

Henson leaves lingering risks for purchasers of defaulted consumer loans

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The U.S. Supreme Court recently held in *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017), that a company may collect debts it purchased for its own account without triggering the statutory definition of “debt collector” under the Fair Debt Collection Practices Act.

In Justice Neil Gorsuch’s debut opinion, the high court held that purchasers of defaulted loans who attempt to collect on the loans for their own account do not constitute “debt collectors” for purposes of the FDCPA.

The court determined that these purchasers, whom this article will refer to as “proprietary debt collectors,” are not “debt collectors” as defined in the FDCPA because they do not collect debts “owed or due another.”

At first blush, the court’s unanimous opinion appears to hand a momentous victory to the consumer debt collection industry by insulating a particular subset of debt collectors — namely propriety debt collectors — from the FDCPA’s purview and restricting the universe of debt collectors subject to potential liability under the FDCPA.

However, a deeper dive into the *Henson* decision reveals that the ruling may not significantly affect much of the legal landscape affecting proprietary debt collectors.

The court’s opinion was narrowly tailored to address a discrete issue of statutory interpretation, and it expressly sidestepped an opportunity to provide holistic clarification as to when — if ever — proprietary debt collectors can be deemed “debt collectors” under the statute.

This continued uncertainty, coupled with the fact that the *Henson* decision does nothing to shield proprietary debt collectors from the operation of otherwise applicable state law, means those in the business of purchasing and collecting on defaulted loans must continue to remain aware of the requirements and attendant risks of the FDCPA and any analogous state laws.

THE CONSUMER DEBT MARKET

The consumer debt market in the United States is significant. As of the end of the first quarter of 2017, total consumer debt

stood at \$12.73 trillion (a \$50 billion increase over its previous peak in the third quarter of 2008), of which about \$9 trillion constituted housing debt (e.g. home mortgages) and about \$3.8 trillion constituted nonhousing debt (e.g., auto loans, credit cards).

As with any debt market, defaults are a common occurrence. As of March 31, about 4.8 percent of the total balance of consumer debt (\$615 billion) was in some stage of delinquency, and \$426 billion in consumer debt was at least 90 days late.¹

According to a 2017 report prepared by the Consumer Financial Protection Bureau, in 2012 the United States had nearly 4,000 debt collection firms generating over \$12 billion in annual revenue. Most of these firms are small, with over 75 percent of them employing fewer than 20 people. However, two-thirds of industry revenue is generated by firms that employ at least 100 people.

The Henson decision is great news for companies that purchase loans in default, but the victory for debt collectors is a partial one.

These firms, both large and small, interact with a significant percentage of the nation’s consumers. For the 12-month period ending March 31, about 12.5 percent of consumers were the subject of third-party collections (i.e., collections not being handled by the original creditor), and the average collection amount per person was about \$1,330.²

THE FDCPA

Congress enacted the FDCPA in 1977 as a consumer protection measure with the goal of eliminating abusive debt collection practices by debt collectors. It had found widespread “use of abusive, deceptive, and unfair debt collection practices by many debt collectors,” which contributed “to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.”³

The FDCPA was enacted in response to this landscape. Despite Congress’ attempt to counter abusive debt collection practices,

in the 40 years since the passage of the FDCPA, consumer complaints regarding debt collection practices continue to comprise a large portion of the complaints received by federal regulators overseeing consumer debt collection activities. In 2016 alone, the Federal Trade Commission received 859,090 complaints related to consumer debt collection activities.

These complaints comprised 28 percent of the total complaints submitted to the FTC. That same year, the CFPB received about 88,000 complaints related to consumer debt collection activities, comprising 30 percent of the total complaints submitted to that agency.⁴

Accordingly, a U.S. Supreme Court decision addressing what constitutes a debt collector under the FDCPA has broad-reaching consequences for the consumer debt market.

