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Eric M. Marshall

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Note

The Protective Scope of the Fair Debt Collection Practices Act: Providing Mortgagors the Protection They Deserve from Abusive Foreclosure Practices

*Eric M. Marshall**

One in every fifty-four households received a notice of foreclosure in 2008.¹ A record number of homes have entered foreclosure in each of the first three quarters of 2009,² and the trend is expected to continue through at least 2010.³ An additional four million homeowners are delinquent on their mortgages and risk suffering the same fate.⁴ Adding insult to injury, individuals are frequently subjected to excessive fees and other abusive practices during the foreclosure process.⁵ Some mort-

* J.D. Candidate 2010, University of Minnesota Law School; B.A. 2003, University of Northern Iowa. I would like to thank the staff and board of the *Minnesota Law Review*, particularly Nathan Brennan, Elizabeth Borer, Joseph Hansen, and Julia Jackson for their ideas and suggestions. I would also like to thank Professor Prentiss Cox for his valuable advice and Professor Ken McCormick for teaching me the value of direct, concise writing. Finally, thank you to all of my friends and family for their constant encouragement, especially to Kristin for her undying love, support, and knowledge of *The Bluebook*. Copyright © 2010 by Eric M. Marshall.

1. Les Christie, *Foreclosures Up a Record 81% in 2008*, CNNMONEY.COM, Jan. 15, 2009, http://money.cnn.com/2009/01/15/real_estate/millions_in_foreclosure/index.htm.

2. See *U.S. Q3 Foreclosures Highest Ever*, RECESSION.ORG, Oct. 15, 2009, <http://recession.org/news/q3-foreclosures-highest-ever>; Karey Wutkowski, *U.S. Q2 Home Foreclosures, Mortgage Delinquencies Up*, REUTERS, Sept. 30, 2009, <http://www.reuters.com/article/ousivMolt/idUSN3020877720090930>, KeepMyHouse.com, <http://www.keepmyhouse.com/2009/04/16/latest-foreclosure-statistics-us-foreclosures-increase-by-9/> (last visited Mar. 13, 2010) (first-quarter statistics).

3. See Les Christie, *4 Million Home Loans Are Delinquent*, CNNMONEY.COM, Aug. 20, 2009, http://money.cnn.com/2009/08/20/real_estate/Mortgage_delinquencies_keep_rising/index.htm.

4. See *id.*

5. See Gretchen Morgenson, *Panel to Look at Foreclosure Practices*, N.Y. TIMES, Apr. 29, 2008, at C3.

gagors have fought back by challenging abusive foreclosure practices under the Fair Debt Collection Practices Act (FDCPA).⁶ However, courts are split on whether the protections of the FDCPA extend to individuals facing foreclosure.⁷ With the recent spike in foreclosures, it is likely that mortgagors will increasingly seek protection under the FDCPA.⁸ Therefore, it is essential that courts begin taking a unified approach to interpretation of the FDCPA's protective scope.

This Note argues that the plain language of the FDCPA as well as the Act's legislative history command an interpretation under which the FDCPA applies to home mortgage foreclosures. This interpretation would further the Act's broad goal of protecting all consumers from abusive debt collection and recognize that satisfaction of debt is a creditor's true objective in foreclosure. The proposed interpretation looks beyond the means used to accomplish debt collection, and in doing so provides mortgagors the protections they need and deserve.

Part I of this Note briefly describes the problematic definitions of the FDCPA and the ensuing split among courts regarding its proper application, and also explains the fundamental concepts of mortgages and foreclosure. Part II analyzes the statutory language of the FDCPA and explains why the legislative history of the Act commands an interpretation broadly protective of debtors. Additionally, it explores several arguments made by litigants and courts and analyzes the security interest clause. Finally, Part III concludes that mortgage foreclosure activities must be covered by the FDCPA in order to give effect to the Act's broad aim of protecting all consumers regardless of the collection method employed.

6. See, e.g., *Stanley v. Hollingsworth*, No. 08-2453, 2009 WL 102125, at *1 (7th Cir. Jan. 15, 2009); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 538 F.3d 469, 471 (6th Cir. 2008), *cert. granted*, 129 S.Ct. 2863 (2009).

7. Compare *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 376-79 (4th Cir. 2006) (holding that foreclosure on a property pursuant to a deed of trust is the collection of a debt), and *Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 236 (3d Cir. 2005) (concluding that enforcing a security interest is the collection of a debt), with *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."), and *Jordan v. Kent Recovery Servs., Inc.*, 731 F. Supp. 652, 660 (D. Del. 1990) (construing the FDCPA to hold that the enforcer of a security interest is not a debt collector).

8. Cf. Jonathan D. Glater, *Financial Crisis Provides Fertile Ground for Boom in Lawsuits*, N.Y. TIMES, Oct. 18, 2008, at B1 (noting the potential boom in lawsuits related to fraud and the housing market).

I. PROBLEMATIC TERMINOLOGY OF THE FDCPA

The FDCPA regulates debt collection but vaguely defines what constitutes debt collection.⁹ This problematic terminology has created disagreement among courts as to whether the foreclosure of a home mortgage constitutes debt collection subject to the requirements of the FDCPA.¹⁰

A. PROTECTIONS OF THE FDCPA

Congress passed the Fair Debt Collection Practices Act in 1977.¹¹ The FDCPA forbids the use of deceptive, abusive, and unfair practices by third-party debt collectors.¹² For example, debt collectors are prohibited from communicating with a consumer regarding the collection of a debt if the time of the communication is inconvenient for the consumer, if the consumer is represented by an attorney, or if the consumer informs the debt collector that she refuses to pay the debt or that she does not wish to be contacted in the future.¹³ Debt collectors are also prohibited from threatening violence or criminal acts against the consumer, using obscene or abusive language,¹⁴ and making false statements in an attempt to induce the consumer to pay the debt.¹⁵ These and other restrictions are placed on debt collectors for the purpose of eliminating abusive debt collection practices, allowing nonabusive debt collectors to remain competitive in the marketplace, and promoting consistent protection of debtors.¹⁶

Under the FDCPA, liability attaches only to those who meet the statutory definition of “debt collector,”¹⁷ which is defined 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

9. See 15 U.S.C. § 1692a (2006) (defining “debt” and “debt collector”).

10. Compare *Wilson*, 443 F.3d at 376–79 (concluding that property foreclosure is debt collection), with *Rosado*, 324 F. Supp. 2d at 924 (holding that security enforcement is not debt collection).

11. Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. §§ 1692–1692o (2006)).

12. 15 U.S.C. § 1692(a).

13. *Id.* § 1692c.

14. See *id.* § 1692d.

15. See *id.* § 1692e.

16. See *id.* § 1692(e).

17. See, e.g., *Montgomery v. Huntington Bank*, 346 F.3d 693, 695 (6th Cir. 2003); *Hulse v. Ocwen Fed. Bank, FSB*, 195 F. Supp. 2d 1189, 1202 (D. Or. 2002).

attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”¹⁸ Six classes of individuals and entities are expressly exempted from the definition of “debt collector.”¹⁹

The Act further provides that, for purposes of § 1692f(6), the term “debt collector” “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.”²⁰ Section 1692f prohibits debt collectors from using “unfair or unconscionable means” to collect a debt and provides eight, nonexhaustive examples of “unfair or unconscionable means.”²¹ Specifically, § 1692f(6) prohibits threatening dispossession of property when dispossession cannot legally be effected.²²

To determine whether a person is subject to the requirements of the FDCPA, one must first determine whether the person is attempting to collect a debt.²³ The FDCPA defines a debt as “any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.”²⁴

In recent years, many debtors have brought suit under the FDCPA against individuals for their actions in foreclosing upon a security interest.²⁵ In response, foreclosing parties have argued that the enforcement of a security interest is not debt collection, and therefore is not within the purview of the FDCPA.²⁶ Courts are split on this point of law.²⁷

18. 15 U.S.C. § 1692a(6).

19. *See id.* § 1692a(6)(A)–(F).

20. *Id.* § 1692a(6). I will refer to this clause of the FDCPA as the “security interest clause.”

21. *Id.* § 1692f.

22. *See id.* § 1692f(6).

23. *See Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 232 (3d Cir. 2005).

24. 15 U.S.C. § 1692a(5).

25. *See, e.g., Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 374 (4th Cir. 2006); *Piper*, 396 F.3d at 231–32; *Hulse v. Ocwen Fed. Bank, FSB*, 195 F. Supp. 2d 1188, 1202 (D. Or. 2002).

26. *See, e.g., Wilson*, 443 F.3d at 374; *Piper*, 396 F.3d at 231–32; *Hulse*, 195 F. Supp. 2d at 1202.

27. *Compare Wilson*, 443 F.3d at 376–78 (holding that foreclosure on a property pursuant to a deed of trust is the collection of a debt), and *Piper*, 396

B. MORTGAGES AND THE FORECLOSURE PROCESS

A mortgage is the most commonly used residential real estate security device. A standard residential mortgage is straightforward. An individual borrows funds from a financial institution, such as a bank, to purchase residential real property.²⁸ The purchaser (the mortgagor) then guarantees the debt by granting the financial institution (the mortgagee) a security interest in the purchased property.²⁹ If a mortgagor defaults on a mortgage, the creditor has the right to foreclose on the mortgagor's interest in the mortgaged real estate and force the sale of the real estate to satisfy the secured debt.³⁰ In most states, there are two primary types of foreclosures: judicial foreclosure and nonjudicial foreclosure.³¹

When a debtor defaults on a mortgage, the creditor may initiate judicial foreclosure by filing a lawsuit naming as defendants the debtors and any other parties with an interest in the secured property.³² After filing a complaint, the creditor provides notice of the pending foreclosure and litigation proceeds as normal.³³ The facts in most foreclosure actions are straightforward and rarely disputed: (1) a creditor loans a debtor money, (2) the debtor grants the creditor a security interest in real property, (3) the debtor defaults on the loan, and (4) the debtor's default gives the creditor the right to accelerate the loan and foreclose upon the secured property.³⁴ Therefore, nearly all foreclosure actions are either unchallenged and result in default judgment or are resolved on summary judgment.³⁵ If the creditor is entitled to foreclosure, the court issues a decree of foreclosure that determines the amount of the debt and the priority of all lien holders, orders a public auction of the secured property, and details how the proceeds of the foreclosure

F.3d at 236, with *Rosado v. Taylor*, 324 F. Supp. 2d 917, 924 (N.D. Ind. 2004), and *Jordan v. Kent Recovery Servs., Inc.*, 731 F. Supp. 652, 660 (D. Del. 1990).

