

BANKING ALERT

March 2019

[United States Supreme Court Rules Law Firm Filing Nonjudicial Foreclosure Action Not Subject to FDCPA](#)

In *Obduskey v. McCarthy & Holthus LLP*, 2019 WL 1264579 (U.S. Mar. 20, 2019), the United States Supreme Court held that law firms engaged to file “nonjudicial foreclosure” proceedings were not subject to the Fair Debt Collection Practices Act (“FDCPA”).

The underlying action took place in Colorado, a state that, unlike New Jersey, employs non-judicial foreclosure proceedings. In 2007, plaintiff Dennis Obduskey (“Plaintiff”) obtained a mortgage loan for approximately \$330,000, which was serviced by Wells Fargo Bank, N.A. (“Wells Fargo”). Two years later, Plaintiff defaulted on his loan obligations. In 2014, Wells Fargo retained McCarthy & Holthus LLP (“Defendant”) to pursue a non-judicial foreclosure against Plaintiff, which, in Colorado, would require Defendant to ultimately obtain an order from a court authorizing the sale. Defendant mailed a letter to Plaintiff advising him, among other things, that the firm had been instructed to commence a foreclosure against Plaintiff’s property. The letter also purported to provide notice pursuant to both Colorado state law and the FDCPA.

In a written response, Plaintiff disputed the amount owed and demanded, pursuant to the FDCPA, that Wells Fargo cease collection until the amount of the debt was verified in writing. Defendant, however, did not cease collection efforts, instead filing a notice of election and demand with the state county public trustee as is required under Colorado law. Thereafter, Plaintiff sued both Wells Fargo and Defendant in federal court claiming violation of the FDCPA. The district court dismissed the suit in its entirety, including the claims against Defendant based on the FDCPA on the grounds that Defendant was not a “debt collector” within the meaning of the act. The United States Court of Appeals for the Tenth Circuit affirmed this ruling.

The Supreme Court unanimously affirmed the ruling, noting the topic of whether an entity who seeks to enforce a security interest is a “debt collector” within the meaning of the FDCPA was the subject of a split amongst the circuit courts. In finding that the FDCPA did not apply to

In This Issue

United States Supreme Court Rules Law Firm Filing Nonjudicial Foreclosure Action Not Subject to FDCPA

Pg 1

New Jersey Appellate Division Rejects Borrower’s Challenge to Mortgage Assignment Agreement in Defense of Foreclosure Action

Pg 2

New Jersey Appellate Division Finds Bank Has Standing to Foreclose

Pg 2

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Defendant, and in turn, to law firms retained to initiate and pursue non-judicial foreclosure proceedings, the Supreme Court focused on the FDCPA's provision which, in the Supreme Court's view, supplemented the primary definition of the term "debt collector" to include those businesses whose "principal purpose of which is the enforcement of security interests." However, the supplemental definition, the Supreme Court noted, was limited to the reach of subsection 1692f(6), not the entire act and, notably, not the provision of the act upon which Plaintiff filed suit. Thus, based on the reading of the act, the Supreme Court concluded that Defendant, in proceeding with a non-judicial foreclosure, was not doing so as a "debt collector" under the primary definition of "debt collector," which would have subjected Defendant to liability under the main provisions of the act. The Supreme Court also noted that Congress, in limiting the definition of "debt collector," may have done so to avoid conflicts with non-judicial foreclosure states and their respective procedures, noting that, if Plaintiff were to proceed, the advertising of a foreclosure sale, an essential element of non-judicial foreclosure procedure, would subject a law firm publishing such notice to liability under the act.

[New Jersey Appellate Division Rejects Borrower's Challenge to Mortgage Assignment Agreement in Defense of Foreclosure Action](#)

In *U.S. Bank, National Association v. Jin Choi*, Docket No. A-1059-17T2 (N.J. App. Div. Mar. 6, 2019), defendant Jin Choi ("Defendant"), challenged the entry of summary judgment against him in a residential foreclosure case. Defendant stopped making payments on his mortgage in 2009. Defendant originally executed a mortgage and a later modification with Chevy Chase Bank. Subsequently, Chevy Chase Bank assigned the note and the mortgage to U.S. Bank. After Defendant defaulted, U.S. Bank brought a foreclosure action against Defendant. The trial court entered judgment against Defendant, and the Appellate Division affirmed.

