No. 10-56884

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIEN-PHUONG THI HO,
Plaintiff-Appellant,

v.

RECONTRUST COMPANY, N.A., ET AL.,
Defendants-Appellees.

On Appeal from the
United States District Court for the
Central District of California
Hon. George H. Wu
Case No. 2:10-cv-00741

BRIEF OF *AMICUS CURIAE* CONSUMER FINANCIAL PROTECTION BUREAU IN SUPPORT OF APPELLANT AND REVERSAL

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GLOSSARY

CFPB or Bureau	Consumer Financial Protection Bureau
FTC	Federal Trade Commission
FDCPA or Act	Fair Debt Collection Practices Act
ReconTrust	ReconTrust Company, N.A.
SER	Supplemental Excerpts of Record

QUESTIONS PRESENTED

Pursuant to this Court's Order of June 8, 2015, this brief addresses "whether, in this case, defendant ReconTrust is a 'debt collector' for the purposes of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq*., or its implementing regulations" and "[i]n general . . . whether a trustee who forecloses on a California deed of trust in a non-judicial action qualifies as a 'debt collector' because he has 'attempt[ed] to collect, directly or indirectly, debts owed or asserted to be owed or due to another.'" *See* ECF No. 67 at 1–2 (quoting 15 U.S.C. § 1692a(6)) (second bracketed text in original).

INTEREST OF AMICUS CURIAE

The Consumer Financial Protection Bureau (CFPB or Bureau), an agency of the United States, files this brief pursuant to Federal Rule of Appellate Procedure 29(a) and pursuant to this Court's June 8, 2015 Order inviting the Bureau to submit an amicus brief in this matter. *See* ECF No. 67.

STATEMENT

A. Statutory Background

Congress enacted the Fair Debt Collection Practices Act (FDCPA) in 1977 to eliminate "abusive, deceptive, and unfair debt collection practices," which Congress found had contributed "to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."

15 U.S.C. § 1692(a). To achieve that goal, the Act creates a wide range of consumer protections, including broad prohibitions on harassing or abusive collection practices; false or misleading representations; and unfair or unconscionable debt-collection methods. *Id*. §§ 1692d–1692f.

These prohibitions apply to third-party debt collectors that collect debts from individual consumers. *See id*. § 1692a(3), (5), (6). As a general matter, "[t]he term 'debt collector' means 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) (emphasis added). This general definition is subject to certain supplementations and exceptions. For example, even if an entity is not covered by either prong of the general definition, it will be considered a debt collector for purposes of § 1692f(6) if, under the third sentence of § 1692a(6), it uses "any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." *Id.* Likewise, certain entities are explicitly excluded from the definition of "debt collector," including those engaged in debt collection that "is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement." *Id.* § 1692a(6)(F)(i).

With passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress established the Bureau "to protect consumers from abusive financial services practices," *see* Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010), and vested the Bureau with authority to enforce the FDCPA and to prescribe rules implementing the Act. *Id.* § 1089 (amending 15 U.S.C. § 1692*l*(b), (d)).

The Bureau is the first agency ever to have general rulemaking authority under the FDCPA. Pursuant to that authority, the Bureau issued an advance notice of proposed rulemaking on debt collection in November 2013. *See* Debt Collection (Regulation F), 78 Fed. Reg. 67,848 (Nov. 12, 2013).

B. Facts

In June 2007, Appellant Vien-Phuong Thi Ho purchased residential property in Long Beach, California through a loan obtained from Countrywide Bank, FSB. *See* Supplemental Excerpts of Record (SER) at 385. The loan was secured by a deed of trust naming Appellee ReconTrust Company, N.A. (ReconTrust) as trustee. *Id.* In late 2008, Ho began missing payments on the loan, and in March 2009 ReconTrust sent Ho a Notice of Default advising her of the initiation of non-judicial foreclosure proceedings. *See id.* at 453–54. The Notice warned Ho that her property "may be sold without any court action" and that she could stop the

sale "by paying the entire amount demanded," which the Notice of Default stated was $22,782.68 as of March 26, 2009. *Id.* at 453.