28. See GRANT S. NELSON & DALE A. WHITMAN, *REAL ESTATE FINANCE LAW* § 1.1 (4th ed. 2001) (discussing the basic mortgage transaction).

29. *Id.*

30. BLACK'S LAW DICTIONARY 674 (8th ed. 2004) (citing EDWARD H. RABIN, *FUNDAMENTALS OF MODERN REAL PROPERTY LAW* 1087 (1974)).

31. See Christopher A. Camardello, *Understanding Foreclosure on Real Property*, BENCH & B. MINN., Oct. 2008, at 20, 21.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

sale will be distributed.³⁶ After the sale and confirmation of the sale by the court, the sale proceeds are distributed to satisfy the debts secured by the property.³⁷

Nonjudicial foreclosure, also known as power-of-sale foreclosure, is quite similar to judicial foreclosure but is generally faster and less expensive because it does not require formal litigation.³⁸ In power-of-sale foreclosure, a creditor provides notice of foreclosure to the debtor and publicizes the foreclosure sale.³⁹ After providing notice and publication, the creditor may request a sheriff's sale of the secured property.⁴⁰ Sale of the secured property and distribution of the profits proceed in the same manner as in judicial foreclosure.⁴¹

If the sale price of the foreclosed-upon property is less than the secured debt, the debtor is generally liable to the creditor for the difference in the form of a deficiency judgment.⁴² In judicial foreclosure, deficiency judgments are generally awarded automatically if the sale price is less than the outstanding secured debt, as is nearly always the situation.⁴³ Deficiency judgments are not automatically awarded in nonjudicial foreclosure.⁴⁴ However, the mortgagee may seek a deficiency judgment through separate litigation.⁴⁵

Most states provide debtors a statutory right of redemption which allows them to recover possession of the secured property within a statutory period of time after the sale of the property by paying the foreclosure sale price plus costs.⁴⁶ Essentially, the debtor repurchases the property from the winning bidder at the amount of the winning bid.⁴⁷ Statutory redemption periods vary by state and range from five weeks to two years.⁴⁸ Most

36. *See id.* at 21–22.

37. *See id.* at 22, 24.

38. *See* Prentiss Cox, *Foreclosure Reform Amid Mortgage Lending Turmoil: A Public Purpose Approach*, 45 HOUS. L. REV. 683, 699–700 (2008).

39. *See* Camardello, *supra* note 31, at 22.

40. *See id.*

41. *See id.*

42. *See* NELSON & WHITMAN, *supra* note 28, § 8.1.

43. *See id.*

44. *See id.* § 8.3.

45. *See id.* § 8.1.

46. *See id.* § 8.4.

47. *See* Camardello, *supra* note 31, at 25.

48. *See* NELSON & WHITMAN, *supra* note 28, § 8.4; Camardello, *supra* note 31, at 25.

states allow the debtor to retain possession of the foreclosed property for the duration of the redemption period.⁴⁹

Nearly all mortgages provide the mortgagee the right to accelerate—call due—the entire debt, plus interest, within thirty days of default.⁵⁰ Acceleration allows the creditor to foreclose upon the entire debt, including those payments not yet due.⁵¹ Without an acceleration clause, the mortgagee would have to foreclose on every monthly payment individually or wait until the amortization period is complete to foreclose on the entire debt—an approach that is impractical at best.⁵² Most mortgages and many state foreclosure statutes provide debtors reinstatement rights, which allow them to reverse acceleration and reinstate the debt by paying the arrearage on the loan.⁵³ Furthermore, most mortgagees allow debtors to reinstate the loan even when reinstatement rights are not expressly granted by the mortgage or by statute.⁵⁴

C. SEVERAL CIRCUIT COURTS HOLD THAT ENFORCEMENT OF A SECURITY INTEREST IS DEBT COLLECTION UNDER THE FDCPA

Nearly all of the circuit courts that have addressed the applicability of the FDCPA to the enforcement of security interests have held that a person against whom a security interest is enforced is entitled to the protections of the FDCPA.⁵⁵ For example, the plaintiff in *Wilson v. Draper & Goldberg, P.L.L.C.* allegedly failed to make the mortgage payments on her home.⁵⁶ In response, the creditor retained the defendant-law firm to foreclose on the plaintiff's home.⁵⁷ The plaintiff sued, alleging that the defendant firm violated the FDCPA by failing to verify

49. NELSON & WHITMAN, *supra* note 28, § 8.4.

50. See Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1462–64 (2004).

51. See *id.* at 1462.

52. See RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 8.1 cmt. a (1997) (noting that without acceleration, the mortgagee would have to wait until the end of the amortization period to foreclose).

53. See Cox, *supra* note 38, at 702.

54. See *id.*

55. See, e.g., *Kaltenbach v. Richards*, 464 F.3d 524, 529 (5th Cir. 2006); *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 375 (4th Cir. 2006); *Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 229 (3d Cir. 2005); *Romea v. Heiberger & Assocs.*, 163 F.3d 111, 116 (2d Cir. 1998); *Law Offices of David J. Stern, P.A. v. Martinez (In re Martinez)*, 271 B.R. 696, 700 (S.D. Fla. 2001), *aff'd per curiam*, 311 F.3d 1272 (11th Cir. 2002).

56. See *Wilson*, 443 F.3d at 374.

57. See *id.*

the debt and engaging in prohibited communication with the plaintiff.⁵⁸ The *Wilson* defendants argued that the debt ceased to be a debt once they initiated foreclosure because foreclosure is “a termination of the debtor’s equity of redemption relating to the debtor’s property,” and therefore is distinct from “the enforcement of an obligation to pay money or a ‘debt.’”⁵⁹ The Fourth Circuit refused to adopt this logic because it would create “an enormous loophole,” allowing creditors to avoid FDCPA obligations by simply proceeding *in rem* rather than *in personam*.⁶⁰ The *Wilson* court noted the defendant’s willingness to terminate foreclosure proceedings if the plaintiff paid her mortgage obligations supported its conclusion.⁶¹

In *Romea v. Heiberger & Associates*, the Second Circuit rejected the argument that enforcement of a security interest is not debt collection when the plaintiff-debtor can avoid enforcement by paying the arrearage.⁶² The Second Circuit held that the fact that the debtor may avoid enforcement of the security interest through payment of the obligation has no effect on the determination of whether the enforcement of a security interest is debt collection.⁶³ The Third and Fifth Circuits have similarly refused to deny FDCPA protections to debtors facing foreclosure.⁶⁴

Interpretation of the security interest clause is a critical step in determining whether foreclosure is debt collection.⁶⁵ Courts holding that enforcement of a security interest is debt collection interpret § 1692a(6) of the FDCPA as an inclusive clause.⁶⁶ These courts find that the enforcer of a security inter-

58. *See id.* at 375.

59. *Id.* at 376.

60. *Id.* (citing *Piper*, 396 F.3d at 236).

61. *Id.*

62. *See Romea v. Heiberger & Assocs.*, 163 F.3d 111, 116 (2d Cir. 1998) (holding that the proceeding’s purpose to collect back rent still qualified the amount owed as debt).

63. *See id.*

64. *Kaltenbach v. Richards*, 464 F.3d 524, 529 (5th Cir. 2006); *Piper*, 396 F.3d at 229.

65. *See Kaltenbach*, 464 F.3d at 526–28 (engaging in statutory interpretation); *Jordan v. Kent Recovery Servs., Inc.*, 731 F. Supp. 652, 657–58 (D. Del. 1990) (comparing the defendant’s interpretation of the statute with the court’s final interpretation).

66. *See Kaltenbach*, 464 F.3d at 527–28 (finding that enforcing a security interest is part of the general definition of debt collector); *Wilson*, 443 F.3d at 378 (“[I]t is an inclusion to the term debt collector.”); *Piper*, 396 F.3d at 236 (endeavoring to not limit the definition of debt collector).

est who satisfies the definition of the security interest clause is always subject to § 1692f(6) of the FDCPA.⁶⁷ They further hold that any enforcer of a security interest who also meets the general definition of a debt collector is subject to the entire FDCPA.⁶⁸ Thus, these courts read the scope of the term “debt collector” to be broader in the context of § 1692f(6) than in the context of the FDCPA generally.⁶⁹ However, they do not view these two definitions of “debt collector” as mutually exclusive.⁷⁰

Courts that interpret the security interest clause as an inclusive clause assert that the inclusion of six explicit exceptions to the definition of “debt collector” in the FDCPA supports their interpretation.⁷¹ These courts argue that Congress’s decision to include the security interest clause within the inclusive language of § 1692a(6), rather than listing it among the exceptions to the definition of “debt collector,” was an intentional decision

67. See *Wilson*, 443 F.3d at 378 (“Thus, Defendants cannot benefit from § 1692a(6)(F)(i)’s exception to the definition of ‘debt-collector’ merely because they were trustees foreclosing on a properly pursuant to a deed of trust.”); *Piper*, 396 F.3d at 236 (“[W]e believe it was intended to make clear that some persons who would be without the scope of the general definition are to be included where § 1692f(6) is concerned.”).

68. See *Wilson*, 443 F.3d at 378 (“Thus, if Defendants meet the statutory definition of ‘debt collector,’ they can be covered by all sections of the Act, not just § 1692f(6), regardless of whether they also enforce security interests.”); *Piper*, 396 F.3d at 236 (disagreeing with the idea that some are not subject to the entire Act if they may not fall under the general definition of debt collector).

69. *Wilson*, 443 F.3d at 378 (“[The provision] does not exclude those who enforce security interests but who also fall under the general definition of ‘debt collector.’”); *Piper*, 396 F.3d at 236.

70. See *Wilson*, 443 F.3d at 378; *Piper*, 396 F.3d at 236 (stating that some debt collectors are not enforcing a security interest).

