Georgia State University Law Review

Volume 35
Issue 2 *Winter 2018-2019*

Article 5

2-1-2019

Gorsuch's Purgatory: Attempting to Define Debt Collector Under the Fair Debt Collection Practices Act

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GORSUCH'S PURGATORY: ATTEMPTING TO DEFINE DEBT COLLECTOR UNDER THE FAIR DEBT COLLECTION PRACTICES ACT

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INTRODUCTION

A whopping seventy million consumers in the United States are the subjects of debt collection activities.[1] As of March 2017, debt collection was an $11.4 billion industry nationwide.[2] Debt collection affects almost one-third of American consumers, and almost three-fourths of these consumers have two or more debts out for collection.[3] The majority of debts originate from credit or charge cards.[4] In a survey conducted by the Consumer Financial Protection Bureau (CFPB), nearly half of the consumers who were contacted

* J.D. Candidate, 2019, Georgia State University College of Law. I owe a huge thanks to Professor Emeritus Mark Budnitz for his help and feedback throughout the writing and editing process. To my family—especially my parents and sister—thank you for your guidance, encouragement, wisdom, laughs, and love before, during, and after law school. To my wife, Harriet, thank you for all of the sacrifices you have made during law school and your unwavering love and support. Finally, thank you to all of the members of the *Georgia State University Law Review* for the relentless hard work that went into this Note and in general.

1. *CFPB Survey Finds Over One-in-Four Consumers Contacted by Debt Collectors Feel Threatened*, CFPB (Jan. 12, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-survey-finds-over-one-four-consumers-contacted-debt-collectors-feel-threatened/ [https://perma.cc/P689-543F] [hereinafter *CFPB Survey*].

2. CFPB, FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL REPORT 2017, at 9 (2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201703_cfpb_Fair-Debt-Collection-Practices-Act-Annual-Report.pdf [https://perma.cc/3ZFK-9G54] [hereinafter CFPB 2017]. The number of consumers affected by debt collection has more than doubled in the past four years—in 2013, the CFPB reported that thirty million consumers were subject to debt collection activities. CFPB, FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL REPORT 2013, at 2 (2013), http://files.consumerfinance.gov/f/201303_cfpb_March_FDCPA_Report1.pdf [https://perma.cc/77MX-3N3D].

3. CFPB, CONSUMER EXPERIENCES WITH DEBT COLLECTION: FINDINGS FROM THE CFPB'S SURVEY OF CONSUMER VIEWS ON DEBT, at 5 (2017), https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf [https://perma.cc/F99P-U3ZL]. The majority of consumers with more than one debt out for collection are between thirty-five and forty-nine years old, but debt collection affects all age groups. *Id.* at 17.

4. *Id.* at 19. Student loans are the second most common type of debt reported with credit or charge cards and student loans comprising nearly 75% of all reported debts. *Id.*

about a debt by a debt collector indicated that they requested that the debt collector stop contacting them.[5] Three-fourths of consumers in this group reported that the debt collector did not honor their requests.[6] The federal Fair Debt Collection Practices Act (FDCPA) makes it illegal for debt collectors to use certain tactics and contact debtors at certain times and places and provides opportunities for harmed consumers to seek redress.[7] The FDCPA, a strict liability statute, creates a private right of action that allows consumers to collect up to $1,000 in statutory damages if they can prove that the debt collector did not collect, or attempt to collect, the debts in accordance with the statute.[8]

In June 2017, the Supreme Court's decision in *Henson v. Santander Consumer USA, Inc.* made it harder for consumers to seek redress from certain entities when it definitively ruled that those who purchase debt profiles and subsequently attempt to collect on them are not debt collectors under the statute.[9] The Court's analysis

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5. *CFPB Survey*, *supra* note 1.

6. *Id.* The CFPB also reported that, in general, over 25% of consumers contacted about a debt felt threatened. *Id.*

7. *See* 15 U.S.C. § 1692k(a) (2012). The FDCPA is a strict liability statute, making any debt collector who fails to comply with any section of the Act with respect to a consumer liable to that consumer in an amount equal to:

> (1) any actual damage sustained by such person as a result of such failure; (2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or (B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

Id. However, the Act provides that a debt collector may not be liable if it can show "by a preponderance of evidence that the violation was not intentional" and was the result of a bona fide error. *Id.* § 1692k(c).

