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# OBDUSKEY V. MCCARTHEY & HOLTHUS LLP: DECLINING TO DISTINGUISH BETWEEN JUDICIAL AND NON-JUDICIAL FORECLOSURE IN FURTHERANCE OF THE FDCPA'S MISSION

MOSHE Y. GUGENHEIM\*©

## ABSTRACT

*The Fair Debt Collection Practices Act was created to eliminate abusive debt collection practices and to promote consistent State action to protect consumers against debt collection abuses. The Act contains a general definitional provision subjecting those who fit under the definition to the Act's requirements. Additionally, the Act contains a limited purposes provision for certain forms of debt collection which are subject to specific requirements. While in some instances it is clear as to who qualifies as a debt collector under the Act, in other instances it is less clear. One instance of ambiguity is the enforcement of security interests. From the Act itself, it is unclear if entities, such as law firms, who enforce security interests are considered debt collectors under the Act's general definitional provision thereby requiring those entities to adhere to the Act's various requirements. Due to a circuit split on the matter, the Supreme Court answered the ambiguity in *Obduskey v. McCarthey*.*

*The Supreme Court held that entities enforcing security interests are not debt collectors as defined by the Act's general definitional provision. Thus, law firms and other entities who conduct foreclosures are not required to follow all of the Act's requirements. However, the Court cautioned that abusive debt collection practices could transform such entities into debt collectors under the Act. While the Supreme Court may have missed an opportunity to reconcile the circuit split by distinguishing between judicial and non-judicial foreclosures, the Court was correct to decline to make such a distinction since, by doing so, it protects debtors in spirit of the Act's purpose.*

## INTRODUCTION

In *Obduskey v. McCarthey & Holthus LLP*, the Supreme Court addressed whether a business which is involved in the enforcements of security is considered a "debt collector" under the Fair Debt Collection Practices Act's<sup>1</sup> ("the Act") general

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definitional provision.<sup>2</sup> In light of statutory construction, legislative history, and legislative intent, the Court held that an entity enforcing non-judicial foreclosure is not a “debt collector” under the Act’s general definitional provision.<sup>3</sup> In reaching its conclusion, the Court missed an opportunity to reconcile a circuit split by declining to distinguish between entities enforcing judicial versus non-judicial foreclosures.<sup>4</sup> However, the Court was correct to decline to make such a distinction, as the Court’s analysis better protects debtors in the spirit of the Act’s primary purpose.<sup>5</sup>

### *THE FAIR DEBT COLLECTION PRACTICES ACT*

Congress enacted the Act in 1977 “to eliminate abusive debt collection practices by debt collectors” and to “promote consistent State action to protect consumers against debt collection abuses.”<sup>6</sup> There are two pertinent provisions defining debt collection under the Act: the general definitional provision (subjecting debt collectors to all of the Act’s requirements) and the limited-purposes provision (subjecting specific forms of debt collectors to specific requirements).<sup>7</sup>

#### *The Definitional Provisions*

The general definitional provision is found in 15 U.S.C. § 1692(a)(6).<sup>8</sup> That provision states that the term “debt collector” “means any person . . . 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 asserted to be owed or due another.”<sup>9</sup> The limited-purposes provision is found in 15 U.S.C. 1692(f)(6) and states, “[f]or the purpose of section 1692f(6) [the] term [debt collector] also includes any person . . . in any business the principal purpose of which is the enforcement of security interests.”<sup>10</sup>

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1. 15 U.S.C. § 1692 *et seq.* (2006).
2. *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1033 (2019).
3. *Id.* at 1040.
4. *See infra* text accompanying notes 101–122.
5. *See infra* text accompanying notes 123–26.
6. *Obduskey*, 139 S. Ct. at 1040–41 (Sotomayor, J., concurring).
7. *Id.* at 1035–36 (citing 15 U.S.C. § 1692(a),(6); § 1692(f)(6)).
8. *Id.* at 1035–37.
9. *Id.*
10. *Id.* at 1037.

