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Safe at First—U.S. Supreme Court Confirms that Purchasers of Debt Are Collecting Their Own Debt and Are Not Subject to the FDCPA as They Are Not Collecting a Debt Owed to Another

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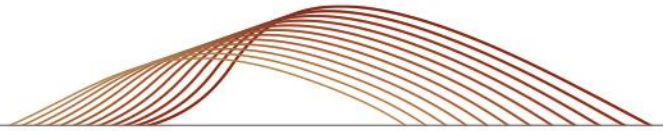
The U.S. Supreme Court recently unanimously held in *Henson v. Santander Consumer USA Inc.* ("*Henson*")[1] that a company that collects debts that it purchased for its own account does not fall within the definition of "debt collector" under the Fair Debt Collection Practices Act ("FDCPA").[2] The Court ruled that the plain language of the statute focuses on third-party collection agents regularly collecting for a debt owner—not on a debt owner seeking to collect defaulted debts for itself—in the first opinion written by Justice Neil Gorsuch.

Notably, the Court's decision was unanimous (9-0), resolving a split where the Third, Fifth, Sixth, Seventh, and D.C. circuits held that debt purchasers were subject to the FDCPA, while the Ninth and Eleventh circuits held that a party that purchases debt was collecting its own debt.

The *Henson* Decision

The FDCPA is a federal statute that authorizes private lawsuits and fines designed to deter certain debt collection practices by limiting practices that are "unfair or unconscionable" or acts whose "natural consequence" is to "harass, oppress or abuse." The 1970's-era statute was enacted before the practice of buying and selling consumer debt became a common industry practice. As such, the sole question before the Court was how to classify those parties that regularly purchase debts originated by someone else and then seek to collect those debts on their own behalf.

After engaging in a grammar lesson as to the text and structure of the FDCPA, the Court held that the plain language and context of the FDCPA excluded purchasers of debt who are not primarily in the business of debt collection and service the debt, as a past participle like "owed" is routinely used as an adjective to describe the present state of a thing. As the FDCPA used the term "owed" near other portions of the statute, the Court concluded that identical words in the statute carry the same meaning. Accordingly, the current owner of debt is collecting its own debt, rather than the debt of another, which is governed by FDCPA.



The Court also declined 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." Instead, the Court noted that it operates under the premise that Congress says what it means and means what it says. The Court concludes that while reasonable people could disagree with how Congress balanced the costs and benefits of the FDCPA, the Court's role is only to apply—not amend—the work of Congress, and therefore the FDCPA does not apply to Santander's practices of collecting on defaulted debts it purchased.

Implications of the Court's Decision: Federal Regulators, Capitol Hill Remain Active

The Court's decision has broad-ranging implications.

First, the decision provides some uniformity in what had previously been an area of law comprised of patchwork judicial interpretations. The decision creates certainty that companies not engaged primarily in debt collection that purchase and service debt are not deemed to be "debt collectors" under the FDCPA as they are not collecting debts owed to "another."

The decision also makes it possible that the Consumer Financial Protection Bureau ("CFPB") and/or the Federal Trade Commission ("FTC"), the two federal agencies authorized to enforce the FDCPA, could update their rules and regulations regarding debt collection practices. As CFPB Director Cordray recently noted, both industry and consumer groups are pressing for updated interpretations of the FDCPA because the law has been unable to keep up with the pace of technological developments such as mobile phones, email, and social media.[3] In fact, the CFPB has already begun the process of updating its rules addressing collection practices and has considered revised regulations applying to both first- and third-party debt collectors, which will be subject to market-wide considerations. What is less clear is what *Henson* means for the nature and the scope of this pending rulemaking.

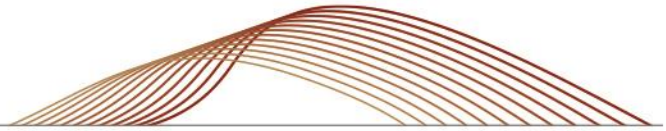
Notwithstanding the *Hensen* decision, federal and state prohibitions against unfair, deceptive, or abusive acts or practices ("UDAAP") will still apply to debt collection activities. Accordingly, while some technical applications of the FDCPA are now inapplicable to purchased debt, we do not expect that the CFPB, FTC, and state attorneys general will forego enforcement actions where debt collection practices—whether by first- or third-party debt collectors—result in consumer harm.

In light of the Court's commentary that it is not its job to rewrite constitutionally valid text, it is possible that Congress could seek to take action regarding debt collection practices. *Henson* presents interesting opportunities for negotiation between Democrats and Republicans on Capitol Hill as each represents factions impacted by the decision, as Democrats will focus on consumer protection, and the Republicans, certainty in debt collection. It is possible that that Congress could conduct hearings, both in the Senate Banking Committee and the House Committees on Financial Services and Commerce, which could lead to clarifying legislative fixes to modernize the FDCPA. This is a unique opportunity to make changes to a statute that has not been updated to account for technological advances, including cell phones.

Action Items

Industry participants, including defaulted debt purchasers, should consider the following action items in light of the Court's decision:

- Review and update consumer debt collection practices to ensure compliance with UDAAP rules;



- Review and consider appropriate corporate structures relating to your primary business purpose;
- Review contracts governing the sale and servicing of consumer debt to address the scope of compliance obligations and related litigation risk as clarified by *Henson*;
- Monitor agency rulemakings to remain updated as the debt collection practices landscape continues to change; and
- Monitor legislative activity and develop legislative proposals for action on Capitol Hill.

The Paul Hastings banking and government affairs practices are actively advising clients on this issue.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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[1] 582 U.S. __ (2017).

[2] *See* 15 U.S.C. § 1692(a)(6).

[3] *See* https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-consumer-advisory-board-meeting-june-2017/.