A REMEDY FORECLOSED? MORTGAGE FORECLOSURE AND THE FAIR DEBT COLLECTION PRACTICES ACT

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During the Global Financial Crisis, millions of homeowners received foreclosure notices. Many of these notices were sent by attorneys, and informed consumers of an impending mortgage foreclosure. Courts are split on whether foreclosures must conform with the Fair Debt Collection Practices Act (FDCPA). In order to be subject to the FDCPA, an entity must meet the statutory definition of "debt collector." Courts struggle with whether foreclosure attorneys fall under this definition. This Note examines this conflict, and suggests a fact-sensitive framework for evaluating whether foreclosure attorneys are debt collectors.

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INTRODUCTION

Three attorneys—Smith, Jones, and Rogers[1]—practice at separate firms in one of the many states that allow both judicial and nonjudicial foreclosure.[2] Each has as his primary business the enforcement of mortgages through the process of nonjudicial foreclosure. In order to comply with the state's nonjudicial foreclosure proceedings, each attorney sends an identical foreclosure notice to every homeowner.[3] The foreclosure notices do not verify the debt,[4] and do not contain the mini-*Miranda* warning[5] required by the Fair Debt Collection Practices Act[6] (FDCPA). They also never demand repayment in the notice.

Although the attorneys have similar practices and use identical nonjudicial foreclosure notices, there are some differences in how each attorney runs his practice. Smith's sole practice area is nonjudicial foreclosure. His notices only inform consumers of the pending nonjudicial

1. Attorneys Smith, Jones, and Rogers and their law practices are entirely fictitious.
2. For a discussion on the difference between judicial and nonjudicial foreclosure, see *infra* Part I.B.2.
3. *See infra* Part I.B.2.b.
4. *See infra* Part I.A.1.
5. *See infra* Part I.A.1.
6. 15 U.S.C. §§ 1692–1692p (2006).

foreclosure sale. In addition to his nonjudicial foreclosure practice, Jones also does a non-trivial amount of traditional debt collection (e.g., mail dunning letters) on a consistent basis. Finally, Rogers's practice also includes a consistent, non-trivial amount of judicial foreclosure that always includes a demand for a deficiency judgment, but he otherwise does not demand payment from consumers.

Several recipients of these notices realize that they have colorable claims, and file three distinct class actions against Smith, Jones, and Rogers for FDCPA violations. However, there is a circuit split regarding whether foreclosure attorneys are "debt collectors" under the FDCPA.[7] Are Smith, Jones, and Rogers "debt collectors"?

This Note answers this question, and advocates a consistent framework to analyze different requirements under the FDCPA.[8] Part I of this Note provides background information on the FDCPA, mortgage foreclosure, and the interplay of the two that has led to the circuit split. Part II explores the circuit split. Finally, Part III offers a consistent framework for assessing whether the FDCPA covers mortgage foreclosure.

I. LAYING THE FOUNDATION: BACKGROUND ON THE FDCPA AND MORTGAGE FORECLOSURE

Before analyzing the conflict among the circuits, this Note provides background information on the FDCPA and mortgage foreclosure. Part I.A begins with an overview of the FDCPA and explains the areas implicated in the typical mortgage foreclosure. Next, Part I.B discusses the basics of mortgages and foreclosure, and examines the differences between judicial and nonjudicial foreclosure. Finally, Part I.C examines three clauses in the FDCPA that circuit courts have analyzed in addressing whether mortgage foreclosure is covered by the FDCPA.

A. The FDCPA's Purpose and Effect

In deciding whether Smith, Jones, and Rogers fall under the FDCPA, courts must look at the text of the statute in light of the Act's history and

7. *See* Hasbun v. Recontrust Co., No. 11-60488-CIV., 2011 WL 3837158, at *2 (S.D. Fla. Aug. 24, 2011) (characterizing the circuit split as between the Fourth and Fifth Circuits on one side, and the Eleventh Circuit on the other); *see also* Eric M. Marshall, Note, *The Protective Scope of the Fair Debt Collection Practices Act: Providing Mortgagors the Protection They Deserve from Abusive Foreclosure Practices*, 94 MINN. L. REV. 1269, 1275–81 (2010) (distinguishing circuit courts that had found enforcers of security interests are debt collectors and district courts that had rejected that view); Alexandra Vozza, Student Article, *The FDCPA's Application to the Foreclosure Process*, 24 LOY. CONSUMER L. REV. 640, 660 (2012) (concluding that the FDCPA does not apply to mortgage foreclosures). This Note focuses solely on mortgage foreclosure and thus refers to cases regarding other security interests only as necessary. This Note characterizes the split as between the Fourth and Fifth Circuits on one side, and the Eleventh Circuit on the other. *See infra* Part II.A–B. It also acknowledges the contribution of the Tenth Circuit in analyzing the issue without resolving it. *See infra* Part II.C.

8. *See infra* Part III.

purpose. As courts evaluate the text, they will examine typical violations and defenses under the statute, the defined terms "debt" and "debt collector," and the ever-present but undefined "debt collection." Finally, courts must also consider how the FDCPA can be best enforced by private individuals and agencies.

1. General Information

In 1968, Congress passed the Consumer Credit Protection Act[9] (CCPA), which includes the Truth in Lending Act[10] (TILA). Although TILA offered some consumer protections through disclosure requirements for loans,[11] it did not protect consumers from abusive attempts to collect debts.[12] Recognizing a "widespread and serious national problem" with abusive debt collection,[13] Congress passed the FDCPA in 1977[14] to protect consumers from these abuses,[15] and to fill existing gaps in state protections.[16] However, the FDCPA was also meant to be fair to ethical debt collectors.[17]

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9. Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended in scattered sections of 15 and 18 U.S.C.).

10. 15 U.S.C. §§ 1601–1667f (2006); *see also* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 130 S. Ct. 1605, 1615 (2010).

11. *See* Regulation Z, 12 C.F.R. § 226.1 (2011) (outlining regulations for extending credit to consumers). TILA gave the Board of the Federal Reserve System the power to promulgate rules including model forms. *See* 15 U.S.C. § 1604.

12. *See* William P. Hoffman, Comment, *Recapturing the Congressional Intent Behind the Fair Debt Collection Practices Act*, 29 ST. LOUIS U. PUB. L. REV. 549, 551–52 (2010) (indicating that the FDCPA is meant to fill a gap in consumer protection laws left by the CCPA); *see also* Presidential Remarks on Signing H.R. 5294 into Law, 13 WEEKLY COMP. PRES. DOC. 1382, 1383 (Sept. 20, 1977) [hereinafter Presidential Remarks] (noting that the FDCPA was a "great step forward" for consumer protection).

13. *See* S. REP. NO. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 (listing particular types of abusive debt collection behavior such as the use of "obscene or profane language" and the "misrepresentation of a consumer's legal rights"); *see also* Presidential Remarks, *supra* note 12, at 1382 (noting that protecting consumers from harassment was a motivating factor for passing the law).

14. Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. §§ 1692–1692p (2006)).

15. *See* 15 U.S.C. § 1692(e) (2006) (noting that one purpose of the FDCPA is "to promote consistent State action to protect consumers against debt collection abuses"); S. REP. NO. 95-382, at 1, 1977 U.S.C.C.A.N. at 1696–97; Presidential Remarks, *supra* note 12, at 1382 (noting examples of consumer harassment provide during the congressional hearings); *see also* Elwin Griffith, *Identifying Some Trouble Spots in the Fair Debt Collection Practices Act: A Framework for Improvement*, 83 NEB. L. REV. 762, 762–64 (2005); Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257, 267 (2011).

16. *See* S. REP. NO. 95-382, at 2, 1977 U.S.C.C.A.N. at 1696–97 (noting that thirteen states had no debt collection laws at that time); Griffith, *supra* note 15, at 763.

17. *See* § 1692(e) (noting that one purpose of the FDCPA is "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged"); S. REP. NO. 95-382, at 1, 1977 U.S.C.C.A.N. at 1696; Marshall, *supra* note 7, at 1289.

The FDCPA is a remedial statute, and courts interpret it broadly to protect consumers that owe, or allegedly owe, a debt.[18] The statute provides rules for debt collectors in their collection efforts,[19] and regulates the way they interact with consumers,[20] as well as how they engage in third-party communications regarding the consumer.[21] For instance, a debt collector may not harass any person,[22] engage in unfair practices,[23] or use false or misleading representations in its attempts to collect a debt.[24]

The FDCPA also requires the debt collector to be forthright with the consumer about the collector's efforts. In the debt collector's initial communication with the consumer, the debt collector must provide a mini-*Miranda*[25] warning to the consumer.[26] This warning informs the consumer that the communication is from a debt collector, and that any information the consumer provides may be used to collect the consumer's debt.[27]

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18. *See, e.g.*, Brown v. Card Serv. Ctr., 464 F.3d 450, 453 (3d Cir. 2006); Clark v. Capital Credit & Collection Servs., Inc., 460 F.3d 1162, 1176 (9th Cir. 2006); Johnson v. Riddle, 305 F.3d 1107, 1117 (10th Cir. 2002); *see also* S. REP. NO. 95-382, at 4, 1977 U.S.C.C.A.N. at 1698 (indicating that the FDCPA uses "general terms" like "harassing, unfair, or deceptive" to allow courts, "where appropriate, to proscribe other improper conduct which is not specifically addressed"); Griffith, *supra* note 15, at 775 n.89 ("The FDCPA was intended to be broadly remedial."). The FDCPA defines a consumer as any person—not a corporation—that owes or allegedly owes a debt. *See* § 1692a(3) ("[A]ny natural person . . . .").

19. *See* Spector, *supra* note 15, at 267 ("[The FDCPA] regulates the time and place at which the collector may communicate with the consumer, the method of communicating, and the content of the communication.") (footnotes omitted).

20. *See* §§ 1692c–1692g; Spector, *supra* note 15, at 267

21. *See* § 1692b; Heintz v. Jenkins, 514 U.S. 291, 292–93 (1995). Section 1692c(b) provides that a debt collector may only communicate with third parties (i.e., persons that are not the consumer, the consumer's attorney, or a consumer reporting agency) to gain location information pursuant to § 1692b. *See* § 1692c(b). Section 1692b provides that debt collectors may not tell third parties that the consumer is a debtor, *see* § 1692b(2), or that the debt collector is in the debt collection business. *See* § 1692b(5).

22. *See* § 1692d; Christopher L. Peterson, *Predatory Structured Finance*, 28 CARDOZO L. REV. 2185, 2229 (2007). Specifically, the debt collector may not use or threaten violence, *see* § 1692d(1), use abusive or obscene language, *see* § 1692d(2), or harass a person on the telephone—including ringing the phone with intent to harass. *See* § 1692d(5).

23. *See* § 1692f; Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359, 1386 (2010). Unfair practices under this section include the collection of amounts not authorized by the agreement creating the obligation, *see* § 1692f(1), and taking or threatening nonjudicial action to dispossess property when the debt collector has no present right to possession, or no intention to take possession of the property. *See* § 1692f(6)(A). The section prohibiting nonjudicial action also applies to security enforcers. *See* § 1692a(6). This Note discusses § 1692f(6) in detail in Part I.C.1.

24. *See* § 1692e; Elwin Griffith, *The Challenge of Communicating with the Consumer and Validating the Debt Under the Fair Debt Collection Practices Act*, 55 U. KAN. L. REV. 61, 78 (2006). False and misleading representations include: the false representation of the amount owed, *see* § 1692e(2)(A), the use of deceptive practices to collect a debt, *see* § 1692e(10), and the use of a name other than the debt collector's own. *See* § 1692e(14).

25. Miranda v. Arizona, 384 U.S. 436 (1966).

26. *See* § 1692e(11); Ehrich v. I.C. Sys., Inc., 681 F. Supp. 2d 265, 274 (E.D.N.Y 2010); *see also* Hoffman, *supra* note 12, at 563.

27. *Compare* § 1692e(11) ("[A]ny information obtained will be used [to collect a debt] . . . ."), *with Miranda*, 384 U.S. at 469 ("The warning of the right to remain silent must be

The FDCPA also requires a debt collector to validate the consumer's debt.[28] After the debt collector's initial communication[29] with the consumer, the debt collector has five days to inform the consumer—in writing—of the amount of the debt,[30] the name of the creditor,[31] and of the consumer's right to dispute the debt in writing.[32] The notice must inform the consumer that the debt collector must provide verification of a disputed debt.[33] It must also inform the consumer that the consumer's failure to dispute the debt allows the debt collector to assume the debt's validity.[34]

If the consumer writes to the debt collector within thirty days to dispute the debt or to request information about the original creditor, the debt collector must cease collection efforts until she can verify the debt or provide the original creditor's information.[35] The debt collector does not need to cease collection efforts until the debt is disputed but may not

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accompanied by the explanation that anything said can and will be used against the individual in court.").

28. *See* § 1692g; Elwin Griffith, *The Role of Validation and Communication in the Debt Collection Process*, 43 CREIGHTON L. REV. 429, 430–31 (2010) (indicating this provision is meant to inform consumers of their right to dispute the debt and have it verified).

29. Pleadings are not considered an initial communication for the purposes of § 1692g(a). *See* § 1692g(d). This was part of the 2006 amendments to the FDCPA. *See* Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351, § 802, 120 Stat. 1966, 2004–07 (codified as amended at 15 U.S.C. § 1692g(d) (2006)). The amendment also exempts certain required notices that do not relate to debt collection, *see* § 1692g(e), and clarifies that debt collection activities could continue in the thirty-day window until the consumer disputes the debt. *See* § 1692g(b); *see also* Colin Hector, Comment, *Debt Collection in the Information Age: New Technologies and the Fair Debt Collection Practices Act*, 99 CALIF. L. REV. 1601, 1610 n.56 (2011).

30. *See* § 1692g(a)(1); Elwin Griffith, *The Peculiarity of Language in the Debt Collection Process: The Impact of the Fair Debt Collection Practices Act*, 54 WAYNE L. REV. 673, 719 (2008) (explaining the problem of including interest and other costs in debt calculation).

31. *See* § 1692g(a)(2); Christian Stueben, Note, *Judge or Jury? Determining Deception or Misrepresentation Under the Fair Debt Collection Practices Act*, 78 FORDHAM L. REV. 3107, 3116 (2010). The notice must also inform the consumer of the right to request and receive the name and address of the original creditor if different from the current creditor. *See* § 1692g(a)(5); Griffith, *supra* note 28, at 450–51 (discussing how requesting information regarding the original creditor and disputing the debt are independent of each other).

32. *See* § 1692g(a)(3)–(5); Griffith, *supra* note 28, at 433–34.

33. *See* § 1692g(a)(4); Griffith, *supra* note 28, at 430.

