. First and foremost, the issue of whether mortgage indebtedness falls squarely within the Act's definition of "debt" is not a foregone conclusion.

While, on its face, mortgage indebtedness appears to satisfy the definition of "debt" articulated in Section 1692a(5), a closer examination of other provisions of the Act demonstrates that Congress did not intend to engage in a simple, "check the box" type of analysis when dealing with mortgage indebtedness. For instance, in Section 1692a(6)(F), Congress excluded from the definition of "debt collector" persons who are foreclosing (whether judicially or non-judicially) on mortgage debt that was not in default when they obtained it, whether it be for purposes of servicing the loan or its collection. *Henson*, 137 S. Ct. at 1723-24. *See also*, S. Rep. No. 95-382, at 3-4. As a result, in such situation, non-judicial foreclosure of a previously performing loan would not fall within the purview of the Act.

Moreover, in limiting Section 1692i's venue provision to judicial foreclosures only (*Obduskey*, at 1222 – recognizing that the term "action" applies to a judicial proceeding), Congress – while being well aware of the fact that more than half of the states have laws governing non-judicial foreclosures – appears to have made a conscious decision to exempt or otherwise exclude the non-judicial foreclosure process from the Act's provisions. *See, e.g., Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 259, 129 S. Ct. 788, 172 L.Ed.2d 582 (2009) [in assessing the Congress' intent the Court evaluates the state of law at the time the statute is passed]; *Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor v. Perini N. River Assocs.*, 459 U.S. 297, 319, 103 S. Ct. 634, 74 L.Ed.2d 465 (1983) [the Court "may presume 'that our elected representatives, like other citizens, know the law'"]; *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40, 129 S. Ct. 2484, 174 L.Ed.2d 168 (2009) ["Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."]; *Loughrin v. United States*, 573 U.S. 351, 134 S. Ct. 2384, 2390, 189 L.Ed.2d 411 (2014) ["We have often noted that when 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court 'presume [s]' that Congress intended a difference in meaning."]; *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725, 198 L. Ed. 2d 177 (2017) ["[W]hile it is of course our job to apply faithfully the law Congress has written, it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress

might have done had it faced a question that, on everyone's account, it never faced... Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known 'pursues its [stated] purpose [ ] at all costs.'"] [internal citations omitted]; *Townsend v. Yeomans*, 301 U.S. 441, 451, 57 S. Ct. 842, 81 L. Ed. 1210 (1937) ["the Legislature, acting within its sphere, is presumed to know the needs of the people of the state."]

Based on this authority and given the language of the Act itself, it is therefore evident that a more detailed analysis (than the one suggested by the Petitioners) is necessary. But, even if mortgage indebtedness falls within the provisions of the definition of "debt," as discussed below, the process of non-judicially foreclosing on a delinquent mortgage loan does not constitute "collection" under the Act.

B. The Act does not apply to non-judicial foreclosure activities because they do not qualify as "debt collection."

While the Act did not define the term "debt collection," case law interpreted it to mean the "activity undertaken for the general purpose of inducing payment." *McLaughlin v. Phelan Hallinan & Schmieg, LLP*, 756 F.3d 240, 245 (3d Cir. 2014) [internal citation omitted]. There is a caveat to this definition, however. When reviewing Section 1692a(5)'s definition of "debt," it stands out that Congress has elected to limit it to an "obligation … <u>of a consumer</u> to pay money." While the NCLS *amici* attempt to gloss over this limitation, the limitation is significant. Based on this limitation, it is evident that, in order for the activity to fall within the

definition of "debt collection," it must be aimed or directed at collecting money from the consumer and not from any other person as the NCLS *amici* suggests.[4] *Vien-Phuong Thi Ho v. ReconTrust Co., NA*, 858 F.3d 568, 572 (9th Cir., 2017) ("*Ho*") [also holding that "debt collection" necessarily involves collection of money from the consumer, as "debt" is "synonymous with 'money.'" *Id.* at 571]; *see also*, *Molina v. F.D.I.C.*, 870 F. Supp.2d 123, 133 (D.D.C. 2012), aff'd in part sub nom. *Molina v. Ocwen Loan Servicing*, 545 F.App'x 1 (D.C. Cir. 2013) [holding that the plaintiff failed to state a claim for violation of FDCPA where he failed to allege that the defendant attempted to collect money from him].