HENSON: BACKGROUND

In *Henson*, several auto loan borrowers brought a class action against Santander Consumer USA Inc. in federal court, claiming that Santander acquired their loans from their original lender after the loans were in default and then engaged in debt collection practices that violated the FDCPA.

The plaintiffs had obtained auto loans from CitiFinancial Auto and had subsequently defaulted by failing to make timely installment payments. In response, CitiFinancial Auto repossessed and sold their vehicles and informed the individual borrowers they owed a deficiency balance.

On Dec. 1, 2011, CitiFinancial Auto sold Santander \$3.55 billion in loan receivables, including the deficiency claims against the individual borrowers.

Santander later commenced efforts to collect the debts the borrowers allegedly owed and, during the course of communications, allegedly misrepresented the amount of the debts and its entitlement to collect.

In response, the borrowers filed a class action suit against Santander for violations of the FDCPA, asserting that Santander qualified as a “debt collector” under the law.

The District Court dismissed the claims, concluding that Santander was not a “debt collector” for purposes of the FDCPA because the statute does not apply to “creditors collecting debts in their own names and whose primary business is not debt collection.”

On appeal, the 4th U.S. Circuit Court of Appeals affirmed on the basis that “the debts that Santander was collecting were owed to it, Santander, not to another” and, therefore “those collection efforts were pursued for [Santander’s] own account, as the loans were then owed to it.”⁵

By its decision, the 4th Circuit contributed to circuit split surrounding whether proprietary debt collectors qualify as “debt collectors” for purposes of the FDCPA.

The statute defines “debt collector” as: “Any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who *regularly collects or attempts to collect*, directly or indirectly, *debts owed or due* or asserted to be owed or due *another*.”⁶

The 4th Circuit’s decision fell in line with the 9th and 11th circuits in holding that collectors of purchased defaulted loans are not “debt collectors” within the meaning of the FDCPA.

Focusing on the statutory use of the word “another,” these courts found that proprietary debt collectors are not “debt collectors” for purposes of the FDCPA by virtue of their regular debt collection activities for debt purchased and collected for their own account.⁷

On the other side of the circuit split, the 3rd, 6th and 7th circuits have held that collectors of purchased defaulted loans qualify as “debt collectors” for purposes of the FDCPA. These courts extrapolated from the exclusionary language found in 15 U.S.C.A. § 1692a(6)(F)(iii) that, for purposes of assessing whether a proprietary debt collector is a “debt collector” under the FDCPA, the defaulted status of the loan is determinative.⁸

In light of this circuit split, the issue of whether a proprietary debt collector constitutes a “debt collector” as defined in 15 U.S.C.A. § 1692a(6) was ripe for the Supreme Court’s disposition.

THE SUPREME COURT’S DECISION

The Supreme Court ruled unanimously in favor of Santander that proprietary debt collectors do not qualify as debt collectors under the plain language of the portion of 15 U.S.C.A. § 1692a(6) that encompasses any entity “who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”⁹

According to the court, Santander did not qualify as a debt collector under the FDCPA because it sought to collect debts it had purchased from a third party, CitiFinancial Auto, and, therefore, owned outright. In so ruling, the court rejected the borrowers’ arguments regarding statutory interpretation as well as related public policy considerations.

The borrowers’ primary textual argument focused on the construction of the word “owed.” They argued that the phrase “owed or due to another” under 15 U.S.C.A. § 1692a(6) encompasses debts previously held by another person because the word “owed” is the past participle of the verb “to owe.”

As a result, the borrowers posited, the FDCPA’s definition of “debt collector” captures those who collect debts previously “owed ... another” — excluding loan originators but including

entities like Santander and other proprietary debt collectors who purchase (and then collect) outstanding debts.

However, the court noted that past participles like “owed” are routinely used as adjectives to describe the present state of a thing, offering examples of burnt toast being inedible, a fallen branch blocking a path, and a debt owed to a current owner being collectible by that owner.