I. THE CASE

In 2007, Dennis Obduskey obtained a mortgage loan from Magnus Financial Corporation, secured by Obduskey's property in Bailey, Colorado.<sup>11</sup> The loan was subsequently acquired by Freddie Mac, and Wells Fargo Bank was assigned as the servicer.<sup>12</sup> In 2014, after Obduskey defaulted on the loan, Wells Fargo retained McCarthy & Holthus LLP to conduct a non-judicial foreclosure<sup>13</sup> on Obduskey's property.<sup>14</sup> McCarthy mailed Obduskey a letter that said it had been instructed to commence foreclosure against Obduskey's property, disclosed the amount of the debt, and identified the creditor (Wells Fargo).<sup>15</sup> Obduskey sent back a letter "invoking § 1692(g)(b) of the Act, which provides that if a consumer disputes the amount of a debt, a "debt collector" must "cease collection" until it "obtains verification of the debt" and mails a copy to the debtor."<sup>16</sup> Instead of sending the verification, McCarthy continued with the non-judicial foreclosure by filing a notice of election and demand with the county trustee.<sup>17</sup> Obduskey filed suit alleging that McCarthy had violated the Act by not adhering to the verification procedure.<sup>18</sup>

The district court granted McCarthy's motion to dismiss reasoning that the majority view on the matter is that foreclosure activities are not covered under the Act.<sup>19</sup> The Court of Appeals for the Tenth Circuit affirmed the dismissal, reasoning that the mere enforcement of a non-judicial foreclosure does not make one a debt collector under the Act.<sup>20</sup> In light of a circuit split about the application of the Act to non-judicial proceedings, the Supreme Court granted Obduskey's petition for certiorari.<sup>21</sup>

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11. *Obduskey v. Fargo*, No. 15-CV-01734-RBJ, 2016 WL 4091174, at 1 (D. Colo. July 19, 2016), *aff'd sub nom.* *Obduskey v. Wells Fargo*, 879 F.3d 1216 (10th Cir. 2018), *aff'd sub nom.* *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, (2019).

12. *Id.*

13. *See Obduskey*, 139 S. Ct. 1029 at 1034 (2019) ("About half the States also provide for what is known as nonjudicial foreclosure, where notice to the parties and sale of the property occur outside court supervision."). The main difference between judicial and non-judicial foreclosure is that with non-judicial foreclosure, an entity such as a trustee conducts the sale as opposed to judicial foreclosure where the court conducts the sale. *See id.*

14. *Fargo*, 2016 WL 4091174 at 1.

15. *Obduskey* 139 S. Ct. at 1035.

16. *Id.*

17. *Id.* Under Colorado non-judicial foreclosure law one conducting a non-judicial foreclosure "must first mail the homeowner certain preliminary information, including the telephone number for the Colorado foreclosure hotline. Thirty days later, the creditor may file a 'notice of election and demand' with a state official called a 'public trustee.'" *Id.* at 1034.

18. *Id.* at 1035.

19. *Obduskey v. Fargo*, No. 15-CV-01734-RBJ, 2016 WL 4091174 at 3 (D. Colo. July 19, 2016).

20. *Obduskey*, 139 S. Ct. at 1035.

21. *Id.*

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### II. THE COURTS REASONING

In *Obduskey v. McCarthy & Holthus, LLP*, the Supreme Court unanimously held that an entity conducting a non-judicial foreclosure proceeding is not considered a debt collector under the general definitional provision of the Act.<sup>22</sup> Justice Breyer, writing for the Court, based the Court's ruling on three grounds: (1) statutory construction, (2) legislative history, and (3) legislative intent.<sup>23</sup> Justice Breyer also discussed and rejected each of Obduskey's arguments for why McCarthy was a debt collector under the Act.<sup>24</sup>

#### A. *The Court's Reasons in Support of its Holding*

##### 1. *Statutory Construction*

The opinion starts with statutory construction.<sup>25</sup> The Act defines a debt collector as one who "regularly collects or attempts to collect, directly or indirectly, debts."<sup>26</sup> The proceeds of a foreclosure sale are given to a creditor to satisfy the debt.<sup>27</sup> Thus, a business which conducts non-judicial foreclosure sales indirectly collects debt and, therefore, qualifies as a debt collector under the Act's general definitional provision.<sup>28</sup> However, the Act also contains a limited purpose definition when it says, "[for] purposes of section 1692(f)(6)...a debt collector *also* includes (a business) the principal purpose of which is the enforcement of security interests."<sup>29</sup> This definition includes a business which conducts non-judicial foreclosure sales.<sup>30</sup> The limited purpose definition, therefore, makes it clear that a business conducting a non-judicial foreclosure is not included under the Act's general definition of a debt collector or else the Act would be superfluous.<sup>31</sup>