The non-judicial foreclosure activity does not fall within these provisions as it does not involve collection of money from the consumer. The Ninth Circuit, which is the first Circuit that has thus far recognized the fact that the "debt collection" activity is limited to activity designed to induce payment from the consumer and not from some other person

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[4] The NCLS *amici* rely on provisions of Section 1692a(2) and 1692d in their attempt to avoid the consequences of the limitations Congress imposed on the definition of "debt." However, neither of these provisions is relevant to the issues at hand, as they neither address the issue nor aid in making the determination of whether non-judicial foreclosure constitutes "debt collection." Specifically, Section 1692a(2) merely sets forth the definition of "communication," whereas Section 1692d articulates prohibitions on conduct that is harassing, oppressing, or abusing to "any person" in connection with debt collection activity. Neither of these provisions is in any way related to the determination of what activity constitutes "debt collection" or aides in making the determination whether the definition includes non-judicial foreclosure.

(and construed this limitation in the context of a non-judicial foreclosure), explained that, while different courts have come to different conclusions regarding the purpose of a non-judicial foreclosure sale,[5] the undeniable effect of a non-judicial foreclosure sale is collection of money by the trustee from the purchaser of the property and not from the delinquent consumer/borrower. *Ho*, at 572.

In *Hulse v. Ocwen Fed. Bank, FSB*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002), the United States District Court of Oregon, elaborated that foreclosing on a trust deed is distinct from the collection of the obligation to pay money, as payment of funds is not the object of the foreclosure action. Rather, the lender is foreclosing its interest in the property. *Hulse*, at 1204. Consequently, the non-judicial foreclosure sale cannot equate to collection of debt – *i.e.*, money – from the consumer, as, the "FDCPA was intended to curtail objectionable acts occurring in the process of collecting funds from a debtor. But foreclosing on a trust deed is an entirely different path. *Id*. Payment of funds is not the object of the foreclosure action. *Id.* Rather, the lender is foreclosing its interest in the property." *Id.*

Additionally, under 15 U.S.C. § 1692a(6), "the statute's definition of a 'debt collector' clearly reflects Congress's intent to distinguish between the

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[5] *See*, *Ho*, at 572 [citing to *Burnett* v. *Mortg. Elec. Registration Sys., Inc.*, 706 F.3d 1231, 1239 (10th Cir. 2013) and *Alaska Tr., LLC* v. *Ambridge*, 372 P.3d 207, 228 (Alaska 2016) (Winfree, J., dissenting) for the proposition that non-judicial foreclosure does not involve collection of money but merely sale or real estate and *Glazer* v. *Chase Home Fin. LLC*, 704 F.3d 453, 463 (6th Cir. 2013) for the proposition that "the ultimate purpose of foreclosure is the payment of money".]

'collection of any debts' and the 'enforcement of security interests.'" *Gray v. Four Oak Court Ass'n, Inc.*, 580 F. Supp. 2d 883, 887–88 (D. Minn. 2008). As the first sentence of the definition under 15 U.S.C. § 1692a(6), defines a debt collector as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." *Id.* § 1692a(6)." *Id.* While, the third sentence of Section 1692a(6) provides that for purposes of Section 1692f(6), a debt collector is also "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." *Id.*

If the enforcement of a security interest was synonymous with debt collection, the third sentence would be surplusage because any business with a principal purpose of enforcing security interests would also have the principal purpose of collecting debts. *Id.* "Therefore, to avoid this result, the court determines that the enforcement of a security interest, including a lien foreclosure, does not constitute the 'collection of any debt.'" *Id.* Accordingly, the non-judicial foreclosure process and the resulting sale does not and cannot equate to collection of debt – *i.e.*, money – from the consumer and, therefore, does not amount to "debt collection" under the Act.

