IADC COMMITTEE NEWSLETTER

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This month's Newsletter focuses on Justice Gorsuch's first Supreme Court Opinion. The Court held that debt buyers are exempt from the Fair Debt Collection Practices Act.

Supreme Court Holds that Debt Buyers are Exempt from the Fair Debt Collection Practices Act

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ABOUT THE COMMITTEE

This Appellate Practice Committee is available to all members who routinely practice in state and federal appellate courts, as well as trial lawyers who handle their own appeals. The Committee publishes quarterly newsletters addressing various appellate related topics and recent trends in appellate practice. The Committee also offers CLE programs focusing on appellate related issues that often arise before, during, and after trial. Networking among members is also encouraged through Committee meetings held during bi-annual IADC meetings. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article contact:

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Justice Neil Gorsuch authored his first opinion as a Supreme Court Justice on June 2, 2017, in a unanimous decision holding that companies who purchase debt from creditors are not considered "debt collectors" pursuant to the Fair Debt Collection Practices Act (FDCPA) 15 U.S.C. § 1692 *et seq*. Justice Gorsuch, nominated by President Donald Trump to succeed Justice Antonin Scalia on the bench, was sworn in on April 10, 2017. Justice Gorsuch is considered a proponent of originalism and textualism, believing that the Constitution should be interpreted as perceived at the time of enactment and that statutes should be interpreted literally. In a 2005 speech at Case Western University, Justice Gorsuch stated that judges should:

> "strive to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be – not to decide cases based on their own moral convictions or the policy consequences they believe might serve society best."

In 1977, Congress enacted the FDCPA in an effort to curb abusive, deceptive, and unfair debt collection practices by debt collectors. Congress stated in the Act that the purpose of the Act was to curb these abusive debt collection practices as they "contribute to a number of personal bankruptcies, to marital instability, to the loss of jobs and to invasions of individual privacy." Congress further noted that a goal of the FDCPA is to "insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692. The Act is generally self-enforcing through private litigation by consumers who allege that debt collectors have violated the Act.

The Act defines a "debt collector" as anyone who "regularly collects or attempts to collect…debts owed…another" and explicitly precludes creditors who are defined as those who "offer or extend to offer credit creating a debt or to whom a debt is owed." 15 U.S.C. § 1692a(4). The question posed to the Court in *Henson* was: if an entity purchases a debt and then tries to collect the debt for itself, does that qualify the entity as a "debt collector" under the Act? The Court held that it does not.

In *Henson*, Santander purchased defaulted auto loans from CitiFinancial, including Henson's defaulted loan, and thereafter sought to collect on the loans. Henson then brought a class action lawsuit against Santander pursuant to the FDCPA, alleging that Santander's collection practices violated the Act. Santander filed a motion to dismiss plaintiff's FDCPA claim in the United States District Court in the District of Maryland on the basis that it was *not* a "debt collector" under the FDCPA. The District Court agreed and granted Santander's motion, which was affirmed by the Fourth Circuit Court of Appeals and subsequently appealed to the United States Supreme Court. *Henson v.*

Santander Consumer USA, Inc., 2014 U.S. Dist. LEXIS 62237 (D. Md. May 6, 2014).

Justice Gorsuch affirmed the Fourth Circuit's holding, stating that the language of the FDCPA defining debt collectors as collecting a debt "owed…another" suggests that those entities collecting debts purchased from another are *not* debt collectors. In this regard, Justice Gorsuch stated that the FDCPA's explicit language "does not appear to suggest that we should care how a debt owner came to be a debt owner – whether the owner originated the debt or came by it only through a later purchase." Although *Henson* argued that Congress would have intended debt buyers to be considered debt collectors if the debt buying industry was prevalent in the 1970s, Justice Gorsuch stated that "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." *Henson v. Santander*, 582 U.S. ____ (2017), slip op.

The secondary debt market was created in the late 1980s and early 1990s when creditors began selling debt portfolios in large scale. According to a January 2013 Federal Trade Commission study on debt buying practices, in 2008, debt buyers purchased $72.3 billion in consumer debt, including credit cards, medical, utility, auto and mortgage debts. Of that total, $55 billion, or 76.8 percent was credit card debt bought directly from credit issuers. Although the amount of FDCPA complaints filed nationwide has been trending slightly downward in recent years, consumer protection litigation is still very much alive and kicking. A recent consumer protection lawsuit statistical study found that 4,360 FDCPA lawsuits were filed in United States District Courts between January 1, 2017, and May 31, 2017, many of which likely stem from collection activities involving purchased debts. Thus, this decision will likely have a large impact on the debt buying industry and the financial services industry, in general, now that debt buyers may be shielded from FDCPA claims arising from debts they purchased. However, the Court did not address whether debt buyers who also regularly collect debts of another are considered "debt collectors."

Thus, if a business that purchases debt also performs third party collection of debts of another, it is not clear whether they will be forever stamped as a "debt collector" and effectively lose immunity from private rights of action. Further, although debt buyers are shielded from claims under the FDCPA, many states have their own statutes regulating the collection of debts that may apply to debt buyers. Only time will tell how far reaching the effects of the *Henson* decision are on the debt buying industry.

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