34. *See* § 1692g(a)(3); Young Walgenkim, Student Article, *Killing "Zombie Debt" Through Clarity and Consistency in the Fair Debt Collection Practices Act*, 24 LOY. CONSUMER L. REV. 65, 75 (2011). However, although the debt is presumed valid, a failure to dispute is not an admission that the consumer owes the debt. *See* § 1692g(c). For a discussion on whether § 1692g(a)(3) includes a writing requirement see Griffith, *supra* note 30, at 678–81, 732–33, and Griffith, *supra* note 15, at 798–802.

35. *See* § 1692g(b); Michael D. Slodov, *Documentation? I Don't Have to Show You Any Stinkin' Documentation! An Evaluation of the Verification Requirement of 15 U.S.C. § 1692g(b)*, 24 LOY. CONSUMER L. REV. 156, 158–59 (2011). Slodov's article also discusses the three different views regarding what type of verification is required: (1) forms from the creditor that document the debt; (2) forms that are responsive to the consumer's dispute or inquiry; or (3) a declaration confirming the debt without any further documentation. *See id.* at 160–68.

communicate or act in a way that "overshadow[s]" the consumer's rights to dispute the debt or obtain information about the original creditor.[36]

The FDCPA is a strict liability statute that covers both intentional and unintentional violations.[37] This means that the consumer does not need to show that she was injured, suffered damages, or actually deceived by the notice.[38] Courts agree that the FDCPA protects unsophisticated consumers, with the majority of circuits that have addressed the issue going even further, finding that it protects the *least* sophisticated consumer.[39]

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36. *See* § 1692g(b); Stueben, *supra* note 31, at 3117 (clarifying that a debt collector must go beyond technical compliance to clearly and effectively communicate to the consumer the consumer's rights under the FDCPA).

37. *See, e.g.*, Clark v. Capital Credit & Collection Servs., Inc., 460 F.3d 1162, 1175–76 (9th Cir. 2006) (agreeing with the Second and Seventh Circuits); *see also* Darren W. Ford, Comment, *Secondary Liability Under the Fair Debt Collection Practices Act*, 78 U. CIN. L. REV. 1079, 1087 (2010) ("[T]he majority of the [FDCPA's] provisions impose strict liability on debt collectors."). *But see, e.g.*, § 1692c(a)(3) (requiring knowledge that the consumer's employer prohibits the consumer from receiving communications regarding the collection of a debt).

38. *See* Griffith, *supra* note 30, at 706; Stueben, *supra* note 31, at 3117 (noting that the plaintiff need not even read the letter).

39. *Compare* Gonzales v. Arrow Fin. Servs., LLC, 660 F.3d 1055, 1061–62 (9th Cir. 2011) (least sophisticated debtor standard), Lesher v. Law Offices of Mitchell N. Kay, PC, 650 F.3d 993, 997 (3d Cir. 2011) (least sophisticated debtor standard), LeBlanc v. Unifund CCR Partners, 601 F.3d 1185, 1193–94 (11th Cir. 2010) (least sophisticated consumer standard), Hartman v. Great Seneca Fin. Corp., 569 F.3d 606, 611–12 (6th Cir. 2009) (least sophisticated consumer standard), Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 309 (2d Cir. 2003) (least sophisticated consumer standard), *and* United States v. Nat'l Fin. Servs., Inc., 98 F.3d 131, 135–36, 139 (4th Cir. 1996) (least sophisticated consumer/debtor standard), *with* McMillan v. Collection Prof'ls Inc., 455 F.3d 754, 758 (7th Cir. 2006) (unsophisticated debtor standard), *and* Strand v. Diversified Collection Serv., Inc., 380 F.3d 316, 317 (8th Cir. 2004) (unsophisticated consumer standard). The least sophisticated consumer standard is meant to be lower than the standard for reasonableness, *see Gonzales*, 660 F.3d at 1061–62; Rosenau v. Unifund Corp., 539 F.3d 218, 221 (3d Cir. 2008), and is meant to protect persons specifically targeted for their lower levels of sophistication. *Gonzales*, 660 F.3d at 1062 (noting that the standard protects less sophisticated consumers "particularly when [they] are targeted by debt collectors"); Clomon v. Jackson, 988 F.2d 1314, 1319 (2d Cir. 1993) ("[C]onsumers of below-average sophistication or intelligence are especially vulnerable to fraudulent schemes."). This standard is meant to "ensure that the FDCPA protects all consumers, the gullible as well as the shrewd." *Clomon*, 988 F.2d at 1318. However, it is still an objective standard, and it is not enough that the consumer alone was deceived. *See LeBlanc*, 601 F.3d at 1194; *Clomon*, 988 F.2d at 1319 (noting that the least sophisticated consumer standard protects debt collectors from liability for "bizarre or idiosyncratic interpretations of collection notices"). In comparison, the unsophisticated consumer standard adds an explicit element of reasonableness to clarify that the least sophisticated standard should not be read literally. *See* Gammon v. GC Servs. Ltd. P'ship, 27 F.3d 1254, 1257 (7th Cir. 1994); *see also* Duffy v. Landberg, 215 F.3d 871, 874–75 (8th Cir. 2000). Either way, the bar is low and protects consumers with very low levels of sophistication. *See* Peter v. GC Servs. L.P., 310 F.3d 344, 348 n.1 (5th Cir. 2002) (noting the split but refusing to distinguish between the two standards because the difference between them is "de minimis"); Avila v. Rubin, 84 F.3d 222, 226–27 (7th Cir. 1996) (noting that the unsophisticated consumer standard "does not significantly change the substance of the 'least sophisticated consumer' standard as . . . routinely applied by courts.") (emphasis omitted); Elwin Griffith, *The Fair Debt Collection Practices Act—Reconciling the Interests of Consumers and Debt Collectors*, 28 HOFSTRA L. REV. 1, 14–16 (1999) (discussing both standards). Courts have also split regarding whether violations under § 1692e and § 1692g

A debt collector that violates the FDCPA may raise two defenses to avoid liability.[40] The first is the bona fide error defense,[41] which requires a defendant to show the FDCPA violation "(1) was unintentional; (2) was a 'bona fide' error; and (3) occurred despite the existence of procedures reasonably adapted to avoid violations of the FDCPA."[42] However, this defense is limited to clerical errors and does not apply to mistakes of law.[43]

The second defense is to show that the action was done in good-faith compliance with a Federal Trade Commission (FTC) advisory opinion.[44] However, over the course of ten years only seven requests for guidance were sent to the FTC and only four advisory opinions have been issued.[45] Since the Dodd-Frank Wall Street Reform and Consumer Protection Act[46] (Dodd-Frank) went into effect on July 21, 2011,[47] debt collectors may now rely on the advisory opinions of the newly created Consumer Financial Protection Bureau (CFPB).[48]

2. Debt, Debt Collectors, and Debt Collection

There are two thresholds that must be met for there to be a violation of the FDCPA[49]: (1) the defendant must be a debt collector within the meaning of the FDCPA;[50] and (2) the action or communication must be an

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are questions of law or fact, and subsequently whether a judge or jury should decide whether a violation has occurred. *See* Stueben, *supra* note 31, at 3132–49 (examining the split).

40. *See* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 130 S. Ct. 1605, 1609 (2010); Vartan S. Madoyan, *Attorneys Beware:* Jerman v. Carlisle *Holds You Liable for Technical Legal Errors Under the FDCPA*, 44 LOY. L.A. L. REV. 1091, 1094–95 (2011).

41. *See* § 1692k(c); Griffith, *supra* note 15, at 814.

42. Hepsen v. Resurgent Capital Servs., LP, 383 F. App'x 877, 882 (11th Cir. 2010); *see also* § 1692k(c).

43. *See Jerman*, 130 S. Ct. at 1610–11, 1624; *see also* Madoyan, *supra* note 40, at 1098–1104 (discussing the Court's reasoning in *Jerman*); Walgenkim, *supra* note 34, at 87–89.

44. *See* § 1692k(e); *Jerman*, 130 S. Ct. at 1609.

45. *See Jerman*, 130 S. Ct. at 1621; Walgenkim, *supra* note 34, at 86 (discussing the safe harbor provision).

46. Pub. L. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

47. *See* 12 U.S.C. § 5582 (Supp. V 2011) (providing guidelines for the designated transfer date); *see also* 75 Fed. Reg. 57,252, 57,253 (Sept. 20, 2010) (notice of the Secretary of Treasury setting the transfer date as July 21, 2011).

48. Dodd-Frank § 1089 (amending 15 U.S.C. §§ 1692a, l692k, 1692*l*, 1692m, and 1692o by striking "Commission" and inserting "Bureau [of Consumer Financial Protection]"); 76 Fed. Reg. 78,121, 78,122 (to be codified at 12 C.F.R. pt. 1006) (indicating that the CFPB will adopt additional FDCPA guidelines through regulation rather than advisory opinions).

49. *See* Gburek v. Litton Loan Servicing LP, 614 F.3d 380, 384 (7th Cir. 2010) (providing a two-threshold test); Stagikas v. Saxon Mortg. Servs., Inc., 795 F. Supp. 2d 129, 138 n.12 (D. Mass. 2011) (same). *But see* Suquilanda v. Cohen & Slamowitz, LLP, No. 10 Civ. 5868(PKC), 2011 WL 4344044, at *3 (S.D.N.Y. Sept. 8, 2011) (adding whether the plaintiff is a consumer to create a three part test); Murphy v. Bronson, Cawley, & Bergmann, LLP, No. 3:10-cv-01929 AJN (RBB), 2011 WL 2413447, at *6 (S.D. Cal. June 13, 2011) (same). However, most provisions of the FDCPA apply to any person, not just consumers. *See infra* note 81 and accompanying text.

50. *See* Montgomery v. Huntington Bank, 346 F.3d 693, 698 (6th Cir. 2003); Izenberg v. ETS Servs., LLC, 589 F. Supp. 2d 1193, 1198 (C.D. Cal. 2008).

attempt to collect a debt.[51] Implicit in both thresholds is that an alleged debt must exist.[52]

The FDCPA defines "debt" broadly as "any obligation" that a consumer has incurred to pay for personal, family, or household expenses.[53] The debt may—but need not—arise out of judgment,[54] and courts have interpreted the term broadly to include various obligations to pay money.[55]

The FDCPA defines "debt collector" as "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."[56] Because the debt must be "due another," the FDCPA applies to third-party debt collectors, but not

51. *See* Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379, 400 (3d Cir. 2000); Akalwadi v. Risk Mgmt. Alts., Inc., 336 F. Supp. 2d 492, 500 (D. Md. 2004).

52. Fleming v. Pickard, 581 F.3d 922, 925 (9th Cir. 2009) (finding that whether there is a debt is a threshold requirement); Hawthorne v. Mac Adjustment, Inc., 140 F.3d 1367, 1370–71 (11th Cir. 1998) ("[T]he existence of a 'debt' [is] a threshold requirement . . . ."). However, the debt need not be valid. *See* Baker v. G. C. Servs. Corp., 677 F.2d 775, 777 (9th Cir. 1982).

53. 15 U.S.C. § 1692a(5) (2006); Duffy v. Landberg, 133 F.3d 1120, 1123 (8th Cir. 1998). The FDCPA's definition of "debt" is similar to the Bankruptcy Code's definition of "consumer debt". *Compare* 15 U.S.C. § 1692a(5), *with* 11 U.S.C. § 101(8) (2006). Most courts hold that a mortgage on real property is a consumer debt under the Bankruptcy Code. *See In re* Kelly, 841 F.2d 908, 913 (9th Cir. 1988) ("It is difficult to conceive of any expenditure that serves a 'family . . . or household purpose' more directly than does the purchase of a home and the making of improvements thereon."); *In re* Lemma, 393 B.R. 299, 301–02 (Bankr. E.D.N.Y. 2008) (gathering cases). *But see In re* Ikeda 37 B.R. 193, 195 (Bankr. D. Haw. 1984) (finding a mortgage lien was not a consumer debt).

54. *See* § 1692a(5); Schuh v. Druckman & Sinel, L.L.P., 602 F. Supp. 2d 454, 469 (S.D.N.Y. 2009).

55. *See, e.g.*, Piper v. Portnoff Law Assocs., Ltd., 396 F.3d 227, 232–33 (3d Cir. 2005) (finding the use of water services created a debt obligation); Romea v. Heiberger & Assocs., 163 F.3d 111, 116 (2d Cir. 1998) (holding that the payment of back rent is both the "payment of a debt" and a "means by which to avoid termination of the lease"). *But see* Gulley v. Markoff & Krasny, 664 F.3d 1073, 1075 (7th Cir. 2011) (holding municipal fines are not debts because they are not derived from a consumer transaction).

56. § 1692a(6).

creditors.[57] Creditors include those who have obtained debts that were not in default, such as a mortgage service company.[58]

To satisfy the FDCPA's definition of "debt collector" an entity must either: (1) have debt collection as the principal purpose of its business; or (2) regularly engage in debt collection.[59] A business's principal purpose is debt collection if a high proportion of its business is derived from debt collection,[60] and an entity regularly engages in debt collection when it has a significant volume or consistent frequency of debt collection business.[61] Thus, persons engaging in isolated or infrequent debt collection are not debt collectors within the meaning of the FDCPA.[62] For the purposes of one

57. *Id.*; S. REP. NO. 95-382, at 6 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1701 ("'[D]ebt collector' is defined to include all third parties who regularly collect consumer debts for others."); *see also* MacDermid v. Discover Fin. Servs., 488 F.3d 721, 734–35 (6th Cir. 2007); ROBERT J. HOBBS ET AL., NAT'L CONSUMER LAW CTR., FAIR DEBT COLLECTION § 4.2.5 (6th ed. 2008). There are two caveats: First, a creditor is considered a debt collector if it uses a name other than its own that would cause a consumer to think that the creditor was a third party attempting to collect a debt. *See* § 1692a(6); HOBBS ET AL., *supra* note 57, § 4.2.5. Second, a person is not a creditor—and thus may be a debt collector—under the FDCPA if it obtains a debt already in default. *See* § 1692a(4); Hoffman, *supra* note 12, at 552. Creditors are excluded partly because they are thought to have incentives to "protect their good will" with consumers when collecting debts because of their potential future dealings with the consumer. S. REP NO. 95-382, at 2, *reprinted in* 1977 U.S.C.C.A.N. at 1696; *see also* Brooks v. Citibank (South Dakota), N.A., 345 F. App'x 260, 262 (9th Cir. 2009); Aubert v. Am. Gen. Fin., Inc., 137 F.3d 976, 978 (7th Cir. 1998).

58. *See* S. REP. NO. 95-382, at 3–4, 1977 U.S.C.C.A.N. at 1698 (excluding from the definition of debt collector "mortgage service companies and others who service outstanding debts for others, so long as the debts were not in default when taken for servicing"); HOBBS ET AL., *supra* note 57, § 4.3.10.