ReconTrust subsequently sent Ho a Notice of Trustee's Sale, advising that unless she took action to protect her property it would be sold at public auction. SER at 456. The Notice of Trustee's Sale stated that the unpaid balance on her obligation was $592,419.88. *Id.* ReconTrust also stated in the notice that it was "a debt collector attempting to collect a debt" and that "[a]ny information obtained [would] be used for that purpose." *Id.* Ho alleged that the notices sent by ReconTrust contained false and misleading information regarding the amount and existence of debts she purportedly owed. *See id.* at 409.[1]

C. Proceedings Below

Ho sued ReconTrust and the other appellants under the FDCPA and other federal and California state laws. *See* SER at 401. As relevant here, ReconTrust moved to dismiss the FDCPA claim on the grounds that it was not a debt collector under the FDCPA and that foreclosure proceedings do not constitute debt collection activities under the Act. *Id.* at 364–65. The district court granted the motion to dismiss. *Id.* at 340–41. Following the filing and dismissal of three additional amended complaints, Ho appealed. *Id.* at 1.

[1] Because this is an appeal from an order dismissing Ho's complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), this brief accepts as true the allegations in her complaint. *See Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1030–31 (9th Cir. 2008).

SUMMARY OF ARGUMENT

A trustee, like Appellee ReconTrust, who sends notices to consumers stating the amount of a debt the consumer would have to pay to avoid non-judicial foreclosure in California is "attempt[ing] to collect, directly or indirectly, debts owed or due another," and is therefore a "debt collector" subject to the FDCPA's prohibition on false or misleading statements made in connection with the collection of debts. The notices trustees send to consumers as part of the non-judicial foreclosure process in California threaten foreclosure unless the consumer makes payment on the debt. As the weight of authority has recognized, such communications constitute debt collection under the FDCPA. The fact that California does not permit deficiency judgments in non-judicial foreclosure actions, and that California requires the provision of notices as part of the foreclosure process, does not transform such communications into something other than attempts to collect a debt under the Act.

An entity that "regularly collects or attempts to collect" debts satisfies the general definition of "debt collector" and is subject to the entire Act even if that same entity is engaged in a business the principal purpose of which is the enforcement of security interests. 15 U.S.C. § 1692a(6). Nothing in the text or structure of the FDCPA suggests that enforcers of security interests are categorically excluded from this general definition of debt collector. Such an

exclusion would be plainly inconsistent with the purpose of the FDCPA, as it would create a loophole permitting enforcers of security interests to engage in the very practices the Act was intended to prevent. This understanding of the Act is supported by prior administrative interpretation and by every appellate court that has addressed the issue.

Therefore, trustees who regularly foreclose on California deeds of trusts in non-judicial actions constitute debt collectors under the general definition of the FDCPA.

ARGUMENT

I. Foreclosure Trustees Are Debt Collectors Under the FDCPA.

The FDCPA generally regulates the conduct of "debt collectors." 15 U.S.C. § 1692(e). Under the Act, "[t]he term 'debt collector' means 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). The Act then lists certain additional persons who are "include[d]" and "not include[d]" in the term "debt collector." *Id.* Included in the term is 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," but only "[f]or the purpose of section 1692f(6)

of [the Act]," *id.*, which governs acts or threats involving the "dispossession or disablement of property," *id.* § 1692f(6).[2] Not included in the term are persons who fall within one of six exceptions enumerated in § 1692a(6)(A) through (F), such as the exception regarding fiduciary obligations under § 1692a(6)(F)(i).

Ho alleges that ReconTrust sent her a Notice of Default and a Notice of Trustee's Sale stating the amount she would be required to pay to avoid foreclosure. SER at 409–10. Assuming that a foreclosure trustee such as ReconTrust regularly sends such notices in the course of conducting non-judicial foreclosures in California, the trustee satisfies the general definition of "debt collector" and, unless an exception applies, is subject to the prohibition on misrepresentations in § 1692e.[3]

1. In *Heintz v. Jenkins*, the Supreme Court considered whether the meaning of "debt collector" under the FDCPA includes lawyers who regularly try to collect consumer debts through litigation. 514 U.S. 291, 292 (1995). In concluding that such lawyers are included, the Court explained that, "[i]n ordinary English, a lawyer who regularly tries to obtain payment of consumer debts through legal

[2] The inclusion of enforcers of security interests in the general definition of debt collector is addressed in Part II, *infra*.