On appeal, Defendant argued that he could challenge U.S. Bank's compliance with the mortgage assignment agreement, that U.S. Bank lacked standing to foreclose, and that the trial court improperly granted summary judgment for U.S. Bank as he set forth a *prima facie* claim of predatory lending. First, the Appellate Division explained that, because Defendant was not a party to the mortgage assignment agreement and not a beneficiary of its terms, he lacked standing to challenge the agreement. Second, the panel determined that affidavits from U.S. Bank's records custodian and its servicer were sufficient to prove U.S. Bank's ownership and possession of the note. Thus, as both the record holder and as the party in physical possession of the note, U.S. Bank had standing to file a foreclosure action against Defendant. Third, the panel found that Defendant did not set forth a claim of predatory lending: he was represented by counsel throughout the loan transaction and, although he claimed he was not fluent in English, he spoke and read English at his deposition without an interpreter. As the panel explained, public policy does not impose liability on a bank because the venture it finances faces financial difficulty, as Defendant did in the matter before it.

[New Jersey Appellate Division Finds Bank Has Standing to Foreclose](#)

In *The Bank of New York Mellon v. Narang, et al.*, A-0591-17T24 (N. J. App. Div. Feb. 5, 2019), the Appellate Division affirmed the trial court's grant of summary judgment in favor of plaintiff and entry of final judgment of foreclosure. In August 2004, defendant executed a note payable to America's Wholesale Lenders in the amount of \$1,481,250 and executed a mortgage in favor of Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for America's Wholesale Lenders, encumbering property in Short Hills, New Jersey. Defendant defaulted on the loan in December 2010. On December 31, 2011, MERS assigned the mortgage to plaintiff, and the assignment was recorded

on December 21, 2011. Plaintiff filed a foreclosure complaint in April 2014, at which time plaintiff's mortgage servicing agent, Nationstar Mortgage, LLC ("Nationstar"), possessed the original note and mortgage. Plaintiff filed a motion to strike defendant's amended answer and defendant cross-moved to dismiss the foreclosure complaint. Defendant admitted executing the note and mortgage and defaulting, but challenged plaintiff's standing. The court rejected defendant's standing argument and granted plaintiff's motion. The trial court granted plaintiff's motion for entry of final judgment of foreclosure on September 14, 2017. Defendant appealed.

Defendant argued on appeal that plaintiff lacked standing to foreclose because the evidence showed another entity held the note and plaintiff failed to demonstrate it maintained standing prior to filing the foreclosure complaint. Plaintiff produced two certifications from Nationstar employees stating the "plaintiff is the holder and in possession of the note and mortgage subject to this foreclosure." The Appellate Division found that "a plaintiff establishes standing by demonstrating either possession of the note or an assignment of the mortgage that predated the original complaint." The Appellate Division also found that a witness certification regarding the authenticity of assignment or possession of the note and mortgage is adequate when the witness has access to the business records of plaintiff and personal knowledge of its business practices sufficient to provide the court with competent evidence regarding plaintiff's standing. The Appellate Division found the certifications of Nationstar's two employees were sufficient, as they established that: (1) they were employees of Nationstar; (2) the information contained in their certifications was based on Nationstar's business records; and (3) they had personal knowledge of Nationstar's procedures for creating and maintaining such records. The Appellate Division rejected defendant's argument that the two employees did not exhibit personal knowledge of defendant's mortgage account or the specific records.

Defendant also challenged plaintiff's compliance with the pooling and service agreement (PSA), specifically that because plaintiff did not establish it received assignment of the loan before the trust closed on September 30, 2004, plaintiff's foreclosure action must fail. Here, the evidence showed legal title to the subject mortgage loan passed from MERS, as nominee for America's Wholesale Lender, to plaintiff in 2011. Although the assignment occurred after the closing of the trust, defendant offered no evidence to support his argument that this fact rendered the assignment void, as opposed to voidable. Further, the Appellate Division found that the trial court correctly concluded that defendant lacked standing to contest the PSA.

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4824-7555-9822, v. 1