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Henson v. Santander: What's next?

Hudson Cook analyzes the Supreme Court's landmark decision interpreting the scope of the Fair Debt Collection Practices Act

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On June 12, 2017, the U.S. Supreme Court issued its opinion in the case of *Henson v. Santander Consumer USA, Inc*. The case is significant not just because of its holding. The decision was unanimous, an increasingly rare occurrence. It was Justice Gorsuch's first opinion for the Court (he was silent at oral argument). And, it was the second landmark FDCPA decision this term (the first was *Midland Funding, LLC v. Johnson*, in which the Court held that filing a proof of claim on a time-barred debt in a bankruptcy does not violate the FDCPA).

The Holding

Despite all the fanfare, the holding was relatively limited. The question presented was whether Santander, a bank that bought defaulted debt and serviced that debt in its own name, was a "debt collector" under the FDCPA. The Court pointed out that the FDCPA has two alternate definitions of "debt collector":

> (A) 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
>
> (B) Any person who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

The Court only considered whether Santander was a debt collector under the second prong of the definition - an entity that collects debts "owed or due… another." The Court went to great pains to emphasize throughout its opinion that it was not addressing whether Santander might be a "debt collector" because the principal purpose of its business was debt collection. The opinion that followed was, as a result, not very surprising. The Court focused on the plain text of the second prong of the definition, and held that when Santander collected debt that it owned, it was not a "debt collector" collecting debts owed "to another." The Court rejected the consumer's creative textual argument about the tenses of "owed" and "due" in the definition, and the consumer's policy argument that Congress would have wanted to regulate purchasers of defaulted debt when it passed the FDPCA in the 1970s, before the advent of the modern debt buying industry. The Court refused to construe the definition of "debt collector" beyond its clear statutory limits.

Based on what we know of prior judicial interpretations of the scope of the FDCPA, the opinion appears

to have narrowed the scope of potential coverage of the FDCPA. As discussed below, however, the opinion leaves open the door to future litigation on the "principal purpose" prong of the definition of "debt collector" against purchasers of delinquent consumer debts, and it could accelerate state activity to regulate debt buyers. And, while providing some welcome relief from the FDCPA's private right of action, and the confusing and inconsistent patchwork of case law across the country interpreting the FDCPA, the opinion leaves untouched the regulatory oversight of collection activities by creditors. Specifically, the CFPB retains UDAAP authority and the FTC retains UDAP authority over creditors collecting their own debts. These agencies have shown a willingness to apply most provisions of the FDCPA to creditors collecting their own debts.

Who will this opinion affect?

The crucial part of the opinion was not necessarily the Court's ultimate holding (that Santander was not a "debt collector" in the context of this case because it did not collect debts owed or due another). The crucial part of the opinion was what it did not address: Whether an entity that purchases defaulted debt and services that debt in its own name can be a "debt collector" because it is engaged in a business the principal purpose of which is debt collection (the "principal purpose" prong of the definition of "debt collector"). Traditional debt buyers - entities that regularly buy portfolios of defaulted consumer accounts from creditors and other debt buyers - will likely still be "debt collectors" under the principal purpose prong of the definition, even though they are not collecting on behalf of third parties. An active debt buyer that collects its own accounts will not likely feel empowered by the opinion in *Henson* to cease compliance with the FDCPA, considering the express limitations in the opinion and the fairly long history of judicial interpretation finding that traditional debt buyers with a business model of purchasing and collecting defaulted accounts are "debt collectors" subject to the FDCPA.

The holding in *Henson* impacts full-service financial services companies that, in addition to the incidental purchase of defaulted debt as part of a larger portfolio of consumer accounts, also originate credit and provide other financial services. Before *Henson*, the majority of federal appellate courts to address the issue held (and the CFPB and FTC, unsurprisingly, agreed) that an entity that purchased a debt in default (regardless of the principal purpose of the entity's business) was a "debt collector" subject to the FDCPA. After *Henson*, these types of companies are clearly not collecting debt that was "owed or debt another," and still have a strong argument that the principal purpose of their business is to offer the full range of consumer credit services, and not just to collect debt.

How will the holding affect state law?

Beyond limiting somewhat the scope of (or recognizing the textual limitations in) the federal FDCPA, the holding in *Henson* may impact state laws that regulate debt collection. States regulate debt collection in myriad ways. Some state laws expressly target creditors collecting their own debts. Some state laws expressly regulate servicers of credit accounts, regardless of the default status of the account at the time the servicer begins servicing. Some state laws apply specifically to debt buyers (in fact, more and more states are passing laws that seek to regulate debt buyers). Many states have adopted portions of the FDCPA, either by taking language from the federal statute and using it in a state statute, or by simply adopting the FDCPA (or portions of it) as a matter of state law. These state debt collection statutes could impose licensing, registration, or bonding requirements. They may impose substantive requirements and restrictions, similar to the FDCPA's substantive requirements and restrictions.