71. *Piper*, 396 F.3d at 236 (“The portion of § 1692a(6) upon which PLA relies is not among the six listed exceptions to the general definition.”); see *Wilson*, 443 F.3d at 378 (“[The provision] is not an exception to the definition of debt collector.”). Among those excluded from the definition of “debt collector” under the FDCPA are “any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt” and

any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

and must be given interpretive force.⁷² Courts find further support for an inclusive interpretation of the security interest clause in § 1692i(a)(1),⁷³ which requires debt collectors who bring an action for enforcement of a security interest to bring such action in the jurisdiction in which the property is located.⁷⁴ In *Kaltenbach v. Richards*, the court reasoned that construing § 1692a(6) to mean that enforcers of security interests are only subject to § 1692f(6) would render § 1692i(a)(1) meaningless.⁷⁵

The Federal Trade Commission (FTC), the agency charged with enforcement of the FDCPA,⁷⁶ also adopts an inclusive interpretation of the security interest clause.⁷⁷ Although the FTC's interpretation is not binding on the courts or the Commission,⁷⁸ some courts have found the interpretation to be persuasive.⁷⁹

D. SEVERAL DISTRICT COURTS HOLD THAT ENFORCEMENT OF A SECURITY INTEREST IS NOT DEBT COLLECTION UNDER THE FDCPA

Several district courts hold that enforcement of a security interest is not subject to FDCPA requirements because it is not debt collection.⁸⁰ Many of these courts rely on the reasoning of

72. See *Piper*, 396 F.3d at 236 (finding that Congress meant to include the security interest clause in the definition since it was not "among the six listed exceptions"); see also *Wilson*, 443 F.3d at 378 (concluding that the provision is not an exception).

73. See *Kaltenbach v. Richards*, 464 F.3d 524, 528 (5th Cir. 2006) (relying on § 1692i(a)(1) and statutory interpretation to read the statute as a whole to find that the definition of debt collector is only in § 1692f(6)); *Piper*, 396 F.3d at 235 (stating that "§ 1692i of the Act provides that 'in the case of an action to enforce an interest in real property securing the consumer's obligation,' a debt collector must bring the action to the district in which the real property is located).

74. 15 U.S.C. § 1692i(a)(1) (2006).

75. *Kaltenbach*, 464 F.3d at 528; see also *Piper*, 396 F.3d at 235 (finding that § 1692i shows that § 1692f(6) and § 1692a(6) do not conflict).

76. 15 U.S.C. § 1692l(a) (2006).

77. See Statement of General Policy or Interpretation, Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,108 (Dec. 13, 1988) (stating that "debt collector" includes some security enforcers).

78. See *id.* at 50,101.

79. See, e.g., *Kaltenbach*, 464 F.3d at 528 (stating that the court "defer[s] to the [FTC]'s construction").

80. See, e.g., *Izenberg v. ETS Servs., LLC*, 589 F. Supp. 2d 1193, 1199 (C.D. Cal. 2008) (finding that the lack of a claim that defendant is a debt collector means there is no deficiency under the Act); *Beadle v. Haughey*, No. Civ.04-272-SM, 2005 WL 300060, at *3 (D.N.H. Feb. 9, 2005) ("Security en-

*Jordan v. Kent Recovery Services, Inc.*⁸¹ to draw a distinction between security interests and debt based on the debtor's ability to comply with a request for collection.⁸² In *Jordan*, the court examined the legislative history of the FDCPA and determined that it was enacted to protect individuals who are unable—as opposed to merely unwilling—to meet their financial obligations because of “an unforeseen [sic] event such as unemployment, overextension, serious illness, or marital difficulties or divorce.”⁸³ Thus, the court reasoned, a debtor owing a sum of money may be unable to comply with a request for payment of the debt, whereas a person asked to comply with the enforcement of a security interest must simply surrender possession of the property.⁸⁴ Therefore, the court argued, individuals against whom a security interest is enforced fall outside of the class of people the FDCPA intended to protect and are not covered by the Act.⁸⁵

Courts concluding that foreclosure on a mortgage is not debt collection also rely on the reasoning of *Beadle v. Haughey*, a New Hampshire case that found the distinction between judicial and nonjudicial foreclosure determinative of whether foreclosure is within the scope of the FDCPA.⁸⁶ Based on this distinction, without detailing its reasoning, the court held that, although judicial foreclosure may be covered by the FDCPA, nonjudicial foreclosure is distinct from debt collection, and therefore is not covered by the FDCPA.⁸⁷

Another important factor in *Beadle* was to whom payment could be made.⁸⁸ The court found that where one can avoid fo-

forcement activities fall outside the scope of the FDCPA because they aren't debt collection practices.” (quoting *Rosado v. Taylor*, 324 F. Supp. 2d 917, 924 (N.D. Ind. 2004)).

81. *Jordan v. Kent Recovery Servs., Inc.*, 731 F. Supp. 652, 654 (D. Del. 1990) (reasoning that there is a crucial difference between debt collectors and securing an interest that needs to be considered when interpreting the FDCPA).

82. See, e.g., *Beadle*, 2005 WL 300060, at *3 (relying on *Jordan* to show that receiving debt collection letters does not agonize a person or require protection under the Act if the person is able to comply with the request); *Jordan*, 731 F. Supp. at 658 (“[T]he evil sought to be regulated by the FDCPA, i.e., harassing attempts . . . is not implicated by the actions of an enforcer of a security interest with a ‘present right’ to the secured property.”).

83. *Jordan*, 731 F. Supp. at 657.

84. See *Rosado*, 324 F. Supp. 2d at 925; *Jordan*, 731 F. Supp. at 658.

85. See *Jordan*, 731 F. Supp. at 658.

86. See *Beadle*, 2005 WL 300060, at *3.

87. *Id.* at *4.

88. See *id.* at *3.

reclosure by paying the debt to the law firm enforcing the security interest, the law firm's activities are considered debt collection.⁸⁹ However, where one, as in *Beadle*, can avoid foreclosure by paying the debt to the creditor, the law firm's activities are not debt collection activities, and therefore are not subject to the FDCPA.⁹⁰

Courts holding that foreclosure actions cannot be challenged under the FDCPA view foreclosure and debt collection as two distinct practices.⁹¹ These courts argue that the FDCPA is intended to protect consumers during the "collect[ion] of funds from a debtor."⁹² Dissimilarly, foreclosure is an action by the creditor to obtain possession of the secured property.⁹³ These courts reason that foreclosure is not debt collection because possession rather than payment of funds is sought.⁹⁴

Courts holding that the enforcement of a security interest is not the collection of a debt construe the security interest clause of § 1692a(6) as an exclusive clause.⁹⁵ These courts read the inclusion of enforcement of a security interest for the purposes of § 1692f(6) to mean that enforcers of security interests are not debt collectors for the purpose of any section other than § 1692f(6).⁹⁶ They argue that the explicit inclusion of security interest enforcement for the purposes of § 1692f(6) indicates that Congress was aware of the distinction between debt collection and enforcement of security interests, and holding an enforcer of a security interest subject to the entire FDCPA would render the security interest clause superfluous.⁹⁷

The Eighth Circuit recently sided with the district courts in *Jordan* and *Beadle*.⁹⁸ The Eighth Circuit refused to follow

89. *See id.* ("The key question here is not whether defendants' law firm is a 'debt collector,' but rather, whether defendants were engaged in collecting a debt.").

90. *Id.*

91. *See, e.g.,* *Hulse v. Ocwen Fed. Bank, FSB*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002).

92. *Id.*

93. *Id.*

94. *See id.*

95. *See, e.g., Beadle*, 2005 WL 300060, at *2-3; *Jordan v. Kent Recovery Servs., Inc.*, 731 F. Supp. 652, 659 (D. Del. 1990) (stating that the clause is exclusive to give it a purpose in the Act).

96. *Beadle*, 2005 WL 300060, at *3; *Jordan*, 731 F. Supp. at 659.

97. *See Jordan*, 731 F. Supp. at 659 (arguing that Congress's decision to state that "debt collector" includes an "enforcer of a security interest" means that it does not already fall within the definition of debt collector).

98. *See Cohen v. Beachside Two-I Homeowners' Ass'n*, No. Civ. 05-706

the decisions of the Second, Third, and Eleventh Circuits and held that foreclosure is a practice distinct from debt collection, and therefore is not covered by the FDCPA.⁹⁹ Meanwhile, the district courts in circuits that have not yet interpreted the applicability of the FDCPA to foreclosure have also reached disparate conclusions.¹⁰⁰

With the recent spike in home foreclosures and the astonishing foreclosure rates expected to persist,¹⁰¹ consumers will likely increasingly seek protection under the FDCPA. The uncertainty created by the split among the courts regarding the applicability of the FDCPA to foreclosures leaves consumers without clearly defined rights and creates ambiguity as to attorneys' and collectors' legal obligations. The legal community needs a unified interpretation of the FDCPA's scope to remove this uncertainty and decrease litigation.

II. INTERPRETATION OF THE FDCPA

Principles of statutory interpretation, public policy, and the legislative history of the FDCPA support a broad interpretation of the Act inclusive of home mortgage foreclosure. Congress intended the Act to provide consumers with expansive protection from abusive debt collection practices, and the text of the Act commands an interpretation consistent with that goal.¹⁰²

A. PLAIN LANGUAGE OF THE FDCPA

The FDCPA is clearly worded and provides broad coverage of consumer obligations.¹⁰³ A threshold issue in determining whether an individual is a debt collector when foreclosing on a

ADMJSM, 2005 WL 3088361, at *14 (D. Minn. Nov. 17, 2005), *aff'd*, 272 Fed. App'x 534 (8th Cir. 2008).

99. *Id.*

100. *Compare* Muldrow v. EMC Mortgage Corp., No. 08-1771 (RMU), 2009 WL 3069731, at *3-4 (D.D.C. Sept. 28, 2009) (holding that foreclosure activities must comply with the entire FDCPA), *with* Izenberg v. ETS Servs., LLC, 589 F. Supp. 2d 1193, 1199 (C.D. Cal. 2008) (noting that foreclosure is not debt collection under the FDCPA). Notably, California and Nevada account for approximately one-third of all foreclosures, KeepMyHouse.com, *supra* note 2, and the Ninth Circuit has not yet defined the scope of the FDCPA.

101. *See* Renae Merle & Tomoeh Murakami Tse, *Mortgage Foreclosures Reach All-Time High*, WASH. POST, Mar. 7, 2008, at D1.