59. *See* § 1692a(6); *see also* Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56, 62–63 (2d Cir. 2004) (providing considerations for analysis "relating to ordinary concepts of regularity"); Garrett v. Derbes, 110 F.3d 317, 318 (5th Cir. 1997) (noting that they are two distinct prongs).

60. *See* Oppong v. First Union Mortg. Corp., 215 F. App'x 114, 118–19 (3d Cir. 2007) (looking to the low proportion of loans acquired in default to find that the defendant did not meet the principal purpose prong); *Goldstein*, 374 F.3d at 61 (noting that factors such as the percentages of "resources devoted to, and revenues derived from" debt collection are more appropriate for the principal purpose prong, but may be useful for the regularity prong); Scott v. Jones, 964 F.2d 314, 316 (4th Cir. 1992) (finding that an attorney that derived 70 to 80 percent of his legal fees from debt collection met the principal purpose prong).

61. *See Goldstein*, 374 F.3d at 61–62 (cautioning against blurring the line between the principal purpose and regularity prongs); *Garrett*, 110 F.3d at 318 ("[I]f the volume of a person's debt collection services is great enough, it is irrelevant that these services only amount to a small fraction of [the entity's] business activity; the person still renders them 'regularly.'"); S. REP NO. 95-382, at 3, 1977 U.S.C.C.A.N. at 1697–98 (indicating that the definition of "debt collector" includes those who collect debts "for others in the regular course of business."); Derek S. Burrell, *The Federal Fair Debt Collection Practices Act: An Overview Rx for Debt Collector Myopia*, 21 S. ILL. U. L.J. 1, 9–10 (1996). *Goldstein* provides three additional considerations to volume and frequency: (1) whether the entity has staff devoted to debt collection; (2) whether there are "systems or contractors" to streamline debt collection; and (3) whether there is an ongoing relationship with a creditor. *Goldstein*, 374 F.3d at 62–63.

62. *See* Mertes v. Devitt, 734 F. Supp. 872, 874–75 (W.D. Wisc. 1990) (distinguishing regular debt collection from occasional debt collection); S. REP NO. 95-382, at 3, 1977 U.S.C.C.A.N. at 1697–98 (indicating that persons collecting debt "in an isolated instance" are excluded from the FDCPA's definition of "debt collector").

section of the Act, the "debt collector" also includes security enforcers when they threaten nonjudicial action to dispossess property without a right or intention to take that property.[63]

However, there are enumerated exceptions that exclude persons who otherwise meet the definition of debt collector.[64] These exceptions include (1) persons employed by a creditor;[65] (2) persons whose principal business is not debt collection and who only act as debt collectors for a creditor with whom they share common ownership;[66] (3) employees of the United States or an individual state acting in their official capacity;[67] (4) process servers attempting to serve legal process in connection with judicial enforcement;[68] and (5) bona fide, nonprofit credit counselors.[69] The Act also exempts actions taken that are incidental to a bona fide fiduciary duty.[70]

In 1986, Congress amended the FDCPA to remove an exemption for lawyers.[71] Almost a decade later, the Supreme Court held in *Heintz v. Jenkins*[72] that the FDCPA applies to attorneys even when their debt collection included litigation.[73] Since then, most courts that have

63. *See* §§ 1692a(6), 1692f(6); Marshall, *supra* note 7, at 1272. This Note refers to this clause as the security enforcer clause, and this Note discusses it in greater detail in Part I.C.1.

64. *See* § 1692a(6)(A)–(F); *see also* S. REP. NO. 95-382, at 3, 1977 U.S.C.C.A.N. at 1698 (indicating that the FDCPA would exclude "the activities of trust departments, escrow companies, or other bona fide fiduciaries; the collection of debts, such as mortgages and student loans, by persons who originated such loans" from the definition of "debt collector").

65. *See* § 1692a(6)(A); Chad M. Knight, Note, *Attorney Liability Under the Fair Debt Collection Practices Act*, 85 KY. L.J. 463, 466 (1997).

66. *See* § 1692a(6)(B); Wood v. Capital One Servs., LLC, 718 F. Supp. 2d 286, 289–90 (N.D.N.Y 2010) (analyzing the "affiliate" exception).

67. *See* § 1692a(6)(C); Ezra Ross & Martin Pritkin, *The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties*, 29 YALE L. & POL'Y REV. 453, 522 & n.404 (2011) (noting that the government is exempt from the FDCPA).

68. *See* § 1692a(6)(D); McNall v. Credit Bureau of Josephine Cnty., 689 F. Supp. 2d 1265, 1277–78 (D. Or. 2010) (distinguishing between process servers who act as "mere messenger[s]" and those that also harass and abuse consumers).

69. *See* § 1692a(6)(E); Yang v. DTS Fin. Grp., 570 F. Supp. 2d 1257, 1259–60 (S.D. Cal. 2008) (finding that the plaintiff had sufficiently pled that the defendant was a for-profit organization and thus may have fallen outside the exception).

70. *See* § 1692a(6)(F)(i); Davis v. United Student Aid Funds, Inc., 45 F. Supp. 2d 1104, 1108–09 (D. Kan. 1998) (finding that a guaranty agency owed a fiduciary obligation to the Secretary of Education, and thus fell within the exception). This Note refers to this clause as the fiduciary obligation clause, and discusses it further in Part I.C.2.

71. An Act to Amend the Fair Debt Collection Practices Act, Pub. L. No. 99-361, 100 Stat. 768 (1986) (codified as amended at 15 U.S.C. § 1692a(6)); *see also Heintz*, 514 U.S. at 294–95, 299 (holding that attorneys who regularly engage in debt collection are debt collectors under the FDCPA); H.R. REP. NO. 99-405, at 3–7 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1752, 1754–57 (explaining the need to remove the attorney exemption to protect consumers from the increase in attorney debt collectors). Originally, the FDCPA did not cover attorneys. *See* Pub. L. No. 95-109, § 803(6)(F), 91 Stat. 874 (1982) (codified as amended at 15 U.S.C. §§ 1692–1692p (2006)); Heintz v. Jenkins, 514 U.S. 291, 294 (1995).

72. 514 U.S. 291 (1995).

73. *Id.* at 299.

considered the issue have found that litigation activity, such as discovery, falls within the FDCPA unless it is expressly exempted.[74]

In order for a debt collector's actions to violate the FDCPA, they must be in "connection with the collection of any debt."[75] However, although the FDCPA utilizes this phrase—and similar variations[76]—throughout the statute, it leaves the specifics of debt collection undefined.[77] Without much guidance from the FDCPA, courts have struggled with whether debt collection includes mortgage foreclosure, and have so far reached differing results when confronted with this question.[78]

3. Agency and Private Enforcement

The FDCPA has two primary enforcers: private persons[79] and the Federal Trade Commission (FTC).[80] For private enforcement, the FDCPA allows any aggrieved person to sue,[81] except for when the statute expressly limits standing to "consumers."[82] If a violation is found, the aggrieved

74. *See* § 1692e(11) ("[E]xcept that this paragraph shall not apply to a formal pleading made in connection with a legal action."); *see also* McCollough v. Johnson, Rodenburg & Lauinger, LLC, 637 F.3d 939, 950–52 (9th Cir. 2011) (holding that service of requests for admission fell under the FDCPA); Sayyed v. Wolpoff & Abramson, 485 F.3d 226, 228–29, 231–32 (4th Cir. 2007) (holding that interrogatories are covered under the FDCPA). *But see* Vega v. McKay, 351 F.3d 1334, 1337 (11th Cir. 2003) (holding that a complaint fell outside the FDCPA).

75. *See, e.g.*, §§ 1692a(6), 1692c, 1692d, 1692e, 1692g.

76. Section 1692d uses the similar phrase "collection of a debt," § 1692d, and § 1692f uses "collect any debt." § 1692f. The definition of "communication" also alludes to debt collection, in that the communication must "convey[] . . . information regarding a debt," § 1692a(2), but the meaning of this phrase is also undefined. *See* Gillespie v. Chase Home Fin., LLC, No. 3:09-CV-191-TS, 2009 WL 4061428, at *3 (N.D. Ind. Nov. 29, 2009); Mabbitt v. Midwestern Audit Serv., Inc., No. 07-11550, 2008 WL 723507, at *4 (E.D. Mich. Mar. 17, 2008).

77. *See* Warren v. Countrywide Home Loans, Inc., 342 F. App'x 458, 460 (11th Cir. 2009) ("[T]he FDCPA does not define 'debt collection.'"); Gray v. Four Oak Court Ass'n, Inc., 580 F. Supp. 2d 883, 887 (D. Minn. 2008) ("The FDCPA does not define 'the collection of any debt.'"); Marshall, *supra* note 7, at 1271 ("The FDCPA . . . vaguely defines what constitutes debt collection.").

78. *See* Marshall, *supra* note 7, at 1271. *Compare* Brown v. Morris, 243 F. App'x 31, 35 (5th Cir. 2007) (recognizing that nonjudicial foreclosure is not per se debt collection), *with* McDaniel v. South & Assocs., P.C., 325 F. Supp. 2d 1210, 1218 (D. Kan. 2004) (holding that filing judicial foreclosure is debt collection under the FDCPA).

79. *See* § 1692k (2006); Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 130 S. Ct. 1605, 1609 (2010)

80. *See* § 1692*l*; *see also Jerman*, 130 S. Ct. at 1609.

81. *See* § 1692k(a) ("[A]ny debt collector who fails to comply with any provision of this subchapter with respect to *any person* is liable to such person . . . ."") (emphasis added); Montgomery v. Huntington Bank, 346 F.3d 693, 697 (6th Cir. 2003).

82. *See, e.g.*, § 1692c(a) ("[A] debt collector may not communicate with a consumer in connection with the collection of any debt."); § 1692e(11) ("[F]ailure to disclose in the initial written communication with the consumer . . . ."); *see also Montgomery*, 346 F.3d at 697 (finding that the plaintiff lacked standing under § 1692c because he was not a consumer); Bank v. Pentagroup Fin., LLC, No. 08-CV-5293 (JG)(RML), 2009 WL 1606420, at *4 (E.D.N.Y June 9, 2009) (noting and distinguishing both the broad language encompassing "any person" and limitations set by the use of "consumer."); Conboy v. AT &

person is entitled to actual damages,[83] up to $1,000 in additional statutory damages,[84] as well as court costs and attorneys' fees.[85] If the suit is a class action, each named plaintiff is entitled to additional damages of up to $1,000, and all other class members may be entitled to the lesser of $500,000 or one percent of the debt collector's net worth.[86] These recoveries may, however, be limited at the trial court's discretion. [87]

The FTC can also enforce the FDCPA because a violation of the FDCPA is an unfair or deceptive practice under the Federal Trade Commission Act[88] (FTCA).[89] The FTCA allows the FTC to commence litigation for damages of up to $16,000 per day against debt collectors for intentional violations of the FDCPA.[90] However, the Supreme Court has noted that there is a potential "enforcement gap" when the law is unsettled, because consumers would have diminished incentives to bring claims, and the FTC cannot respond to the thousands of FDCPA complaints each year.[91] In fact, according to a 2009 FTC Report, the FTC only brought sixty actions in the twenty years since the passage of the FDCPA.[92]

T Corp., 84 F. Supp. 2d 492, 504–05 (S.D.N.Y. 2000) (noting that the language limiting violations of § 1692e(11) to those communications with consumers).

83. *See* § 1692k(a)(1); *Jerman*, 130 S. Ct. at 1609; Hoffman, *supra* note 12, at 555 (indicating that actual damages may include emotional distress). Courts must look at the nature, intent, and frequency of the noncompliance to determine the proper amount of damages. *See* § 1692k(b)(1); *Jerman*, 130 S. Ct. at 1609. Actual damages for marginal or technical violations may be zero or close to it. *See Jerman*, 130 S. Ct. at 1620–21; Madoyan, *supra* note 40, at 1102.

84. *See* § 1692k(a)(2)(A); *Jerman*, 130 S. Ct. at 1609; Hoffman, *supra* note 12, at 555 (indicating that there is a split among the circuits regarding whether statutory damages are calculated per violation or per case).

85. *See* § 1692k(a)(3); *Jerman*, 130 S. Ct. at 1609; Hoffman, *supra* note 12, at 555. A winning plaintiff's attorney is entitled to reasonable attorney's fees as determined by the court. *See* § 1692k(a)(3); *Jerman*, 130 S. Ct. at 1621 & n.16 (citing district court cases that use the lodestar method to calculate reasonable attorney's fees); HOBBS ET AL. *supra* note 57, § 6.8.6.1 (defining lodestar as "allowable hours times an appropriate hourly rate" and noting the "strong presumption" that the lodestar is reasonable); Hoffman, *supra* note 12, at 555. However, if a plaintiff brings an FDCPA action in "bad faith and for the purpose of harassment" a court has the discretion to award reasonable attorney's fees to the defendant. § 1692k(a)(3); *see also Jerman*, 130 S. Ct. at 1621; Hoffman, *supra* note 12, at 555. However, it is unlikely that a court will find bad faith where a circuit has yet to decide an issue (e.g., whether foreclosure attorneys are debt collectors under the FDCPA). *See Jerman*, 130 S. Ct. at 1639 (Kennedy, J., dissenting).

86. *See* § 1692k(a)(2)(B); *Jerman*, 130 S. Ct. at 1609; Andrew Bradt, *"Much to Gain and Nothing to Lose" Implications of the History of the Declaratory Judgment for the (b)(2) Class Action*, 58 ARK. L. REV. 767, 821–22 (2006). Courts will look at the resources of the debt collector and the number of consumers adversely affected. *See* § 1692k(b)(2); Knight, *supra* note 65, at 473.

87. *See Jerman*, 130 S. Ct. at 1620–21; HOBBS ET AL., *supra* note 57, at § 6.8.6.

88. 15 U.S.C. § 41–58 (2006).

89. *See* § 1692*l*; *see also Jerman*, 130 S. Ct. at 1609.

90. *See Jerman*, 130 S. Ct. at 1609; *see also* 15 U.S.C. § 45(m)(1)(A), (C) (2006); 74 Fed. Reg. 858 (Jan. 9, 2009) (amending 16 C.F.R. § 1.98(d)).

91. *Jerman*, 130 S. Ct. at 1624 (referencing state amici briefs and FTC, COLLECTING CONSUMER DEBTS: THE CHALLENGE OF CHANGE 67 (2009)).

