

NINTH CIRCUIT DINGS FORECLOSED OUT JUNIOR LIENHOLDER FOR CONTINUING TO REPORT BORROWER AS DELINQUENT

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The Ninth Circuit's recent decision in *Gross v. CitiMortgage* is a mixed bag of positive and negative case law for lender's reporting negative credit information. 33 F.4th 1246.

In *Gross*, CitiMortgage held a second deed of trust on a property located in Arizona. The borrower defaulted on the first lien, causing the first to foreclose in 2013. Unfortunately, the first's foreclosure barely netted enough to cover its lien, leaving nothing for CitiMortgage. Flash forward and, in 2017, the borrower was denied a mortgage application because CitiMortgage was still reporting his second mortgage as past due with late and interest fees accruing even though the deficiency had been extinguished by Arizona's Anti-Deficiency Statute, which prohibits collection of any deficiency post-foreclosure. The borrower disputed the credit report twice in 2018. In response to the first dispute, CitiMortgage reported a balance of \$38,010 and past due amount of \$50,000. CitiMortgage also reported the account as 180 days past due, rather than 120 days. In response to the second dispute, CitiMortgage changed the balance on the account to zero and marked the account as "paid, closed" with \$38,010 "charged off". The borrower sued anyway for violations of the FCRA.

The District Court ruled in CitiMortgage's favor. The Ninth Circuit reversed, finding that the credit reporting violated Arizona's Anti-Deficiency Statute because when the consumer's liability was abolished, he no longer had an obligation to pay the debt. First, the Court held that in order to prevail on a FCRA claim the consumer must make a *prima facie* showing that the report was inaccurate. Second, the Court found that it was patently incorrect for CitiMortgage to report a loan balance and that payments were late and accruing interest or late fees. Finally, the Court held that even though the consumer had established liability, the question of whether CitiMortgage had conducted a reasonable investigation was a question for the jury to decide. Under the FCRA, conducting a reasonable investigation absolves the credit furnisher from liability. Further, the Court ruled that even though CitiMortgage had argued that the consumer's damages were caused by other derogatory remarks on his credit report, the question of causation was also one for the jury to decide.

The Court's ruling leaves a lot to unpack. First, the Ninth Circuit's holding that the consumer must find a *prima facie* violation is a positive outcome for lenders and other credit furnishers. Previously, the Court only required analysis of whether the furnisher conducted a reasonable investigation. As a result of *Gross*, it is now the consumer's burden to establish a *prima facie* violation before determining whether the credit furnisher conducted a reasonable violation. In other words, the Court added an additional step for the consumer before determining liability.

Second, the Ninth Circuit held that if a credit furnisher cannot collect on a deficiency, the furnisher should report the tradeline with a zero balance and no late fees and charges. While the Court did not specifically opine on whether the charge-off indicator was, in fact, misleading, the Court highlighted it as a potential issue and credit furnishers should take note. Most importantly, lenders and loan servicers should be very careful not to report a balance or any other charges if the deficiency can no longer be collected via state law. Here, the Court held that the debt was no longer recoverable under Arizona law; therefore, CitiMortgage should not have been reporting the debt as owed. Note – the result would likely have been different in states like California, where a junior lienholder can still sue the borrower on the note after being wiped out at the senior lienholder's foreclosure sale. **Takeaway** – lenders and loan servicers should determine whether the debt is still recoverable under applicable state law *before* reporting the matter as owed.

If you have any questions about this holding or, any other FCRA or related matters, please feel free to contact Christina Miller at cmiller@wrightlegal.net or Rami Hernandez at rhernandez@wrightlegal.net.



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