

# Supreme Court Narrows FDCPA Coverage of Debt Purchasers

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In a unanimous opinion authored by the newly appointed Justice Gorsuch, the Supreme Court has ruled in [Henson v. Santander Consumer USA, Inc.](#) [1] that a company does not automatically become a “debt collector” under the Fair Debt Collection Practices Act (FDCPA) when collecting accounts it obtained after default. However, the Supreme Court expressly declined to address under what circumstances a company that purchases consumer debt may be deemed to be a debt collector if it is engaged in any business the principal purpose of which is the collection of any debts. As a result, the *Henson* decision stands for the position that a diversified financial services company, whose “principal business purpose” is not the collection of debts, is not subject to the FDCPA when collecting accounts it purchased. However, the Supreme Court did not address other legal theories that could be raised, and traditional debt buyers and default servicers may still be subject to the FDCPA. Ultimately, the Supreme Court’s decision provides relief for companies like Santander Consumer USA, Inc. (Santander), likely shifts the legal theories used in future FDCPA litigation, and perhaps alters the strategy of the Consumer Financial Protection Bureau’s (CFPB) debt collection enforcement and rulemaking. Indirectly, the decision also elevates the role of states as debt collection regulators. A detailed analysis of the *Henson* decision may be found below.

## The *Henson* Holding

The *Henson* decision addressed one of the two alternative definitions of a “debt collector” under the FDCPA. Under the FDCPA, a “debt collector” is defined as any person whose principal business purpose is debt collection, or who regularly collects debts owed to another. In its decision, the Supreme Court addressed whether a purchaser of debt is someone who regularly collects debts “owed to another” and thus is regulated by the FDCPA as a debt collector.

In *Henson*, a borrower filed suit against Santander alleging it violated the FDCPA when collecting an auto loan account that Santander first serviced, and then purchased, as part of Santander’s acquisition of a portfolio containing current and defaulted loans. Santander successfully argued to the trial court and to the Fourth Circuit on appeal that it was not a debt collector when collecting the accounts it purchased.

Affirming the Fourth Circuit, the Supreme Court held that a person who purchases a debt is not someone who regularly collects debts owed to another, regardless of whether the debt was current or in default at the time of acquisition. The Court also rejected the petitioner’s argument that the FDCPA’s use of the word “owed,” instead of “owing,” indicated that Santander was collecting debt “owed to another” because the debt was originally owed to someone else. The Court explained that the term “owed” refers to the time of collection, and concluded that the term “owed” does not create a distinction based upon how the debt owner acquired the

account. Santander did not regularly collect debts owed to another when it purchased and collected debt, including defaulted debt. Because the company did not satisfy the test to be included as a “debt collector,” it was unnecessary to examine or apply any of the potential exclusions.

The Court left unresolved whether Santander is subject to the FDCPA under the alternative definition of a “debt collector,” which is a person engaged in any business the principal purpose of which is the collection of any debts. The Court did not address whether Santander’s principal business purpose was the collection of debts or what would have been required to make that showing, as the issue was not raised in Henson’s Petition for Writ of Certiorari.

## Impact on Diversified Financial Services Companies

The *Henson* decision most significantly affects financial services companies that purchase consumer debt portfolios *as part of a diversified business model*. Unfortunately, the Court did not address the FDCPA’s “principal business purpose” prong. Whether a company is sufficiently diversified or principally a debt collector remains unclear and unresolved, as the “diversified business model” test does not yet exist. Until now, cautious portfolio purchasers complied with the FDCPA when collecting defaulted, purchased accounts; or, to avoid FDCPA coverage, they simply excluded defaulted, or even delinquent, accounts from the target portfolio. Now, the opinion suggests those companies no longer need take such measures. However, the FDCPA continues to apply to accounts they service for others.

And it is also critical to remember that the *Henson* decision does not affect state law regulation of debt collection practices, including the licensing of debt collectors and debt buyers. Many states regulate purchasers of defaulted debt as debt collectors or have enacted laws that solely apply to debt buyers. For example, Arkansas requires licensing for any person who purchases and attempts to collect delinquent accounts. Companies must continue to be mindful of the effect of state regulation on their activities.