102. *See* Duffy v. Landberg, 133 F.3d 1120, 1123 (8th Cir. 1998) ("The FDCPA is clearly worded and broadly defines debt as 'any obligation' to pay arising out of a consumer transaction.")

103. *Id.*

security interest is whether the consumer obligation at issue is a debt.¹⁰⁴ Therefore, the scope of “debt” determines, in part, the scope of the term “debt collector.”¹⁰⁵ The FDCPA broadly defines a debt as “any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes.”¹⁰⁶ The word “any” demands a broad interpretation of the terms to which it is attached.¹⁰⁷ Thus, the FDCPA definition of “debt” should be interpreted to include *all* obligations otherwise falling within the FDCPA definition, regardless of whether the obligation is secured.

Similarly, the phrase “money, property, insurance, or services”¹⁰⁸ connotes broad coverage of consumer transactions. One is hard pressed to think of a transaction resulting in the obligation to pay money, the subject of which is not property, money, insurance, or services.¹⁰⁹ At a minimum, the transaction must merely involve the rendition of services or the purchase of something of value.¹¹⁰ Furthermore, “any natural person” is a consumer under the FDCPA.¹¹¹ Based on these broad definitions, nearly all consumer transactions—transactions “primarily for personal, family, or household purposes,”¹¹²—resulting in an obligation to pay money are debts under the FDCPA.¹¹³ Therefore, a residential mortgage¹¹⁴ is a debt under

104. See *Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 332 (3d Cir. 2005) (“The threshold requirement of the FDCPA is that the prohibited practices are used in an attempt to collect a ‘debt.’”).

105. See *id.* at 332.

106. 15 U.S.C. § 1692a(5) (2006) (emphasis added).

107. See, e.g., *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (interpreting “any” in the case of a prison sentence statute).

108. 15 U.S.C. § 1692a(5).

109. Anything possessed, used, or enjoyed is “property,” BLACK’S LAW DICTIONARY 1252 (8th ed. 2004), and the provision of “services” encompasses any contribution to the welfare of others, WEBSTER’S II NEW COLLEGE DICTIONARY 1009–10 (1995).

110. See *Staub v. Harris*, 626 F.2d 275, 278 (3d Cir. 1980).

111. 15 U.S.C. § 1692a(3).

112. *Id.* § 1692a(5).

113. See *id.* § 1692a(5).

114. Although it is not always clear whether a transaction was undertaken for commercial or consumer purposes, see, e.g., *Bloom v. I.C. Sys.*, 972 F.2d 1067, 1068 (9th Cir. 1992) (describing how a loan made to a friend for an undisclosed purpose but ultimately used to invest in business equipment could arguably have been made for either a commercial or consumer purpose), an analysis of the factors relevant to this distinction are outside the scope of this

the FDCPA because it is a transaction for the purchase of property for personal or household purposes that obligates the mortgagor to pay money.¹¹⁵

Defendants have argued that, even if the mortgage at issue is a debt at origination, the secured debt ceases to be a debt upon initiation of foreclosure.¹¹⁶ However, the determination of whether an obligation is a debt under the FDCPA is unaffected by the methods later used to collect that debt.¹¹⁷ The only question to be asked when determining if an obligation to pay money is a debt under the FDCPA is whether the obligation *arose* “out of a transaction in which the money, property, insurance, or services which were the subject of the transaction were primarily for personal, family, or household purposes.”¹¹⁸ The statute makes no mention of the continuing nature of the obligation. Therefore, a residential mortgage is a debt under the FDCPA, and its classification as such is unaffected by its enforceability through foreclosure.

The FDCPA broadly defines a “debt collector” as *any* person using *any* means of interstate commerce or the mail in *any* business involved principally in the collection of *any* debt.¹¹⁹

Note. This Note assumes a clear distinction between commercial and consumer transactions and refers to mortgages undertaken for consumer purposes as “residential mortgages” and those undertaken for commercial purposes as “commercial mortgages.”

115. See, e.g., *Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 231–32, 234 (3d Cir. 2005). There are two primary types of mortgages: purchase-money and non-purchase-money mortgages. A purchase-money mortgage is a mortgage securing the loan used to purchase the mortgaged real estate. BLACK’S LAW DICTIONARY 1033 (8th ed. 2004); NELSON & WHITMAN, *supra* note 28, at 1. A non-purchase-money mortgage is a mortgage securing a debt incurred for a purpose other than the purchase of the mortgaged real estate. *Id.* at 2. Admittedly, a residential non-purchase-money mortgage may secure a non-consumer purchase. *Id.* However, courts do not disagree over the definition of “debt” under the FDCPA; rather, it is interpretation of the term “debt collector” over which courts disagree. Therefore, this Note assumes that residential mortgages are transactions for the purchase of property for personal or household purposes.

116. See, e.g., *Wilson v. Draper & Goldbery, P.L.L.C.*, 443 F.3d 373, 374 (4th Cir. 2006); *Piper*, 396 F.3d at 231–32.

117. See *Piper*, 396 F.3d at 234 (“The fact that the [Pennsylvania Municipal Claims and Tax Liens Act] provided a lien to secure the Pipers’ debt does not change its character as a debt or turn [defendant]’s communications to the Pipers into something other than an effort to collect that debt.”); *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.*, 214 F.3d 872, 874–75 (7th Cir. 2000) (explaining that the nature of an obligation is determined at the time the obligation is undertaken).

118. 15 U.S.C. § 1692a(5) (2006).

119. *Id.* § 1692a(6).

Any person who regularly attempts to collect debts directly or indirectly is also a "debt collector" under the FDCPA, regardless of whether debt collection is the principal purpose of his business or the business for which he works.¹²⁰

Congress narrowed the FDCPA's broad definition of a "debt collector" by providing six exceptions to the definition.¹²¹ When Congress has defined a term as clearly as it defined "debt collector" in the FDCPA, courts should not read additional exceptions into the definition.¹²² Unless an individual falls within one of the narrow exceptions to the definition of a debt collector, the term "debt collector" should be given a broad meaning.¹²³ The enforcer of a security interest does not fall within one of the six exceptions to the FDCPA definition of a debt collector.¹²⁴ Therefore, courts should give effect to the broad language used by Congress by construing the Act's definition of a debt collector to include enforcers of security interests.

B. LEGISLATIVE INTENT OF THE FDCPA

The FDCPA was intended to provide consumers broad protection from abusive debt collection practices.¹²⁵ The goals of the Act command an interpretation protective of consumers in foreclosure.

1. Individuals Intended to Be Protected by the FDCPA

Many courts holding that foreclosure of a mortgage is outside the protective ambit of the FDCPA have relied, at least in part, on *Jordan's* reasoning that the FDCPA is intended to protect individuals who are unable—as opposed to merely unwilling—to meet their financial obligations because of "an unforeseen [sic] event such as unemployment, overextension, serious illness, or marital difficulties or divorce."¹²⁶ These courts believe mortgagors are capable of complying with a debt collec-

120. *Id.*

121. *Id.* § 1692a(6)(A)-(F).

122. *See Hubbard v. United States*, 514 U.S. 695, 708 (1995) (overruling the lower court's overly broad interpretation of a well-defined statutory term).

123. *See id.* (holding that when Congress specifically defines a term, the court should give effect to that language).

124. *See* 15 U.S.C. § 1692a(6)(A)-(F) (describing Congress's reluctance to limit the scope of the protection offered by the Act).

125. *Duffy v. Landberg*, 133 F.3d 1120, 1123 (8th Cir. 1998).

126. *Jordan v. Kent Recovery Servs., Inc.*, 731 F. Supp. 652, 657 (D. Del. 1990) (quoting S. REP. NO. 95-382, at 3 (1977)); *see also Rosado v. Taylor*, 324 F. Supp. 2d 917, 924-25 (N.D. Ind. 2004).

tor's demands because, unlike a debtor who may not have the money to pay a debt, a mortgagor facing foreclosure must simply turn over the secured property.¹²⁷

Mortgagors are as likely as any consumer to be incapable of meeting their financial obligations. In fact, due to the size and duration of the financial obligation imposed by a mortgage, it may be more likely that a mortgagor will be incapable of meeting his financial obligation due to unforeseeable circumstances. In 2007, the average American mortgage payment was \$1464 per month,¹²⁸ far greater than the amount of a typical consumer debt, such as a retail purchase¹²⁹ or utility bill¹³⁰—both of which are undisputedly covered by the FDCPA.¹³¹ Furthermore, unlike a one-time retail store purchase, mortgage obligations often continue for twenty to thirty years.¹³² Through the FDCPA, Congress sought to protect consumers who were unable to meet their financial obligations “due to an unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce.”¹³³ Mortgagors nearly always cite these same reasons for defaulting on their mortgage.¹³⁴

127. See *Rosado*, 324 F. Supp. 2d at 924–25; *Jordan*, 731 F. Supp. at 658.

128. American Community Survey, *Mortgage Crisis and High Energy Costs Reflected in Housing Stats*, RES. ALERT, Oct. 3, 2008, at 1, 1.

129. CardTrak.com, Credit Card Transactions, Dec. 23, 2004, <http://www.cardweb.com/cardtrak/news/2004/december/23a.html> (noting that the average credit card purchase is approximately \$100).

130. Todd Hymas Samkara, *Stats on How Much Americans Pay for Essentials*, GRIST, Mar. 3, 2006, <http://www.grist.org/article/costs1> (noting that the average monthly electricity bill is about eighty dollars).

131. H.R. REP. NO. 95-131, at 4 (1977) (defining debts as “consumer obligations paid by check or other non-credit consumer obligations”).

132. Christopher Tarver Robertson et al., *Get Sick, Get Out: The Medical Causes of Home Mortgage Foreclosures*, 18 HEALTH MATRIX 65, 84 n.87 (2008).

133. S. REP. NO. 95-382, at 3 (1977).

134. According to Freddie Mac, forty-two percent of mortgagors cited unemployment or reduced income as the reason for delinquent mortgage payments from 1999 to 2005. *Preserving the American Dream: Predatory Lending Practices and Home Foreclosures: Hearing on the Impact of Exotic Mortgage Products on Homebuyers and Homeowners Before the S. Comm. on Banking, Housing, & Urban Affairs*, 110th Cong. 130–31 (2007) (statement of Douglas G. Duncan, Senior Vice President, Mortgage Bankers Association), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:50309.pdf. Twenty-three percent cited illness or death in their family. *Id.* Ten percent of delinquencies were due to excessive obligations of the mortgagor, eight percent because of marital difficulties, and three percent due to extreme hardship. *Id.*

Home ownership is often central to an individual's social identity.¹³⁵ Home ownership has also been shown to significantly improve the academic and social development of children.¹³⁶ It is true that mortgagors have the ability to satisfy their debt by surrendering their home; however, due to the social, familial, and financial importance of a person's home, this option should not be forced upon an individual without providing them protection from deceptive and harassing debt collectors.