In *Obduskey,* the Tenth Circuit agreed with the Ninth Circuit's reasoning, explaining that, unlike judicial foreclosure, which permits recovery of deficiency judgments from the defaulted borrowers,

non-judicial foreclosure activity does not provide for recovery of such deficiency. *Obduskey*, at 1221-22 ["non-judicial foreclosure proceeding … only allows 'the trustee to obtain proceeds from the sale of the foreclosed property, and no more.'"]; *see also*, *Ho*, at 571 [under California law, non-judicial foreclosure sale extinguishes the entire debt and the borrower is not subjected to a deficiency judgment].

In *Bourff v. Rubin Lublin*, LLC, No. 1:09-CV-2437-JEC-ECS, 2010 WL 11507208, at *5 (N.D. Ga. Aug. 6, 2010), report and recommendation adopted in part sub nom. *Bourff v. Rubin Lublin, LLC*, No. 1:09-CV-2437-JEC, 2010 WL 11507894 (N.D. Ga. Sept. 22, 2010), vacated and remanded, 674 F.3d 1238 (11th Cir. 2012), the Northern District Court of Georgia held, "the fact that Georgia is a non-judicial foreclosure state further bolsters Defendant's argument that it should not come under the ambit of the FDCPA." citing to *Rousseau v. Bank of New York*, No. 08-CV-00205-PAB-BNB, 2009 WL 3162153, at *7–8 (D. Colo. Sept. 29, 2009) (explaining that courts "have noted the difference between cases involving non-judicial foreclosures, in which FDCPA claims are often disallowed, and cases involving judicial foreclosures, in which claims are permitted"). In conclusion, because the non-judicial foreclosure process is designed solely to sell the collateral which serves as security for the underlying mortgage loan and does not involve actual collection of money from the consumer, it does not and cannot qualify as "debt collection" under the Act. *Id.*

The Petitioners offer no compelling argument to refute this reasoning. They merely rely on the Court's citation to Black's Law Dictionary in *Heintz v. Jenkins*: "[t]o collect a debt or claim is to obtain

payment or liquidation of it, either by personal solicitation or legal proceedings," claiming that foreclosure amounts to "liquidation." *Heintz v. Jenkins*, 514 U.S. 291, 294, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995) [citing to Black's Law Dictionary 263 (6th ed. 1990)]. This reliance is misplaced, as this definition does not apply to non-judicial foreclosures. Specifically, the 6th edition of Black's Law Dictionary defines the term "liquidate" as "[t]o pay or settle" and the term "liquidation" as "[t]he act or process of settling or making clear, fixed, and determine that which before was uncertain or unascertained. Payment, satisfaction, or collection… [t]o clear away (to lessen) a debt." [Black's Law Dictionary, p.p. 930, 931 (6th ed. 1990).] Thus, the Dictionary – and necessarily *Heinz* – refer to liquidation of the debt – through payment or settlement thereof – and not to the liquidation of *collateral* securing the underlying debt. And given that the non-judicial foreclosure sale results in the sale (and not liquidation) of the collateral, it is evident that the non-judicial foreclosure sale does not equate to liquidation specified in *Heinz*.

Legal League recognizes that both, the Ninth and the Tenth Circuit (*Ho*, at 573; *Obduskey*, at 1222) limit their holdings to activities related to non-judicial foreclosure on real property – *i.e.*, mailing, service, recording, and publication of foreclosure notices, and postponements and conducting of the sale – recognizing that activities outside of this process (or activities that are traditionally recognized as debt collection) fall within the purview of the Act. Legal League does not dispute that activities which consist of "traditional debt collection activities [such as] … sending dunning letters,

making collection calls to consumers…" [Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 FR 50097-02], as opposed to non-judicial foreclosure activities described in this Brief fall within the provisions of the Act.