92. FTC, COLLECTING CONSUMER DEBTS: THE CHALLENGE OF CHANGE 67 (2009).

Although the FTC has the power to enforce the FDCPA, it lacks rule-making authority.[93] However, the FTC has issued an interpretation of the FDCPA in a Staff Commentary.[94] The Staff Commentary begins by noting that it is not a trade regulation rule or formal agency action, is not binding, and does not carry the force of law.[95] Thus, with the exception of the Fifth Circuit,[96] courts generally have not given the Staff Commentary *Chevron*[97] deference or treated it as binding law.[98] Because courts may still defer to

93. S. REP. NO. 95-382, at 6 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1700 (noting the FTC's administrative enforcement authority, but indicating that the FTC lacks rule-making authority because the FDCPA is comprehensive). However, with the passage of Dodd-Frank in 2010, Congress empowered the CFPB to engage in rulemaking. *See* Dodd-Frank, Pub. L. 111-203, § 1089, 124 Stat. 1376, 2092–93 (2010) (amending 15 U.S.C. §§ 1692a, l692k, 1692*l*, 1692m, 1692o (2006)); 76 Fed. Reg. 78,121 (Dec. 16, 2011) (to be codified at 12 C.F.R. pt. 1006); Matthew R. Bremner, Note, *The Fair Debt Collection Practices Act: The Need for Reform in the Age of Financial Chaos*, 76 BROOK. L. REV. 1553, 1592 (2011); Hector, *supra* note 29, at 1610–11. In December 2011, the CFPB filed an amicus brief in *Birster v. American Home Mortgage Servicing, Inc.*, a case dealing with mortgage foreclosure and the FDCPA. *See* Brief of the Consumer Financial Protection Bureau as *Amicus Curiae* in Support of Plaintiffs-Appellants and Reversal, Birster v. Am. Home. Mortg. Servicing, Inc., No.11-13574, 2012 WL 2913786 (11th Cir. Dec. 21, 2011).

94. *See* Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg 50,097 (Dec. 13, 1988) [hereinafter FTC Staff Commentary].

95. *See id.* at 50,101 (noting it "synthesize[s] staff views"); Griffith, *supra* note 24, at 63 n.11.

96. *See* Kaltenbach v. Richards, 464 F.3d 524, 528 (5th Cir. 2006) (giving the FTC Staff Commentary *Chevron* deference in holding that a foreclosure attorney was a debt collector).

97. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). *Chevron* outlined a two-part test for reviewing agency interpretation that asks (1) "whether Congress has directly spoken to the precise question at issue;" and if not, (2) "whether the agency's answer is based on a permissible construction of the statute." *Id.* If Congress gave clear meaning to the statute, then that interpretation governs. *See id.* at 842. However, if its meaning is ambiguous, the agency may supply its own interpretation if it is reasonable. *See id.* at 844–45. An agency's reasonable interpretation of an ambiguous statute is given deference by courts. *See id.*; *see also* PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES 368–70 (2d ed. 2002).

98. Heintz v. Jenkins, 514 U.S. 291, 298 (1995) (declining to give "conclusive weight" to the Staff Commentary because it was not binding); *see also* Gulley v. Markoff & Krasny, 664 F.3d 1073, 1074–75 (7th Cir. 2011) (noting the Staff Commentary is entitled to "respectful consideration" but not *Chevron* deference); McMillan v. Collection Prof'ls Inc., 455 F.3d 754, 764 (7th Cir. 2006) ("The FTC Commentary is not binding on the courts because it is not a formal regulation and did not undergo full agency consideration."); Goswami v. Am. Collections Enter., Inc., 377 F.3d 488, 493 n.1 (5th Cir. 2004) (noting that the Staff Commentary lacks the force of law and is therefore not entitled to full *Chevron* deference, but accepting the FTC's interpretation because it was persuasive); Voris v. Resurgent Capital Servs., 494 F. Supp. 2d 1156, 1165 n.6 (S.D. Cal. 2007) (noting that the Staff Commentary was not entitled to *Chevron* deference). *But see* Kaltenbach v. Richards, 464 F.3d 524, 527–28 (5th Cir. 2006) (applying the *Chevron* two part test to the FTC Staff Commentary); Hawthorne v. Mac Adjustment, Inc., 140 F.3d 1367, 1372 n.2 (11th Cir. 1998) (citing to *Chevron* to support the proposition, in dicta, that the Staff Commentary should be given "considerable weight"); Scott v. Jones, 964 F.2d 314, 317 (4th Cir. 1992) (declining to defer to the FTC interpretation because it conflicted with the plain meaning of the statute—the first step of the *Chevron* analysis). With the exception of the Fifth Circuit in *Kaltenbach*, the courts that have applied *Chevron* to the Staff Commentary preceded the Supreme Court cases that clarified *Chevron*. *See* United States v. Mead Corp., 533 U.S. 218,

the Staff Commentary based on its persuasiveness, this Note refers to the FTC's position on certain interpretations.

B. Mortgages and Foreclosures

Beyond the FDCPA, courts must also consider the interplay between mortgages and foreclosures. The following section looks at the nature and purpose of each.

1. Mortgages and Deeds of Trust

A mortgage is a type of lien[99] securing real property for the payment of a debt.[100] The property—often a home[101]— is used to satisfy the debt or obligation in the event of default.[102] The mortgagor—or consumer[103]—generally has the right of possession.[104] Upon default of the loan, a consumer has the equitable right of redemption—to render payment in full—and may retain possession of the property until this right is extinguished through foreclosure.[105]

226–27 (2001) (holding that *Chevron* deference is appropriate when Congress delegates power to the agency "to make rules carrying the force of law"); Christensen v. Harris Cnty, 529 U.S. 576, 587 (2000) (holding that certain interpretations "which lack the force of law" are not entitled to full *Chevron* deference, but only deference insofar as the interpretation is persuasive); *see also* STRAUSS, *supra* note 97, at 371–75 (discussing *Mead*).

99. Liens are security interests in property that help ensure payment of a debt or other obligation. *See* BLACK'S LAW DICTIONARY 1006 (9th ed. 2009); LYNN M. LOPUCKI & ELIZABETH WARREN, SECURED CREDIT: A SYSTEMS APPROACH 21 (6th ed. 2009) (citing the Bankruptcy Code, 11 U.S.C. § 101 (2006)); DAVID A. SCHMUDDE, A PRACTICAL GUIDE TO MORTGAGES AND LIENS 1 (2004); *see also* 11 U.S.C. § 101(37) (2006). Although a mortgage may secure the performance of any act, the act secured is generally the payment of a debt. SCHMUDDE, *supra* note 99, at 8.

100. *See* BLACK'S LAW DICTIONARY, *supra* note 99, at 1101–02; SCHMUDDE, *supra* note 99, at 1; RAY E. SWEAT, MORTGAGES AND ALTERNATE MORTGAGE INSTRUMENTS 17 (1981) (describing the "modern mortgage"). While a mortgage helps secure satisfaction of the debt, a note memorializes the underlying debt. *See* STEVEN W. BENDER ET AL., MODERN REAL ESTATE FINANCE AND LAND TRANSFER 102 (4th ed. 2008) ("[The] note, and not the mortgage, . . . is the legal evidence of indebtedness."); SCHMUDDE, *supra* note 99, at 8. The note memorializes the repayment terms and usually contains an acceleration clause that allows the creditor to demand full repayment of the loan upon default. *See* BENDER ET AL., *supra* note 100, at 102.

101. SCHMUDDE, *supra* note 99, at 1.

102. *See* BENDER ET AL., *supra* note 100, at 97 (describing how the proceeds of the foreclosure sale are distributed); SCHMUDDE, *supra* note 99, at 2; *see also infra* Part I.B.2 (discussing foreclosure proceedings to satisfy a debt).

103. This Note will use the term consumer in lieu of mortgagor or debtor to track the language of the FDCPA.

104. *See* BENDER ET AL., *supra* note 100, at 95 (describing how the consumer gained the ability to stay in possession of the mortgaged property); 4 RICHARD J. POWELL, POWELL ON REAL PROPERTY § 37.02 (Michael Allan Wolf ed. 2011) (describing changes in the seventeenth century that became modern law).

105. *See* BENDER ET AL., *supra* note 100, at 96 (providing an account of the evolution of the equity of redemption to the present day); 4 POWELL, *supra* note 104, § 37.02; *see also infra* Part I.B.2 (discussing different procedures for foreclosure).

There are two broad theories of the rights of a consumer and creditor[106] in a mortgage relationship: title theory and lien theory.[107] Under title theory the consumer transfers title to the creditor until the loan is repaid.[108] However, although the creditor has title, courts will generally recognize an express or implied agreement that the consumer retains possession until foreclosure.[109] In contrast, under lien theory, the mortgage is only a lien on the property, and the consumer retains full title unless and until default and foreclosure.[110] However, most states reach the same results regardless of what theory is applied,[111] with some states utilizing a hybrid theory where the creditor gains title automatically upon default, but before foreclosure.[112]

A deed of trust is another type of security interest in property authorized by some jurisdictions as a substitute for a mortgage.[113] A deed of trust involves a third-party trustee that serves as an intermediary between the consumer and the creditor for the limited purpose of enforcing the trust.[114] The consumer transfers title to the creditor in the deed, which is held by the trustee until repayment or default.[115] If the consumer defaults, the creditor may exercise the power of sale.[116]

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106. This Note will use the term creditor in lieu of mortgagee to track the language of the FDCPA.

107. *See* 4 POWELL, *supra* note 104, § 37.03 (discussing the evolution from lien theory to title theory in England and the United States); Peter L. Cockrell, Comment, *Subprime Solutions to the Housing Crisis: Constitutional Problems with the Helping Families Save Their Homes Act of 2009*, 17 GEO. MASON L. REV. 1149, 1155 n.40 (2010).

108. *See* 4 POWELL, *supra* note 104, at § 37.03; SCHMUDDE, *supra* note 99, at 7 (indicating there are roughly ten states that still follow this theory).

109. *See* 4 POWELL, *supra* note 104, § 37.03; SCHMUDDE, *supra* note 99, at 7 (indicating that the creditor "hold[s] title for security purposes only").

110. *See* 4 POWELL, *supra* note 104, § 37.03; SCHMUDDE, *supra* note 99, at 7 ("[T]he right to possession arises upon a default.").

111. *See* 4 POWELL, *supra* note 104, § 37.03 (attributing this to "transitional thinking" from title to lien theory); SCHMUDDE, *supra* note 99, at 7 ("For practical applications there is usually very little difference between a lien theory and title theory state."); Julia Patterson Forrester, *Still Crazy After All These Years: The Absolute Assignment of Rents in Mortgage Loan Transactions*, 59 FLA. L. REV. 487, 493–94 (2007) (noting that the differences between the title, lien, and hybrid theories "may not be so great as they would first appear").

112. *See* SCHMUDDE, *supra* note 99, at 7–8; Forrester, *supra* note 111, at 494 (referring to the states that follow hybrid theory as "intermediate theory states"); Robyn A. Kowantz, Note, *Property—Landlord-Tenant—The New Jersey Anti-Eviction Act Prohibits Foreclosing Mortgagees from Evicting Tenants of the Defaulted Mortgagor Without Cause*—Chase Manhattan Bank v. Josephson, *135 N.J. 209, 638 A.2d 1301 (1994)*, 25 SETON HALL L. REV. 1292, 1292–93 (1995).

113. *See* BENDER ET AL., *supra* note 100, at 114 ("[T]here is little practical difference between a deed of trust and a mortgage . . . ."); 4 POWELL, *supra* note 104, § 37.03; SCHMUDDE, *supra* note 99, at 8, 89–90.

114. *See* LOPUCKI & WARREN, *supra* note 99, at 34 ("[T]he law regards it not as an actual trust but as simply another form of security interest."); 4 POWELL, *supra* note 104, § 37.03 (noting this trust arrangement is "[u]nlike the usual trust situation" because the title is transferred to the trustee for a limited purpose—to enforce the trust). Often the trustee is the creditor's attorney. *See* SCHMUDDE, *supra* note 99, at 8.

115. *See* SCHMUDDE, *supra* note 99, at 8. Upon repayment the deed is destroyed and upon default the deed is transferred to the creditor. *See id.*

116. *See* LOPUCKI & WARREN, *supra* note 99, at 34 (characterizing the power of sale as a type of foreclosure); SCHMUDDE, *supra* note 99, at 125–26 (characterizing the power of sale

2. Mortgage Foreclosure

Foreclosure is a proceeding that terminates the consumer's interest in property, either transferring title or forcing a sale, in order to satisfy the debt.[117] There are two primary types of foreclosures: judicial and nonjudicial.[118] While some courts do not distinguish between judicial and nonjudicial foreclosures,[119] several cases argue that the FDCPA applies to judicial but not nonjudicial foreclosure.[120]

a. Judicial Foreclosure

Judicial foreclosure is the most utilized method of foreclosure.[121] Every state has a procedure for judicial foreclosure,[122] and many states only use judicial foreclosure.[123] As the name implies, to initiate a judicial foreclosure a creditor or his representative must file an action in court to foreclose on the mortgaged property.[124] The process is time consuming and costly to creditors, but it allows a neutral judge to oversee the seizure.[125] The creditor or third-party agent must serve a complaint on the consumer who may then assert defenses.[126]

Once the court determines that the mortgage is valid and that there are no procedural or substantive defenses, the court calculates the balance owed on the debt.[127] If the balance is not paid, then the court enters a final judgment, the property is sold at a foreclosure sale, and the proceeds are

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as distinct from foreclosure); *see also infra* Part I.B.2 for a discussion of types of foreclosure.

117. *See* BLACK'S LAW DICTIONARY *supra* note 99, at 719; 4 POWELL, *supra* note 104, § 37.36; SCHMUDDE, *supra* note 99, at 125–26.

118. *See* JOHN RAO ET AL., NAT'L CONSUMER LAW CTR., FORECLOSURES § 4.2.1 (3d ed. 2010). There is also strict foreclosure, which vests title with the creditor without a sale or deficiency judgment, but this is only used in three states. *See* 4 POWELL, *supra* note 104, § 37.43; *see also* SCHMUDDE, *supra* note 99, at 125–26 (listing strict foreclosure as one of three methods of foreclosure, and indicating that it is a type of judicial foreclosure).

119. *See, e.g.*, Warren v. Countrywide Home Loans, Inc., 342 F. App'x 458 (11th Cir. 2009); Kaltenbach v. Richards, 464 F.3d 524 (5th Cir. 2006); Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373 (4th Cir. 2006).

120. *See, e.g.*, Rousseau v. Bank of N.Y., No. 08-cv-00205-PAB-BNB, 2009 WL 3162153, at *8–9 (D. Colo. Sept. 29, 2009) (noting distinction); Maynard v. Bryan W. Cannon, P.C., 650 F. Supp. 2d 1138, 1141 (D. Utah 2008) (noting distinction); McDaniel v. South & Assocs., P.C., 325 F. Supp. 2d 1210, 1217 (D. Kan. 2004) (distinguishing the judicial foreclosure in the present case from other cases involving nonjudicial foreclosure).

121. BENDER ET AL., *supra* note 100, at 419; SCHMUDDE, *supra* note 99, at 128.

122. *See* LOPUCKI & WARREN, *supra* note 99, at 32; RAO ET AL., *supra* note 118, § 4.2.1.