8. *See id.* § 1692k. Black's Law Dictionary defines strict liability as "[l]iability that does not depend on proof of negligence or intent to do harm but that is based instead on a duty to compensate the harms proximately caused by the activity or behavior subject to the liability rule." *Strict Liability*, BLACK'S LAW DICTIONARY (10th ed. 2014).

9. Henson v. Santander Consumer USA, Inc., 137 S. Ct. 1718, 1721–22 (2017). The unanimous opinion was the first written by Justice Gorsuch. Ryan Lovelace, *Neil Gorsuch Writes First Opinion as*

focused on one statutory definition of a debt collector as one who collects debts "owed . . . another."[10] The Court reasoned that because debt purchasers become the owners of these debts, they are attempting to collect debts owed to themselves, not debts "owed . . . another."[11] However, the Court addressed only one definition of debt collector under the FDCPA, thus leaving unanswered the question of whether debt purchasers are subject to the other statutory definition of debt collector. Under the other definition, a debt collector is one whose principal business purpose is the collection of debt.[12] This Note analyzes the legal ramifications of the Supreme Court's decision and proposes a solution that provides clarity for consumers, debt collectors, and creditors.

Part I of this Note provides background on the FDCPA and the federal agencies charged with its enforcement.[13] Part I also provides background on judicial analysis of the FDCPA before *Henson v. Santander* and explains the nature of the Supreme Court's decision.[14] Part II analyzes the ramifications of *Henson v. Santander* for debtors and debt purchasers.[15] Part II also analyzes how the Supreme Court's decision can affect the CFPB.[16] Part III proposes and discusses a three-tiered solution that involves congressional and CFPB action and discusses what would happen if Congress and the CFPB left the solution up to the courts.[17]

Supreme Court Justice, WASH. EXAMINER (June 12, 2017, 10:59 AM), http://www.washingtonexaminer.com/neil-gorsuch-writes-first-opinion-as-supreme-court-justice/article/2625661 [https://perma.cc/CH8C-T9LT].

10. *Henson*, 137 S. Ct. at 1721 ("[W]e begin, as we must, with a careful examination of the statutory text.").

11. *Id.*

12. Matthew Rosenkoff, *Game, Set, but Not Match: Supreme Court's Decision in* Henson v. Santander, 86 U.S.L.W. (BNA) 45, 48 (2017).

13. *See* discussion *infra* Part I.A–B.

14. *See* discussion *infra* Part I.C.

15. *See* discussion *infra* Part II.

16. *See* discussion *infra* Part II.

17. *See* discussion *infra* Part III.

I. Background

Congress enacted the FDCPA in 1977[18] in response to congressional research that found evidence of abusive, deceptive, and unfair debt collection practices.[19] The Act's main purposes are to (1) eliminate abusive debt collection, (2) protect ethical debt collectors from disadvantages, and (3) foster uniform consumer protection.[20] The Act has been criticized for its lack of clarity,[21] and disputes over the intended scope of coverage for the FDCPA go back at least thirty years.[22]

A. Who Does the FDCPA Cover?

The FDCPA is a broad statute,[23] but in many respects it is also narrow.[24] The Act only covers debt collectors who are collecting debts stemming from primarily personal consumer transactions.[25] Congress intended for the FDCPA to apply only to debt collectors—as opposed to banks and other financial product lenders—due to the belief that financial product lenders were more likely to have repeated contact with a consumer.[26]

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18. Kaymark v. Bank of Am., N.A., 783 F.3d 168, 174 (3d Cir. 2015).

19. 15 U.S.C. § 1692(a)–(b), (e) (2012); *Kaymark*, 783 F.3d at 174.

20. Jolina Cuaresma, Katherine Lamberth & Brent Yarborough, *Do You Think Banks Are Debt Collectors? The CFPB and the FTC Do*, BUS. L. TODAY, Oct. 2016, at 1.

21. Carmen H. Thomas, Graham R. Billings & Donna O. Tillis, *Defining "Debt Collector" Under the FDCPA: The Eleventh and Fourth Circuits Reject the Acquired-in-Default Test*, 72 BUS. LAW. 487, 487 (2017).