C. The provisions of Section 1692f(6) do not in any way alter the conclusion reached in *Ho* and *Obduskey*.

While the Circuits disagree as to whether the non-judicial foreclosure process and the entities involved in it are subject to the provisions of Section 1692(f)(6),[6] that divergence does not affect the determination of the underlying issue of whether non-judicial foreclosure activities amount to "debt collection." Even if the provisions of Section 1692f(6) were applicable to the non-judicial foreclosure process, they would only impose limits on the activities prohibited thereunder, *i.e.*, commencing or threatening the non-judicial foreclosure "to effect dispossession… of property if - (A) there is nopresent right to possession of the property claimed as collateral through an enforceable security interest; (B) there is no present intention to take possession of the property; or (C) the property is exempt by law from such dispossession or disablement." *Ho*, at 573; 15 U.S.C. § 1692f(6). They have no impact on the general classification of the non-judicial foreclosure activity as "debt collection".

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[6] *See, e.g.*, *Obduskey*, at 1221, fn. 4 [holding that non-judicial foreclosure actions do not fall within the provisions of Section 1692f(6)]; and *Ho*, at 572-73 [finding that a foreclosure trustee falls under the definition of "debt collector" under the provisions of Section 1692f(6).]

IV. The Policy Behind the Act Also Suggests that Non-Judicial Foreclosure Activity Does Not Amount to "Debt Collection.

The Act was enacted because Congress found that State laws were inadequate to protect consumers from abusive debt collection practices by third party collection agencies and that such practices were "a widespread and serious national problem." *See*, 15 U.S.C. § 1692; Senate Report No. 95-382, p. 2. However, these considerations do not apply to the non-judicial foreclosure notices issued pursuant to the mandates of State law. Not only are these notices merely informational in nature, they do not demand payment from the consumer borrowers, and are not the type of harassing or abusive communication the FDCPA was designed to protect against. Indeed, they "were designed to *protect* the debtor." *Ho*, at 574 [emphasis in original].[7]

While the issuance of non-judicial foreclosure notices may, of course, induce the defaulted consumer borrower to either cure the deficiency or even pay off the loan completely, that possibility, in and of itself, does not transform a regular non-judicial foreclosure process into "debt collection": "[t]he prospect of having property repossessed may, of course, be an inducement to pay off a debt. But that inducement exists by virtue of the lien, regardless of whether foreclosure proceedings

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[7] *See also, e.g., Yvanova v. New Century Mortg. Corp., supra,*, 62 Cal.4th at 926-27; *U.S. Bank Nat. Ass'n v. Castro, supra,*, 131 Haw. at 39 *Bain v. Metro. Mortg. Grp., Inc., supra* 175 Wn.2d at 93-94*Brandrup v. ReconTrust Co., supra*, 353 Or. at 677-78; *Patton v. First Fed. Sav. & Loan Ass'n of Phoenix, supra*, 118 Az. at 477.

actually commence. The fear of having your car impounded may induce you to pay off a stack of accumulated parking tickets, but that doesn't make the guy with the tow truck a debt collector." *Ho*, at 572.

V. Industry Impact and Public Policy

A. Legislative History and Original Intent of FDCPA

The roots of the Fair Debt Collection Practices Act ("FDCPA") trace to the enactment of the Consumer Credit Protection Act ("CCPA") in May 1968 which was an effort by Congress to "safeguard consumers in connection with the utilization of credit by requiring full disclosure of the terms and conditions of finance charges in credit transactions",[8] among other activities. The original CCPA covered several major areas of consumer credit, relating to both origination and collection activity, and was the framework for the Truth in Lending Act, Equal Opportunity Act and the Fair Credit Reporting Act, among others. The stated purpose of the CCPA was to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices", believing that "economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of

[8] Pub.L. 90-321 82 Stat. 146 Codified as amended to 15 U.S.C. 1601 §§1692 *et.seq*.