As such, the court dismissed the borrowers’ statutory argument, stating that it did not “follow even as a matter of good grammar, let alone ordinary meaning.”

The court also rebuffed the contextual factors cited by the borrowers in support of their textual argument, noting, “Even what may be petitioners’ best piece of contextual evidence ultimately proves unhelpful to their cause.”

In short, the court determined that the statutory language does not “appear to suggest that we should care how a debt owner came to be a debt owner. ... All that matters is whether the target of the lawsuit regularly seeks to collect debts for its own account or does so for ‘another.’”¹⁰

The borrowers also attempted to advance a policy argument that, had Congress known the market for defaulted debt would grow to become so significant (and proprietary debt collectors would become so ubiquitous) in the 40 years following the FDCPA’s enactment, it would have included proprietary debt collectors within the ambit of the FDCPA.

Thus, according to the borrowers, expanding the FDCPA to encompass proprietary debt collectors is an appropriate, if not necessary, extension of existing federal law.

The court rejected this argument, declining the invitation to unilaterally expand the FDCPA’s statutory language. In doing so, it reminded all of its limited, nonlegislative role by stating that it “is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone’s account, it never faced.”¹¹

POST-HENSON: LINGERING RISKS

Although the *Henson* decision is great news for companies that purchase loans in default, the victory for debt collectors is a partial one.

The Supreme Court did not address every argument a litigant may bring to convince a trial court that it and other proprietary debt collectors are “debt collectors” under the FDCPA, and other laws and regulations remain applicable. Proprietary debt collectors should be mindful of a number of risks that survive *Henson*’s industry-favorable holding.

First, a court could determine that a proprietary debt collector is a “debt collector” under the FDCPA because it collects debts for its own account as well as for the account of third parties.

The court expressly declined to address this argument, stating that the borrowers had not raised it in their petition for certiorari and the court had not agreed to review it.¹²

Second, a court could determine that a proprietary debt collector is a “debt collector” under the FDCPA because the principal purpose of its business is the collection of debt.

The court declined to address this argument as well, stating, “The parties haven’t much litigated that alternative definition and in granting certiorari we didn’t agree to address it either.”¹³

Third, a court could find that proprietary debt collectors are “debt collectors” under otherwise applicable state law regarding consumer debt collection. All states have consumer protection laws that prohibit deceptive practices, and most have enacted legislation specifically governing debt collection practices in a manner analogous to the FDCPA.¹⁴

Many of these laws apply to a broader range of debt collection activities than the FDCPA. For example, California’s Rosenthal Fair Debt Collection Practices Act defines “debt collector” as “any person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in [any act or practice in connection with the collection of consumer debts].”¹⁵

The *Henson* decision did nothing to mitigate regulatory risks at the state level, and proprietary debt collectors, among others, must remain cognizant of the legal requirements of the environment in which they operate.

Fourth, federal law other than the FDCPA could impact actions attendant to consumer debt collection activities.

For example, the Servicemembers Civil Relief Act, 50 U.S.C.A. § 3901, regulates debt collection activities with respect to people serving in the military; the Fair Credit Reporting Act, 15 U.S.C.A. §§ 1681, regulates the collection, dissemination and use of consumer information; and the Telephone Consumer Protection Act, 47 U.S.C.A. § 227, regulates telephonic communications with consumers.

Fifth, economic and political circumstances could again yield the requisite conditions for further regulation of the consumer debt collection industry.

As described above, in the late 1970s Congress determined that debt collection practices demanded greater regulation and enacted the FDCPA. In the wake of the 2008 financial crisis, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 to address various risks identified in the U.S. financial system.

One of the key features of Dodd-Frank was the creation of the CFPB, which consolidated most federal consumer financial protection authority into one regulator, thereby increasing the number, and effectiveness, of regulations.

Although the present political environment appears to indicate that the existing enforcement powers of the CFPB

may be weakened,¹⁶ a change in administration or another significant recession materially impacting U.S. consumers could provide the impetus for further regulation.