[3] Because ReconTrust was acting as a foreclosure trustee, this case appears to involve a "debt[] owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). The Bureau, however, takes no position regarding whether Ho's complaint otherwise adequately alleges that ReconTrust falls within the FDCPA's general definition of "debt collector." *See* Br. of Appellees at 34.

proceedings is a lawyer who regularly 'attempts' to 'collect' those consumer debts." *Id*. at 294 (citing Black's Law Dictionary 263 (6th ed. 1990) ("To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings.")).

Following *Heintz*, courts of appeals have held that foreclosure activities constitute debt collection under the FDCPA, even though such activities also relate to the enforcement of a security interest. As the Sixth Circuit explained in *Glazer v. Chase Home Fin. LLC*, "mortgage foreclosure activity" is debt collection because the "purpose of foreclosure is to obtain payment on the underlying home loan." 704 F.3d 453, 461 (6th Cir. 2013). Likewise, the Third Circuit has concluded that "foreclosure meets the broad definition of 'debt collection' under the FDCPA." *Kaymark v. Bank of Am., N.A.*, 783 F.3d 168, 179 (3d Cir. 2015). The key factor distinguishing foreclosure activities from non-judicial actions to repossess property securing a loan is the need to "communicate with the debtor regarding the debt during the foreclosure proceedings, regardless of whether the proceedings are judicial or non-judicial in nature." *Glazer*, 704 F.3d at 464.[4] By

[4] *See also Piper v. Portnoff Law Associates, Ltd.*, 396 F.3d 227, 236 (3d Cir. 2005) (noting that enforcers of security interests "are people who engage in the business of repossessing property, whose business does not primarily involve communicating with debtors in an effort to secure payment of debts."); *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1218 (11th Cir. 2012) ("A communication related to debt collection does not become unrelated to debt collection simply because it also relates to the enforcement of a security interest.").

contrast, other non-judicial actions to enforce security interests, such as repossessing a car, are taken without communicating with the consumer because they do not involve attempts to "obtain payment . . . by personal solicitation or legal proceedings." *Heintz*, 514 U.S. at 294 (quoting Black's Law Dictionary 263 (6th ed. 1990)).[5]

Applying the same principle here, the Notice of Default and the Notice of Trustee's Sale constitute attempts to collect the mortgage debt owed by Ho. The Notice of Default warns Ho that she is in default on her mortgage, states the amount that is claimed past due, and represents that she may be able to bring her account in good standing (and avoid foreclosure) by paying "all of [her] past due payments plus permitted costs and expenses." SER at 453. The Notice of

[5] Appellees contend (Br. at 38) that because § 1692f(6) applies to enforcers of security interests and because that provision prohibits certain "threats" to effect non-judicial dispossession of property, the FDCPA recognizes that enforcers of security interests communicate with consumers. Not so. Section 1692f(6) broadly prohibits "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property" if one of the three criteria specified in § 1692f(6)(A) through (C) is present. That prohibition applies equally to debt collectors under the general definition and enforcers of security interests under the third sentence in § 1692a(6), and it covers taking and threats to take both secured and unsecured property. Thus, "[t]aking" property in violation of § 1692f(6) need not involve enforcement of a security interest, and an enforcer of security interests may unlawfully "threaten[]" a particular consumer in violation of § 1692f(6) even if it does not *regularly* engage in debt collection. To be sure, if an entity purporting to enforce security interests regularly threatened consumers—for instance, by regularly threatening to repossess consumers' automobiles unless they made payment—such an entity would constitute a debt collector under the general definition of § 1692a(6).

Trustee's Sale again tells Ho that she is "in default" and advises her that "unless you take action to protect your property, it may be sold at a public sale." *Id*. at 456 (capitalization altered). By sending these notices, ReconTrust is therefore involved in more than simply enforcing the creditor's rights under the deed of trust (for example, by conducting the foreclosure sale). These notices are communications directed at the consumer that provide the consumer an opportunity to cure her default and also threaten foreclosure on the consumer's home unless payment on the debt is made. Such communications constitute debt collection, as they threaten foreclosure unless the consumer makes payment on her debt. *See McLaughlin v. Phelan Hallinan & Schmieg, LLP*, 756 F.3d 240, 245-46 (3d Cir. 2014) (noting that "discussions of the status of payment [and] offers of alternatives to default" may constitute debt collection activity, and that "a communication need not contain an explicit demand for payment to constitute debt collection activity"), *cert. denied*, 135 S. Ct. 487 (2014).

