A LOAN SERVICER'S FAILURE TO TIMELY RESCIND ITS NOTICE OF DEFAULT COULD VIOLATE FDCPA

by Joan C. Spaeder-Younkin and T. Robert Finlay, Esq.

California law requires that, upon reinstatement of a loan or other cure of a default, the lender or loan servicer must record a rescission of the Notice of Default. Recently, in *Randall v Ditech Financial, LLC*, (2018) 23 Cal. App. 5th 804, the California Court of Appeals for the Fourth District weighed in on what can happen if the servicer fails to timely record the rescission.

The facts of the *Randall* case are fairly similar to most foreclosure cases. Randall defaulted on the loan, causing Ditech to record a Notice of Default, followed by a Notice of Sale. Prior to the foreclosure sale, Randall paid $20,664.36 to reinstate the loan. Ditech accepted the payments, but did not cancel the foreclosure sale. Despite repeated requests by Randall that Ditech cancel the foreclosure sale, including submitting a "Notice of Error", Ditech failed to cancel the sale. Finally, after Randall filed suit alleging that Ditech failed to cancel the sale and had overcharged Randall to reinstate the loan. On the day of the scheduled foreclosure sale (39 days after accepting reinstatement), Ditech cancelled the sale and rescinded the Notice of Default.

Despite the cancelation and rescission, Randall continued their lawsuit for violations of, among other laws, the Federal Fair Debt Collection Practices Act ("FDCPA"). Specifically, Randall alleged that Ditech inflated the amount necessary to reinstate the loan and then improperly continued with the foreclosure sale, despite Randall's reinstatement. The trial court sustained Ditech's demurrer to the Complaint, finding that Randall failed to state sufficient facts to constitute a viable claim. Randall appealed.

The Court of Appeals reversed, finding that Randall had pled sufficient facts to state a cause of action. After initially determining that Randall had sufficiently plead facts that Ditech was a "debt collector," the Court acknowledged that nonjudicial foreclosure activity, "the purpose of which is to "retake and resell the security, not to collect money from the borrower (*Vien-Phuong Thi Ho v. ReconTrust Company, NA* (9th Cir. 2017) 858 F.3rd 568, 571), such as sending a notice of default or notice of trustee's sale, is *not* actionable under 15 U.S.C. §1692f(1). However, the Court went on to find that, where the loan servicer allegedly *overcharges* the borrower to reinstate the loan and continues to charge default fees and costs for a loan that is not in default, it is attempting to collect money rather than foreclosure activity, which is actionable under §1692f(1). Since Randall alleged that Ditech overcharged him, this was sufficient for the Court to find that Ditech is a "debt collector" within the meaning of the FDCPA.

Further, the Court found that, for purposes of 15 U.S.C. §1692f(6), mortgage loan servicers, as enforcers of security instruments, are "debt collectors" citing *Dowers v. Nationstar Mortgage, LLC* (9th Cir. 2017) 852 F.3d 964, 969. Section 1692f(6) applies to "any business the principal purpose of which is the enforcement of a security interest," and prohibits "taking or threatening to take nonjudicial action to effect dispossession or displacement of property" when the debt collector has no intention of taking possession of the property, or holds "no present right to possession of the property claimed as collateral through an enforceable security instrument." Because Randall alleged that Ditech did not halt its nonjudicial foreclosure activity until well after the loan was reinstated, even after the lawsuit was filed, the Court found that Randall stated an actionable claim under §1692f(6).

Finally, Ditech's alleged conduct was also sufficient to state a violation of the UCL, California *Business & Professions Code* §17200 *et seq.*, which "prohibits, and provides civil remedies for, 'unfair competition' including 'any unlawful, unfair or fraudulent business act or practice." The UCL's unlawful prong borrows the underlying violation of other laws to make an actionable claim under the UCL. Here, the violations of the FDCPA provided the unlawful conduct to state an actionable claim under the UCL.

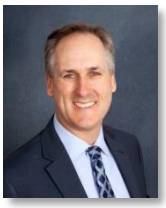
The Court did not rule that Ditech actually violated any laws. Instead, it merely determined that the alleged conduct was sufficient to withstand demurrer. Nevertheless, the lesson for loan servicers to avoid FDCPA and corresponding UCL violations is to promptly rescind a Notice of Default after receiving reinstatement. While this case did not focus on the trustee, it is conceivable that a borrower will next allege that the trustee, knowing about the reinstatement, was no longer "enforcing the security" and, as a result, by failing to rescind the Notice of Default violated the FDCPA.

Joan C. Spaeder-Younkin, Esq.
jyounkin@wrightlegal.net

Joan Spaeder-Younkin is a Senior Associate in WFZ's California Office.

T. Robert Finlay, Esq.
rfinlay@wrightlegal.net

Robert Finlay is a founding Partner of WFZ.



Disclaimer: The above information is intended for information purposes alone and is not intended as legal advice.