Other areas of the law provide special protections for home ownership.¹³⁷ Foreclosure laws generally provide debtors with the right of redemption¹³⁸ and prohibit the acceleration and foreclosure of a mortgage for technical defaults or when the creditor has exhibited a practice of allowing late payments.¹³⁹ Additionally, filing for Chapter 13 bankruptcy stays a foreclosure proceeding against the filer and gives the filer an opportunity to propose a payment plan to cure the arrearage and retain ownership of his or her home.¹⁴⁰ All of these laws recognize the potentially damaging effects of losing one's home.¹⁴¹ Therefore, the FDCPA should not be interpreted as viewing the loss of one's home as so insignificant of an event that homeowners are not afforded the protections of the FDCPA.

Coverage by the FDCPA does not mean that a creditor or collector may not foreclose upon the secured property; it merely provides mortgagors the right to be free from false, deceptive,

135. See Cox, *supra* note 38, at 711 (“[A family] may be rooted in the house where they are raising their children, the neighborhood where they have found a sense of belonging, or a home they built.”); Donald Haurin et al., *The Impact of Home Ownership on Child Outcomes* 5 (Mar. 15, 2000) (unpublished article), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=218969.

136. See Haurin et al., *supra* note 135, at 3 (“[O]wning a home compared with renting leads to a higher quality home environment, the improvement being 16 to 22 percent.”).

137. See *id.* at 5 (outlining several benefits designed to encourage and protect home ownership).

138. Cox, *supra* note 38, at 701–02. Various state statutes grant mortgagors the right of redemption. See, e.g., ALA. CODE § 6-5-248 (LexisNexis 2005); CAL. CIV. CODE § 2903 (West Supp. 2010); MINN. STAT. § 580.23 (2008).

139. See, e.g., *Browne v. Nowlin*, 570 P.2d 1246, 1248–49 (Ariz. 1977) (holding that acceptance of a late payment cured default and prevented acceleration); *Fed. Home Loan Mortgage Corp. v. Taylor*, 318 So. 2d 203, 207–08 (Fla. Dist. Ct. App. 1975).

140. See 11 U.S.C. §§ 362, 1322(b)(5) (2006); Melissa B. Jacoby, *Bankruptcy Reform and Homeownership Risk*, 2007 U. ILL. L. REV. 323, 327.

141. Cf. *Vonk v. Dunn*, 775 P.2d 1088, 1089–91 (Ariz. 1989) (holding that equitable considerations apply to enforcement of acceleration clauses); Haurin et al., *supra* note 135, at 5 (noting U.S. laws that encourage home ownership).

and harassing actions during the foreclosure process.¹⁴² Under the FDCPA, a mortgagee or collector remains free to pursue foreclosure or other methods of debt collection so long as they comply with the requirements of the Act.¹⁴³ Even if the mortgagor requests that the debt collector cease communication—a request with which the collector must comply¹⁴⁴—the mortgagee or collector may still pursue foreclosure in a judicial forum.¹⁴⁵

Mortgagors also fall within the group of individuals intended to be protected by the FDCPA because they are as susceptible to the abusive practices targeted by the Act as any consumer facing debt collection. Congress enacted the FDCPA to curb abusive collection practices such as “obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentations of a consumer’s legal rights, [and] disclosing a consumer’s personal affairs.”¹⁴⁶ Mortgagors are particularly susceptible to these types of abusive collection practices because they rarely challenge foreclosure and instead rely upon the information provided to them by their lender without confirming the accuracy of the information.¹⁴⁷ The detrimental effect of losing one’s home¹⁴⁸ makes mortgagors particularly susceptible to coercive settlement practices. Because of their susceptibility to abusive collection practices, mortgagors are at least as deserving of FDCPA protection as other consumers.

142. *Cf. Paulemon v. Tobin*, 30 F.3d 307, 309 (2d Cir. 1994) (allowing the creditor to pursue litigation against the debtor after he was required to terminate all other communication with the debtor so long as the debtor was not subjected to abusive or harassing conduct in violation of the FDCPA).

143. 15 U.S.C. § 1692c(c) (2006).

144. *See id.* (allowing a debt collector to notify the debtor that it intends to invoke specific remedies).

145. *See* 15 U.S.C. § 1692c(c)(1)–(3) (allowing communication invoking a specified remedy even when all other communication must cease); 132 CONG. REC. 30,842 (1986) (statement of Rep. Annunzio) (“[The Act] does not prevent creditors, through their attorneys, from pursuing any legal remedies available to them.”) 123 CONG. REC. 10,246 (1977) (statement of Rep. Minish) (“The bill does allow the collector to communicate with the consumer, at home and at work, but within reason.”).

146. S. REP. NO. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696.

147. *See* Morgenson, *supra* note 5 (noting that a Senate subcommittee planned to review mortgage lenders’ debt collection practices).

148. *See, e.g., Cox, supra* note 38, at 711 (noting the emotional attachment families feel toward their homes); Haurin et al., *supra* note 135, at 5–6 (describing the detrimental effects of home loss on children).

2. Reasons for Enacting the FDCPA

Construing foreclosure as debt collection is consistent with Congress's reasons for enacting the FDCPA. Congress passed the FDCPA because it recognized the need to curb the effect abusive debt collection practices have on "personal bankruptcies," "marital instability," and job loss.¹⁴⁹ Abusive and deceptive practices in foreclosure also affect financial, job, and marital stability. Like the debt collection practices Congress intended to address through the FDCPA, threatened foreclosure contributes to personal bankruptcy.¹⁵⁰ When faced with the possibility of foreclosure, many homeowners file bankruptcy in a last ditch effort to keep their home because filing for Chapter 13 bankruptcy automatically stops foreclosure sales and allows the filer up to five years to correct delinquencies.¹⁵¹

False and harassing conduct by debt collectors in mortgage foreclosure is also connected to job insecurity.¹⁵² Job loss paired with the threat of foreclosure greatly enhances the bargaining power of the creditor over the debtor in renegotiating the loan,¹⁵³ thereby exacerbating the financial impact of threatened foreclosure and the collector's ability to exploit the mortgagor. Therefore, foreclosure must be considered debt collection in order to achieve Congress's goal of eliminating job losses caused by abusive debt collection practices.

Similarly, the risk of marital instability resulting from mortgage foreclosure through false and harassing means is no less severe than the risk of marital instability resulting from the abusive collection of other consumer debts.¹⁵⁴ In fact, the risk of marital instability resulting from foreclosure is likely greater than in the collection of other consumer debts because the home, which is lost in foreclosure, and the community the

149. 15 U.S.C. § 1962(a) (2006).

150. Susan Taylor Martin, *A Chapter 13 Standoff*, ST. PETERSBURG TIMES, June 16, 2008, at A1.

151. *See id.* (describing the case of a woman who filed for bankruptcy eight separate times in order to avoid losing her home).

152. *See* Tami Luhby, *Foreclosures Soar 76% to Record 1.35 Million*, CNNMONEY.COM, Dec. 5, 2008, http://money.cnn.com/2008/12/05/news/economy/mortgage_delinquencies/index.htm (describing the link between recent increases in unemployment and home foreclosures).

153. Charles M. Kahn & Abdullah Yavaş, *The Economic Role of Foreclosures*, 8 J. REAL EST. FIN. & ECON. 35, 44 (1994) (explaining banks' power over debtors' fear of job loss).

154. *See* Scott J. South & Glenna Spitze, *Determinants of Divorce over the Marital Life Course*, 51 AM. SOC. REV. 583, 588-89 (1986) (finding that couples who own their home are less likely to divorce).

home is in are often central to the identity of the marriage and the family unit.¹⁵⁵ Therefore, broad FDCPA protection is consistent with Congress's goal of curbing the personal effects of abusive debt collection.

3. Objectives of the FDCPA

Although Congress did not want to unnecessarily inhibit the ability of ethical debt collectors to perform their jobs, it found the regulations of the FDCPA to be justified by the fact that debt collectors have alternative, nonabusive collection practices at their disposal.¹⁵⁶ Similarly, foreclosure can be achieved through nonabusive practices. It is particularly unnecessary to resort to abusive collection practices in the foreclosure context because most states provide for summary proceedings¹⁵⁷ that allow the foreclosure process to occur three times faster than traditional foreclosure.¹⁵⁸ Thus, the FDCPA should be interpreted as prohibiting the use of abusive foreclosure practices because there is no need for collectors to resort to such practices.

Congress also believed the FDCPA was needed to curb the detrimental effect of abusive debt collection practices on interstate commerce. The recent foreclosure crisis demonstrates the damaging impact foreclosures have on the national economy.¹⁵⁹ The recent flood of foreclosures has depressed job creation and decreased consumer spending.¹⁶⁰ Recent foreclosures are expected to lead to a \$1.2 trillion decline in property values and

155. See Cox, *supra* note 38, at 711 (describing the attachment families feel toward their home); South & Spitze, *supra* note 154, at 588–89 (noting the link between home ownership and lower divorce rates).

156. 15 U.S.C. § 1692(c) (2006).

157. See G.E. Capital Mortgage Servs., Inc. v. Levenson, 657 A.2d 1170, 1178 (Md. 1995) (“Foreclosure pursuant to a power of sale is intended to be a summary, in rem proceeding.”).

158. Compare *Levenson*, 657 A.2d at 1178 (stating that sale of foreclosed property can occur within twenty-one days of docketing when power of sale is used), with Maryland Foreclosure Law Summary, http://stopforeclosure.com/Maryland_Foreclosure_Law.htm (last visited Jan. 18, 2009) (stating that a foreclosure sale typically takes ninety days in Maryland).