2. Appellees claim that even if ReconTrust meets this definition, it is exempt under the fiduciary exception included among the six enumerated exemptions under § 1692a(6)(A)–(F). *See* Br. of Appellees at 21. Under this exception, an entity is exempt from the definition of "debt collector" if its collection activities are "incidental to a bona fide fiduciary obligation." 15 U.S.C. § 1692a(6)(F)(i). As this Court has explained, two requirements must be satisfied

for an entity to come within this exception: (1) "the entity must have a 'fiduciary obligation,'" and (2) the collection activity must be "incidental to" that obligation. *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1032 (9th Cir. 2009).

Appellant argues that ReconTrust fails the first requirement, citing California precedent stating that a foreclosure trustee "owes no true fiduciary duty to either party" in a foreclosure action. Reply Br. of Appellant at 22 (citing *Hatch v. Collins*, 225 Cal. App. 3d 1104 (1990)). *See also Pro Value Properties, Inc. v. Quality Loan Service Corp.*, 170 Cal. App. 4th 579, 583 (2009) ("The trustee in nonjudicial foreclosure is not a true trustee with fiduciary duties, but rather a common agent for the trustor and beneficiary.") (citations omitted). Appellees do not appear to contest this issue of state law, but instead claim that use of the term "fiduciary obligation" in the Act's exception "was meant to apply beyond the narrow confines of common law 'fiduciary duties.'" Br. of Appellees at 21 n.10.

Although the Bureau takes no position on the underlying issue of state law, the Bureau disagrees with Appellees' attempt to expand the meaning of the fiduciary exception of the FDCPA. Such an interpretation is not supported by the Act. To the contrary, the requirement that the fiduciary obligation under § 1692a(6)(F)(i) be "bona fide" indicates that only actual fiduciary obligations fall

under the exception.[6] Nothing in the text or purpose of the Act, nor any authority cited by Appellees, indicates that a broader meaning was intended.

3. Appellees and their amici raise several objections to treating the foreclosure notices as debt collection activity, all of which relate to California law. None has merit.

First, Appellees and their amici emphasize that the foreclosure notices are required under state law as preconditions to non-judicial foreclosure. *See* Br. of Appellees at 31; Br. of United Trustees' Ass'n, *et al*., ECF No. 54, at 5. The misrepresentation alleged here, however, involves the amount claimed due on the two foreclosure notices, an amount which is not dictated by California law. More generally, providing a notice as a "statutory condition precedent" to further action against the consumer is not "mutually exclusive with debt collection." *Romea v. Heiberger & Associates*, 163 F.3d 111, 116 (2d Cir. 1998) (discussing that notice required under New York's *in rem* eviction procedure involved debt collection under the FDCPA). As *Romea* makes clear, "the fact that [a] letter also served as a

[6] Even if, contrary to the California law cited by the parties, ReconTrust satisfied this first requirement, it likely would still not satisfy the additional requirement that its collection activities be "incidental" to its fiduciary obligations. *See* 15 U.S.C. § 1692a(6)(F)(i). The FTC, which has had authority to enforce the FDCPA since its enactment in 1977, *see* Pub. L. No. 95-109, § 814, 91 Stat. 874, 881-82 (1977), has construed the exception as including entities such as "trust departments of banks" but not trustees named "solely for the purpose of conducting a foreclosure sale (*i.e.*, exercising a power of sale in the event of default on a loan)." 53 Fed. Reg. 50,097, 50,103.

prerequisite to commencement of the [eviction] process is wholly irrelevant to the requirements and applicability of the FDCPA." *Id.*; *see also Piper v. Portnoff Law Associates, Ltd.*, 396 F.3d 227, 234 (3d Cir. 2005) (rejecting argument that debt collector's conduct "cannot be found to be covered by the FDCPA because all it ever tried to do was enforce a lien in the manner dictated by [state law]").