22. *See, e.g.*, Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480, 1484 (M.D. Ala. 1987).

23. *Kaymark*, 783 F.3d at 174 ("The Court has repeatedly held that '[a]s remedial legislation, the FDCPA must be broadly construed in order to give full effect to these purposes . . . .'").

24. *See* Rosenkoff, *supra* note 12, at 46.

25. *Id.*; *see also* FTC, DEBT COLLECTION 1 (2015), https://www.consumer.ftc.gov/articles/pdf-0036-debt-collection.pdf [https://perma.cc/9RDV-CHF5]. Even though the FDCPA does not cover debts incurred for business or commercial purposes, a consumer can still be liable in his individual capacity for business debts. Boosahda v. Providence Dane LLC, 462 F. App'x 331, 335 (4th Cir. 2012).

26. Cuaresma et al., *supra* note 20, at 1. Congress thought that debt collectors have little to no concern with a debtor's perception of them because, often, debt collectors do not have contact with a debtor after receiving payment. *Id.* However, banks and consumer lenders are more likely to have future contact with consumers and therefore have an inherent reason not to engage in abusive behavior so that they can protect their good will. *Id.*

The FDCPA defines a debt collector as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."[27] Put another way, a debt collector is bound to the provisions of the FDCPA if its principal purpose of business is debt collection or if they regularly collect debts owed to another entity.[28]

B. The Consumer Financial Protection Bureau

Before 2010, the Federal Trade Commission (FTC) served as the enforcing body of the FDCPA, and in many respects the Commission still has enforcement power.[29] The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), among other things,

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27. 15 U.S.C. § 1692a(6) (2012). The statute excludes from the definition:

> (A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor; (B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts; (C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties; (D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt; (E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and (F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

Id. § 1692a(6)(A)–(F).

28. Thomas et al., *supra* note 21, at 487–88.

29. 15 U.S.C. § 1692*l*(a) (2012) ("The Federal Trade Commission shall be authorized to enforce compliance with this subchapter, except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to another Government agency . . . ."). Generally, the FTC seeks to prevent persons and businesses, with some statutory exceptions, from engaging in unfair competition and unfair or deceptive acts or practices that affect interstate commerce. *Id.* § 45(a)(2).

created the Consumer Financial Protection Bureau (CFPB) as part of the sweeping financial reforms in the wake of the 2008 financial crisis.[30] Dodd-Frank amended the FDCPA to add the Bureau to the list of agencies with the power to enforce the Act.[31] The CFPB oversees federal laws that protect financial-products consumers from unfair, abusive, and deceptive acts or practices.[32] It is the only consumer-focused regulatory agency, consolidating the shared power of several agencies within the federal government.[33] The CFPB and the FTC share enforcement authority of the FDCPA,[34] but from a practical standpoint the CFPB assumes a large role over enforcing the FDCPA and other debt collection laws.[35] Since Congress established the CFPB six years ago, the agency has enjoyed success in its consumer protection goals, returning billions of dollars to consumers through enforcement actions.[36] However, the Supreme Court dealt a

30. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011, 124 Stat. 1376, 1964 (2010) (codified as 12 U.S.C. § 5491 (2012)).

31. *Id.* § 1089, 124 Stat. 1376, 2092 (codified as amended as 15 U.S.C. § 1692*l* (2012)) ("The Fair Debt Collection Practices Act (15 U.S.C. 1692 et seq.) is amended . . . by striking 'Commission' each place that the term appears and inserting 'Bureau' . . . . The term 'Bureau' means the Bureau of Consumer Financial Protection."). Until Dodd-Frank created the CFPB, no agency had the authority to issue regulations with respect to the FDCPA. CFPB, SMALL BUSINESS REVIEW PANEL FOR DEBT COLLECTOR AND DEBT BUYER RULEMAKING: OUTLINE OF PROPOSALS UNDER CONSIDERATION AND ALTERNATIVES CONSIDERED 2 (2016), http://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf [https://perma.cc/YR7H-TZL3].

32. 12 U.S.C. § 5531(a) (2012).