##### 2. *Legislative Intent*

The Court then turns to legislative intent.<sup>32</sup> Congress likely structured the Act in a way which coincides with state non-judicial foreclosure schemes.<sup>33</sup> The Act limits

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22. *Id.* at 1040.

23. *Id.* at 1036–38.

24. *Id.* at 1038–40.

25. *Id.* at 1036–37.

26. *Obduskey v. McCarthy & Holthus, LLP*, 139 S. Ct. 1029, 1036 (2019) (citing §15 U.S.C. § 1692(a)(6)).

27. *Id.*

28. *Id.* at 1036–37.

29. *Id.* at 1037 (citing § 15 U.S.C. § 1692(f)(6)).

30. *See id.* (holding that the limited-purpose definition encompasses "a business, like McCarthy" which enforces non-judicial foreclosures).

31. *Id.*

32. *Obduskey v. McCarthy & Holthus, LLP*, 139 S. Ct. 1029, 1037 (2019).

33. *Id.*

debt collectors from communicating consumer debt to third parties.<sup>34</sup> However, in a foreclosure sale, the “purpose of publicizing a sale is to attract bidders, ensure that the sale price is fair, and thereby protect the borrower from further liability.”<sup>35</sup> Congress created the Act to protect the debtor and a prevention of advertising a foreclosure sale would hurt the debtor.<sup>36</sup> Thus, if businesses which conduct non-judicial foreclosure sales were considered debt collectors under the Act, the Act would clash with state non-judicial foreclosure schemes.<sup>37</sup> Therefore, Congress likely did not intend for those businesses to be considered debt collectors under the Act.<sup>38</sup>

### 3. *Legislative History*

Lastly, the Court turns to legislative history.<sup>39</sup> When drafting the Act, there were two versions presented in Congress.<sup>40</sup> One version explicitly included entities enforcing non-judicial foreclosures as debt collectors.<sup>41</sup> Another version excluded non-judicial foreclosure sales from the Act.<sup>42</sup> Thus, it makes sense that Congress compromised between the two drafts, subjecting entities enforcing non-judicial foreclosures as debt collectors only under the limited purpose section of the Act.<sup>43</sup>

#### B. *The Court’s Rejection of Obuskey’s Arguments*

##### 1. *Superfluity Argument*

Obduskey argued that the Act’s general definitional provision includes businesses that conduct non-judicial foreclosure sales.<sup>44</sup> The limited purpose section, by specifying those enforcing security interests, does make the Act superfluous as the limited purpose definition was meant for “repo men” — those who seize collateral from the debtor’s property at night.<sup>45</sup> Obduskey argues that repo men do not fit under the Act’s general definitional provision.<sup>46</sup> The Court dismissed this argument reasoning that repo activity is an indirect collection of a debt since it is undertaken

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34. *Id.* (citing § 15 U.S.C. § 1692(c)(b)).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Obduskey v. McCarthy & Holthus, LLP*, 139 S. Ct. 1029, 1037-38 (2019).

40. *Id.*

41. *Id.* at 1037.

42. *Id.* at 1038.

43. *Id.*

44. *See id.*

45. *Obduskey v. McCarthy & Holthus, LLP*, 139 S. Ct. 1029, 1038 (2019).

