

FC Lawyers & Trustees Subject to the FDCPA in the Fourth Circuit

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The Fourth Circuit (covering North Carolina, South Carolina, Virginia, West Virginia and Maryland) recently held that substitute trustees, including attorneys acting in connection with a foreclosure, can be debt collectors under the Fair Debt Collection Practices Act (FDCPA), and are therefore potentially liable for FDCPA violations.

In *Wilson v. Draper & Goldberg*, 443 F.3d 376 (4th Cir. 2006), the borrower sued a law firm and the individual firm member who had initiated foreclosure proceedings on the lender's behalf, specifically alleging that the law firm failed to verify the debt, continued collection efforts after the debt was disputed, and communicated directly with the borrower when the law firm had been advised that the borrower was represented by counsel.

The defendants moved for summary judgment, alleging that the FDCPA did not apply to the firm or its members as they were acting as substitute trustees foreclosing on a deed of trust, and any actions taken in connection with the foreclosure could not be challenged under the act. The district court agreed, concluding that substitute trustees foreclosing on a deed of trust could not be "debt collectors" under the act. The court of appeals reversed and found that the defendants' initial demand letter and subsequent reinstatement quote to the borrower were attempts to collect the debt on behalf of the lender.

Further, the court opined that the defendants were not excluded from the definition of "debt collectors" merely because they were acting as the trustees foreclosing pursuant to a deed of trust, nor was it relevant that the defendants were attorneys, as attorneys can be debt collectors while conducting litigation. The court noted that its decision was not meant to bring all foreclosure law firms into the gambit of the FDCPA, only those that "regularly" engage in consumer debt-collection activity.

The *Wilson* decision is a potential landmine for foreclosure attorneys who fail to comply with the strict-liability standards of the FDCPA. *Wilson* sets the precedent that a firm that initiates foreclosure proceedings on a consistent basis must identify itself as a debt collector on its initial communication with the borrower and, within five days thereafter, provide the validation of debt notice required by 15 U.S.C. § 1692(g). If the borrower requests verification of the debt or otherwise disputes the debt within 30 days of receiving the validation notice, then the FDCPA provides that all collection activities and litigation must cease until the requested verification is mailed to the borrower. Firms should train their staff to identify debt validation requests and halt foreclosure proceedings until the servicer has been notified and a response has been provided to the borrower.

The North Carolina debtors' bankruptcy bar has been active on the bankruptcy bar's listserv discussing the application of the rule of this case. Lenders must be certain that their legal counsel in Fourth Circuit states are complying with the FDCPA.

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