

CFPB Files SCOTUS Amicus Brief; Argues FDCPA Does Not Apply To Non-Judicial Foreclosure Proceedings

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The CFPB has filed [an amicus brief](#) in the U.S. Supreme Court in support of the respondent/law firm defendant in *Obduskey v. McCarthy & Holthus LLP, et al.*, a Tenth Circuit decision that held that a law firm hired to pursue a non-judicial foreclosure under Colorado law was not a debt collector as defined under the Fair Debt Collection Practices Act. The Supreme Court [granted certiorari](#) in June 2018 to review the Tenth Circuit's decision and resolve a circuit split on whether the FDCPA applies to non-judicial foreclosure proceedings. Because the Supreme Court's decision in *Obduskey* will determine whether the FDCPA's protections apply in countless non-judicial foreclosure actions, it could have a significant financial impact on the mortgage industry.

The amicus brief represents the second CFPB amicus brief filed under Acting Director Mulvaney's leadership (the first was filed [in the Seventh Circuit](#)) and the first CFPB amicus brief filed in the Supreme Court under his leadership. Most significantly, the amicus brief appears to be the first amicus brief filed by the CFPB in which it has supported the industry position.

In its amicus brief, the CFPB points to FDCPA Section 1692a(6) which defines the term "debt collector" to include, for purposes of Section 1692f(6), someone whose business is principally the "enforcement of security interests." Section 1692f(6) provides that it is an unfair or unconscionable collection practice to take or threaten to take nonjudicial action to effect dispossession of property under specified circumstances. The CFPB argues that it follows from this "limited-purpose definition of debt collector" that, except for purposes of Section 1692f(6), enforcing a security interest, is not, by itself debt collection and to read the provision differently would render the "limited-purpose definition...superfluous."

Based on these provisions, the CFPB contends that because enforcement of a security interest by itself is generally not debt collection under the FDCPA, a person cannot violate the FDCPA by taking actions that are legally required to enforce a security interest. According to the CFPB, "[t]hat is dispositive here because the initiation of a Colorado nonjudicial-foreclosure proceeding undisputedly was a required step in enforcing a security interest." (The CFPB observes in a footnote that, although not implicated in *Obduskey*, actions clearly incidental to the enforcement of a security interest, even if not strictly required by state law, also would not constitute debt collection.) The CFPB asserts that deeming the initiation of a non-judicial foreclosure proceeding to be debt collection "could bring the FDCPA into conflict with state law and effectively preclude compliance with state

foreclosure procedures. No sound basis exists to assume Congress intended that result.”

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