46. *Id.*

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to collect some or all of the defaulted debt.<sup>47</sup> Thus, “repo men” do fit under the Act’s general definitional provision.<sup>48</sup> Therefore, if the enforcement of a security interest was included in the Act’s general definition, the Act’s limited purpose section would be superfluous.<sup>49</sup>

### 2. *Venue Argument*

Obduskey pointed to the Act’s venue provision which states, “[a]ny debt collector who brings any legal action on a debt against any consumer shall...in the case of an action to enforce an interest in real property securing the consumer’s obligation, bring such action only in a judicial district.”<sup>50</sup> Since the provision includes judicial foreclosures, it must also include non-judicial foreclosures.<sup>51</sup> The Court rejected this argument as well reasoning that the venue provision only speaks of judicial, and not non-judicial, foreclosures.<sup>52</sup> Additionally, the venue provision merely references a debt collector who is conducting a foreclosure.<sup>53</sup> It does not mean that one who conducts a foreclosure is a debt collector under Act.<sup>54</sup>

### 3. *Transformation into a Debt Collector Argument*

Obduskey argued that even assuming *arguendo* that a business conducting a non-judicial foreclosure is not a debt collector under the Act, McCarthy transformed itself into a debt collector “by sending notices that any ordinary homeowner would understand as an attempt to collect a debt backed up by the threat of foreclosure.”<sup>55</sup> The Court rejected this argument reasoning that if the non-judicial foreclose is not debt collection under the Act, then neither are the legal means necessary to carry out non-judicial foreclosure.<sup>56</sup> Here, McCarthy was obligated under Colorado non-judicial foreclosure law to send the notices.<sup>57</sup> Therefore, McCarthy did not act as a debt collector when sending the notices.<sup>58</sup>

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47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 1039 (citing 15 U.S.C. § 1692(i)(a) (2006)) (emphasis added).

51. *Obduskey v. McCarthy & Holthus, LLP*, 139 S. Ct. 1029, 1039 (2019).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *See Obduskey v. McCarthy & Holthus, LLP*, 139 S. Ct. 1029, 1039 (2019).

58. *Id.*

4. *Loophole Argument*

Lastly, Obduskey argued that the Court's decision excluding businesses conducting non-judicial foreclosure sales as debt collectors gives creditors a loophole under the Act to engage in abusive practices.<sup>59</sup> The Court rejected this argument reasoning that States guard against such practices, for example, by requiring notice to the debtor.<sup>60</sup> It is up to Congress, and not the judiciary, to determine if these safeguards are adequate.<sup>61</sup>

III. THE CIRCUIT SPLIT

There is a circuit split on the application of the Act to non-judicial foreclosure proceedings.<sup>62</sup> In *Vien-Phuong Thi Ho v. ReconTrust Co.*, the Ninth Circuit ruled that a trustee conducting a non-judicial foreclosure is not a debt collector under the Act's primary definitional provision (and, thus, not subject to the Act's requirements).<sup>63</sup> Ho, the debtor, borrowed money from creditor Countrywide Bank to buy a home.<sup>64</sup> The loan was secured by a deed of trust with ReconTrust acting as the Trustee.<sup>65</sup> After Ho missed her payments, ReconTrust sent her a Notice of Default and, subsequently, a Notice of Sale.<sup>66</sup> Ho alleged that the notices violated the Act by misrepresenting the amount of money she owed.<sup>67</sup> The Ninth Circuit rejected Ho's argument reasoning that ReconTrust was not a debt collector under the Act for the following reasons:<sup>68</sup>

First, the Act defines debt collectors generally as those who directly or indirectly attempt to collect money.<sup>69</sup> However, the objective of a non-judicial foreclosure is to sell the security interest and foreclose redemption – not to collect money from the debtor.<sup>70</sup> Although money from the sale is used to pay the creditor, that is not

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59. *Id.* at 1040.

60. *Id.*

61. *Id.*

62. *Id.* at 1035.

63. 858 F.3d 568, 572 (9th Cir. 2016).

64. *Id.* at 570.

65. *Id.*

66. *Id.* at 570–71. ReconTrust was required to send the Notices to conform with California's non-judicial foreclosure process. *See id.* (citing Cal. Civ. Code § 2924(a)(1), (3)).

67. *Id.* at 571 (citing 15 U.S.C. § 1692(e)(2)(A) which says, "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: . . . The false representation of . . . the character, amount, or legal status of any debt . . .").

68. *Id.* at 570–76.

69. *Vien-Phuong Thi Ho v. ReconTrust Co.*, 858 F.3d 568, 571 (9th Cir. 2016). (citing 15 U.S.C. § 1692(a)(5), (6)).

