No. 17-1351

In The
Supreme Court of the United States

RICK GREER,

Petitioner,

v.

GREEN TREE SERVICING LLC, NORTHWEST TRUSTEE SERVICES, INC., AND RCO LEGAL, P.C.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT GREEN TREE SERVICING LLC IN OPPOSITION

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QUESTION PRESENTED

Whether the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p, applies to loan servicers in the context of non-judicial foreclosure.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Rick Greer. Respondent is Green Tree Servicing LLC. On May 21, 2018, Petitioner requested dismissal of Northwest Trustee Services, Inc., and RCO Legal. On May 24, 2018, the Court granted the dismissal request.

Green Tree Servicing LLC now is known as Ditech Financial LLC. In August of 2015, Green Tree Servicing merged with Ditech Mortgage Corp. and thereafter changed its name to Ditech Financial LLC. At the time Petitioner filed his action, Green Tree Servicing was a Delaware limited liability company. It was not publicly held. Walter Investment Management Corp., a publicly-held corporation, owned 100% of the membership interest of Green Tree Servicing LLC.

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OPINIONS BELOW

The unpublished memorandum of the court of appeals (Pet. App. 1a-3a) appears at 708 Fed. Appx. 371. The order of the district court (Pet. App. 13a-21a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 2017. The petition for a writ of certiorari was filed on March 26, 2018. The Court granted respondent's motion to extend time to May 29, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Even assuming, *arguendo*, that petitioner correctly identifies a circuit split regarding whether the Fair Debt Collection Practices Act (FDCPA) applies to non-judicial foreclosures, this case is not the vehicle through which to resolve the purported circuit split. The Court can, and would, uphold the judgment below on other grounds briefed, and decided below.

The only respondent remaining in this case, Green Tree Servicing LLC, is a loan servicer. The servicing of petitioner's home loan was transferred to respondent, effective February 1, 2013. Petitioner's loan was not in default at the time it was transferred to respondent. Rather, default occurred over six months later, on August 26, 2013, when respondent issued a notice of default and right to cure to petitioner. Northwest Trustee Services, Inc., the foreclosing trustee of petitioner's Deed of Trust, and not respondent, was the party who, subsequent to respondent's August 26, 2013 notice, initiated and prosecuted the non-judicial foreclosure against petitioner's property.

Because petitioner's loan was not in default when respondent began servicing it, respondent was not a "debt collector" for purposes of the FDCPA. 15 U.S.C. § 1692a(6)(F)(iii). For that reason, the district court entered summary judgment for respondent. The circuit court affirmed.

The circuit court's unpublished affirmance of the district court's unpublished order is of little significance beyond this case. No circuit has departed from the plain language of 15 U.S.C. § 1692a(6)(F)(iii), which excludes from the ambit of the FDCPA a servicer of a home mortgage loan that is not in default at the time the servicer begins servicing the loan. There is no direct conflict between the circuit court's ruling and any other federal circuit court. The petition for certiorari should be denied.

A. Background

1. The FDCPA bars "debt collector[s]" from engaging in certain practices while attempting to collect debts. 15 U.S.C. §§ 1692c-1692h, 1692k. The FDCPA defines a "debt collector" as, *inter alia*, any entity that "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another"—*i.e.*, an entity whose overall practices involve sufficiently frequent debt collection. 15 U.S.C. § 1692a(6); *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017). "Debt" is defined as an actual or alleged "obligation of a consumer to pay money." 15 U.S.C. § 1692a(5).

The FDCPA excludes certain persons from the general definition of "debt collector." Of particular relevance here, the FDCPA provides that "debt collector" does not include "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity * * * concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F)(iii).

2. The FDCPA does not define "in default." The district court therefore looked to the specific circumstances in this case to determine whether the loan was in default when respondent obtained it. The district court found that prior to undertaking any foreclosure action, respondent sent petitioner a notice of default and right to cure, which also gives notice of intent to accelerate the balance of the loan. Pet. App. 14a. Separate and apart from this notice, Washington law prohibits the issuance of a *statutory* notice of default under Wash. Rev. Code 61.24.030(8) prior to satisfaction of certain due diligence, including written and telephonic communications and an opportunity for the debtor to meet with the trustee or its agent. Wash. Rev. Code 61.24.031(1)(a). Once these requirements are satisfied, a statutory notice of default may be issued after 30 days or, if the borrower responds, after 90 days. *Id.*; Wash. Rev. Code 61.24.030(8). None of the above had occurred at the time respondent began servicing the loan.

B. Facts And Procedural History

1. On September 12, 2006, petitioner signed a promissory note in order to obtain a $214,000 property loan from Sierra Pacific Mortgage Company, Inc. The loan was secured by a deed of trust. Pet. App. 13a-14a. From November 1, 2006 until October 1, 2009, petitioner's loan was serviced by GMAC Mortgage, LLC (GMAC). GMAC transferred petitioner's loan to respondent, effective February 1, 2013. GMAC notified petitioner of this transfer. Pet. App. 14a.