Appellees' related argument that state-mandated notices "are not the type of activity the FDCPA was intended to address" fails for similar reasons. *See* Br. of Appellees at 30–31; *see also* Br. of United Trustees' Ass'n at 9–10. Appellees' argument misconstrues both the intended purpose of the FDCPA and the "activity" at issue in this case. The express purpose of the FDCPA is to "eliminate abusive debt collection practices by debt collectors," which include the use of any "false, deceptive, or misleading representation." 15 U.S.C. §§ 1692(e), 1692e. Ho alleges that Appellees violated § 1692e by making false and misleading misrepresentations in the amount claimed due for her to avoid foreclosure. SER at 409–10. That such a misrepresentation might have occurred in the context of a state-mandated notice does not somehow immunize Appellees from abiding by § 1692e in the course of providing such notices. As the Second Circuit stated in *Romea*, a statutorily required notice is "undeniably a 'communication' as defined by the FDCPA in that it convey[s] 'information regarding a debt' to another person." *Romea*, 163 F.3d at 116. Carving out such notices from the scope of the FDCPA would create a

loophole in the Act, allowing debt collectors to engage in conduct expressly prohibited by the Act. Nothing indicates Congress intended to exempt such conduct from the scope of the FDCPA.

Second, Appellees and their amici suggest that California's prohibition on deficiency judgments in non-judicial actions somehow exempts foreclosure-related activity from qualifying as debt collection. *See* Br. of Appellees at 37 n.16; Br. of United Trustees' Ass'n at 7, 10 n.7, 13. This argument ignores the weight of authority that foreclosure itself constitutes debt collection. *See, e.g., Kaymark*, 783 F.3d at 179; *Glazer*, 704 F.3d at 461. Whether the mortgage note holder can pursue further relief against the consumer for deficiencies after foreclosure does not alter the fact that the foreclosure process itself involves the collection of a debt under the FDCPA. *See Piper*, 396 F.3d at 236 ("if a collector were able to avoid liability under the FDCPA simply by choosing to proceed *in rem* rather than *in personam*, it would undermine the purpose of the FDCPA.") (quoting *Piper v. Portnoff Law Associates*, 274 F. Supp. 2d 681, 687 (E.D. Pa. 2003)).

Finally, amici in support of Appellees claim that compliance with California's non-judicial foreclosure process creates conflicts with the FDCPA. *See* Br. of United Trustees' Ass'n at 33–36. That a conflict may exist between state and federal law is no basis for state law to trump or somehow excuse compliance with federal law. Under § 1692n, the Act does not preempt state law

"except to the extent that those laws are inconsistent with any provision of [the Act], and then only to the extent of the inconsistency." Therefore, if a conflict were found between the FDCPA and state law, "it would be [the state law], and not the FDCPA, that would have to yield." *Romea*, 163 F.3d at 118 n.10.

However, a court need not necessarily resort to preemption. The Supreme Court in *Heintz* made clear that the FDCPA is more flexible than Appellees' argument would suggest. In *Heintz*, an attorney claimed that the Act's communication prohibitions led to certain "anomalies" when applied to litigation activities, and thus claimed that litigating attorneys should be altogether exempt from the Act. *Heintz*, 514 U.S. at 296. The Court rejected that argument. Instead, the Court held it easier to infer an "additional, implicit, exception" regarding such conduct in order to avoid creating "a far broader exception" applicable to an entire class of persons. *Id.* at 297. *See also McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 952 (9th Cir. 2011) (noting the "implicit[] exception" analysis in *Heintz*). As with the Court's approach to the so-called "anomalies" in *Heintz*, interactions between California's foreclosure provisions and the Act may be harmonized, where warranted, through narrowly tailored exceptions to the specific conduct at issue. The alternative approach—carving out foreclosure trustees as a class—would create precisely the kind of "far broader exception" rejected by the Court in *Heintz*. *See* 514 U.S. at 297.

II. An Entity Whose Principal Purpose Is Enforcing Security Interests May Meet the Act's General Definition of "Debt Collector" for Purposes of the Entire Act.

