Debt buyers beware: SCOTUS will decide if the FDCPA applies to you

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On Friday, January 13, 2017, the U.S. Supreme Court granted certiorari in *Henson v. Santander Consumer USA, Inc.*, 817 F.3d 131 (4th Cir. March 23, 2016).

This case raises the question whether a debt buyer is a "creditor" or a "debt collector" under the Fair Debt Collection Practices Act (FDCPA). The answer to this question, it turns out, is far from clear since debt buyers fit plausibly into either category.

Santander purchased $3.5 billion in deficiencies arising from defaulted auto loans. The plaintiffs alleged that in the course of attempting to collect these debts, Santander violated the FDCPA in a variety of ways, including misrepresenting the amount of the debts and their validity and speaking with debtors it knew to be represented by counsel. The plaintiffs sued and sought to represent a class of similarly situated consumers, alleging violations of the FDCPA.

Santander argued that it was not a "debt collector" as the term is defined in 15 USC § 1692a(6), since it purchased the debt, and, hence, was the owner/creditor. It relied on 15 USC § 1692a(6), which defines a "debt collector" in a variety of ways, including one "who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."

The Fourth Circuit agreed with Santander, holding that "the complaint's allegations . . . do not satisfy this definition because the debts that Santander was collecting were owed to it, Santander, not to another." *Henson*, 817 F.3d at 138. The court described the plaintiffs' argument as a "kind of upside-down logic that relies on an inaccurate premise and a negative pregnant that does not follow."

But the plaintiffs' arguments are not so easily dismissed. They claimed that the statutory definitions of both "debt collector" and

"creditor" supported their argument.

Starting with the definition of "debt collector," they focused on 15 USC § 1692a, which identifies who is a "debt collector." They argued that the phrase "who regularly collects or attempts to collect . . . debts owed or due or asserted to be owed *or due another*" (emphasis added) should be read to mean debts owed or due another at the time of origination of the debt. Since Santander did not originate the debt, it fits squarely within the scope of the definition.

The plaintiffs bolstered this argument by looking at the second part of the statutory definition, which excludes certain activities from the definition of "debt collector."

15 USC § 1692a(f)(iii) provides that the term "debt collector" does not include "any person collecting or attempting to collect any debt owed or due . . . another to the extent such activity . . . concerns *a debt which was not in default* at the time it was obtained by such person" (emphasis added). Because the auto deficiencies were in default at the time Santander obtained the debt, Santander is not excluded from and, thus, remains squarely within the definition of "debt collector."

The federal circuits have split on this issue. *Compare, e.g.*, *Bridge v. Ocwen Fed. Bank, FSB*, 681 F.3d 355, 362 (6th Cir. 2012) states that "the 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 default at the time of acquisition," while according to *Davidson v. Capital One Bank (USA), N.A.,* 797 F.3d 1309, 1314 (11th Cir. 2015), the plain language of the FDCPA says that a bank cannot be a "debt collector" where it attempts to collect debts "owed or due another" even where the customer was in default at the time of acquisition.

The plaintiffs next argued that the statutory definition of "creditor" contains an exception roughly parallel to the subsection (F)(iii) exception to the definition of "debt collector." The term "creditor" is defined as "any person who offers or extends credit creating a debt or to whom a debt is owed," 15 USC § 1692a(4), and then excludes "any person to the extent that he receives an assignment or transfer of *a debt in default* solely for the purpose of facilitating collection of such debt for another" (emphasis added).

The plaintiffs called this an FDCPA bullseye, which describes exactly what Santander does: it purchases defaulted debt for the purpose of collection for CitiFinancial Auto, the original lender. Therefore, applying the exclusion, Santander cannot be a "creditor" because the debt was in default at the time Santander bought it.

The Supreme Court will be faced with several vexing issues:

- Is a statutory definition to be interpreted as much by what it includes as what it excludes?
- Does the phrase "due another" mean debts "due another" at inception or collection of a debt?
- Are debt buyers that are divisions of a multi-service consumer finance company categorically excluded from regulation under the FDCPA?

The question presented is this: Whether a company that regularly attempts to collect debts it purchased after the debts had fallen into default is a "debt collector" subject to the FDCPA?

It remains to be seen if granting certiorari on Friday the 13th bodes ill for debt buyers. Time will tell.

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