2. Respondent further notified petitioner of the transfer. Respondent also notified petitioner of the loan balance and that petitioner could request verification of the debt and original creditor. *Id.*

On July 8, 2013, petitioner requested verification of his debt and refused to pay because, according to petitioner, respondent had not yet proven the debt to be the one petitioner was required to pay. Respondent replied to the letter on July 16, 2013. Pet. App. 14a. On August 26, 2013, respondent sent petitioner a "Notice of Default and Right to Cure Default" as required under the Deed of Trust. Pet. App. 14a, 20a. On August 27, 2013, respondent sent petitioner a "Notice of Preforeclosure Options," which outlined petitioner's rights under Washington law, Wash. Rev. Code 61.24.031, including the right to request a meeting within 30 days. Pet. App. 14a-15a.

3. On September 16, 2013, petitioner requested an in-person meeting with the loan beneficiary, but placed demands as a condition for the meeting. Thereafter, on

November 8, 2013, Northwest Trustee Services, Inc. issued a statutory Notice of Default under Wash. Rev. Code 61.24.030(8) and, on January 29, 2014, a Notice of Trustee's Sale. Pet. App. 5a, 9a, and 15a.

Respondent's law firm, now-dismissed respondent RCO Legal, P.S., requested a May 12, 2014 meeting with petitioner. Petitioner refused to appear and alleged that respondent had not complied with the Washington Deed of Trust Act. Pet. App. 15a.

4. On July 25, 2014, petitioner filed suit against respondent, Northwest Trustee Services, Inc., and RCO Legal, P.S. in the United States District Court for the Western District of Washington. Petitioner alleged violations of the FDCPA and Washington state law. Pet. App. 16a.

5. Respondent moved for summary judgment (as did the now-dismissed respondents). The district court granted the motions. With respect to respondent, the district court held that respondent was not a "debt collector" within the meaning of the FDCPA because respondent obtained plaintiff's loan for servicing before that loan was in default. That is, the district court applied the language of 15 U.S.C. § 1692a(6)(F)(iii), which excludes from the definition of "debt collector" "any person collecting or attempting to collect any debt * * * which was not in default at the time it was obtained by such person." Pet. App. 19a-20a.

The court noted that the FDCPA itself did not define "in default," but held that petitioner's loan could

not have been in default until respondent sent petitioner the August 26, 2013 notice of default. To hold otherwise, the court reasoned, would negate the pre-foreclosure protections afforded to borrowers by Washington statute, Wash. Rev. Code 61.24.031. Pet. App. 20a.

6. The court of appeals affirmed in an unpublished memorandum. Pet. App. 1a-3a. The court noted that it could "affirm on any basis supported by the record." Pet. App. 2a. The court did not address 15 U.S.C. § 1692a(6)(F). The court held that the FDCPA's one-year statute of limitation barred petitioner's FDCPA claims. Pet. App. 2a. The court further held that the communications petitioner received from respondent within the statute of limitation were not attempts to collect a debt within the meaning of the FDCPA. *Ho v. ReconTrust Co., N.A.*, 858 F.3d 568, 572 (9th Cir. 2017), cert. denied, 138 S. Ct. 504 (Dec. 4, 2017); Pet. App. 2a.

ARGUMENT

This case does not squarely present the broad question of whether the FDCPA applies to non-judicial foreclosures. Furthermore, petitioner has not persuasively demonstrated a circuit conflict on that question. The Court should deny certiorari, just as it did five months ago in *Ho v. ReconTrust Co., N.A.*, 138 S. Ct. 504 (2017).

A. This Case Is Not The Appropriate Vehicle Through Which To Address The Purported Circuit Conflict Petitioner Cites

Although the circuit court below did not address whether respondent is a "debt collector" within the meaning of the FDCPA, the district court did. It held that respondent is not a "debt collector." Because that issue was addressed in the district court, respondent may defend the district court's judgment on that basis. The Court therefore has a firmly-established, alternative basis on which to affirm the circuit court without addressing the broader issue petitioner urges. The Court should deny the Petition.

1. As the prevailing party, respondent is "free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 476, n.20 (1979) (collecting authorities); *see Thigpen v. Roberts*, 468 U.S. 27, 29-30 (1984) ("Although the court below and the petition for certiorari addressed only the double jeopardy issue, we may affirm on any ground that the law and the record permit and that will not expand the relief granted below."). Respondent may raise the exception provided in 15 U.S.C. § 1692a(6)(F)(iii) without cross-petitioning for certiorari. *Reno v. Flores*, 507 U.S. 292, 300 n.3 (1993).

