

# PUBLICATION

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## Will FDCPA Apply to Non-Judicial Foreclosures?

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November 19, 2018

**Does the Fair Debt Collection Practices Act (FDCPA) apply to non-judicial foreclosures? This is a question of enormous import to the mortgage servicing industry, as the FDCPA is a common subject for class action claims and further provides that an individual who obtains a judgment under the FDCPA is entitled to an award of his or her costs, including attorney's fees. Providing FDCPA liability for non-judicial exposures on a nation-wide basis would expand the legal exposure and expense faced by mortgage servicers across the country.**

That is exactly the question before the United States Supreme Court, having granted certiorari on June 28, 2018 in the case of *Obduskey v. McCarthy & Holthus, LLP*. Presumably, the Supreme Court determined to take this case because there is a split of authority among the federal circuits on this issue.

In *Obduskey*, the Tenth Circuit found that the FDCPA does not apply to non-judicial foreclosures. 879 F.3d 1216 (10th Cir. 2018) The Tenth Circuit acknowledged that other circuits, namely the Fourth, Fifth and Sixth, have ruled otherwise, but rejected the rationale advanced by those courts. Instead, the Tenth Circuit found the plain language of the statute to be controlling, and that "entities engaged in non-judicial foreclosure actions in Colorado are not debt collectors under the FDCPA." *Id.* at 1221. That court adopted the view that, "because enforcing a security interest is not an attempt to collect money from the debtor, and the consumer has no 'obligation... to pay money,' non-judicial foreclosure is not covered under the FDCPA." *Id.* The Tenth Circuit also rejected the Sixth Circuit and found that the venue statute (15 U.S.C. §1692i) "covers only 'action[s] to enforce an interest in real property,'" with "action" meaning a "judicial proceeding" (emphasis in original). *Id.* at 1222.

Of interest, the Tenth Circuit made it clear that its ruling did not apply to judicial foreclosures and surmised that the FDCPA "may" apply to judicial foreclosures "because of the underlying deficiency judgment." *Id.* at 1221. Time will tell whether the Supreme Court will address judicial foreclosures in this case or in a future case as well.

The Petitioner's brief to the Supreme Court was filed on September 10, 2018. Several organizations have filed amicus briefs on either side of the issue. The Respondent's brief should be filed any day now. The mortgage servicing industry will be watching the Court with baited breath to see whether their legal exposure to FDCPA claims grows substantially or is limited.