159. See Merle & Murakami, *supra* note 101, (describing the impact of home foreclosures on U.S. financial markets).

160. See Sue Kirchoff, *Foreclosures to Have 'Profound' Impact, Report Warns*, USA TODAY, Nov. 27, 2007, http://www.usatoday.com/money/economy/housing/2007-11-27-foreclosures_N.htm (highlighting the impact of home foreclosures on the job market and consumer spending).

decrease tax revenues by billions of dollars.¹⁶¹ In light of the extensive impact that home foreclosures have on interstate commerce, the FDCPA should be interpreted to prohibit abusive foreclosure practices in order to serve the FDCPA's goal of curbing the effects of abusive debt collection on interstate commerce.

Congress explicitly stated three principal purposes of the FDCPA: (1) elimination of abusive debt collection practices, (2) assuring that collectors who did not engage in abusive practices were not competitively disadvantaged, and (3) promoting consistent consumer protection laws among the states.¹⁶² All three of these purposes would be served by an interpretation of the FDCPA that foreclosure constitutes debt collection. Abusive, deceptive, and harassing practices are prevalent in home foreclosures,¹⁶³ and mortgagors are no less susceptible to abusive collection practices than other consumers.¹⁶⁴ Furthermore, there is no reason to believe that firms engaging in nonabusive foreclosure practices will face any less of a competitive disadvantage than nonabusive collectors of other consumer debts.

Consistent consumer protection is needed in the mortgage and foreclosure industry. Mortgage lending and foreclosure is increasingly being performed by national firms,¹⁶⁵ but foreclosure laws, fees, and procedures continue to vary by state.¹⁶⁶ Therefore, *consistent* legislation prohibiting foreclosure firms from engaging in abusive practices, such as threatening excessive fees or use of procedures that are not actually available in the foreclosure state, is needed to protect mortgagors. The central focus of the FDCPA was to prevent the use of such practic-

161. *Id.* (noting the effects of foreclosure on the job market, property values, and tax revenues).

162. 15 U.S.C. § 1692(e) (2006).

163. See Morgenson, *supra* note 5 (noting a planned Senate investigation of excessive fees assessed against mortgagors in foreclosure).

164. See *supra* Part II.B.1.

165. See Ann M. Burkhardt, *Lenders and Land*, 64 MO. L. REV. 249, 281–82 (1999) (noting the reasons for national regulation of the mortgage market and why regulation makes historical sense); Cox, *supra* note 38, at 743–44 (noting the increasingly national nature of real estate finance and the resulting need for national regulation).

166. See Cox, *supra* note 38, at 686, 702 (noting that state laws differ regarding redemption periods and reinstatement rights); see also Tara Twomey, *Deciphering Mortgage Proofs of Claim*, AM. BANKR. INST. J., Nov. 2008, at 1, 53–54 (“Foreclosure costs and fees also vary depending on whether a state is a judicial or nonjudicial foreclosure state and on state law itself.”).

es against debtors,¹⁶⁷ and therefore, mortgagors facing foreclosure are within the class of individuals in need of the protections of the Act.¹⁶⁸

The President touted the FDCPA as a comprehensive consumer protection act intended to replace prior scattered consumer protection regulations with a single, consistent protective regulation that would reduce the effort and cost of consumer protection.¹⁶⁹ An interpretation that would require additional legislation in order to provide mortgagors the protections they need—the same protections provided to other consumers under the FDCPA—rather than include them within the protective ambit of the FDCPA runs contrary to the Act's goal of providing a single, uniform law protective of all consumers in debt collection.

4. Legislative History of the FDCPA

The legislative history of the FDCPA supports protection of mortgagors from abusive foreclosure practices. Congress believed that several people and situations are not within the scope of the term “debt collector.” “[T]he collection of debts, such as mortgages and student loans, *by persons who originated such loans,*” is not debt collection.¹⁷⁰ Therefore, Congress implied that the collection of mortgages by persons other than the originator is debt collection under the FDCPA by not including mortgage debt collection among the exceptions to “debt collector,” and interpretive force should be given to Congress's implication.¹⁷¹

Congress also stated that “mortgage service companies” are not debt collectors “so long as the debts were not in default

167. See 15 U.S.C. § 1692(e) (outlining the goals of the FDCPA).

168. See 123 CONG. REC. 28,112 (1977) (statement of Rep. Annunzio) (stating that the FDCPA is intended to “assure that every individual, whether or not he actually owes a debt, is treated in a reasonable manner by debt collectors”); Morgenson, *supra* note 5, at C3 (noting excessive fees assessed against mortgagors in foreclosure and deceptive actions taken by mortgage lenders and foreclosure firms).

169. See Consumer Protection Act Amendments: Remarks on Signing H.R. 5294 into Law, 2 PUB. PAPERS 1628–29 (Sept. 20, 1977).

170. S. REP. NO. 95-382, at 4 (1977) (emphasis added).

171. Cf. *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 487 (1999) (stating that expression of one thing suggests the exclusion of others); *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616 (1980) (holding that when Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied in the absence of evidence of a contrary legislative intent).

when taken for servicing."¹⁷² The FDCPA exempts the collection of any debt from the definition of "debt collector" if the debt "was not in default at the time it was obtained by such person."¹⁷³ Thus, Congress saw no distinction between collecting on mortgages and collecting other debts covered by the FDCPA. Like any other debt, when mortgages are in default at the time they are assumed by a collector, collection on that mortgage is debt collection under the FDCPA, and all activity in connection with the collection must comply with the Act.¹⁷⁴

Nondebtors contacted or harassed because of mistaken identity are a key group of individuals Congress intended the FDCPA to protect.¹⁷⁵ To those not owing any debt it is irrelevant whether the improper collection is attempted through foreclosure or by demanding the payment of money. It is even more imperative that nondebtors be protected by the Act in the foreclosure context because of the extensive impact threatened foreclosure can have on financial and familial stability.¹⁷⁶ Individuals not actually owing a debt need and deserve the protection of the FDCPA regardless of the method of attempted collection, and therefore, the FDCPA's regulations should apply to foreclosures.

C. ARGUMENTS OF COURTS AND LITIGANTS OPPOSED TO APPLICATION OF THE FDCPA TO FORECLOSURES

Courts and litigants in favor of the inapplicability of the FDCPA to foreclosures have advanced faulty arguments in support of their position.

1. Effect of Delinquency Payments

In *Beadle*, a New Hampshire court held that a law firm's activities are considered debt collection when foreclosure can be avoided by payment of the debt to the law firm enforcing the security interest, but similar activities are not debt collection when foreclosure can be avoided by payment of the debt to the

172. S. REP. No. 95-382, at 4-5 (1977).

173. 15 U.S.C. § 1692a(6)(F)(iii) (2006).

174. *Id.*

175. *See, e.g.*, 123 CONG. REC. 10,241 (1977) (statement of Rep. Annunzio) ("[E]very individual, whether or not he owes a debt, has the right to be treated in a reasonable and civil manner [during debt collection].").

176. *See Cox, supra* note 38, at 711; South & Spitze, *supra* note 154, at 588-89.

creditor.¹⁷⁷ However, this distinction was improper because a settlement offer is necessarily an attempt to collect on the debt.

Even if foreclosure were not debt collection, when foreclosure can be avoided by paying the arrearage, the collector's actions necessarily become debt collection. Once the enforcer of the security interest offers to cease foreclosure actions if the debtor pays the delinquent debt, the enforcer is demanding, albeit as one of two alternatives, the payment of money. A demand for the payment of money is clearly within the FDCPA's definition of debt collection.¹⁷⁸

This interpretation of the FDCPA is necessary regardless of to whom payment is to be made. The FDCPA focuses on protection of the debtor.¹⁷⁹ To a debtor, it is irrelevant to whom the debt must be paid; rather, the debtor is only concerned with *whether* payment must be made. A debt collector is likely to seek collection with equal fervor regardless of to whom payment is to be made because collectors are often paid based on the amount they recover.¹⁸⁰ Therefore, a debtor needs the same protections from abusive practices regardless of whether payment to the collector or the creditor is being sought.

Furthermore, contrary to the argument of the *Romea* defendant, offering the debtor the opportunity to avoid foreclosure by making delinquent payments does not remove foreclosure from the protective ambit of the FDCPA.¹⁸¹ A debt collector must cease communications with a debtor once the debtor refuses to pay the debt or requests that the collector cease communication.¹⁸² However, a statutory exception allows a debt collector to continue to communicate with the debtor in order to notify the debtor that the creditor or collector may invoke a specified remedy.¹⁸³ A settlement offer constitutes a specified remedy, and therefore, notifying a debtor that further collection efforts will be terminated upon payment of the debt is expressly

177. *Beadle v. Haughey*, No. Civ.04-272-SM, 2005 WL 300060, at *3 (D.N.H. Feb. 9, 2005).

178. *See, e.g., Walcker v. SN Commercial, LLC*, 286 F. App'x 455, 457 (9th Cir. 2008).

179. *See, e.g., King v. Asset Acceptance, LLC*, 452 F. Supp. 2d 1272, 1281-82 (N.D. Ga. 2006).

180. Neighborhood Economic Development Advocacy Project, Inc., *Negotiating with Debt Collectors*, <http://www.nedap.org/hotline/dcnegotiating.html> (last visited Mar. 13, 2010).

181. *Romea v. Heiberger & Assocs.*, 163 F.3d 111, 116 (2d Cir. 1998).

182. 15 U.S.C. § 1692c(c) (2006).

183. *Id.* § 1692c(c)(2).

exempted from the requirements of § 1692c(c).¹⁸⁴ If settlement offers were not covered by the FDCPA generally, there would have been no reason for Congress to exempt them from the requirements of § 1692c(c).¹⁸⁵ Therefore, because the FDCPA expressly exempts settlement offers from the requirements of § 1692c(c), settlement offers must comply with all sections other than § 1692c(c).¹⁸⁶

The FTC has supported a similar view, concluding that communication with a debtor regarding options for resolving debts in order to avoid foreclosure must comply with the requirements of §§ 1692e and 1692g.¹⁸⁷ Sections 1692e and 1692g both apply only to debt collectors.¹⁸⁸ Therefore, the FTC presumably considers a person initiating foreclosure to be a debt collector under the FDCPA, regardless of whether foreclosure can be avoided through payment of the debt.