33. Megan Slack, *Consumer Financial Protection Bureau 101: Why We Need a Consumer Watchdog*, OBAMA WHITE HOUSE: BLOG (Jan. 4, 2012, 11:13 AM), https://obamawhitehouse.archives.gov/blog/2012/01/04/consumer-financial-protection-bureau-101-why-we-need-consumer-watchdog#What is CFPB [https://perma.cc/54S5-RYAR]. Before the CFPB, the Federal Deposit Insurance Corporation, the Federal Trade Commission, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the Department of Housing and Urban Development shared consumer financial protection responsibilities. Matt Gunn, *What's Getting Consolidated Under the CFPB?*, BANK SYS. & TECH. (Mar. 23, 2011, 12:25 PM), http://www.banktech.com/compliance/whats-getting-consolidated-under-the-cfpb/d/d-id/1294592.html [https://perma.cc/T6ZW-CG4J].

34. *See generally* CFPB 2017, *supra* note 2, at 8 ("The CFPB and the FTC work closely to coordinate debt collection enforcement actions among other matters related to debt collection."). From a practical standpoint, the CFPB assumes a large role over enforcing the FDCPA and other debt collection laws.

35. Evan Dix, *Dazed and Confused: The Need for Clarity in Dodd-Frank's Abusive Standard*, 47 STETSON L. REV. 185, 211 (2017).

36. C. Ryan Barber, *The CFPB, Often a Winner in Court, Hit a Rough Patch this Summer*, NAT'L

significant blow to the regulatory agency when it announced that debt purchasers do not qualify as debt collectors under the FDCPA.[37] The decision severely limits the reach of the FDCPA and, given the recent uncertainty surrounding the CFPB, creates new questions about the CFPB's future role in enforcing consumer protection laws.[38]

C. Henson v. Santander Consumer USA, Inc.

Prior to *Henson v. Santander*, most courts that addressed the default status of an acquired debt held that the terms "creditor" and "debt collector" were mutually exclusive, meaning that an entity can

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L.J. (Sept. 19, 2017, 2:13 PM), http://www.nationallawjournal.com/id=1202798320034 [https://perma.cc/U5E5-Q6P7]; *Standing up for You*, CFPB, https://www.consumerfinance.gov/ [https://perma.cc/K8DD-MHMT] (last updated June 4, 2018) (claiming to hold companies accountable for "$12.4 billion in relief to consumers through [CFPB's] enforcement actions"). These enforcement actions include filing actions in federal district court and initiating administrative adjudication proceedings. *Enforcement Actions*, CFPB, https://www.consumerfinance.gov/policy-compliance/enforcement/actions/ [https://perma.cc/U8S9-AGA7] (last visited Oct. 16, 2018). The CFPB uses these tactics to effectuate its goals of making consumer finance rules more effective, consistently enforcing those rules, and empowering consumers to take more control over their economic lives. *Strategy, Budget and Performance*, CFPB, https://www.consumerfinance.gov/about-us/budget-strategy/ [https://perma.cc/9WT8-RQ25] (last visited Oct. 16, 2018).