70. *Id.*



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the object of the non-judicial foreclosure.<sup>71</sup> In fact, in California, a creditor may not bring a deficiency action after a foreclosure sale thereby showing that non-judicial foreclosure is not annexed to debt collection.<sup>72</sup>

Second, if the Act's general definitional provision included entities enforcing security interests, it would render the limited purposes section of § 1692(f)(6) as superfluous.<sup>73</sup> Lastly, "[h]olding trustees liable under the [the Act] would subject them to obligations that would frustrate their ability to comply with the California statutes governing non-judicial foreclosure."<sup>74</sup> The court said, "[w]hen one interpretation of an ambiguous federal statute would create a conflict with state foreclosure law and another interpretation would not, respect for our federal system counsels in favor of the latter."<sup>75</sup> Thus, the court ruled that ReconTrust as a trustee enforcing a security interest was not a general debt collector under the Act and, thus, not subject to the Act.<sup>76</sup>

On the other side of the circuit split, in *Kaymark v. Bank of Am.*, the Third Circuit ruled that an entity which enforces a security interest is considered a debt collector under the Act.<sup>77</sup> Dale Kaymark defaulted on a mortgage held by Bank of America ("BOA").<sup>78</sup> On behalf of BOA, Udren Law Offices, P.C. ("Udren") initiated judicial foreclosure on Kaymark's property in state court.<sup>79</sup> The foreclosure complaint received by Kaymark listed fees which, although were likely to occur, had not occurred yet.<sup>80</sup> Kaymark alleged that by listing the not-yet-incurred fees on the complaint, Udren violated § 1692e(2)(A), (5), (10), and § 1692f(1) of the Act.<sup>81</sup>

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71. *See id.*

72. *Id.* The Court makes an analogy to a tow truck which tows a car due to the non-payment of parking tickets. *Id.* Although one may be induced to pay parking tickets from the fear of having his or her car towed, the fear of such a towing is not enough to transform the tow truck company into a debt collector. *Id.*

73. *Id.* at 573. The Act's general definition of a "debt collector" to whom the Act generally applies to is found in 15 U.S.C. § 1692(a)(6). *Id.* at 572. The Act defines "debt collectors" as those who "regularly collect or attempt to collect, directly or indirectly, debts owed or due or asserted to be owed or due [to] another." *Id.* The Act's limited purpose definition is found in 15 U.S.C. § 1692(f)(6) where the Act specifies that it "also includes" entities whose principal business purpose is "the enforcement of security interests." *Id.* at 573.

74. *Id.* at 575. The Court says, "[f]or example, the FDCPA prohibits debt collectors from communicating with third parties about the debt absent consent from the debtor. 15 U.S.C. § 1692(c)(b). But California law requires the trustee to announce all trustee's sales in a newspaper and mail the notice of default to various third parties. See Cal. Civ. Code §§ 2924b(c)(1)–(2), 2924f(b). Moreover, the Act prohibits debt collectors from directly communicating with debtors if the debt collector knows that the debtor is represented by counsel. 15 U.S.C. § 1692c(a)(2). California law requires the trustee to mail the notices of default and sale directly to the borrower, and makes no exception for borrowers who are represented by counsel." *Id.*

75. *Vien–Phuong Thi Ho v. ReconTrust Co.*, 858 F.3d 568, 576 (9th Cir. 2016).

76. *Id.* at 572.

77. 783 F.3d 168, 179 (3d Cir. 2015).

78. *Id.* at 171.

79. *Id.*

80. *Id.*

81. *Id.* at 174.

Udren argued that foreclosure actions cannot be the basis of an Act claim since “[the Act] has the apparent objective of preserving creditors’ judicial remedies.”<sup>82</sup> The court rejected the argument reasoning that foreclosure meets the definition of debt collection under the Act.<sup>83</sup> If entities enforcing foreclosure actions were not considered debt collectors under the Act, it would create a loophole for debt collectors when debt is secured by real property and foreclosure is used to collect that interest.<sup>84</sup> Additionally, “if a collector were able to avoid liability under the Act simply by choosing to proceed *in rem* rather than *in personam*, it would undermine the purpose of the Act.”<sup>85</sup> Lastly, Congress, and not the courts, would have to exclude foreclosure proceedings from debt collection given that the plain language of the Act seems to indicate that such proceedings are covered.<sup>86</sup>