In addition, the CFPB will likely continue to rely on its authority to prohibit unfair, deceptive, and abusive acts and practices (UDAAP) to regulate creditors’ collection conduct.

## Impact on Traditional Debt Buyers

The opinion’s impact on traditional debt buyers is less clear. The Supreme Court did not address debt collectors who, as defined by the FDCPA, are “engaged in a business the principal purpose of which is the collection of debts.” A traditional debt buyer may be deemed to be a debt collector, even if it only collects loans it has purchased. Despite the proclaiming headlines—DEBT BUYERS ARE NO LONGER SUBJECT TO THE FDCPA!—traditional debt buyers should consider complying with the FDCPA until courts resolve this question.

## Impact on Servicers

The *Henson* decision also does not affect a loan servicer’s FDCPA status. As before, a servicer is generally subject to the FDCPA because it regularly collects debts owed to another. While a servicer that begins servicing an

account prior to default is still exempt from the definition of a debt collector, a servicer that collects payments owed on a defaulted account owned by another person remains subject to the FDCPA.

*Henson* does impact a diversified entity that has a debt purchasing business and a servicing business, and that wears two hats with respect to the same debt. Santander serviced the portfolio containing the Henson debt prior to purchasing it, and the parties agreed that Santander was a debt collector when it was servicing those debts. However, the Court held that the FDCPA did not apply to collection activities that occurred after Santander purchased the debts.

## Impact on Future FDCPA Litigation for Debt Purchasers

The fact that a debt was, or was not, in default has historically been the critical (and sometimes only) inquiry for many courts prior to the *Henson* decision. The *Henson* decision will likely cause the “principal business purpose” question to take center stage in determining whether a company collecting its own debts will be subject to the FDCPA. However, there is no established test to make this determination and it is inherently fact-specific. In FDCPA litigation, some courts have looked at a company’s collection expenditures as a percentage of its operations budget to determine whether debt collection is its “principal business purpose,” while others have looked at revenue generated by collections. Still others have rejected a quantitative approach for a qualitative review of a company’s overall business structure (i.e., “I’ll know it when I see it”). Although companies that purchase defaulted debt are not automatically subject to the FDCPA, companies will need to consider the “principal business purpose” standard to assess the potential applicability of the FDCPA.

## Impact on Debt Collection Rulemaking and Enforcement

Through its guidance and enforcement actions, the CFPB has applied the FDCPA to purchasers of defaulted debt, and it has also sought to regulate creditor collection practices under its UDAAP authority. Now that the Supreme Court has removed debt purchasers whose principal business is not debt collection from the purview of the FDCPA, the CFPB should have to rely exclusively on its UDAAP authority to regulate them. This is significant for two reasons. First, the scope of regulation possible under UDAAP is arguably more limited. For example, it may be difficult to impose affirmative conduct requirements from the FDCPA, such as Mini-Miranda disclosure requirements, onto creditors through UDAAP (although the CFPB has brought enforcement actions finding that it is unfair to sell debt that was not sufficiently verified). Second, if the Financial CHOICE Act becomes law, the CFPB will lose its UDAAP authority, including its primary authority to write debt collection rules applicable to entities that are not debt collectors, as defined by *Henson* and the FDCPA.

Just prior to the release of the *Henson* decision, the CFPB announced that it planned to cover creditors and debt collectors in a rulemaking that will focus on “information integrity,” which incorporates requirements designed to prevent debt collectors from seeking to collect payments from the wrong consumer or in the wrong amount based on inaccurate data received from creditors or prior debt collectors. While the CFPB may adjust the authority it relies upon, we do not believe *Henson* will dissuade the Bureau from this path.

Please contact the authors of this alert or another member of the firm’s Consumer Financial Services Group for questions regarding the impact of this decision on your organization.

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[1] No. 16-349, 2017 WL 2507342 (June 12, 2017).

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