consumer credit would be strengthened by the informed use of credit."[9]

In 1977, the CCPA was amended to add Title VIII, the Fair Debt Collection Practices Act as a response to the "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors."[10] The FDCPA was crafted to prohibit debt collectors from threatening or harassing debtors and generally defined a "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly, or indirectly, debts owed or due another."[11] The FDCPA principally applies to third party collectors, and not a creditor attempting to collect his own debt unless the creditor uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts.[12] Those debts covered by the FDCPA are limited to "obligations of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment"[13] and do not include debts that

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[9] Section 1 of title I of the Act of May 29, 1968 (Pub. L. No. 90--321; 82 Stat. 146), effective May 29, 1968; Codified as amended to 15 U.S.C. 1601 §102(a)

[10] 15 USC §1692 (a)

[11] *Id.* §1692a (6)

[12] *Id.*

[13] *Id.* §1692a (5)

were not in default at the time it was obtained by the creditor.[14] Violations of the FDCPA give rise to a private cause of action for the consumer and could lead to an award of $1,000 per violation in addition to actual damages.[15] Today, rulemaking, reporting, and enforcement of debt collection activities governed by the FDCPA are shared by the Consumer Financial Protection Bureau and the Federal Trade Commission.[16]

The FDCPA was intended to serve three purposes: (i) eliminate abusive debt collection practices by debt collectors; (ii) insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged; and (iii) promote consistent State action to protect consumers against debt collection abuses.[17]

1. To eliminate abusive debt collection practices by debt collectors.

Prior to the enactment of the FDCPA, debt collection activity was wholly unregulated. Debt collectors were able to use harassing, embarrassing, and other extreme collection activity with little to no accountability. The purpose of the FDCPA was to provide parameters for collection activity and to expressly prohibit conduct intended to harass, oppress, or abuse any person in connection with the collection of a debt.[18]

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[14] *Id.*§1692a (6)(f)

[15] *Id.*§1692k (a)

[16] P.L. 111-203, 124 Stat. 1376 (2010).

[17] 15 USC §1692 (e).

[18] *Id*. §1692d.

The FDCPA details prohibited activities such as false, deceptive, or misleading representations[19]; unfair or unconscionable means;[20] communications at unusual times or places;[21] or at the consumer's place of employment.[22] The FDCPA does not prevent a creditor or a debt collector from attempting to collect a debt nor does it prohibit a creditor from using reasonable non-legal and legal means to collect a debt. The purpose of the FDCPA was not to limit collection activity, but rather to eliminate abusive collection practices.

2. Insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged.

Congress was clear the FDCPA's sole purpose wasn't just to protect consumers, but to also protect debt collectors who were using non-abusive collection efforts. The enactment of the FDCPA has given rise to thousands of consumer claims against debt collectors, both in judicial and regulatory settings. Violations of the FDCPA have become a common cause of action in the creditor's rights arena, giving rise to frivolous lawsuits seeking damages for technical violations, causing backlogs in the courts and delays in collecting valid debts. As a result, the overall cost of collecting a debt increases, ultimately absorbed by the debtor. The FDCPA was never intended to impede a debt collector from collecting a valid debt using non-abusive collection efforts. Rather, the purpose was to level the playing field by

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[19] *Id*. §1692e

[20] *Id*. §1692f

[21] *Id*. §1692c (a)(1)

[22] *Id*. §1692c (a)(3)

penalizing those debt collectors that did not comply with the FDCPA.

3. To promote consistent State action to protect consumers against debt collection abuses.

The FDCPA was never intended to preempt state debt collection laws nor private contracts where they are not inconsistent.[23] Unfortunately, due to the broad and inconsistent application of the FDCPA, debt collectors routinely find themselves in situations where they are unable to comply with state statute or contractual obligations without risking violating the FDCPA. The liberal and often inappropriate application and interpretation of the FDCPA in the courts across the country has only increased the inconsistency of State action to protect consumers.

a. Public Policy and the Effect of Detrimental Ruling

In addition to the position that the FDCPA does not apply to non-judicial foreclosures based on a plain reading of the language of the statute, public policy considerations require a ruling in favor of the FDCPA not applying to non-judicial foreclosures due to the conflicts between the FDCPA and state foreclosure laws. The application of the FDCPA to non-judicial foreclosures would not only conflict with Colorado law governing non-judicial foreclosures, but most other non-judicial foreclosure states as well.