#### IV. ANALYSIS

In *Obduskey v. McCarthy & Holthus LLP*, the Supreme Court correctly held that entities enforcing non-judicial foreclosures are not considered debt collectors under the Act’s general definitional provision.<sup>87</sup> The Court was correct to limit its holding to entities enforcing non-judicial, and not judicial, foreclosures.<sup>88</sup> However, the Court missed an opportunity to reconcile a circuit split when it left open the issue of whether entities enforcing judicial foreclosures are considered debt collectors under the Act.<sup>89</sup>

A. *The Court correctly held that entities enforcing non-judicial foreclosures are not considered debt collectors under the Act.*

The Court’s strongest argument supporting its conclusion is its superfluity argument.<sup>90</sup> Under the Act’s general provision, an entity enforcing a foreclosure would qualify as a debt collector since foreclosure is an indirect attempt to collect a debt.<sup>91</sup> However, the Act’s limited purposes provision specifies entities enforcing

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82. *Id.* at 178 (citing *Heintz v. Jenkins*, 514 U.S. 291, 296 (1995)).

83. *Kaymark v. Bank of Am.*, 783 F.3d 168, 179 (3d Cir. 2015).

84. *Id.*

85. *Id.* (citing *Piper v. Portnoff Law Assocs.*, 396 F.3d 227, 236 (3d Cir.2005)).

86. *Id.* The Court also mentions *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 461 (C.A.6 2013) and *Wilson v. Draper & Goldberg, P. L. L. C.*, 443 F.3d 373, 376 (C.A.4 2006) as cases where Circuits have held entities enforcing non-judicial foreclosures as covered by the Act. *Id.*

87. 139 S. Ct. 1029, 1040 (2019).

88. *Id.* at 1039.

89. *See id.* *See infra* text accompanying notes 104–128.

90. *See Obduskey v. McCarthy & Holthus, LLP*, 139 S. Ct. 1029, 1037 (2019); *see also Vien–Phuong Thi Ho v. ReconTrust Co.*, 858 F.3d 568, 573 (9th Cir. 2016).

91. *Obduskey*, 139 S. Ct. at 1036-37. *But see ReconTrust Co.*, 858 F.3d at 571 (holding that an entity enforcing non-judicial foreclosure is not a “debt collector” under the Act, even “indirectly” since the object of non-judicial foreclosure is to sell the security interest and foreclose redemption).

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security interests as debt collectors for the purposes of the limited provision.<sup>92</sup> Thus, if the Act's general definition included entities enforcing security interests, it would render the limited purposes provision unnecessary.<sup>93</sup>

Judge Korman, in his concurrence in part and dissent in part to *Vien–Phuong Thi Ho v. ReconTrust Co.*, attempts to combat the superfluity argument by reasoning that entities enforcing security interests act in different ways.<sup>94</sup> There are entities which “enforce security interests yet who do not typically engage in activity that would also come within the definition of ‘debt collection.’”<sup>95</sup> One example is a tow truck driver.<sup>96</sup> Additionally, some entities “do not [collect] with sufficient regularity to bring them within the definition of ‘debt collector.’”<sup>97</sup> However, all entities enforcing security interests, including tow truck drivers and those who act infrequently, would have been covered under the Act's general definition.<sup>98</sup> Thus, the superfluity issue remains unresolved.<sup>99</sup>

Judge Korman argues that if trustees are not considered “debt collectors” under the Act's general provision, they will be able to engage in deceptive collection acts which is contrary to Congress's intent in creating the Act.<sup>100</sup> However, the majority's holding in *Obduskey* is “limited to circumstances where an entity enforcing a non-judicial foreclosure only takes the necessary steps required by state law.”<sup>101</sup> Abusive debt collection practices can transform such an entity into a debt collector under the Act.<sup>102</sup>

*B. However, the Court missed an opportunity to reconcile a circuit split when it left open the issue of whether entities enforcing judicial foreclosures are considered debt collectors under the Act.*

The Supreme Court missed an opportunity to reconcile the rulings of *Kaymark v. Bank of Am.*, and *Vien–Phuong Thi Ho v. ReconTrust Co.*, when it failed to elaborate on the potential difference in terms of what is considered a debt collector between

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92. *Obduskey*, 139 S. Ct. at 1037.