Interpreting the Act such that a settlement offer that allows a debtor to avoid foreclosure does not fall within the specified remedy exception to § 1692c(c) would force creditors to pursue collection through litigation once the debtor has refused to pay the debt. Forcing collectors to resort to litigation once a debtor has refused to pay the debt, even though a settlement offer may be successful, needlessly increases litigation costs.¹⁸⁹ But the FDCPA was touted as cost-saving legislation.¹⁹⁰ In order to give effect to the cost-reduction goals of the FDCPA, settlement offers must fall within the specified remedy exception to § 1692c(c).

184. *Lewis v. ACB Bus. Servs.*, 135 F.3d 389, 398–99 (6th Cir. 1998).

185. *Cf. O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86–87 (1994) (stating that the expression of one thing suggests the exclusion of the other); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 730–31 (1989) (same).

186. *Cf. O'Melveny & Myers*, 512 U.S. at 86–87; *Jett*, 491 U.S. at 730–31.

187. See Letter from Donald S. Clark, Secretary, Fed. Trade Comm'n, to Barbara A. Sinsley & Manuel H. Newburger, Barron, Newburger, Sinsley & Wier, P.L.L.C. (Mar. 19, 2008), available at <http://www.ftc.gov/os/2008/03/P084801fdcpa.pdf> (concluding that a debt collector does not commit a per se violation of § 1692e or § 1692g by communicating settlement options to the debtor, but a violation can arise if the communication is deceptive).

188. See 15 U.S.C. § 1692e (2006) (detailing actions that cannot be taken by debt collectors); *id.* § 1692g (requiring that debt collectors validate debts within five days); see also *Romea v. Heiberger & Assocs.*, 163 F.3d 111, 116–17 (2d Cir. 1998).

189. *Lewis*, 135 F.3d at 399.

190. See, e.g., Consumer Protection Act Amendments: Remarks on Signing H.R. 5294 Into Law, 2 PUB. PAPERS 1628, 1628 (Sept. 20, 1977).

Like a settlement offer, foreclosure is also a specific remedy falling within the exception to § 1692c(c), and therefore is covered by the remainder of the FDCPA. In fact, the *Cohen* court itself recognized foreclosure as a specified remedy falling within the exception to § 1692c(c).¹⁹¹ However, the court failed to consider the implication of its finding. If the specific remedy of foreclosure were not debt collection, there would be no reason to exempt the specific remedy of foreclosure from the requirements of § 1692c.¹⁹² Therefore, foreclosure activities must be covered by all sections of the FDCPA other than § 1692c.

2. Distinction Between Demanding the Payment of Money and Enforcing a Property Interest

Most courts that hold the FDCPA inapplicable to foreclosures draw a sharp distinction between foreclosure and an attempt to collect money in satisfaction of a debt.¹⁹³ Although collection of money is clearly debt collection within the purview of the FDCPA, these courts frame foreclosure as an action enforcing a property interest held by the creditor, rather than the enforcement of an obligation to pay money.¹⁹⁴ In so construing foreclosure, these courts ignore the Act's focus on the debt rather than the collection method, fail to give proper credence to Congress's intent, and do not consider foreclosure laws' focus on satisfaction of the underlying debt.

a. *The FDCPA's Focus on the Underlying Debt*

Applicability of the FDCPA depends upon the character of the underlying debt, not the collection method used to enforce

191. *Cohen v. Beachside Two-I Homeowners' Ass'n*, No. Civ. 05-706ADMJSM, 2005 WL 3088361, at *14 (D. Minn. Nov. 17, 2005), *aff'd*, 272 F. App'x 534 (8th Cir. 2008).

192. *Cf. O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86–87 (1994) (stating that the expression of one thing suggests the exclusion of the other); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 730–31 (1989) (same).

193. *See, e.g., Hulse v. Ocwen Fed. Bank, FSB*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002) (“Payment of funds is not the object of the foreclosure action. Rather, the lender is foreclosing its interest in the property.”); *Heinemann v. Jim Walter Homes, Inc.*, 47 F. Supp. 2d 716, 722 (N.D. W. Va. 1998) (“Since the trustees were not collecting on the debt at that time but merely foreclosing on the property pursuant to the deed of trust, these activities do not fall within the terms of the FDCPA.”), *aff'd*, 173 F.3d 850 (4th Cir. 1999); *see also Beadle v. Haughey*, No. Civ.04-272-SM, 2005 WL 300060, at *3 (D.N.H. Feb. 9, 2005) (exempting collection activities from debt collection when foreclosure can be avoided).

194. *See, e.g., Hulse*, 195 F. Supp. 2d at 1204; *Heinemann*, 47 F. Supp. 2d at 722; *see also Beadle*, 2005 WL 300060, at *3.

the debt.¹⁹⁵ The method of enforcement used is irrelevant.¹⁹⁶ Rather, the decisive factor is whether the debt being collected is one that is covered by the FDCPA.¹⁹⁷ Several courts and the FTC have endorsed this view.¹⁹⁸ A residential mortgage is clearly a debt.¹⁹⁹ Therefore, any actions taken for the purpose of satisfying that debt are covered by the FDCPA, regardless of whether the method used seeks the direct payment of money.

The FDCPA focuses on protecting debtors from deceptive and abusive collection practices.²⁰⁰ Debtors are equally, if not more, susceptible to such practices in foreclosure proceedings than they are when collectors demand the payment of money.²⁰¹ This is particularly true for those individuals who do not actually owe a debt—a key group of individuals Congress intended the FDCPA to protect.²⁰² Therefore, courts should not draw needless distinctions based upon the method of debt collection, but rather give credence to the FDCPA's intent to protect debtors regardless of the collection method used and interpret foreclosure as debt collection.²⁰³

195. *Cf. Sheehan v. Mellon Bank*, Civ. A. No. 95-2969, 1995 WL 549018, at *2 (E.D. Pa. Sept. 13, 1995) (holding foreclosure against personal property securing a commercial debt is not covered by the FDCPA because commercial debt is not debt under the Act); *Ranck v. Fulton Bank*, No. Civ. A. No. 93-1512, 1994 WL 37744, at *3 (E.D. Pa. Feb. 4, 1994), *aff'd*, 40 F.3d 1241 (3rd Cir. 1994) (holding that actions of a debt collector executing upon personal items are not debt collection if the underlying debt was not undertaken for personal, familial, or residential purposes).

196. *Cf. Sheehan*, 1995 WL 549018, at *2; *Ranck*, 1994 WL 37744, at *3.

197. *Cf. Sheehan*, 1995 WL 549018, at *2; *Ranck*, 1994 WL 37744, at *3.

198. *See, e.g., Sheehan*, 1995 WL 549018, at *2; *Ranck*, 1994 WL 37744, at *3; Letter from Roger J. Fitzpatrick, Attorney, Fed. Trade Comm'n, Div. of Credit Practices, to Christopher J. Hall, Attorney, Thompson, McNaboe, Ashley & Bull (Apr. 11, 1988), available at <http://www.ftc.gov/os/statutes/fdcpa/letters/hall.htm>.

199. *See supra* Part II.A.

200. *See, e.g., Brown v. Card Serv. Ctr.*, 464 F.3d 450, 454 (3d Cir. 2006) (quoting *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993)) (giving effect to the "basic purpose of the FDCPA: . . . to protect 'all consumers, the gullible as well as the shrewd'").

201. *See supra* Part II.B.1.

202. *See* 123 CONG. REC. 28,112 (1977) (statement of Rep. Annunzio) (stating that the FDCPA is intended to "assure that every individual, whether or not he actually owes a debt, is treated in a reasonable manner by debt collectors").

203. *Cf. Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001) (interpreting the Federal Arbitration Act to "give effect to [the statute's] purpose").

b. Objective of Foreclosure and Demands for Payment

Courts finding the FDCPA inapplicable to foreclosure view the goal of foreclosure as perfection of a property interest rather than the collection of money.²⁰⁴ However, a creditor's true objective in foreclosure is satisfaction of the underlying debt, not obtaining possession of the secured property. This objective is evidenced by the availability of deficiency judgments, the right of redemption, and the requirement of debt acceleration.

With the exception of strict foreclosure—a rarely used form of foreclosure in which the title to secured property transfers directly to the creditor²⁰⁵—foreclosed property is sold at public sale, and the proceeds from the sale are then applied to the outstanding debt.²⁰⁶ Thus, like any debt collection, the payment of money is the ultimate result of foreclosure. In foreclosure there merely happens to be an additional step required to obtain that payment, namely, sale of the secured property. Regardless, the ultimate result of foreclosure is that the debtor's obligation is satisfied through the payment of money.²⁰⁷

The right of redemption, available in most states, further indicates that the objective of foreclosure is satisfaction of the secured debt. If the objective of foreclosure were to foreclose a property interest rather than satisfy a debt, presumably creditors would not be expected to later give up that property interest. The right of redemption is similar to a statutorily imposed settlement offer. Because a settlement offer brings the foreclosure action within the purview of the FDCPA, foreclosure must necessarily be covered by the FDCPA when there is a statutory right to recover.²⁰⁸

If the foreclosure sale of secured property does not satisfy the outstanding debt, the creditor is entitled to a deficiency judgment.²⁰⁹ A deficiency judgment entitles the creditor to further recover the amount of debt not offset by the proceeds of the foreclosure sale.²¹⁰ Therefore, the law clearly views foreclosure

204. See, e.g., *Hulse v. Ocwen Fed. Bank, FSB*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002).

205. See, e.g., *Cook v. Glover*, 22 F. Supp. 531, 531 (E.D. Ill. 1938); *Rabbit v. First Nat'l Bank*, 237 Ill. App. 289, 290 (2d Dist. 1925).

206. *Camardello*, *supra* note 31, at 20, 22.

207. See *Cox*, *supra* note 38, at 702–03 (stating that either foreclosure sale proceeds satisfy the secured debt or a deficiency judgment is rendered for the remaining portion).

208. See *supra* Part II.C.1.

209. See *Cox*, *supra* note 38, at 702–03.

210. *Id.*

as at least partial satisfaction of the underlying debt. When a party initiates foreclosure, it is seeking satisfaction of a debt. When satisfaction of a debt is sought, actions related thereto must comply with the FDCPA regardless of the method used.²¹¹ Therefore, foreclosure activities must be within the purview of the FDCPA.