Real estate transactions, property rights, and foreclosures of real property have traditionally been governed by state law. *BFP v. Resolution Tr. Corp.,* 511 U.S. 531 (1994). Most non-judicial states have a

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[23] *Id*. §1692n

statutory scheme governing their foreclosure process which balances the rights of lenders to obtain title to the secured real estate and borrower's and interested parties' rights to be properly notified of the foreclosure in a manner that allows the borrower or third parties to protect their interest in the property. Every state's non-judicial process is unique from states such as Texas[24] and Georgia[25] which require all sales to occur on the first Tuesday of the month, to public trustee states such as Colorado[26] which involve a public trustee and limited court process. When considering conflicts between areas of the law traditionally regulated by the state and federal law, the court must assume that congress did not plan to override or exercise preemption over state law unless specifically stated in the statute. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005);*BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 544 (1994). Congress did not manifest a specific intention to override state foreclosure law when drafting the FDCPA and does not reference non-judicial foreclosures in the statute.

Under Colorado Law, a notice of foreclosure must be provided to any party with an interest in the property including but not limited to junior lienholders and other owners who are not obligated on the debt.[27] The notices required to be provided not only contains notice that the property is in foreclosure, but also contains account information which would not otherwise be provided to third

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[24] Tex. Prop. Code § 51.002

[25] O.C.G.A. § 9-13-161(a)

[26] C.R.C.P. 120(a)

[27] C.R.C.P. 120(a)

parties without specific authorization from the borrower in accordance with the FDCPA.[28] IF the FDCPA were to apply to non-judicial foreclosure, strict compliance with the Colorado foreclosure laws by a foreclosing party violates the FDCPA.

These public policy concerns are not isolated to Colorado. Petitioner claims that concerns over a conflict with a few Colorado statutes should not result in the FDCPA being ruled inapplicable to the foreclosures in all 50 states, however concerns over conflicts with state law are applicable to all non-judicial states. Like Colorado most non-judicial states require a notice of the foreclosure sale be sent directly to parties with an interest in the property not just the obligor on the underlying loan. These other parties can include junior lienholders and or other individuals with an ownership interest in the property.[29] All non-judicial states require the notice of foreclosure sale to be publicly posted or advertised in one or more of the following manners: posting the notice at the property, posting the notice at the courthouse, or publishing the notice in the newspaper.[30] These notices would technically violate the FDCPA requirements prohibiting the release of information if the FDCPA were to be applied to non-judicial foreclosures.

The public notice requirement in non-judicial states serve three important purposes which benefit

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[28] C.R.C.P. 120(a)

[29] *See Generally* California Civil Code §2924, 2924(f); O.C.G. A. §9-13-142

[30] *See Generally* California Civil Code §2924, 2924(f); O.C.G. A. §9-13-142; Tex. Prop. Code §51.002.

the borrower and general public. First, the public notice requirements serve to provide a borrower additional notice their property is scheduled to be foreclosed. Even though all non-judicial states require some form of notice be provided directly to a borrower via mail, the public notice requirements ensure a borrower has another way to become aware of the foreclosure should the borrower not receive the mailed notices. Second, notices to third parties with an interest in the property allows for those third parties to protect their interest. It would be unjust for a junior lienholder to be extinguished in a foreclosure by a senior lien holder without notice over concerns that releasing information to them would violate a borrower's rights. Third, providing public notice of the foreclosure sale encourages third parties to attend and bid at the foreclosure sale. By including the total debt amount it allows third parties to make a proper analysis of whether it is economically feasible to purchase the property at the foreclosure sale. It is not only in the lender's best interest that the greatest value be achieved at the foreclosure sale. It also benefits the borrower. Funds that are obtained at the foreclosure sale reduce any potential deficiency balance remaining on the borrower's loans. Also, if the property is sold for more than total debt, those excess funds are generally distributed directly the borrower. The best way to attract purchasers at a foreclosure sale and increase the sales price at auction is through an open and transparent process. Prohibiting the notice of a foreclosure sale to the general public would no longer make foreclosures a public auction. It makes it more difficult for borrowers and other parties to