123. *See* RAO ET AL., *supra* note 118, § 4.2.2.

124. *See* LOPUCKI & WARREN, *supra* note 99, at 32; RAO ET AL., *supra* note 118, § 4.2.2.

125. *See* BENDER ET AL., *supra* note 100, at 419–20; SCHMUDDE, *supra* note 99, at 128.

126. *See* LOPUCKI & WARREN, *supra* note 99, at 32. This is a simplification of the procedure, which, for the purposes of this Note, is sufficient. For a more detailed look at the procedure involved in judicial foreclosure, see BENDER ET AL., *supra* note 100, at 419–20; 4 POWELL, *supra* note 104, §§ 37.37–41; and SCHMUDDE, *supra* note 99, at 128–29.

127. *See* LOPUCKI & WARREN, *supra* note 99, at 32. The creditor must prove ownership of the mortgage or note, and establish standing. RAO ET AL., *supra* note 118, §§ 4.2.2, 4.2.2.3.

used to satisfy the debt.[128] Typically the consumer retains possession of the property until the sale, after which point the consumer must vacate.[129] If the sale's proceeds do not satisfy the debt in full, then the creditor may seek a personal deficiency judgment against the consumer.[130]

There are two distinct types of judicial foreclosure: strict foreclosure and executory process. Strict foreclosure is available in only three states,[131] and is the transfer of title without a sale.[132] Executory process—which is only used in Louisiana[133]—is an expedited in rem[134] procedure where there is no personal judgment entered against the consumer.[135] Instead, a deficiency judgment may be obtained after appraisal.[136]

b. Nonjudicial Foreclosure

In addition to judicial foreclosure, a majority of states and the District of Columbia allow power of sale foreclosure—also called nonjudicial foreclosure.[137] For nonjudicial foreclosure, a power of sale provision in the mortgage or deed of trust allows the creditor to proceed to a foreclosure sale without judicial action.[138] Upon default, instead of filing a civil action in court, the creditor gives notice to the consumer[139] and initiates a foreclosure sale[140] after a period of time set by state statute.[141] A court will only

128. *See* LOPUCKI & WARREN, *supra* note 99, at 32; RAO ET AL., *supra* note 118, § 4.2.2.

129. *See* LOPUCKI & WARREN, *supra* note 99, at 32 (indicating that a creditor can obtain a writ that entitles her to a sheriff's assistance in putting the creditor in possession).

130. *See* SCHMUDDE, *supra* note 99, at 127. However, some states do not allow deficiency judgments. *Id.* If the sale generates more proceeds than the debt owed, the surplus goes to the debtor. *Id.* at 127–28.

131. *See* 4 POWELL, *supra* note 104, § 37.43; *see also* SCHMUDDE, *supra* note 99, at 125–26.

132. *See* 4 POWELL, *supra* note 104, § 37.43; SCHMUDDE, *supra* note 99, at 130; *see also supra* note 118 and accompanying text.

133. *See* A. Brooke Overby, *Mortgage Foreclosure in Post-Katrina New Orleans*, 48 B.C. L. REV. 851, 868 (2007).

134. *See* BLACK'S LAW DICTIONARY, *supra* note 99, at 864 ("Involving or determining the status of a thing, and therefore the rights of persons generally with respect to that thing.").

135. *See* Paul S. Ottinger, *Enforcement of Real Mortgages by Executory Process*, 51 LA. L. REV. 87, 92–95 (1990); Overby, *supra* note 133, at 870.

136. *See* Ottinger, *supra* note 135, at 92; Overby, *supra* note 133, at 870 n.82.

137. *See* RAO ET AL., *supra* note 118, § 4.2.3; *see also* BENDER ET AL., *supra* note 100, at 421 (contrasting the nonjudicial method, which lacks judicial supervision, with the judicial supervision that accompanies judicial foreclosure); LOPUCKI & WARREN, *supra* note 99, at 34 (indicating that the power of sale is accomplished without filing a lawsuit); 4 POWELL, *supra* note 104, § 37.42[1] (referring to power of sale foreclosure as a "non-judicial alternative" to judicial foreclosure).

138. *See* BENDER ET AL., *supra* note 100, at 421; LOPUCKI & WARREN, *supra* note 99, at 34; RAO ET AL., *supra* note 118, § 4.2.4.

139. *See* 4 POWELL, *supra* note 104, § 37.42[4]. The creditor must (1) notify the defendant of the intent to foreclose and include information regarding the debt and details of the mortgage; and (2) provide notice of the proposed sale. *See id.*

140. *See* 4 POWELL, *supra* note 104, § 37.43[5] (indicating that a public sale is often required).

become involved if the consumer files for an injunction.[142] Therefore, nonjudicial foreclosure offers less protection to the consumer, but is quicker and less expensive for the creditor.[143] Where the power of sale is in a deed of trust rather than a mortgage, the trustee—not the creditor—provides the notice and executes the sale.[144] After the sale, some states allow for a deficiency judgment against the consumer.[145]

C. Mortgage Foreclosure and the FDCPA

Three clauses within the FDCPA—the security enforcer clause, the fiduciary obligation clause, and the judicial venue clause—have special importance when dealing with mortgage foreclosure. This section will look at each in turn.

1. The Security Enforcer Clause

The FDCPA's definition of "debt collector" includes the following clause: "[f]or 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."[146] The non-binding FTC Staff Commentary suggests that security enforcers—who "do not otherwise fall within the definition" of debt collector—are only subject to the FDCPA covers when they take nonjudicial action on security interests.[147]

The security enforcer clause has divided courts over the impact of the FDCPA on security enforcers.[148] In particular, this clause has been central

141. *See* BENDER ET AL., *supra* note 100, at 421 (indicating that advertising may also be required by statute); LOPUCKI & WARREN, *supra* note 99, at 34 (discussing California's power of sale law); RAO ET AL., *supra* note 118, § 4.2.4; SCHMUDDE, *supra* note 99, at 131.

142. *See* LOPUCKI & WARREN, *supra* note 99, at 34 (discussing the ways a power for sale foreclosure may end up in court); RAO ET AL., *supra* note 118, § 4.2.3.

143. *See* BENDER ET AL., *supra* note 100, at 421; LOPUCKI & WARREN, *supra* note 99, at 34; 4 POWELL, *supra* note 104, § 37.42[1] (indicating that power of sale is "widely used" and is the "preferred approach" where it is available because of the cost and time savings). *But see* RAO ET AL., *supra* note 118, §§ 4.2.3, 4.4.3 (discussing procedural requirements provided by statute to protect consumers, such as recording chain of title and limiting those who may use the procedures); SCHMUDDE, *supra* note 99, at 131 (noting some state provisions are meant to protect consumers, such as the requirement of appraisals).

144. *See* BENDER ET AL., *supra* note 100, at 421; LOPUCKI & WARREN, *supra* note 99, at 34.

145. *See* LOPUCKI & WARREN, *supra* note 99, at 34; 4 POWELL, *supra* note 104, § 37.42[6].

146. 15 U.S.C. § 1692a(6) (2006).

147. FTC Staff Commentary, 53 Fed. Reg. 50,097, 50,108 (Dec. 13, 1988).

148. *Compare* Piper v. Portnoff Law Assocs., Ltd., 396 F.3d 227, 236 (3d Cir. 2005) (finding that the security enforcer clause includes—rather than excludes—security enforcers in the definition of "debt collector"), *with* Jordan v. Kent Recovery Servs., Inc., 731 F. Supp. 652, 657–58 (D. Del. 1990) (distinguishing security enforcement from debt collection because with security enforcement there is a present right to the property); *see also* Marshall, *supra* note 7, at 1275–81.

to judicial analysis[149] and scholarly commentary[150] regarding whether persons foreclosing on a mortgage or deed of trust are debt collectors under the FDCPA. Some courts have distinguished between judicial and nonjudicial foreclosure proceedings. They reason that because judicial foreclosure often involves a deficiency judgment against the person, it is distinct from merely foreclosing on property through nonjudicial foreclosure.[151]

2. The Fiduciary Obligation Clause

The definition of "debt collector" includes the following exception: "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."[152] The FTC Staff Commentary provides that a trustee appointed solely to conduct a foreclosure sale does not fall under this exemption.[153] The few courts to address this issue in the context of mortgage foreclosures have cited the FTC Staff Commentary to conclude that foreclosing trustees are not entitled to the exemption because debt collection activity is central—not incidental—to their fiduciary obligation.[154]

3. The Judicial Venue Clause

The final clause at issue is the judicial venue clause. It provides that a debt collector must bring an action to enforce an interest in real property in the judicial district where the property is located.[155] One circuit found that

149. *Compare* Rosado v. Taylor, 324 F. Supp. 2d 917, 924 (N.D. Ind. 2004) ("Security enforcement activities fall outside the scope of the FDCPA because they aren't debt collection practices."), *with* Shapiro & Meinhold v. Zartman, 823 P.2d 120, 124 (Colo. 1992) (finding that the security enforcer clause does not limit, but rather enlarges, the category of debt collectors).

150. *See* Griffith, *supra* note 24, at 77–78; Marshall, *supra* note 7, at 1298–1300 (analyzing the clause and concluding that it is "broader" than the definition of "debt collector").

151. *See* Beadle v. Haughey, No. Civ.04-272-SM, 2005 WL 300060, at *3 (D.N.H. Feb. 9, 2005) (noting that the additional activity of pursuing a personal judgment qualifies as debt collection); McDaniel v. South & Assocs., P.C., 325 F. Supp. 2d 1210, 1217 (D. Kan. 2004) (finding that "collecting money from a consumer" and "enforcing an interest in real property" are distinguishable).

152. 15 U.S.C. § 1692a(6)(F)(i) (2006). The accompanying Senate Report indicates that this provision was meant to exempt "trust departments, escrow companies, or other bona fide fiduciaries." S. REP. NO. 95-382, at 3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1698.

153. FTC Staff Commentary, 53 Fed. Reg. 50,097, 50,103 (Dec. 13, 1988).

154. *See* Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373, 377–78 (4th Cir. 2006); Thomson v. Prof'l Foreclosure Corp. of Wash., No. 98-CS-478, 2000 WL 34335866, at *7 (E.D. Wash. Sept. 25, 2000); *see also* Rowe v. Educ. Credit Mgmt. Corp., 559 F.3d 1028, 1034–35 (9th Cir. 2009) (citing *Wilson* and applying its reasoning to a student loan).

155. § 1692i(a)(1); S. REP. NO. 95-382, at 8, 1977 U.S.C.C.A.N. at 1702 ("Actions on real property are required to be brought in the judicial district in which the property is located."); FTC Staff Commentary, 53 Fed. Reg. at 50,109 (clarifying that a debt collector can only bring an action based on the location of a consumer's real property when that action is to enforce an interest in that real property).

this clause would be superfluous if the FDCPA excluded foreclosure attorneys or trustees from the definition of debt collector.[156] Other courts that have discussed this clause have not had occasion to decide its implications on security enforcers, because the enforcers' activities were nonjudicial.[157]

II. A HOUSE DIVIDED: COURTS DISAGREE ON WHETHER THE FDCPA COVERS MORTGAGE FORECLOSURE

Part II of this Note discusses the split that has emerged among circuits addressing whether mortgage enforcers are debt collectors under the FDCPA. Part II.A looks at the Fourth and Fifth Circuits, which found that the FDCPA extends to mortgage foreclosure. Part II.B then turns to the Eleventh Circuit, which held that mortgage foreclosure is not debt collection under the FDCPA. Finally, Part II.C examines the Tenth Circuit, in addressed the issue without resolving it.

A. The FDCPA Covers Mortgage Foreclosure

The Fourth and Fifth Circuits were the first to address the issue. Their analysis in *Wilson v. Draper & Goldberg, P.L.L.C.*,[158] and *Kaltenbach v. Richards*,[159] will be addressed in turn.

1. The Fourth Circuit

The Fourth Circuit first addressed the issue in *Wilson*.[160] There, a divided panel held that a law firm could be held liable for FDCPA violations in connection with initiating a foreclosure.[161] The panel analyzed both the security enforcer clause[162] and the fiduciary obligation clause.[163]

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156. *See* Kaltenbach v. Richards, 464 F.3d 524, 528 (5th Cir. 2006) (noting that "§ 1692i(a)(1) would be without effect" unless the FDCPA covered security enforcers that also met the definition of "debt collector"). *But see* Fouche' v. Shapiro & Massey L.L.P., 575 F. Supp. 2d 776, 787–88 (S.D. Miss. 2008) (finding that the defendant was only a debt collector for the purposes of § 1692f(6) and § 1692i(a)); Marshall, *supra* note 7, at 1278.

157. *See* Chomilo v. Shapiro, Nordmeyer & Zielke, LLP, No. 06-3103 (RHK/AJB), 2007 WL 2695795, at *3 n.3 (D. Minn. Sept. 12, 2007); Beadle v. Haughey, No. Civ.04-272-SM, 2005 WL 300060, at *4 (D.N.H. Feb. 9, 2005). *But see Fouche'*, 575 F. Supp. 2d at 788 (finding that a security enforcer who does not otherwise meet the definition of "debt collector" is still subject to § 1692f(6) and § 1692i(a) of the FDCPA).

158. 443 F.3d 373 (4th Cir. 2006).

159. 464 F.3d 524 (5th Cir. 2006).

160. The Fourth Circuit had previously affirmed a lower court's holding that distinguished between debt collection and mortgage foreclosure. *See* Heinemann v. Jim Walter Homes, Inc., 47 F. Supp. 2d 716, 722 (N.D. W. Va. 1998), *aff'd* 173 F.3d 850 (4th Cir. 1999) (unpublished table decision). The *Wilson* court considered this distinction and disagreed. *See Wilson*, 443 F.3d at 376.

161. *See Wilson*, 443 F.3d at 378.

162. *See id.*

163. *See id.* at 377–78.

The defendants were a law firm hired by a bank to foreclose on the plaintiff's home[164] and an attorney at the firm who was substitute trustee for the deed of trust.[165] The defendants sent a letter to the plaintiff, informing her that her mortgage payments were in default and that they intended to initiate foreclosure proceedings.[166] The letter also asserted that the lawyers were not debt collectors, but indicated that the notice was an attempt to collect a debt and was sent in compliance with the FDCPA.[167] The plaintiff disputed the debt and requested verification in writing.[168] The defendants then initiated foreclosure proceedings in court.[169]

Although contacted by the plaintiff's attorney, the defendants sent a letter directly to the plaintiff to inform her of the foreclosure proceeding.[170] The plaintiff's attorney requested a full statement of the plaintiff's account.[171] The defendants sent a letter directly to the plaintiff indicating the balance owed on the mortgage and the amount owed to avoid foreclosure.[172]

The plaintiff resolved the dispute with the bank and the foreclosure action was dismissed.[173] The plaintiff then sued the defendants for violating the FDCPA.[174] The district court granted summary judgment for the defendants because it held that trustees foreclosing on property are not debt collectors, and are therefore outside the scope of the FDCPA.[175] On appeal, the plaintiff argued that the defendants' demand for money placed the defendants under the FDCPA,[176] while the defendants argued that they fell outside the FDCPA.[177]

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164. *See id.* at 374; Brief for Plaintiff-Appellant at 8, *Wilson*, 443 F.3d 373 (No. 05-1392); Brief of Appellees at 1, *Wilson*, 443 F.3d 373 (No. 05-1392).