As noted above in Part I, § 1692a(6) of the FDCPA states that the general definition of debt collector "also includes" persons who use "any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests," but only for purposes of § 1692f(6) of the Act. This case raises the question whether, under this definition, an entity whose principal purpose is the enforcement of security interests is necessarily excluded from the general definition of "debt collector" and, therefore, exempt from all but § 1692f(6) of the Act. It is not. As discussed in Part I, an entity that satisfies the general definition is a "debt collector" for purposes of the entire Act unless one of the six exceptions specified in § 1692(a)(6)(A) through (F) applies. Because none of those exceptions covers entities that enforce security interests, the general definition governs according to its own terms. *See* 15 U.S.C. § 1692a(6)(A)–(F).

The text and structure of the definition confirm that entities that enforce security interests are not necessarily excluded from the general definition of debt collector. The general definition encompasses both entities whose "principal purpose" is debt collection and entities that "regularly collect[]" debts, while the definition for purposes of § 1692f(6) includes entities whose "principal purpose" is enforcing security interests. 15 U.S.C. § 1692a(6). Thus, an entity that "regularly

collects" debts is a "debt collector" regardless of the principal purpose of its business.[7] And nothing in the text of the statute suggests that an entity whose principal business is enforcing security interests cannot also regularly collect debts.

Appellees incorrectly assert that this interpretation renders superfluous the inclusion of enforcers of security interests for purposes of § 1692f(6). *See* Br. of Appellees at 35. Because it is possible for an entity to enforce security interests without regularly collecting debts, the express inclusion of such entities for purposes of § 1692f(6) still has "work to do." *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1841 (2012) (noting canon of interpretation that statutes should be construed to avoid rendering any provision "superfluous, void, or insignificant") (*quoting TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)). For instance, businesses that enforce security interests may be involved exclusively in the repossession of automobiles or other personal property. If such entities never demand payment or otherwise communicate with debtors, they will not meet the general definition of "debt collector," but will be considered debt collectors for purposes of § 1692f(6) because of the third sentence of § 1692a(6). *See Glazer*, 704 F.3d at 464 ("Section 1692a(6) thus recognizes that there are people who engage in the business of repossessing property, whose business does not primarily involve communicating with debtors in an effort to secure payment of debts.")

[7] For this reason, the Court need not decide whether an entity could have as its "principal purpose" both collecting debts and enforcing security interests.

(quoting *Piper*, 396 F.3d at 236); *see also Montgomery v. Huntington Bank*, 346 F.3d 693, 700–01 (6th Cir. 2003).

A prior administrative interpretation of the Act further supports this conclusion. In long-standing staff commentary published after notice and comment, the FTC stated that "[b]ecause the FDCPA's definition of 'debt collection' includes parties whose principal business is enforcing security interests only for [§ 1692f(6)] purposes, such parties (*if they do not otherwise fall within the definition*) are subject only to this provision and not to the rest of the FDCPA."[8] Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,108 (Dec. 13, 1988) (emphasis added). Relying on this interpretation, the Fifth Circuit has held that "the entire FDCPA can apply to a party whose principal business is enforcing security interests but who nevertheless fits § 1692a(6)'s general definition of a debt collector." *Kaltenbach v. Richards*, 464 F.3d 524, 528 (5th Cir. 2006).

Finally, the FDCPA's consumer-protection purposes would be significantly undermined if entities that regularly collect debts from consumers were exempted from the Act's prohibitions on abusive, deceptive, and unfair practices simply

[8] After passage of the Dodd-Frank Act in 2010, the Bureau determined that FTC commentary on the FDCPA will be given "due consideration." *See* Identification of Enforceable Rules and Orders, 76 Fed. Reg. 43,569, 43,570 (July 21, 2011). The Bureau agrees with this commentary to the extent that it indicates that entities satisfying the general definition of "debt collector" are subject to the entire Act.

because the principal purpose of their business is enforcing security interests. It would be easy for an entity that regularly seeks payment of secured debt that is in default to structure its interactions with consumers to emphasize the upcoming loss of the security. *See Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1217 (11th Cir. 2012) (noting that communications from debt collector had "dual purposes"); *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 376–77 (4th Cir. 2006) (debt collector initiated foreclosure proceedings and then requested money to "reinstate the . . . account"); *Piper*, 396 F.3d at 230 (debt collector threatened sheriff's sale of home if consumers did not pay debts). If such an entity were not a "debt collector" for purposes of the entire Act, then the statute's consumer protections, other than § 1692f(6), simply would not apply, and consumers could be subject to much of the conduct that Congress sought to prohibit simply because the debt is secured. The FDCPA unambiguously applies to consumer debt whether secured or unsecured. *See* 15 U.S.C. § 1692a(5); *Reese*, 678 F.3d at 1218 (under the Act, "[a] debt is still a 'debt' even if it is secured"). It is implausible that Congress would have intended to "create a loophole" giving entities that regularly collect secured debt such a ready means for evading the Act's consumer protections. *Reese*, 678 F.3d at 1218 (noting that "[t]he practical result would be that the Act would apply only to efforts to collect unsecured