37. Henson v. Santander Consumer USA, Inc., 137 S. Ct. 1718, 1721–22 (2017).

38. *E.g.*, C. Ryan Barber, *CFPB Lawyers: Trumped?*, NAT'L L.J., Feb. 27, 2017, at 6. Barber's article quotes one lawyer who, in court, recently referred to the CFPB as the "'800-pound gorilla in the regulatory room.'" *Id.* In addition, Republican nominee Donald Trump vowed to dismantle the CFPB as part of his campaign platform. *Id.* His transition team reaffirmed this position after the election, stating Trump's belief that the agency's mandates "'do[] not work for working people.'" C. Ryan Barber, *Trump Aims at Dodd-Frank*, NAT'L L.J., Nov. 14, 2016, at 6. The distaste toward the CFPB gained support in the courts in October 2016 when the United States Court of Appeals for the District of Columbia Circuit ruled that the President should be able to remove the CFPB's Director, reasoning that the agency's structure was unconstitutional. PHH Corp. v. CFPB, 839 F.3d 1, 8, 37 (D.C. Cir. 2016), *reh'g en banc granted, vacated* (Feb. 16, 2017) (explaining that an independent agency headed by a single director who is removable by the President only for cause violated Article II of the Constitution); C. Ryan Barber, *Riders on the CFPB Storm*, NAT'L L.J., Jan. 9, 2017, at 1 [hereinafter Barber, *Riders on the CFPB Storm*]. The D.C. Circuit's ruling caused several companies, seeking to escape the agency's grasp, to cite the opinion in court. Barber, *Riders on the CFPB Storm*, *supra*, at 1. The CFPB's structure is not the only constitutional challenge to the agency. *See* William Simpson, *Above Reproach: How the Consumer Financial Protection Bureau Escapes Constitutional Checks & Balances*, 36 REV. BANKING & FIN. L. 343, 353 (2016). The agency's budget comes directly from the Federal Reserve, not the Appropriations Committee, making the agency's budget exempt from Congressional review. *Id.* at 345, 353. In Atlanta, District Judge Richard Story sanctioned the CFPB in August 2017 because he felt the agency showed disregard for judicial instructions during the discovery process. R. Robin McDonald, *Judge Sanctions Federal Consumer Bureau in Collections Case*, DAILY REPORT, Aug. 30, 2017, at 1. The dismissal came after Judge Story issued an injunction earlier in 2015 that froze the assets of the individual defendants and their business operations. *Id.*

be either a creditor or debt collector under the statute, but not both.[39] Determination of an entity's status depended on the status of the debt sought for collection: If the debt was in default, the entity was a debt collector, and if the debt was not in default, the entity was a creditor.[40] The distinction between creditor and debt collector is important because creditors are not liable for the actions of third-party debt collectors under the FDCPA.[41] But a debt collector can be vicariously liable for the actions of those seeking to collect a debt on its behalf.[42] Following the lead of the Eleventh Circuit in *Davidson v. Capital One Bank (USA), N.A.*, the Fourth Circuit departed from this dichotomous school of thought and laid the foundation for the Supreme Court's review of the newly-created circuit split.[43]

The facts setting the stage for *Henson v. Santander* are not unique: Four Maryland consumers each signed a retail sales contract with CitiFinancial Auto (CitiFinancial) to finance an automobile purchase.[44] When the plaintiffs stopped making payments and defaulted on the contract, CitiFinancial repossessed the cars and informed each plaintiff of its intention to pursue a deficiency judgment.[45] CitiFinancial later sold the plaintiffs' defaulted debts as part of a large debt portfolio to Santander Consumer USA (Santander).[46] After Santander began contacting the plaintiffs in an

39. Thomas et al., *supra* note 21, at 488. The FDCPA defines a creditor as "any person who offers or extends credit creating a debt or to whom a debt is owed." 15 U.S.C. § 1692a(4) (2012). The term does not include "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." *Id.*

40. Thomas et al., *supra* note 21, at 488.

41. Rosenkoff, *supra* note 12, at 46; *see also* Henson v. Santander Consumer USA, Inc., 817 F.3d 131, 136–37 (4th Cir. 2016), *cert. granted*, 137 S. Ct. 810 (2017), *aff'd*, 137 S. Ct. 1718 (2017).

42. Rosenkoff, *supra* note 12, at 46.

43. *Henson*, 817 F.3d at 135–36 (explaining that the FDCPA "purports to regulate only the conduct of debt collectors, not creditors," and debt collectors collect debt on behalf of a creditor, whereas creditors are those to which a debt is owed, so when a creditor seeks to collect its own debts, it is not acting as a debt collector); Davidson v. Capital One Bank (USA), N.A., 797 F.3d 1309, 1316 (11th Cir. 2015). With their decisions, the Fourth and Eleventh Circuits split from rulings in the Third, Sixth, and Seventh Circuits, which previously adopted the "mutually exclusive" approach. Cuaresma et al., *supra* note 20, at 3.

44. *Henson*, 817 F.3d at 134.

