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U.S. Supreme Court Hears Oral Argument over Whether Debt Buyers are Subject to the FDCPA

May 31, 2017 | Anastasia V. Caton

On April 18, 2017, the U.S. Supreme Court heard oral argument in the case of *Henson v. Santander Consumer USA, Inc*. The issue in the case was whether a company that regularly buys debt and then collects on that debt is a "debt collector" subject to the Fair Debt Collection Practices Act.

It is clear under the language of the FDCPA that a third-party debt collector - someone who collects on behalf of another person and begins collecting once the account has already gone into default - is a "debt collector" subject to the FDCPA. Less clear is whether the language in the FDCPA picks up a debt buyer. At the time the FDCPA was enacted in 1977, the debt buying industry as we know it - debt buyers purchasing older, less collectible debts at a deep discount from the original creditor or a subsequent holder - did not exist.

Most federal appellate courts around the country have decided that the FDCPA applies to debt buyers, but a few have decided that it does not. This disagreement leaves debt buyers in a bind - you might be a debt collector in Illinois but not in Georgia. As a result, many of the largest debt buyers in the U.S. have chosen to comply with the FDCPA.

That split in federal appellate court interpretations is how the case ended up in the Supreme Court. Much of the oral argument focused on whether the text of the FDCPA could be interpreted to apply to debt buyers. Justices Alito and Kagan were both skeptical of the consumers' argument - how can you say that the phrase "a person collecting debts owed or due another" includes a person collecting debts that are currently due to her, but were at one time owed to another person? The consumers' stronger arguments were that debt buyers are more like third-party debt collectors in their motivations and tactics than they are like creditors and that if a debt buyer is not subject to the FDCPA, then third-party debt collectors will just buy up the debts they are collecting and avoid liability and regulatory scrutiny under the FDCPA. Several of the justices, including Justices Ginsburg, Sotomayor, and Breyer, seemed amenable to these arguments.

One thing was absolutely clear from the oral argument: The justices are going to have a difficult time overcoming the plain text of the FDCPA, which does not appear to apply to debt buyers. One possible outcome is that the Court could decide that debt buyers are outside the scope of the plain language of the statute and could signal in its opinion that Congress should amend the statute to account for the changes in the debt collection industry.

However the Court ultimately rules, *Henson* will be a landmark case under the FDPCA because it will set the scope of the FDCPA's applicability (unless and until Congress amends the FDCPA). The Court's

decision will also affect state collection agency and debt collection laws and regulations that have adopted the FDCPA's definitions and rely on judicial interpretations of the FDCPA to determine which types of companies are subject to licensing and regulation.

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