debts."). The entirety of the Act therefore applies to such entities, regardless of whether the debts they attempt to collect are secured.

* * *

CONCLUSION

The Court should reverse the district court and hold that trustees who regularly foreclose on California deeds of trust in non-judicial actions are debt collectors subject to the entire FDCPA.

Respectfully submitted,

Dated: August 7, 2015

/s/ Thomas M. McCray-Worrall

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STATUTORY APPENDIX

15 U.S.C. § 1692. Congressional findings and declaration of purpose

(a) Abusive practices

There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Inadequacy of laws

Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods

Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Interstate commerce

Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes

It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

15 U.S.C. § 1692a. Definitions

As used in this subchapter--

* * *

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term "debt" means any obligation or alleged obligation 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.

(6) The term "debt collector" means 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. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes 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. The term does not include--

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is

so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) 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 (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

* * *

15 U.S.C. § 1692d. Harassment or abuse

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. * * *

15 U.S.C. § 1692e. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. * * *

15 U.S.C. § 1692f. Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * *

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if--

(A) there is no present 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.

* * *

15 U.S.C. § 1692*l*. Administrative enforcement

(a) Federal Trade Commission

The Federal Trade Commission shall be authorized to enforce compliance with this subchapter, except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to another Government agency under any of paragraphs (1) through (5) of subsection (b), subject to subtitle B of the Consumer Financial Protection Act of 2010. For purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act (15 U.S.C. 41 et seq.), a violation of this subchapter shall be deemed an unfair or deceptive act or practice in violation of that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Federal Trade Commission to enforce compliance by any person with this subchapter, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act, including the power to enforce the provisions of this subchapter, in the same manner as if the

violation had been a violation of a Federal Trade Commission trade regulation rule.

(b) Applicable provisions of law

Subject to subtitle B of the Consumer Financial Protection Act of 2010, compliance with any requirements imposed under this subchapter shall be enforced under—

(1) section 1818 of Title 12, by the appropriate Federal banking agency, as defined in section 1813(q) of Title 12, with respect to--

(A) national banks, Federal savings associations, and Federal branches and Federal agencies of foreign banks;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act; and

(C) banks and State savings associations insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), and insured State branches of foreign banks;

(2) the Federal Credit Union Act [12 U.S.C.A. § 1751 et seq.], by the National Credit Union Administration Board with respect to any Federal credit union;

(3) subtitle IV of Title 49, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board;

(4) part A of subtitle VII of Title 49, by the Secretary of Transportation with respect to any air carrier or any foreign air carrier subject to that part;

(5) the Packers and Stockyards Act, 1921 [7 U.S.C.A. § 181 et seq.] (except as provided in section 406 of that Act [7 U.S.C.A. §§ 226, 227]), by the Secretary of Agriculture with respect to any activities subject to that Act; and

(6) subtitle E of the Consumer Financial Protection Act of 2010, by the Bureau, with respect to any person subject to this subchapter.

The terms used in paragraph (1) that are not defined in this subchapter or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(c) Agency powers

For the purpose of the exercise by any agency referred to in subsection (b) of this section of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b) of this section, each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this subchapter any other authority conferred on it by law, except as provided in subsection (d) of this section.

(d) Rules and regulations

Except as provided in section 5519(a) of Title 12, the Bureau may prescribe rules with respect to the collection of debts by debt collectors, as defined in this subchapter.

15 U.S.C. § 1692n. Relation to State laws

This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation stated in this Court's June 8, 2015 Order inviting the Bureau to file an amicus curiae brief not exceeding 5,000 words. The brief contains 4,838 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(5) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

Dated: August 7, 2015

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9th Circuit Case Number(s) 10-56884

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