Client Alert

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Third Circuit Again Refuses to Read Supreme Court's *Henson* Decision to Exclude Debt Buyer From Qualifying as "Debt Collector" Under FDCPA[1]

In 2017, the Supreme Court held that a company that collects charged-off debts that it purchases for its own account does not qualify as a "debt collector" under one definition of the Fair Debt Collection Practices Act (FDCPA or Act). *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017). The *Henson* court addressed the FDCPA provision defining "debt collector" as anyone who "regularly collects or attempts to collect … debts owed or due … another." 15 U.S.C. § 1692a(6). But the Supreme Court did not address another statutory definition of the term "debt collector" found in the same section of the Act that covers those engaged "in any business the principal purpose of which is the collection of any debts." *Id*. The US Court of Appeals for the Third Circuit recently addressed whether debt buyers—which represent the muddied middle ground between those creditors that themselves originate and collect their own debt and third parties collecting debt on behalf of others—are covered by the "principal purpose" definition that the *Henson* court did not consider.

In the case on appeal before the Third Circuit, Crown Asset Management (Crown) purchased charged-off consumer credit card receivables and retained a third-party collection agency to initiate collection on its behalf consistent with its ordinary business practices. In this particular case, the debtor ultimately filed bankruptcy, triggering Crown to recall the account from the collection agency and close it. Months later, the debtor sued Crown, as well as the collection agency Crown retained, alleging FDCPA violations. The debtor eventually dismissed the collection agency from the lawsuit, leaving Crown as the sole defendant. The parties filed cross-motions for summary judgment on the issue of whether Crown qualified as a "debt collector," with the debtor-plaintiff asserting that Crown qualified under the "principal purpose" definition.

Crown argued that the principal purpose of its business was to *acquire* defaulted debt, not to *collect* defaulted debt, because it outsourced all collection activity. The district court disagreed and determined Crown qualified as a "debt collector," finding little distinction between directly collecting charged-off receivables and referring collection to a third party. Crown then sought reconsideration based on the intervening *Henson* decision and argued that it could not be a debt collector under *Henson*'s interpretation of the Act because it had purchased the charged-off receivable for its own account. The district court rejected this argument too, determining that *Henson* addressed only the "regularly collects" definition, not the "principal purpose" definition.

On interlocutory appeal, the Third Circuit took a narrow view of *Henson*. First, the Third Circuit rejected Crown's argument that under *Henson* it must be a creditor and, therefore, cannot be a debt collector because the two statuses are mutually exclusive. Relying on its 2018 decision in *Tepper v. Amos Fin., LLC*, 898 F.3d 364, 366 (3d Cir. 2018), which reached a similar conclusion regarding application of the FDCPA, the Third Circuit held that the two statuses are no longer mutually exclusive as a result of *Henson*'s rejection of the "default" test, which looked solely to whether a debt buyer obtained the debt

[1] The Third Circuit's decision is *Barbato v. Greystone Alliance, LLC*, No. 18-1042 __ F.3d __, 2019 WL 847920 (3d Cir. Feb. 22, 2019).

pre-default (rendering it a creditor) or post-default (rendering it a debt collector). Second, the Third Circuit rejected any attempt to read *Henson* as opining on the "principal purpose" definition given the Supreme Court's express statement that it was not. Third, the Third Circuit parsed the statutory language, finding that Congress plainly intended the "principal purpose" definition to cover both direct and indirect collection activity. Finally, the court rejected Crown's policy argument, finding no support for the argument that Congress intended that the Act only cover debt collectors engaged in active collection activity.

For many debt buyers whose business is purchasing charged-off receivables, the Third Circuit's decision renders the holding in *Henson* meaningless. The *Henson* decision was touted by many commentators as holding that debt buyers that purchase charged-off receivables are not subject to the FDCPA. But if a person can be both a creditor and a debt collector for purposes of the FDCPA under the "regularly collects" and "principal purpose" definitions, respectively, then the latter definition essentially swallows the former definition from the perspective of most debt buyers. Moreover, based on the Third Circuit's affirmation of the lower court's decision and guidance concerning passive collection activity satisfying the "principal purpose" definition, it is likely that most debt buyers would qualify as debt collectors under the "principal purpose" definition. The Third Circuit remains the only circuit court of appeals to directly apply *Henson* to an FDPCA claim. And it is clear that the Third Circuit assumed that, in rejecting the "default" test, *Henson* implicitly recognized that a person can be both a creditor and a debt collector under the statute. But that assumption is far from clear from the text of the *Henson* decision and it remains an open question. If other circuits reach contrary conclusions, it may set the stage for the Supreme Court to address whether the two statuses are mutually exclusive, which would potentially have a significant impact on the debt-buying industry.

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