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U.S. Supreme Court Hears Oral Arguments over Whether Debt Buyers are Debt Collectors under FDCPA

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On April 18, 2017, the U.S. Supreme Court heard oral argument in the case of *Henson v. Santander Consumer USA, Inc.* The case presented the question of 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 Fair Debt Collection Practices Act. As Chief Justice Roberts pointed out during oral argument, when Congress drafted the FDCPA in the 1970s, the debt buying industry did not exist in the form it does today. A majority of circuits have held that the FDCPA's protections for consumers regulate both third-party debt collectors *and* debt buyers.

The arguments initially focused on the meaning of the FDCPA's definition of "debt collector:" "[A]ny person … who regularly collects … debts owed or due … another." Counsel for Mr. Henson and the class of consumers suing Santander argued that the debts are "owed" to the originating creditor, but are "due" to the debt buyer. Therefore, counsel claimed, a debt buyer is collecting debts that are "owed" to the originating creditor, and is a "debt collector" as defined in the FDCPA. Justices Kagan and Alito both questioned this unusual and creative use of the term "owed," with Justice Kagan prodding counsel to use "owed" in a sentence that supports his reading, and Justice Alito expressing disbelief with counsel's interpretation. Counsel for Santander countered that "owed or due another" could only mean that the debt is currently owed to another person. Because Santander was collecting a debt owed to it (by virtue of its purchase) at the time of the alleged FDCPA violation, counsel argued that Santander was not a debt collector subject to the FDCPA.

Given the vagueness of the definition of "debt collector," counsel for the consumers leaned on policy arguments. Specifically, under the unusual facts of this case - Santander was servicing the defaulted accounts as a "debt collector," and then later purchased the defaulted accounts - counsel for the consumers argued that Santander could remove itself from the scope of the FDCPA by simply buying up defaulted accounts, something counsel claimed Congress could not have possibly foreseen or intended. Justices Ginsburg and Kagan seemed amenable to this argument.

Counsel for Santander argued that a person that owns a debt, like Santander, has different incentives from a third-party debt collector, including the incentive to maintain a positive account relationship with the consumer and to market additional products to her. As a result, counsel claimed, owners of debt should be exempt from the FDCPA.

Counsel for both parties and the Justices also sparred over how the definition of "creditor" and the exceptions to the definition of "debt collector" affect the meaning of "debt collector," with each side picking apart the meaning of terms like "assignment" and "obtained."

The Court's decision will be landmark precedent for the FDCPA, on par with the decision in *Heintz v. Jenkins* (which held that attorneys collecting debt are subject to the FDCPA), because it will set the scope of the FDCPA's applicability. It will also impact state collection agency and debt collection laws that have adopted the FDCPA's definitions and, in the absence of definitive state regulator or case law guidance, rely on FDCPA jurisprudence. Attorneys general from 28 states and the District of Columbia joined in an amicus brief supporting the consumers' argument that debt buyers are debt collectors.

For questions, please contact Anastasia Caton at acaton@hudco.com or 202-715-2001.

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