93. *Id.*

94. *ReconTrust Co.*, 858 F.3d at 583 (Korman, J., concurring in part and dissenting in part).

95. *Id.*

96. *Vien–Phuong Thi Ho v. ReconTrust Co.*, 858 F.3d 568, 583 (9th Cir. 2016) ((Korman, J., concurring in part and dissenting in part).

97. *Id.*

98. See *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1040–41 (2019) (Sotomayor, J., concurring) (combating the argument that the specific provision was intended for “repo men” – those who collect personal property security interests).

99. *Id.*

100. *ReconTrust Co.*, 858 F.3d at 583–84 (Korman, J., concurring in part and dissenting in part).

101. *Obduskey*, 139 S. Ct. at 1039–40 (majority opinion).

102. *Id.* at 1040.

entities enforcing judicial and non-judicial foreclosures.<sup>103</sup> In *Kaymark*, the Court considered whether an entity enforcing a *judicial foreclosure* is a debt collector under the Act.<sup>104</sup> In *ReconTrust Co.*, the Court considered whether an entity enforcing a *non-judicial foreclosure* is a debt collector under the Act.<sup>105</sup> Under the Act's general provision defining who is considered a "debt collector," any entity which attempts to collect a debt indirectly is considered a "debt collector."<sup>106</sup> There are two conflicting views as how to evaluate non-judicial foreclosure in connection with the general provision.

One view looks at the overall purpose of non-judicial foreclosure.<sup>107</sup> Although money collected from a non-judicial foreclosure does not come from the borrower (but rather the buyer), that "does not alter the fact that any funds raised would come as a result of the elimination of the debtor's interest and equity in the property."<sup>108</sup> A mortgage secures payment of a debt, and foreclosure is "the process in which property securing a mortgage is sold to pay off the loan balance due."<sup>109</sup> Thus, at the very least, enforcing a foreclosure is an indirect means of collecting a debt putting it within the purview of the Act's general definition of debt collection.<sup>110</sup>

A conflicting view looks squarely to the object of the actual foreclosure sale.<sup>111</sup> It does not contemplate what happens after the non-judicial foreclosure.<sup>112</sup> The purpose of a nonjudicial foreclosure is "to retake and resell the security, not to collect money from the borrower."<sup>113</sup> In fact, without a deficiency action (in some states such an action is not allowed after non-judicial foreclosure), the trustee cannot collect the rest of the debt from the debtor.<sup>114</sup> This is because non-judicial foreclosure is not annexed to the debtor's debt, but purely deals with the security interest.<sup>115</sup> While it is true that funds collected from the trustee's sale are used to pay off the debt, the purpose of the trustee's sale is to sell the security interest.<sup>116</sup>

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103. *See id.* at 1039 (leaving the potential difference between judicial and non-judicial foreclosure for another day).

104. *See Kaymark v. Bank of Am., N.A.*, 783 F.3d 168, 178 (3d Cir. 2015).

105. *Vien–Phuong Thi Ho v. ReconTrust Co.*, 858 F.3d 568, 570 (9th Cir. 2016) (majority opinion).

106. 15 U.S.C. § 1692(a)(6).

107. *See Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1036 (2019); *ReconTrust Co.*, 858 F.3d at 580 (9th Cir. 2016) (Korman, J., concurring in part and dissenting in part).

108. *ReconTrust Co.*, 858 F.3d at 581.

109. *Obduskey*, 139 S. Ct. at 1033–34.

110. *Id.*

111. *Vien–Phuong Thi Ho v. ReconTrust Co.*, 858 F.3d 568, 571 (9th Cir. 2016) (majority opinion); *Obduskey v. Wells Fargo*, 879 F.3d 1216, 1221 (10th Cir. 2018).

112. *ReconTrust Co.*, 858 F.3d at 571; *Wells Fargo*, 879 F.3d at 1221.

113. *ReconTrust Co.*, 858 F.3d at 571.