165. *See* Brief of Appellees at 1, *Wilson*, 443 F.3d 373 (No. 05-1392).

166. *See Wilson*, 443 F.3d at 374; Brief of Appellees at 1, *Wilson*, 443 F.3d 373 (No. 05-1392).

167. *See Wilson*, 443 F.3d at 374–75. The letter also provided the amount owed, the identity of the creditor, and the way to validate the debt. *See id.*

168. *See id.* at 375; Brief of Appellees at 1, *Wilson*, 443 F.3d 373 (No. 05-1392).

169. *See Wilson*, 443 F.3d at 375; Brief of Appellees at 2, *Wilson*, 443 F.3d 373 (No. 05-1392).

170. *See Wilson*, 443 F.3d at 375; Brief of Appellees at 2, *Wilson*, 443 F.3d 373 (No. 05-1392).

171. *See Wilson*, 443 F.3d at 375; Brief of Appellees at 2, *Wilson*, 443 F.3d 373 (No. 05-1392).

172. *See Wilson*, 443 F.3d at 375; Brief for Plaintiff-Appellant at 8, *Wilson*, 443 F.3d 373 (No. 05-1392) (indicating that the letter contained a demand for money to reinstate the account); Brief of Appellees at 2, *Wilson*, 443 F.3d 373 (No. 05-1392).

173. *See Wilson*, 443 F.3d at 375; Brief of Appellees at 3, *Wilson*, 443 F.3d 373 (No. 05-1392).

174. *See Wilson*, 443 F.3d at 375 (indicating that the action was brought for failure to verify the debt, failure to cease collection efforts after the debt was disputed, and for communicating directly with the plaintiff when it was known that she was represented by counsel); Brief for Plaintiff-Appellant at 4, *Wilson*, 443 F.3d 373 (No. 05-1392) (indicating that the action was brought under § 1692g(b) and § 1692c(a)(2) of the FDCPA).

175. *See Wilson*, 443 F.3d at 375; Brief for Plaintiff-Appellant at 6, *Wilson*, 443 F.3d 373 (No. 05-1392).

176. *See* Brief for Plaintiff-Appellant at 8–9, *Wilson*, 443 F.3d 373 (No. 05-1392) (arguing that the purpose of the foreclosure activity was to collect a debt); *see also* Reply Brief for Plaintiff-Appellant at 1, 5–6, *Wilson*, 443 F.3d 373 (No. 05-1392) (framing the

The Fourth Circuit's analysis in *Wilson* focused on whether the defendant law firm was a debt collector.[178] However, before reaching a conclusion, it first looked to the threshold requirement of whether a debt existed.[179] It then considered and rejected the distinction offered in *Hulse v. Ocwen Federal Bank, FSB*[180] between foreclosure and the collection of funds.[181] Instead, the court concluded that the character of the debt remained unchanged throughout the foreclosure proceedings.[182] Otherwise, the court concluded, debt collectors could exploit a loophole in the FDCPA that exempted secured debts from its protection when debt collectors used foreclosure.[183] Thus, the court concluded there was a debt and that the defendant tried to collect it.[184]

Next, the court disagreed with the defendants' defense that they were not debt collectors.[185] The court rejected their first argument that they fell under the fiduciary obligation exception.[186] The court held that the defendants were trustees, but that they were not entitled to the exception

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defendants' actions as "a law firm demanding money from a consumer," and highlighting the demand for money in the letter). There is a subtle difference here: the plaintiff's brief cited an analysis of the defendants' foreclosure activity to demonstrate that the typical outcome was payment to avoid foreclosure, but her reply brief focused on the demand for payment in the letter sent to her. *Compare* Brief for Plaintiff-Appellant at 9, *Wilson*, 443 F.3d 373 (No. 05-1392), *with* Reply Brief for Plaintiff-Appellant at 1, 5–6, *Wilson*, 443 F.3d 373 (No. 05-1392).

177. *See* Brief of Appellees at 5–16, *Wilson*, 443 F.3d 373 (No. 05-1392) (arguing that as trustees under state law, they fell under the fiduciary obligation clause, and that, because their primary business was security enforcement, they fell under the security enforcer clause and were therefore only subject to § 1692f(6)). The defendants also argued that they sent the letters to accommodate the plaintiff's verification request, not to collect a debt. *See id.* at 15. Therefore, the defendants argued that foreclosure was not debt collection because it was terminating a property interest rather than enforcing an obligation to pay money. *See Wilson*, 443 F.3d at 376; Brief of Appellees at 5–7, *Wilson*, 443 F.3d 373 (No. 05-1392).

178. *See Wilson*, 443 F.3d at 375–77 (concluding that trustees acting in connection with a foreclosure can be debt collectors); *see also id.* at 379 (remanding for consideration of whether the firm's principal business is debt collection, or if it regularly engages in the collection of debts).

179. *See id.* at 375–77; *see also* Wymer v. Huntington Bank Charleston, N.A., No. 3:10-0865, 2011 WL 5526314, at *7 (S.D. W. Va. Nov. 14, 2011).

180. 195 F. Supp. 2d 1188 (D. Or. 2002).

181. *Wilson*, 443 F.3d at 376; *see also Hulse*, 195 F. Supp. 2d at 1204 (distinguishing between foreclosure and debt collection, because the action concerned in the former is the power of sale, not an attempt to collect funds).

182. *See Wilson*, 443 F.3d at 376; *see also Wymer*, 2011 WL 5526314, at *8.

183. *See Wilson*, 443 F.3d at 376; *see also* Marshall, *supra* note 7, at 1276.

184. *See Wilson*, 443 F.3d at 377. However, one should note—as a potentially distinguishing characteristic—that the defendant also made demands for money after the foreclosure proceeding began. *See id.* at 376–77; *see also* Blagogee v. Equity Trs., LLC, No. 1:10-CV-13 (GBL-IDD), 2010 WL 2933963, at *5–6 (E.D. Va. July 26, 2010) (distinguishing *Wilson* and finding that the plaintiff did not allege sufficient facts to support an FDCPA claim, because the defendant did not expressly demand payment). Wilson argued in her reply brief that the demand for payment in the letter put the defendant squarely within the FDCPA. *See supra* note 176 and accompanying text.

185. *See Wilson*, 443 F.3d at 377 (rejecting the defendant's fiduciary obligation argument); *id.* at 378 (rejecting the defendant's security enforcer argument).

186. *See id.*

because foreclosure is central—not incidental—to the trustee's fiduciary obligation.[187] It cited the FTC Staff Commentary as persuasive on this point.[188] It also rejected the idea that lawyers are fiduciaries under the FDCPA because that would render the Supreme Court's holding in *Heintz* meaningless.[189]

Similarly, the court rejected the defendants' security enforcer argument.[190] The court cited *Jordan v. Kent Recovery Services, Inc.*[191] to support its conclusion that the security enforcer clause "applies to those whose *only* role in the debt collection process is the enforcement of a security interest."[192] Thus, the court found that the clause includes those who only enforce security interests for § 1692f(6) but does not exclude security enforcers whose primary purpose is debt collection or who regularly collect debts.[193] Ultimately, the court held that the defendants fell within the FDCPA.[194]

However, the dissent noted that defendants were fiduciaries because they were trustees for the purposes of foreclosure.[195] It then criticized the majority's "incidental" and "central" distinction as illogical.[196] It also suggested that it was improper to defer to the FTC Staff Commentary because it conflicted with the text of the statute and its legislative history, and was therefore not entitled to deference.[197] The dissent did not address the security enforcer clause.[198]

187. *See id.* at 377; *see also* Rowe v. Educ. Credit Mgmt. Corp., 559 F.3d 1028, 1034–35 (9th Cir. 2009) (citing *Wilson* and reaching the same conclusion for a guaranty agency that attempted to collect a student loan because the statute "exclude[s] fiduciaries whose sole or primary function is to collect a debt on behalf of the entity to whom the fiduciary obligation is owed").

188. *Wilson*, 443 F.3d at 377.

189. *Id.* 377–78 (concluding that lawyers are generally fiduciaries for clients, and that reading attorneys into the fiduciary obligation exception would be inconsistent with *Heintz*).

190. *See Wilson*, 443 F.3d at 378.

191. 731 F. Supp. 652 (D. Del. 1990).

192. *Wilson*, 443 F.3d at 378. However, the court in *Jordan* also concluded that seeking to recover a car through repossession was not seeking payment of the debt. *Jordan*, 731 F. Supp at 659–60. This conclusion conflicts with *Wilson*'s holding regarding mortgages and debt. *See supra* note 161 and accompanying text.

193. *See Wilson*, 443 F.3d at 378; Marshall, *supra* note 7, at 1276–77.

194. *See Wilson*, 443 F.3d at 378–79.

195. *See id.* at 380 (Widener, J., dissenting).

196. *See id.* ("If the exception covers the minor unintended acts relating to incidental fiduciary duties, it must cover the principal acts as well."); *see also* Pizan v. HSBC Bank USA, N.A., No. C11-26Z, 2011 WL 2531104, at *4 (W.D. Wash. June 23, 2011) (noting the dissent's rejection of this distinction).

197. *See Wilson*, 443 F.3d at 380–81 (Widener, J., dissenting) (noting the FTC Staff Commentary's own limiting language, and that other courts have declined to give it *Chevron* deference). The dissent also noted that the majority did not find that the defendants were appointed solely to foreclose, as the Staff Commentary suggested. *See id.* at 380 n.3.

198. *See id.* at 379–81.

2. The Fifth Circuit

In *Kaltenbach*, the Fifth Circuit also held that mortgage foreclosure could be covered under the FDCPA.[199] The panel examined the security enforcer clause[200] as well as the judicial district clause,[201] but did not consider the fiduciary obligation clause.[202]

The plaintiff secured a loan with a mortgage on a mobile home.[203] After missing payments, the mortgage company notified the plaintiff that it might exercise its right to repossess the home and hired the defendant to initiate an executory process foreclosure.[204] Defendant initiated the foreclosure action in state court, and the home was seized and sold to satisfy the plaintiff's debt.[205] The plaintiff sued for failure to send a notice of debt validation pursuant to § 1692g of the FDCPA,[206] and the district court dismissed the claim based on the security enforcer clause.[207] The court considered and rejected the analysis of *McDaniel v. South & Associates, P.C.*,[208] which had distinguished between judicial and nonjudicial foreclosures.[209] Instead, the district court reasoned that § 1692f(6) only applies to nonjudicial action, and differentiated the judicial action taken by the defendant.[210]

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199. *See* Kaltenbach v. Richards, 464 F.3d 524, 529 (5th Cir. 2006) (holding that an entity satisfying the definition of "debt collector" falls under the FDCPA even if enforcing security interests).

200. *See id.* at 527–28.

201. *See id.* at 528.

202. *See id.* at 527–29. This argument does not appear to have been raised by either party or the district court. *See* Kaltenbach v. Richards, No. 04-CV-65, 2004 WL 5573414, at *1 (M.D. La. Dec. 22, 2004) (summarizing the parties' arguments). The plaintiff focused his argument on *Heintz* and that the defendant was an attorney, but did not squarely address the security enforcer clause. *See* Memorandum in Support of Plaintiff's Opposition to Dismissal at 2–6, *Kaltenbach*, No. 04-CV-65-C-m1, 2004 WL 3723010; Second Supplemental Memorandum in Support Plaintiff's Opposition to Defendant's Motion to Dismiss at 3–4, *Kaltenbach*, No. 04-CV-65-C-m1, 2004 WL 3723012 (discussing the defendant's security enforcer argument, but reframing the issue as a distinction between "[b]anks collecting their own debts to attorneys foreclosing on a security interest"). The crux of the defendant's argument was that he fell under the security enforcer clause and was thus exempt from the FDCPA. *See* Memorandum in Support of Motion to Dismiss at 3–5, No. 04-CV-65-C-m1, 2004 WL 3723009.

203. *See Kaltenbach*, 464 F.3d at 526.

204. *See id.*; *see also supra* notes 133–36 and accompanying text (discussing executor process foreclosure).

205. *See Kaltenbach*, 464 F.3d at 526; *Kaltenbach*, 2004 WL 5573414, at *1.

206. *See Kaltenbach*, 464 F.3d at 526 (referring to the defendant's failure to send a "dunning" letter); *Kaltenbach*, 2004 WL 5573414, at *1.

207. *See Kaltenbach*, 2004 WL 5573414, at *2–3 (finding that security enforcers are only debt collectors under § 1692f(6) of the FDCPA).

208. 325 F. Supp. 2d. 1210 (D. Kan. 2004).

209. *See McDaniel*, 325 F. Supp. 2d at 1216–18 (distinguishing cases that found nonjudicial foreclosure fell outside the FDCPA from the instant case that involved judicial foreclosure, because the judicial foreclosure involves a personal judgment to collect the money owed); *see also Kaltenbach*, 2004 WL 5573414, at * 3.

210. *See Kaltenbach*, 2004 WL 5573414, at * 3; *see also supra* notes 133–36 and accompanying text (characterizing executory process as a type of judicial foreclosure). *But see* Fouche' v. Shapiro & Massey L.L.P., 575 F. Supp. 2d 776, 785–86 (S.D. Miss. 2008) (characterizing the executory process as nonjudicial).

On appeal, the Fifth Circuit's sole inquiry was whether the defendant was a debt collector under the FDCPA.[211] The court looked to *Montgomery v. Huntington Bank*[212] to conclude that security enforcers who do not meet the definition of debt collectors are only covered under § 1692f(6).[213] It assumed for the sake of the appeal that the defendant otherwise met the broader definition of debt collector.[214] The court then gave *Chevron* deference to the FTC Staff Commentary and concluded that the FDCPA applies to a security enforcer who also meets the definition of "debt collector."[215] It rejected the defendant's argument that because his interaction with the plaintiff was not the collection of a debt, but was rather the enforcement of a security interest, it did not need to comply with the FDCPA.[216] The court relied on the text of the Act to support this conclusion.[217] Specifically, the court explained that the judicial venue clause[218] would be meaningless if security enforcers were exempt from the broader FDCPA.[219]

The circuit court observed that other cases[220] had concluded that security enforcers are only subject to the FDCPA under § 1692f(6), but that these

211. *See Kaltenbach*, 464 F.3d at 527.

212. 346 F.3d 693 (6th Cir. 2003).