It is particularly difficult to parse foreclosure from collection of the underlying debt in light of the fact that the debt must be accelerated in order to foreclose on the entire debt.²¹² The acceleration requirement allows the creditor to terminate its relationship with the debtor as to the debt in default.²¹³ Therefore, it seems clear that the central purpose of foreclosure is to allow the creditor to recover its debt. Because the central objective of foreclosure is satisfaction of the underlying debt, foreclosure must be debt collection under the FDCPA.

D. INTERPRETATION OF THE SECURITY INTEREST CLAUSE

Interpretation of the security interest clause is crucial to interpretation of the FDCPA. The structure of the FDCPA, the structure of the security interest clause, and the inclusion of § 1692i(a)(1) support the Third, Fourth, and Fifth Circuits' inclusive interpretation of the security interest clause.

1. "Debt Collector" Under § 1692f(6)

The Third, Fourth, and Fifth Circuits correctly interpret the FDCPA as providing a broader definition of the term "debt collector" in the context § 1692f(6) than in other sections of the Act.²¹⁴ Such a dual interpretation of the term "debt collector" is justified for two reasons.

211. *Cf. Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 376 (4th Cir. 2006) (disfavoring interpretations of the FDCPA that allow creditors to escape FDCPA coverage by collecting a debt through one procedure rather than another procedure that would clearly be covered by the Act when both procedures accomplish the same ends).

212. *See* 12 U.S.C. § 3706(a)(4) (2006); *see also In re S & H Assocs. Ltd. P'ship*, No. 07-00399, 2008 WL 5063851, at *3 (Bankr. D.D.C. Nov. 19, 2008); RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 8.1 (1997).

213. *See* RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 8.1 cmt. a (1997) (noting that without acceleration, the debtor/creditor relationship would have to continue through the end of the amortization period).

214. *See Kaltenbach v. Richards*, 464 F.3d 524, 527–28 (5th Cir. 2006); *Wilson*, 443 F.3d at 378; *Piper v. Portnoff Law Assocs.*, 396 F.3d 227, 236 (3d Cir. 2005) (concluding that an individual could be a debt collector within the context of § 1692f(6) without being a debt collector in the context of the FDCPA generally but not vice versa).

First, unlike the general definition of a debt collector, the security interest clause does not require the existence of a debt as defined by the FDCPA, namely a consumer debt.²¹⁵ Congress could have easily written the security interest clause to pertain to the enforcement of an interest securing a debt, but instead, Congress chose to speak of security interests generally. Therefore, an appropriate interpretation of the security interest clause is that the enforcement of a security interest is covered by the entire FDCPA so long as it arises out of a debt, as defined by the Act, and otherwise satisfies the general definition of debt collection. Additionally, enforcement of any security interest is covered by § 1692f(6), regardless of whether that interest arises out of a debt, as defined by the Act.²¹⁶ Under such an interpretation, foreclosure on a residential mortgage would be subject to the entire FDCPA, including § 1692f(6), but a commercial mortgage would only be covered by § 1692f(6).²¹⁷ This interpretation is more reasonable than an exclusive interpretation that denies debtors facing foreclosure the right to be treated respectfully and honestly.

Second, a broader definition of “debt collector” under the security interest clause than under the FDCPA generally is justified by the definition of “debt collector.” The FDCPA generally defines a 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 . . . debts.”²¹⁸ Notwithstanding this definition, § 1692f(6) applies to “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 interest.”²¹⁹ Therefore, an individual enforcing a security interest whose business’s primary purpose is

215. 15 U.S.C. § 1692a(6) (2006).

216. *Cf. Kaltenbach*, 464 F.3d at 529 (“Whether a debt collector’s specific action qualifies as the collection of a debt may or may not be relevant when determining whether the party must comply with other, specific substantive requirements of the FDCPA . . .”).

217. *See Sheehan v. Mellon Bank*, No. Civ. A. 95-2969, 1995 WL 549018, at *2 (E.D. Pa. Sept. 13, 1995); *Ranck v. Fulton Bank*, No. Civ. A. No. 93-1512, 1994 WL 37744, at *3 (E.D. Pa. Feb. 4, 1994), *aff’d* 40 F.3d 1241 (3rd Cir. 1994); Letter from Roger J. Fitzpatrick, Attorney, Fed. Trade Comm’n, Div. of Credit Practices, to Christopher J. Hall, Attorney, Thompson, McNaboe, Ashley & Bull (Apr. 11, 1988), available at <http://www.ftc.gov/os/statutes/fdcpa/letters/hall.htm>.

218. 15 U.S.C. § 1692a(6).

219. *Id.*

to enforce security interests must comply with the provisions of § 1692f(6), regardless of the frequency with which she collects debts. Additionally, she is subject to the remainder of the FDCPA if she regularly collects or attempts to collect debts.²²⁰ Therefore, it is appropriate to interpret “debt collector” under the security interest clause as broader than, and not mutually exclusive from, “debt collector” under the FDCPA generally.

2. Effect of § 1692i(a)(1)

An inclusive interpretation of the security interest clause is necessary to give effect to § 1692i(a)(1) of the FDCPA. Section 1692i(a)(1) requires an action to enforce a security interest in real property to be brought in the district where the secured property is located.²²¹ An exclusive interpretation requiring enforcement of a security interest to comply only with the requirements of § 1692f(6) would render § 1692i(a)(1) meaningless.²²² Courts must avoid statutory interpretations that render sections of a statute meaningless,²²³ and therefore, the text and structure of the FDCPA require an inclusive interpretation of the security interest clause.

Courts interpreting the security interest clause as exclusive have avoided this anomaly by interpreting § 1692i(a)(1) as nothing more than a venue requirement.²²⁴ However, in light of the FDCPA’s focus on debtor protection, it is more reasonable to interpret § 1692i(a)(1) as an attempt by Congress to prevent creditors from pursuing foreclosure in distant forums, for the purpose of coercing individuals into paying their debt to avoid the costs of distant litigation.

3. Structure of the Security Interest Clause

If Congress intended enforcers of security interests not to be debt collectors for purposes of all sections of the FDCPA other than § 1692f(6), it easily could have included the security in-

220. *See id.*; *Muldrow v. EMC Mortgage Corp.*, No. 08-1771, 2009 WL 3069731, at *3-4 (D.D.C. Sept. 28, 2009).

221. 15 U.S.C. § 1692i(a)(1) (2006).

222. *See Kaltenbach v. Richards*, 464 F.3d 524, 528 (5th Cir. 2006); *see also Piper v. Portnoff Law Assocs*, 396 F.3d 227, 235 (3d Cir. 2005).

223. *See Kungys v. United States*, 485 U.S. 759, 778 (1988) (Scalia, J., plurality opinion); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986) (“It is an ‘elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.’”).

224. *Beadle v. Haughey*, No. Civ.04-272-SM, 2005 WL 300060, at *4 (D.N.H. Feb. 9, 2005).

terest clause within the list of individuals exempted from the definition of “debt collector.”²²⁵ Instead, Congress chose to include the security interest clause within the inclusive language of § 1692a(6). Courts should respect the placement of the security interest clause and interpret it as an inclusive clause.²²⁶

Individuals expressly exempted from the term “debt collector” are excluded for purposes of *every* section of the FDCPA.²²⁷ Therefore, it is plausible that Congress chose not to include the security interest clause within the list of exceptions to the term “debt collector” because enforcers of security interests were not intended to be excluded from the definition of that term for purposes of every section of the Act. However, if this were the true intent of Congress, it could have expressed that intent by merely inserting the word *only* into the security interest clause so that it would read, “[f]or the purpose of section 1692f(6) of this title *only*, 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.” Congress chose not to include any restrictive or exclusive language, such as the word *only*,²²⁸ and therefore, the security interest clause should be interpreted as an inclusive clause.

III. FDCPA PROTECTIONS SHOULD APPLY TO HOMEOWNERS FACING FORECLOSURE

Courts should uniformly interpret the FDCPA as applicable in its entirety to residential mortgage foreclosure activities. This approach is consistent with the FDCPA’s plain language and its broad goal of providing uniform legislation protective of all consumers.²²⁹ The language and goals of the FDCPA suggest that courts should not draw distinctions based on the technical

225. *Cf.* *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 487 (1999) (stating that expression of one thing suggests the exclusion of others); *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 608 (1980) (holding that when Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied).

226. *See* *Hubbard v. United States*, 514 U.S. 695, 695 (1995) (discouraging courts from reading exceptions into statutes that Congress did not itself include in the statutory text).

227. *See* 15 U.S.C. § 1692a(6)(A)–(F) (2006).

228. *See id.*

229. *See* 15 U.S.C. § 1692(e) (2006); Consumer Protection Act Amendments: Remarks on Signing H.R. 5294 Into Law, 2 PUB. PAPERS 1628, 1628 (Sept. 20, 1977).

form of the collection method, but rather look to whether the challenged practice was intended to satisfy a debt. Such an approach is consistent with the text, structure, and goals of the FDCPA.²³⁰ Mortgagors need the protections of the FDCPA regardless of the collection method used. Therefore, courts should give effect to the broad language of the Act and uniformly hold that residential foreclosure activities must comply with the FDCPA.

By focusing on whether satisfaction of a debt is being sought, courts can shift the focus away from the nature of the collection method to the debtor's need for protection. Mortgagors are a prime example of the type of consumer in need of protection from deceptive and harassing collection practices, particularly during the current foreclosure crisis.²³¹ Foreclosure is often extremely damaging to homeowners' personal, family, and financial lives. Although foreclosure is an all-too-common reality of current economic times, the difficulties foreclosure imposes on individuals should not be compounded by the actions of unscrupulous debt collectors. Rather, courts should ensure that homeowners are afforded the protections of the FDCPA by uniformly interpreting the Act as applicable to residential mortgage foreclosures.

CONCLUSION

As foreclosure rates continue to rise, mortgagors will likely increasingly seek protection from abusive foreclosure practices under the FDCPA. Therefore, it is imperative that courts begin to take a unified approach to interpretation of that Act. The language and structure of the FDCPA command coverage of foreclosure activities. Additionally, mortgagors facing the challenges of foreclosure are precisely the type of individuals intended to be protected by the FDCPA from harassing and abusive practices by debt collectors. Therefore, courts should uniformly hold that foreclosure activities must comply with the entire FDCPA.

230. See, e.g., *Brown v. Card Serv. Ctr.*, 464 F.3d 450, 454 (3d Cir. 2006).

231. Morgenson, *supra* note 5.