become aware the property is in foreclosure, and would stifle or chill bidding by third parties.

The argument that it is a remote possibility that a borrower would bring suits against law firms or trustees for violating the FDCPA over strict compliance with the FDCPA is unfounded.[31] Unfortunately, this exact issue is currently being litigated in Michigan. Michigan Law requires a notice of sale include the amount due on the note. MCL 600.3208. Borrowers have filed suit alleging Michigan Law violates the FDCPA prohibitions against releasing account information to unauthorized third parties. Courts in Michigan have specifically ruled that the release of financial information in a notice of sale required under Michigan Law is a violation of the FDCPA. *Thompke v. Fabrizo & Brook, P.C.,* 261 F. Supp. 3d 798, 811 (E.D. Mich. 2017); *Thebert v. Potestivo & Assoc.,* Case No. 16-CV-14341, 2017 WL 3581322. These rulings and strict interpretation of the FDPCA have now cast doubt on the ability of law firms and lenders to conduct non-judicial foreclosure in that state without violating the FDCPA and may force Michigan foreclosures to begin being conducted judicially contrary to the desire of the state that foreclosures be conducted non-judicially.

Releasing information required under state foreclosure laws is not protected under the court order exception of the FDCPA. In a non-judicial foreclosure there is no court involvement and hence no court order authorizing the release of such information. The court order exception is intended to allow a judge on an individual case by case basis to

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[31] *See Petitioners Brief at 27.*

release information where necessary for the efficacy of justice. It was not intended to allow states to pass blanket laws contradictory to the FDCPA. If the court were to interpret the court exception to apply in this case, then states would be able to simply override the entire FDCPA including those sections where, unlike in the case of non-judicial foreclosure, Congress specifically intended for Federal preemption to apply by passing statutes overriding any provision of the FDCPA.

Petitioner claims that even though foreclosure is a traditional state interest Congress has regulated foreclosures in several areas such as TILA, RESPA and the Bankruptcy Code.[32] This is correct, but in each instance, Congress specifically stated its desire to pre-empt state foreclosure law in those areas. For example, in the Bankruptcy Code, Congress specifically states that the Automatic stay applies to "any act to create, perfect, or enforce any lien against property of the estate."[33] The FDCPA does not pre-empt state foreclosure law because Congress does not have the authority to do so. Instead, the FDCPA does not preempt state foreclosure law because Congress did not specifically manifest its intent to do so.

If the court were to hold that an attorney or trustee conducting a non-judicial foreclosure sale is subject to FDCPA liability, it would open the floodgates across the country for copycat suits similar to the pending litigation in Michigan alleging violations of the FDCPA in states where foreclosure laws are in conflict with the FDCPA. This would

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[32] See Petitioner Brief at 26-27.

[33] 11 U.S.C. 362 § (a)(4)

force lenders and their attorneys to consider proceeding with judicial foreclosures in these states which would significantly increase the time and costs associated with a foreclosure. These costs would likely not be borne by the lenders but instead would be added to any debt of the borrower per the terms of most deeds of trust and state law. It would also force states which have carefully crafted foreclosure laws designed to best protect borrowers and lenders to re-write their carefully crafted foreclosure laws in order to comply with the FDCPA.

CONCLUSION

For these reasons set forth above, the ruling of the Tenth Circuit should be affirmed.

Respectfully submitted,

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