2. Because petitioner cannot overcome the 15 U.S.C. § 1692a(6)(F)(iii) exception, the Court will not

reach the broader issue, urged by petitioner, of whether the FDCPA applies to non-judicial foreclosures.

The FDCPA applies only to a "debt collector." *See* 15 U.S.C. §§ 1692b-1692k. Mortgage servicers, such as respondent, are not "debt collectors." Congress explicitly intended that 15 U.S.C. § 1692a(6)(F)(iii) except loan servicers from the FDCPA: "The committee does not intend the definition to cover . . . mortgage service companies and others who service outstanding debts for others, so long as the debts were not in default when taken for servicing[.]" S. Rep. No. 95-382, 95th Cong., 1st Session 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1698 (1977).

3. Every circuit court of appeals to consider whether a loan servicer is subject to the FDCPA has followed the plain meaning of 15 U.S.C. § 1692a(6)(F)(iii) and the stated intent of Congress. *See Roth v. Citi-Mortgage Inc.*, 756 F.3d 178, 183 (2d Cir. 2014) ("[T]he amended complaint does not allege that CitiMortgage acquired Roth's debt after it was in default and so fails to plausibly allege that CitiMortgage qualifies as a debt collector under FDCPA."); *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985) (holding that mortgage servicing company was not a debt collector because debt not in default when obtained); *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 457 (6th Cir. 2013) ("According to Glazer's own allegations, Chase obtained the Klie loan for servicing *before* default. Therefore, Chase is not a 'debt collector.'"); *Bailey v. Sec. Nat'l Servicing Corp.*, 154 F.3d 384, 386-387 (7th Cir. 1998); *Rich v. Bank of Am., N.A.*, 666 Fed. Appx. 635,

639 (9th Cir. 2016) (unpub.) ("Because the admissible evidence shows that BANA has serviced the loan since before Rich and Vitale's default, the FDCPA does not apply to BANA pursuant to 15 U.S.C. § 1692a(6)(F)(iii)."); *Spreitzer v. Deutsche Bank Nat'l Trust Co.*, 610 Fed. Appx. 737, 742-743 (10th Cir. 2015) (unpub.) (affirming dismissal because loan not in default when obtained by servicer); *Diaz v. First Marblehead Corp.*, 643 Fed. Appx. 916, 922 (11th Cir. 2016) (unpub.) (affirming assessment of attorney fees and Rule 11 sanctions against represented plaintiff because the plain meaning of 15 U.S.C. § 1692(a)(6)(F)(iii) "makes it clear to anyone who has read the statute that [the loan servicer] was not a debt collector").

4. Because petitioner's urged question is not squarely presented by this case, and because the case can and would be decided based on 15 U.S.C. § 1692(a)(6)(F)(iii) rather than the broader question petitioner has raised, this case is not an appropriate vehicle.

B. Petitioner Has Not Demonstrated A Square Conflict

1. a. Petitioner has not demonstrated that the circuit court's affirmance below squarely conflicts with the holdings of other federal circuits on the issue of whether the FDCPA applies to non-judicial foreclosure. None of the federal circuit cases petitioner cites involved non-judicial foreclosure. *McGray v. Federal Home Loan Mortgage Corp.*, 839 F.3d 354, 357 (4th Cir.

2016) (judicial foreclosure); *Kaymark v. Bank of America, N.A.*, 783 F.3d 168, 172-173 (3d Cir. 2015), cert. denied, 136 S. Ct. 794 (2016) (same); *Glazer v. Chase Home Finance LLC*, 704 F.3d 453, 456 (6th Cir. 2013) (same); *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 375 (4th Cir. 2006) (same); *Piper v. Portnoff Law Associates*, 396 F.3d 227, 229-230 (3d Cir. 2005) (not involving foreclosure). *Judicial* foreclosure permits a creditor to recover money, an act clearly contemplated by the FDCPA, whereas *non-judicial* foreclosure permits a creditor solely to secure the sale of a property. Pet. App. 2a (collecting authorities, including *Ho v. ReconTrust Co., N.A.*).

b. Furthermore, none of the foregoing cases involved a loan servicer that did nothing more than send notices about the default status of a loan or a foreclosure *that did not happen prior to plaintiff's filing his lawsuit*. Respondent is not the trustee—the party in Washington that actually forecloses on behalf of the lender—or a law firm participating in an active nonjudicial foreclosure. Wash. Rev. Code 61.24.010; Wash. Rev. Code 61.24.030; *see Obduskey v. Fargo*, 879 F.3d 1216 (10th Cir. 2018), cert. petition pending No. 17-1307.

* * *

This case is not the appropriate vehicle through which to address the question petitioner urges. In any event, petitioner has not demonstrated a circuit conflict. The petition for certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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