State debt collection laws may direct courts and regulators to interpret a state statute in the same way

that federal courts have interpreted the FDCPA, or they may be silent on how to interpret a state statute, in which case most assume that the courts and regulators will rely on interpretations of the FDCPA. With the apparent narrowing of the scope of the FDCPA in *Henson*, the Court has triggered a narrowing of the potential application to consumer debt purchasers of state statutes that include definitions of "debt collector" that are similar to the definitions FDCPA. Was this intentional? The attorneys general for 28 states and the District of Columbia filed an amicus brief in *Henson* in which they warned about the potential impact of the Court's opinion on state laws that "expressly link the scope of their laws to the FDCPA" or where "the interpretation of the FDCPA may affect the meaning of state law." We must assume the justices read the brief of the attorneys general, and understood, at least at a high level, the state law impact of their decision.

What's next for the FDCPA?

Justice Gorsuch, speaking on behalf of all nine members of the Court, made clear what he believes Congress ought to do, if it truly believes that purchasers of defaulted debt should be subject to the FDCPA:

> And while it is of course our job to apply faithfully the law Congress has written, 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… Constant competition between constable and quarry, regulator and regulated, can come as no surprise in our changing world. But neither should the proper role of the judiciary in that process-to apply, not amend, the work of the People's representatives.

Given the ambition of the current Congress's legislative agenda, it is unlikely we will see a revised FDCPA anytime soon. What we are more likely to see is increased litigation around the parameters of "debt collector." For instance, can an entity like Santander - a financial services company that purchases portfolios of consumer accounts that include some defaulted accounts, but which also provides a wide range of other consumer financial services - be a debt collector under the "principal purpose" prong of the definition? How much of a company's business must be devoted to collecting debt for that to be its "principal purpose"?

As we mentioned above, many states that have some form of debt collection law have modeled their laws after the FDCPA. State legislatures tend to be more nimble than Congress, and may see an opportunity to step in and regulate when Congress does not act. We could see further acceleration of the state law trend of regulating debt buyers, as states shore up what they might now perceive to be a gap in regulation of debt collection. Or, we could see states fall in line with the Court's definition, and amend state debt collection statutes to clearly exclude entities like Santander - traditional financial services companies that engage in a wide variety of origination activities, in addition to occasionally purchasing mixed portfolios. Regardless of how states react to the decision, one thing is clear: As more states become active in this space, multi-jurisdictional compliance will become more challenging.

What about the CFPB?

The CFPB has express statutory authority to make rules under the FDCPA, and to enforce the FDCPA. Just three days before the Court issued its opinion in *Henson*, the CFPB announced that it would be breaking up its long-pending FDCPA rulemaking into more manageable pieces. In July of 2016, the CFPB issued an outline of proposals under consideration for its debt collector rulemaking. The outline

addressed collection practices as well "right consumer, right amount" requirements. The "right consumer, right amount" proposals would affect the information shared between creditors and debt buyers or third-party debt collectors, and would impose specific, ongoing obligations on debt collectors to ensure that they are collecting the right amount from the right consumer. The CFPB determined that the "right consumer, right amount" proposals would benefit from creditor participation, and decided to shift those rules into a rulemaking for first-party creditors. For now, the CFPB said, it would focus on debt collection practices and disclosures, which will allow it to "move forward more quickly" on the debt collector rulemaking. The outline of proposals made clear that the CFPB sees its FDCPA authority as extending to third party debt collectors and debt buyers, but not to creditors or non-default servicers (e.g., mortgage or student loan servicers that begin servicing prior to default).

Regardless of how the CFPB interprets the scope its authority, after *Henson*, any rules that the CFPB promulgates under the FDCPA that apply to "debt collectors" will not apply to entities like Santander - full-service financial services companies that purchase defaulted debt as part of a mixed pool of performing and non-performing accounts and collect that debt. Both the collection practices rules and the "right consumer, right amount" rules will likely impose complex, potentially expensive, and highly technical requirements on "debt collectors." After *Henson*, though, entities like Santander will be largely exempt from such requirements when they purchase defaulted debt and collect that debt.

This looks like a win for full-service financial services companies. But, although the CFPB will not have authority under the FDCPA to regulate entities like Santander, it will still have UDAAP authority (and the FTC will still have UDAP authority over nonbanks) to bring enforcement actions for unfair, deceptive, or abusive creditor collection practices. So, until the CFPB makes a creditor collection rule, entities such as Santander will have to continue to approach compliance as a reflexive reaction to the CFPB's unpredictable and frustrating rulemaking-by-enforcement.

Conclusion

The decision in *Henson* will likely affect a relatively limited subgroup of entities that buy consumer accounts that are in default - full-service financial services companies that, in addition to purchasing portfolios of mixed accounts, also originate consumer credit and provide other financial services. It will affect state laws that rely on interpretations of the FDCPA, and could spur even more state legislatures to begin regulating the debt buying industry. The opinion appears to limit the scope of the CFPB's authority, but in reality, the CFPB will likely regulate entities like Santander under a UDAAP theory which, for now, is based on a confusing patchwork of enforcement activity.

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