NOTES

¹ FED. RESERVE BANK OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT (2016), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2017Q1.pdf; see also *Consumer Credit – G.19*, Bd. of GOVERNORS OF THE FED. RES. SYS. (last updated Aug. 7, 2017), <https://www.federalreserve.gov/RELEASES/g19/Current/default.htm>.

² CONSUMER FIN. PROT. BUREAU, CONSUMER RESPONSE ANNUAL REPORT JANUARY 1 – DECEMBER 31, 2016 (2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201703_cfpb_Consumer-Response-Annual-Report-2016.PDF.

³ 15 U.S.C.A. § 1692(a).

⁴ FED. TRADE COMM’N, CONSUMER SENTINEL NETWORK DATA BOOK FOR JANUARY – DECEMBER 2016), https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2016/csn_cy-2016_data_book.pdf; Consumer Financial Protection Bureau, *supra* note 2 at 7.

⁵ *Henson v. Santander Consumer USA Inc.*, No. RDB-12-3519 (D. Md. May 6, 2014), ECF No. 24; *Henson v. Santander USA Inc.*, 817 F.3d 131, 134, 138 (4th Cir. 2016) (emphasis omitted).

⁶ 15 U.S.C.A. § 1692a(6) (emphasis added).

⁷ *Schlegel v. Wells Fargo Bank*, 720 F.3d 1204, 1209-10 (9th Cir. 2013) (Wells Fargo did not qualify as a “debt collector” under the FDCPA when it attempted to collect on a loan acquired through a bankruptcy because its principal business was not the collection of debts and because it was seeking collection of a debt for its own account); *Davidson v. Capital One Bank (USA)*, 797 F.3d 1309, 1316 (11th Cir. 2015) (Capital One did not qualify as a “debt collector” under the FDCPA when it attempted to collect on defaulted credit card debt purchased from another bank because its principal business was not the collection of debts and it was seeking collection of a debt for its own account); *Henson*, 817 F.3d at 137, 139.

⁸ *Fed. Trade Comm’n v. Check Inv’rs Inc.*, 502 F.3d 159, 173-74 (3d Cir. 2007) (company that was in the business of purchasing debts arising from bounced consumer checks was a “debt collector” for purposes of the FDCPA because the company acquired the debts after they were in default – even though the company was seeking collection of the debts for its own account); *Bridge v. Ocwen Fed. Bank FSB*, 681 F.3d 355, 359, 362 (6th Cir. 2012) (FDCPA definition of debt collector “includes any non-originating debt holder that either acquired a debt in default or has treated the debt as if it were in the default at the time of acquisition”); *Ruth v. Triumph P’ships*, 577 F.3d 790, 796-797 (7th Cir. 2009) (party that seeks to collect on a debt that was in default when acquired is a debt collector under the FDCPA, even though it owns the debt and is collecting for itself).

⁹ *Henson*, 137 S. Ct. 1718, 1719 (2017).

¹⁰ *Id.* at 1721.

¹¹ *Id.* at 1725.

¹² *Id.* at 1721.

¹³ *Id.*

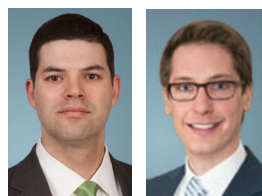
¹⁴ See Carolyn L. Carter, *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes* (Nat’l Consumer Law Ctr. Inc. 2009), https://www.nclc.org/images/pdf/car_sales/UDAP_Report_Feb09.pdf.

¹⁵ Cal. Civ. Code § 1788 (emphasis added).

¹⁶ Marcy Gordon, *Trump Administration Looks to Curb CFPB Powers, Change Bank Rules*, USA TODAY (June 12, 2017), <https://www.usatoday.com/story/money/2017/06/12/trump-administration-looks-curb-cfpb-powers-change-bank-rules/102795120/>.

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