213. *See Kaltenbach*, 464 F.3d at 527; *see also Fouche'*, 575 F. Supp. 2d at 783–84. However, the court in *Montgomery* did not make an express distinction between security enforcers that do and do not otherwise meet the definition of debt collector. *Montgomery*, 346 F.3d at 700–01. Rather, the court flatly noted that security enforcers "d[id] not meet the statutory definition of a debt collector" and that the plaintiff did not allege that the repossession company principally or regularly collected debts. *Id.* It is unclear how it might have affected the court's analysis if the plaintiff had alleged that the defendant was a debt collector. Interestingly, the Eleventh Circuit used *Montgomery* to support a conclusion opposite to that of the Fifth. *See infra* note 243 and accompanying text.

214. *See Kaltenbach*, 464 F.3d at 527; *see also id.* at 529 (remanding for further consideration the question of whether the defendant satisfied the definition of "debt collector").

215. *See Kaltenbach*, 464 F.3d at 527–28; *see also* Brown v. Card Serv. Ctr., 464 F.3d 450, 456 n.4 (3d Cir. 2006) (noting that *Kaltenbach*'s deference was based on Fifth Circuit precedent that requires more deference). *But see* Marshall, *supra* note 7, at 1278 (indicating that deference was based on persuasiveness). For a discussion of *Chevron* in the context of the Staff Commentary see *supra* notes 94–98 and accompanying text.

216. *See Kaltenbach*, 464 F.3d at 527–28. Other courts have held similarly. *See, e.g.*, Boles v. Moss Codilis, LLP, No. SA-10-CV-1003-XR, 2011 WL 2618791, at *3 (W.D. Tex. July 1, 2011) (noting that a security enforcer may be liable under the FDCPA if it meets the "general definition of a debt collector").

217. *See Kaltenbach*, 464 F.3d at 527–28; *see also* Marshall, *supra* note 8, at 1276 (indicating that statutory interpretation is an important step used by courts to ascertain whether foreclosure is debt collection).

218. Under this section, a debt collector must bring an action to enforce a real property interest in the jurisdiction in which the property is located. *See* § 15 U.S.C. 1692i(a)(1) (2006).

219. *Kaltenbach*, 464 F.3d at 528; *see also* Marshall, *supra* note 7, at 1278.

220. The court cited *Hulse*, 195 F. Supp. 2d 1188 (D. Or. 2002), and *Rosado v. Taylor*, 324 F. Supp. 2d 917 (N.D. Ind. 2004), as well as other cases. In *Rosado* the court found that "[s]ecurity enforcement activities fall outside the scope of the FDCPA because they aren't debt collection practices." *Rosado*, 324 F. Supp. 2d at 924. However, it distinguished between sending an FDCPA notice on the one hand (subject to the FDCPA), and sending the

courts did not address the judicial venue clause.[221] The court also contrasted these cases with *Shapiro & Meinhold v. Zartman*,[222] a case that supports the proposition that if a security enforcer meets the broad definition of debt collector she is subject to the whole of the FDCPA.[223]

Further, the Fifth Circuit distinguished "general" and "specific" debt collection activities.[224] General debt collection refers to an individual's primary purpose or regular activity—it defines the individual.[225] Specific debt collection refers to the specific communication or interaction—the action or inaction—between the person attempting to collect the debt[226] and the consumer.[227] Although the court did not decide whether the enforcement of a security interest in a particular instance was a "communication" under the FDCPA,[228] it noted that this was a separate issue from whether the party was a debt collector.[229] Thus, the court concluded that the defendant could be a debt collector under the FDCPA if he satisfied the general definition of debt collector, but remanded the case to the district court to decide whether the defendant met the general definition.[230]

In *Brown v. Morris*,[231] the Fifth Circuit clarified that a foreclosing enforcer, standing alone, is not a per se debt collector; rather, the enforcer must also meet the general definition of debt collector.[232] In evaluating the

summons and complaint for the foreclosure action on the other (not subject to the FDCPA). *Id.* at 925–26.

221. *See Kaltenbach*, 464 F.3d at 528 (noting the inability to reconcile a reading of the security enforcer clause that excludes security enforcers from the definition of "debt collector" and § 1692i, which "is directed at persons enforcing security interests").

222. 823 P.2d 120 (Colo. 1992).

223. *See Kaltenbach*, 464 F.3d at 528. In *Zartman*, the court was dealing with a claim under § 1692i. *Zartman*, 823 P.2d at 122. It found that the security enforcement clause broadened the definition of debt collectors for § 1692f(6) and that "any person who qualifies under the first sentence in the definition [of debt collector] is a debt collector" under the FDCPA. *Id.* at 124–25.

224. *See Kaltenbach*, 464 F.3d at 528–29 (rejecting the idea that an entity enforcing a security interest in a particular instance was not a debt collector); *see also* Memmott v. OneWest Bank, FSB, No. 10-3042-CL, 2011 WL 1560985, at *9 (D. Or. Feb. 9, 2011), *adopted as modified*, 2011 WL 1559298 (D. Or. Apr. 25, 2011); Fouche' v. Shapiro & Massey L.L.P., 575 F. Supp. 2d 776, 784 (S.D. Miss. 2008); Overton v. Foutty & Foutty, LLP, No. 1:07-cv-0274-DFH-TAB, 2007 WL 2413026, at *4 (S.D. Ind. Aug. 21, 2007). This Note adopts this distinction in Part III.

225. *See Kaltenbach*, 464 F.3d at 528–29; *Fouche'*, 575 F. Supp. 2d at 783–84.

226. This roundabout way of saying debt collector is deliberate—not everyone who communicates with a consumer regarding a debt meets the statutory definition of debt collector.

227. *See Kaltenbach*, 464 F.3d at 529 & n.5.

228. *See id.* (declining to express an opinion); *Overton*, 2007 WL 2413026, at *6.

229. *See Kaltenbach*, 464 F.3d at 529; *Overton*, 2007 WL 2413026, at *4, *6.

230. *See Kaltenbach*, 464 F.3d at 529.

231. Brown v. Morris, 243 F. App'x 31 (5th Cir. 2007).

232. *Morris*, 243 F. App'x at 35; Memmott v. OneWest Bank, FSB, No. 10-3042-CL, 2011 WL 1560985, at *10 (D. Or. Feb. 9, 2011), *adopted as modified*, 2011 WL 1559298 (D. Or. Apr. 25, 2011).

general definition of debt collector, the court considers the volume and frequency of the defendant's debt-collection efforts.[233]

B. The FDCPA Does Not Cover Mortgage Foreclosure: The Eleventh Circuit's Approach

In two separate cases, the Eleventh Circuit concluded that mortgage foreclosure is not covered by the FDCPA. More recently, however, it determined that a demand for payment ancillary to a foreclosure proceeding is debt collection.

Warren v. Countrywide Home Loans, Inc.[234] was the first circuit case to hold that the foreclosure process was not debt collection under the FDCPA.[235] In *Warren*, the Eleventh Circuit did not address the fiduciary exception, but rather relied on the security enforcer clause.[236] It found that the clause exempts the enforcement of security interests from being considered "debt collection."[237]

The plaintiff brought an action under § 1692g(b) of the FDCPA for the defendant's failure to verify the plaintiff's debt before proceeding with foreclosure.[238] The court framed its analysis around the absent definition of "debt collection."[239] It concluded that foreclosing on a security interest is not debt collection because a security enforcer is not a "debt collector."[240] It relied on a canon of statutory interpretation—*expressio unius est exclusio alterius*[241]—to hold that the inclusion of a security enforcer in one provision implied its exclusion in the other provisions.[242] The court cited to cases supporting this proposition without noting or distinguishing contrary authority.[243]

In *Ausar-El ex rel. Small, Jr. v. BAC (Bank of America) Home Loans Servicing LP*,[244] the court came to the same conclusion without referencing

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233. *Morris*, 243 F. App'x at 35; *Fouche'*, 575 F. Supp. 2d at 785.

234. 342 F. App'x 458 (11th Cir. 2009).

235. *Warren*, 342 F. App'x at 460–61 (finding that the security enforcer clause exempts security enforcers from the FDCPA except for § 1692f(6)); *see also* Hasbun v. Recontrust Co., No. 11-60488-CIV., 2011 WL 3837158, at *2 (S.D. Fla. Aug. 24, 2011).

236. *See Warren*, 342 F. App'x at 460–61.

237. *See id.* at 460–61.

238. *See id.* at 459.

239. *See id.* at 460 ("[T]he FDCPA does not define 'debt collection.'"); *see also* Kabir v. Statebridge Co., No. 1:11-cv-2747-WSD, 2011 WL 4500050, at *10 (N.D. Ga. Sept. 27, 2011).

240. *See Warren*, 342 F. App'x at 460 (holding that because a security enforcer is included in the definition of "debt collector" for the purposes of § 1692f(6), it is not a debt collector for other provisions of the FDCPA).

241. "[T]o express or include one thing implies the exclusion of the other, or of the alternative." BLACK'S LAW DICTIONARY *supra* note 99, at 661–62; *see also Warren*, 342 F. App'x at 460.

242. *See Warren*, 342 F. App'x at 460.

243. *See id.* at 460–61. The court cited to *Montgomery* to reach a conclusion contrary to the Fifth Circuit, which cited *Montgomery* for the same proposition. *See supra* note 213 and accompanying text.

244. 448 F. App'x 1 (11th Cir. 2011).

Warren, *Kaltenbach*, or *Wilson*.[245] The plaintiff in *Ausar-El* defaulted on a loan secured by a mortgage, and the defendant initiated foreclosure.[246] The plaintiff sued failure to comply with § 1692g's verification requirement.[247] The district court dismissed the action for failure to state a claim.[248]

On appeal, the Eleventh Circuit focused its analysis on the definition of debt collector and the security enforcer clause.[249] It again relied on the canon *expressio unius est exclusio alterius*[250] to conclude that security enforcers are only debt collectors for the purposes of § 1629f(6).[251]

In May 2012, the Eleventh Circuit again addressed foreclosures and the FDCPA in *Reese v. Ellis, Painter, Ratterree & Adams, LLP*.[252] The court did reference *Ausar-El* or *Warren*, but did address *Wilson*.[253] Unlike *Ausar-El* and *Warren*, *Reese* did not address whether a security enforcer could be a debt collector under the FDCPA.[254] Rather, the court limited its analysis to a letter sent that contained both a demand for payment of a promissory note.[255] Like *Wilson*, the court avoided finding a "loophole" in the FDCPA, which would have exempted security enforcers regardless of whether their actions could independently constitute debt collection.[256] The court held that a communication can have a "dual purpose": it can serve as both a foreclosure notice and a demand for payment.[257] Although the

245. *See id.* The court did, however, find support from *Montgomery*. *Id.* at 2.

246. *See id.* at 1.

247. *See id.* at 2 (noting that the lower court found that the defendant was not a debt collector).

248. *See id.*

249. *See id.*; *see also* Comer v. J.P. Morgan Chase Bank, N.A., No. 4:11-CV-88 (CDL), 2011 WL 5878400, at *3 (M.D. Ga. Nov. 23, 2011) (noting that the Eleventh Circuit "follow[ed] the language of the statute").

250. *See supra* note 241 and accompanying text; *see also* Jackson v. Countrywide Home Loans, Inc., No. 2:11-cv-327-MEF, 2011 WL 5358576, at *3 (M.D. Ala. Nov. 7, 2011) (noting that the *Ausar-El* court relied on the doctrine).

251. *Ausar-El*, 448 F. App'x at 2–3; *see also Jackson*, 2011 WL 5358576, at *3.

252. 678 F.3d 1211, 1214 (11th Cir. 2012).

253. *See id*. at 1218.

254. *See id*. at 1218 n.3 ("[W]e do not reach the question of whether enforcing a security interest is itself debt-collection activity covered by the [FDCPA]. That is, we do not decide whether a party enforcing a security interest without demanding payment on the underlying debt is attempting to collect a debt within the meaning of § 1692e.").

255. *See id*. at 1214–17.

256. Unlike the Fourth Circuit, which found it problematic that secured debt would be exempt under the FDCPA, the Eleventh Circuit found it untenable to exempt communications that served the dual purpose of debt collection and security enforcement. *Compare* Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373, 376 (4th Cir. 2006) (discussing the loophole as "immunizing any debt from coverage if that debt happened to be secured by a real property interest and foreclosure proceedings were used to collect the debt"), *with Reese*, 678 F.3d at 1217–18 (characterizing the loophole as "exempt[ing] from the provisions of § 1692e any communication that attempts to enforce a security interest regardless of whether it also attempst to collect the underlying debt").

257. *Reese*, 678 F.3d at 1217–18 ("A communication related to debt collection does not become unrelated to debt collection simply because it also relates to the enforcement of a secuirity interest."); *see also* Birster v. Am. Home Mortg. Servicing, Inc., No. 11-13574, 2012 WL 2913786, at *4 (11th Cir. July 18, 2012) ("[A]n entity can both enforce a security interest *and* collect a debt . . . .").

Eleventh Circuit has walked back its inoculation of security enforcers,[258] by not addressing security enforcement it remains the only circuit to find that the FDCPA does not cover mortgage foreclosure.

C. The Tenth Circuit Provides Further Analysis

In *Maynard v. Bryan W. Cannon, P.C.*,[259] the Tenth Circuit addressed in dicta whether mortgage foreclosure is covered by the FDCPA.[260] Although it resolved the case on other grounds,[261] it provided analysis of the interplay between security enforcers and debt collectors under the FDCPA.[262]

A creditor hired the defendant to initiate nonjudicial foreclosure on the plaintiff's home and designated the defendant trustee of the deed.[263] The defendant recorded a notice of default and mailed it to the plaintiff along with an FDCPA notice—including the mini-*Miranda* warning and the right to dispute the debt.[264] The plaintiff disputed the debt and requested information about the mortgage.[265] The defendant sent the information he had regarding the mortgage to the plaintiff and forwarded the plaintiff's request for more information to the creditor.[266]

The plaintiff responded that this was inadequate, and that she needed her present balance and payment history.[267] The creditor then instructed the defendant not to reach out to the plaintiff because the creditor was dealing directly with her; the defendant took no further action on the foreclosure.[268] Eventually, the plaintiff and the creditor reached an agreement to pay off

258. *Reese*, 678 F.3d at 1217–18.

259. 401 F. App'x 389 (10th Cir. 2010).

260. *See id.* at 395 (assuming that nonjudicial foreclosure is covered by the FDCPA and noting that it would not resolve the issue).

261. *See id.* at 398 (holding that the notice and letter at issue did not violate the FDCPA); Huckfeldt v. BAC Home Loans Servicing, LP, No. 10–cv–01072-MSK-CBS, 2011 WL 4502036, at *4 (D. Colo. Sept. 29, 2011).