114. *Id.*

115. *See id.*

116. *Id.*

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The latter view, thus, distinguishes between judicial and non-judicial foreclosures.<sup>117</sup> A judicial foreclosure comes with an underlying deficiency judgment attached to the sale.<sup>118</sup> This shows that the object and purpose of judicial foreclosure is, at the very least, an indirect attempt to collect money from the debtor making an entity bringing a judicial foreclosure a debt collector under the Act.<sup>119</sup>

The Supreme Court considered this distinction but left the issue open for another day.<sup>120</sup> However, had the Court distinguished between judicial and non-judicial foreclosure, it could have reconciled *ReconTrust Co.* and *Kaymark*. *ReconTrust Co.*, like *Obduskey*, dealt with an entity enforcing non-judicial foreclosure.<sup>121</sup> Under the latter view, such entities are not debt collectors under the Act.<sup>122</sup> On the other hand, *Kaymark* dealt with an entity enforcing judicial foreclosure and is thus an indirect collector thereby qualifying as a “debt collector” under the Act.<sup>123</sup> This distinction may also explain the superfluity issue of the Act.<sup>124</sup> Perhaps the Act’s general definition excludes entities enforcing non-judicial foreclosure and the limited purposes provision was meant to include such entities as debt collectors for limited purposes.

C. *The Court was correct to limit its holding to entities enforcing non-judicial, and not judicial, foreclosures.*

The Court rationale for failing to make a distinction between judicial and non-judicial foreclosures can perhaps be found in Justice Sotomayor’s concurring opinion.<sup>125</sup> The purpose of the Act is to “eliminate abusive debt collection practices” and “promote consistent State action to protect consumers against debt collection abuses.”<sup>126</sup> By considering entities enforcing non-judicial foreclosures as covered by the Act’s general definition of debt collectors, although excluded by the Act’s limited purposes provision, it is less of a stretch for the Court to hold that abusive actions taken by such entities qualify as debt collection.<sup>127</sup> If non-judicial foreclosure

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117. See *Obduskey v. Wells Fargo*, 879 F.3d 1216, 1221 (10th Cir. 2018).

118. See *id.*

119. See *id.*

120. *Obduskey v. McCarthy & Holthus, LLP*, 139 S. Ct. 1029, 1039 (2019).

121. *Vien–Phuong Thi Ho v. ReconTrust Co.*, 858 F.3d 568, 570 (9th Cir. 2016).

122. *Id.* at 572. See *Wells Fargo*, 879 F.3d at 1221.

123. See *Kaymark ex rel. Current v. Bank of Am.*, 783 F.3d 168, 178 (3d Cir. 2015).

124. See *Obduskey*, 139 S. Ct. at 1037.

125. *Id.* at 1040–41 (Sotomayor, J., concurring).

126. *Obduskey v. McCarthy & Holthus, LLP*, 139 S. Ct. 1029, 1041 (2019) (Sotomayor, J., concurring).

127. See *id.* (reasoning that Court’s opinion is does not apply to circumstances of abusive debt collection practices).

was not an indirect attempt to collect a debt, it may have been harder to consider such entities as debt collectors even when they engaged in abusive behaviors.<sup>128</sup>

#### CONCLUSION

In *Obduskey v. McCarthy & Holthus LLP*, in light of statutory construction, legislative history, and legislative intent, the Supreme Court correctly held that an entity which enforces non-judicial foreclosures is not considered a debt collector under the Act's general definitional provision.<sup>129</sup> However, the Court missed an opportunity to reconcile a circuit split when it declined to distinguish between entities which enforce non-judicial as opposed to judicial foreclosures.<sup>130</sup> Ultimately, the Court was correct to leave the distinction for another day, since, by declining to distinguish between judicial and non-judicial foreclosures, the Court was forced to recognize entities enforcing non-judicial foreclosures as covered under the Act's general definitional provision.<sup>131</sup> By recognizing such entities as covered by the Act's general definitional provision, it is less of a stretch for the Court to rule that entities enforcing non-judicial foreclosures are transformed into debt collectors when they engage in abusive debt collection practices.<sup>132</sup>

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128. *See id.*

129. *Id.* at 1040 (majority opinion).

130. *See supra* text accompanying notes 101–122.

131. *See supra* text accompanying notes 123–26.

132. *Id.*