262. *See Maynard*, 401 F. App'x at 393–95. (examining the definition of "debt collector" and the meaning of "debt collection" under the FDCPA); *Huckfeldt*, 2011 WL 4502306, at *5 (noting *Maynard*'s "framing of the issue is helpful to [the] resolution of the issue").

263. *See Maynard*, 401 F. App'x at 391–92; Maynard v. Bryan W. Cannon, P.C., 650 F. Supp. 2d 1138, 1139 (D. Utah 2008) (noting that the defendant was appointed as the trustee but was not asked to collect money).

264. *See Maynard*, 401 F. App'x at 392 (indicating that this was "presumably in an effort to comply with FDCPA requirements for debt collectors"); *Maynard*, 650 F. Supp. 2d at 1140 (the notice indicated the principal secured debt, the cause of the default—failure to make monthly payments—and foreclosure costs); *see also supra* notes 139–41 and accompanying text.

265. *See Maynard*, 401 F. App'x at 392; *Maynard*, 650 F. Supp. 2d at 1140.

266. *See Maynard*, 401 F. App'x at 392 (noting that there was no demand for payment); *Maynard*, 650 F. Supp. 2d at 1140.

267. *See Maynard*, 401 F. App'x at 392 (observing that the plaintiff replied); *Maynard*, 650 F. Supp. 2d at 1140.

268. *See Maynard*, 401 F. App'x at 392 (noting that the defendant had no further communication with the plaintiff); *Maynard*, 650 F. Supp. 2d at 1140–41.

the mortgage, and the foreclosure action was cancelled.[269] The plaintiff brought an action under the FDCPA claiming that the notice of default was a third-party communication,[270] and that the defendant failed to cease its debt collection activity upon the plaintiff's demand for verification.[271]

The district court noted the split in cases applying the FDCPA to foreclosure actions.[272] It also examined the application of the security enforcer clause and highlighted the tension between the limited approach taken by the Sixth Circuit in *Montgomery*, and the expansive approach taken by the Fifth Circuit in *Kaltenbach*.[273] The court found that the defendant was only a debt collector for the purposes of § 1692f(6), because he was only enforcing a security interest through nonjudicial foreclosure.[274] Ultimately, the court concluded that even if the defendant was subject to the FDCPA, it did not violate the Act as a matter of law.[275]

On appeal, the defendant conceded it was a debt collector under the FDCPA, and that it had provided notices as if the Act applied to it.[276] Thus, the court focused on whether the foreclosure action was debt collection.[277] Although it found that a mortgage is itself a debt, it distinguished the payment of money from the sale of property in nonjudicial foreclosure.[278] It noted that other cases—such as *Wilson*—applied the FDCPA to mortgage foreclosures that also involved actions, such as demands for payment, that were "indisputably debt collection activity."[279]

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269. *See Maynard*, 401 F. App'x at 392–93; *Maynard*, 650 F. Supp. 2d at 1141 (noting the foreclosure was cancelled when the defendant was notified approximately two months after the settlement).

270. *See Maynard*, 650 F. Supp. 2d at 1144; *see also* 15 U.S.C. § 1692c(b) (2006).

271. *See Maynard*, 650 F. Supp. 2d at 1144; *see also* § 1692g(b).

272. *See Maynard*, 650 F. Supp. 2d at 1141–42 (discussing how courts have distinguished judicial and nonjudicial foreclosures, and reached different conclusions regarding the nature of security interests).

273. *See id.* at 1142 (reading *Montgomery* as excluding security enforcers from the term "debt collector," and *Kaltenbach* as including them).

274. *See id.* (noting that the defendant was only hired for the "limited purpose" of foreclosure, and that there was no evidence of the frequency of his debt collection practices). The court distinguished another Tenth Circuit case, *Robey v. Shapiro, Marianos & Cejda, L.L.C.*, 434 F.3d 1208 (10th Cir. 2006), because it dealt with a judicial foreclosure that demanded a money judgment and attorney's fees, while *Maynard* dealt with the enforcement of a security interest where there was no agreement to collect money. *See Maynard*, 650 F. Supp. 2d at 1143. The court also concluded that the defendant did not violate the FDCPA as a matter of law, even if it did fall under the definition of debt collector. *See id.* at 1142–45. The court called the mailing of the FDCPA notice "problematic," but found that the FDCPA only requires the cessation of additional collection efforts—not the undoing of ongoing foreclosure procedures. *See id.* at 1144. It also noted that the notice of default was required, and that the plaintiff consented by signing the deed of trust. *See id.* at 1143.

275. *See Maynard*, 650 F. Supp. 2d at 1144–45.

276. *See* Maynard v. Bryan W. Cannon, P.C., 401 F. App'x 389, 393–94 (accepting this admission "for purposes of this case").

277. *See Maynard*, 401 F. App'x at 394. The court also considered the notice and letter sent to the plaintiff as outside the scope of its analysis on foreclosure. *Id.* at 395–98.

278. *See id.* at 394; Huckfeldt v. BAC Home Loans Servicing, LP, No. 10–cv–01072-MSK-CBS, 2011 WL 4502036, at *4 (D. Colo. Sept. 29, 2011).

279. *Maynard*, 401 F. App'x at 394.

The Tenth Circuit also noted that some cases had distinguished nonjudicial and judicial foreclosure, because judicial foreclosure involves a personal judgment.[280] For example, *McDaniel* found that because the foreclosure at issue included a demand for personal judgment, the foreclosure was an attempt to collect a debt, rather than a mere foreclosure on the plaintiff's interest in the property.[281]

The court then cited with approval the Seventh Circuit's *Gburek v. Litton Loan Servicing LP*[282] to hold that a demand for payment is not required, because the purpose of the letter controls—the inclusion of FDCPA language is legally irrelevant.[283] However, the Tenth Circuit ultimately did not answer whether foreclosure was debt collection, because it determined that the defendant's communications with the plaintiff did not violate the FDCPA.[284]

III. A BLUEPRINT FOR RESOLVING THE CONFLICT

Part III attempts to resolve the conflict among the circuits. Part III.A reevaluates the conflict and constructs a framework for analyzing FDCPA cases, with particular emphasis given to those that involve mortgage foreclosure. Finally, Part III.B suggests legislation to amend the FDCPA to prevent some of the inconsistent results that would otherwise arise from a strict reading of the current language in the FDCPA.

A. A Framework for Avoiding Confusion

One cause of the conflict is that courts do not consistently address the same issues: while some have looked to whether a mortgage is a "debt,"[285] others have focused on the definition of "debt collector"[286] or debt collection.[287] In other words, courts have reached different answers because they have asked different questions. A consistent framework is therefore needed to reach fair results.

Many courts already implicitly apply this framework,[288] and other courts evaluating FDCPA claims could also easily utilize it. However, for

280. *See Maynard*, 401 F. App'x at 394–95; *Huckfeldt*, 2011 WL 4502306, at *4.

281. *See* McDaniel v. South & Assocs., P.C., 325 F. Supp. 2d 1210, 1217 (D. Kan. 2004). *But see* Beadle v. Haughey, No. Civ.04-272-SM, 2005 WL 300060, at *3 (D.N.H. Feb. 9, 2005) (distinguishing *McDaniel* because the defendant had not sought a personal judgment against the plaintiff).

282. 614 F.3d 380 (7th Cir. 2010).

283. *Maynard*, 401 F. App'x at 395; *Huckfeldt*, 2011 WL 4502306, at *4. *Gburek* involved a letter inviting the plaintiff to discuss "foreclosure alternatives." *Gburek*, 614 F.3d at 386. The court rejected a brightline rule requiring an explicit payment demand in favor of a "commonsense inquiry" that looked at different factors such as: (1) the relationship between the parties; (2) "the purpose and context of the communications—viewed objectively"; and (3) whether there is an explicit demand for payment. *Id.* at 384–85.

284. *See Maynard*, 401 F. App'x at 395–98; *Huckfeldt*, 2011 WL 4502306, at *4.

285. *See supra* note 179 and accompanying text.

286. *See supra* notes 211, 249 and accompanying text.

287. *See supra* note 239 and accompanying text.

288. *See supra* notes 49–52 and accompanying text.

mortgage foreclosure, this explicit framework is particularly useful to untangle the interwoven definitions.[289]

The proposed framework is a three-threshold test[290]: First, there must be an alleged debt.[291] Second, the individual action or communication at issue must involve a debt (i.e., specific debt collection). Third, the defendant must be involved in general debt collection so that it meets the definition of "debt collector." This means the defendant must either (1) have debt collection as the principal purpose of its business;[292] or (2) regularly collect (or attempt to collect) debts.[293]

1. A Mortgage Is a Debt

To reach the second and third thresholds, there must first be an alleged debt.[294] A mortgage, as a type of security interest, represents an obligation to pay money.[295] When a mortgage secures the purchase of a home,[296] it qualifies as a consumer debt, and therefore fits comfortably in the FDCPA's broad definition of debt.[297] Thus, a home mortgage is a debt, and the three cases involving the attorneys from the Introduction all involve a "debt" as defined by the FDCPA.

2. A Communication or Action Regarding Mortgage Foreclosure Is Specific Debt Collection

The second threshold concerns specific debt collection, which focuses on the defined term "communication"[298] and the phrase "in connection with the collection of any debt."[299] Since "communication" is defined broadly as the "conveying of information regarding a debt," any communication regarding a mortgage—a debt—satisfies the definition.

Although "debt collection" is not defined in the statute,[300] absent language to the contrary, it should be interpreted broadly to meet the remedial purpose of the FDCPA.[301] Although this phrase is similar to the one used to define "debt collector" (i.e., general debt collection), there are two distinctions. First, there is no language indicating that the specific debt

289. *See supra* notes 146–47, 224–32 and accompanying text.
290. *See supra* notes 49–52 and accompanying text.
291. *See supra* note 52 and accompanying text.
292. *See supra* note 60 and accompanying text.
293. *See supra* notes 61–62 and accompanying text.
294. *See supra* note 52 and accompanying text.
295. *See supra* notes 100–02 and accompanying text.
296. *See supra* note 101 and accompanying text.
297. *See supra* notes 53–55 and accompanying text. However, if the mortgage is securing a different type of loan that was not for personal, family, or household purposes, it would not be a debt under the FDCPA.
298. *See supra* note 76 and accompanying text.
299. *See supra* notes 75–76 and accompanying text.
300. *See supra* note 77 and accompanying text.
301. *See supra* note 18 and accompanying text.

collection may be "directly or indirectly" collected.[302] This indicates that specific debt collection must be direct. Second, there is no security enforcer clause for specific debt collection. Thus, specific debt collection—interpreted broadly to achieve the remedial purpose of the FDCPA—includes actions taken in connection with mortgage foreclosure. This holds true regardless of whether the foreclosure is judicial or nonjudicial, or whether there is a demand for money.

Therefore, communications or actions regarding mortgage foreclosure satisfy the second prong of the framework. Because the three attorneys from the Introduction—Smith, Jones, and Rogers—all sent communications in their attempts to mortgage debts, they satisfy the second threshold of the framework.

3. An Entity Whose Principal Purpose Is Security Enforcement Is a Debt Collector Only If It Also Regularly Collects Debts

The third and final threshold examines general debt collection. One of two realities must hold true to satisfy this threshold: the entity must either (1) have debt collection as its principal purpose; or (2) it must regularly collect debts.

a. A Security Enforcer's Principal Purpose Is Not Debt Collection

For general debt collection, an entity's principal purpose is defined by a high percentage or proportion of debt collection activity.[303] In the case of security enforcers, it appears as though their principal purpose is already defined: the enforcement of security interests. Therefore, their principal purpose cannot be the collection of debts.[304] Smith, Jones, and Rogers—the three attorneys from the Introduction—fail to satisfy this prong of the third threshold, because their principal purpose is the enforcement of mortgages—a security interest—through foreclosure.

b. Whether a Security Enforcer Is a Debt Collector Depends on Whether It Also Regularly Collects Debts

Although the attorneys do not satisfy the first prong of the third threshold, they may still satisfy the second prong if they regularly collect debts. This is determined by an examination of the volume and frequency of the attorneys' debt collection.[305]

Because general debt collection contains the security enforcer clause, this suggests that the enforcement of security interests, such as a mortgage, is not considered general debt collection. Thus, the rote enforcement of a mortgage through foreclosure—including the mailing of a foreclosure

302. *See supra* note 56 and accompanying text.
303. *See supra* note 60 and accompanying text.
304. *See supra* note 146 and accompanying text.
305. *See supra* note 61 and accompanying text.

notice or the filing of a foreclosure action—does not qualify as general debt collection. Since the attorney Smith only practices routine nonjudicial foreclosure,[306] he does not engage in general debt collection and is not a debt collector under the FDCPA.

However, general debt collection can be satisfied when an attorney moves beyond simple foreclosure to also demand money for the payment of a debt. Thus, the mailing of demands for payment or the filing of a deficiency judgment—either in conjunction with, or after the foreclosure—could satisfy the general definition of debt collection if it were done with sufficient frequency. Because attorney Jones consistently mails out a non-trivial amount of dunning letters to demand payment, he satisfies the second prong of the third threshold and could therefore be a debt collector under the FDCPA, so long as he does not fall within one of its exceptions. The same is true for attorney Rogers, because of his consistent filing of deficiency judgments, which are demands for payment to satisfy a debt.

It is worth noting, however, that none of the attorneys would be protected by the fiduciary obligation exception.[307] This clause does not cover foreclosure trustees because they are not full trustees; rather their role is limited to the enforcement of the deed of trust.[308]

B. Legislation to Achieve Consistent Results

Although the reading of the FDCPA proposed by this Note is consistent with the Act's text and purpose, it still reaches inconsistent results. While attorneys Smith, Jones, and Rogers sent the same notice in connection with the same type of proceeding, two of the attorneys fall under the FDCPA because of their general debt collection activities, which are unrelated to the specific debt collection.

In order to achieve consistent results, Congress should amend the FDCPA to define "debt collection." Congress could define the term so that it clearly does not include the rote enforcement of security interests—such as mortgages—but does include judicial or nonjudicial demands for payment in conjunction with the enforcement. In this way, specific and general debt collection would share the same definition. Thus, none of the attorneys would fall under the FDCPA since their action—the mailing of a notice of nonjudicial foreclosure—would not be specific debt collection under the FDCPA. In the alternative, Congress could also define debt collection to include the rote enforcement of security interests, so that mortgage foreclosure would be both specific and general debt collection.

CONCLUSION

Courts should use this three-threshold framework to evaluate whether defendants and their actions fall under the FDCPA. The framework

306. *See supra* notes 137–45 and accompanying text.
307. *See supra* notes 152–54 and accompanying text.
308. *See supra* note 114 and accompanying text.

proposed by this Note looks at whether there is an alleged debt, and then evaluates whether there are both specific and general attempts to collect a debt. However, because this framework may lead to inconsistent results, legislation is needed to clarify the definition of "debt collection."