45. *Id.*

46. *Id.*

effort to collect on the debts, the plaintiffs filed an action alleging that Santander violated the FDCPA in both the pursuit of the collection and the manner of pursuit.[47] The Fourth Circuit Court of Appeals concluded that the defaulted status of a debt "has no bearing on whether a person qualifies as a debt collector under the threshold definition set forth in [the statute]."[48]

On appeal, the Supreme Court sought to answer whether the FDCPA treats a debt purchaser in this kind of scenario "more like the repo man or the loan originator."[49] Ultimately, the Supreme Court found the Fourth Circuit's reasoning compelling and held that purchasers of defaulted debt do not trigger the statutory definition of a debt collector when they collect debts for themselves,[50] focusing the majority of its time on a grammatical analysis of the word "another."[51]

One thing is for certain following *Henson v. Santander*: consumers and their attorneys can no longer assert that a debt purchaser is a debt collector subject to the FDCPA simply by showing that the debt was in default at the time of acquisition.[52] However, it remains to be seen whether a debt purchaser of defaulted accounts can be, and will be, classified as a debt collector through a different manner.[53] After all, the Supreme Court explicitly stated that it was not addressing the

47. *Id.* In order to meet FDCPA requirements that a plaintiff properly allege that the defendant is a debt collector, the *Henson* plaintiffs alleged that Santander purchases defaulted consumer debts for pennies on the dollar as part of its business. *Id.* The plaintiffs argued further:

> The terms "debt collector" and "creditor" are mutually exclusive under the FDCPA. An entity can be either a "debt collector" or a "creditor" in any particular transaction. The determining factor of whether an entity is a "debt collector" or "creditor" in any particular transaction when the entity in question is not the originating lender is *whether the debt was acquired prior to default or after default.* Since Santander acquired [the plaintiffs'] debts from the original lender well after each [plaintiff] defaulted on their debt, Santander's collection activities on these defaulted debts make[] it a "debt collector."

Id. at 135.

48. *Henson*, 817 F.3d at 135.
49. Henson v. Santander Consumer USA, Inc., 137 S. Ct. 1718, 1721 (2017).
50. *Id.* at 1721–22.
51. Rosenkoff, *supra* note 12, at 47.
52. *Id.*
53. *Id.*

meaning and application of the other definition of debt collector that focuses on the principal business purpose.[54] Although the Supreme Court focused almost entirely on a grammatical analysis of "another," a distinction or restriction does not exist for the principal purpose definition.[55] Moreover, much of the FDCPA litigation has not focused on the principal business purpose prong, making potential arguments harder for consumer attorneys.[56] The Supreme Court does not seem likely to address the principal business purpose argument any time soon, if ever.[57] Questions about an institution like Santander claiming its primary business purpose to be loan origination, and not the purchase of defaulted debt, surely exist, but the Court did not provide definite answers to those questions or any related ones.[58] Although the Court applauded both sides for presenting strong arguments on the questions not litigated, it believed that the existence of the arguments suggests one likely consequence: the matters not addressed in the opinion are matters for Congress to resolve, not the Supreme Court.[59] This does not mean that lower courts will avoid the question; at least one court has held that the presence of the definite article "the" indicates that Congress intended for a business to have only one principal (or primary) purpose.[60] Just

54. *Henson*, 137 S. Ct. at 1721. Although the court acknowledged the principal purpose prong of the statutory definitions, it explained:

> [T]he parties briefly allude to another statutory definition of the term "debt collector"–one that encompasses those engaged "in any business the principal purpose of which is the collection of any debts." § 1692a(6). But the parties haven't much litigated that alternative definition and in granting certiorari we didn't agree to address it either.

Id.

55. Rosenkoff, *supra* note 12, at 48.

56. *Id.*

57. *See Henson*, 137 S. Ct. at 1725.

58. *Id.*

59. *Id.* This, obviously, is not set in stone. With the Senate confirming Justice Kavanaugh to the Court and two sitting Justices at least eighty years old, the Supreme Court could drastically change in a relatively short amount of time. Newly-confirmed Justice Kavanaugh wrote a lengthy dissent in the rehearing of *PHH v. CFPB* in which he argued that the CFPB is unconstitutional because it is the only independent agency whose "head" is not accountable to a commission or board. PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

60. Hunte v. Safeguard Props. Mgmt., LLC, 25 F. Supp. 3d 722, 726 (N.D. Ill. 2017) ("The pertinent portion of § 1692a(6) defines 'debt collector' as an entity '*the* principal purpose of which is the

as *Henson v. Santander* definitively answered the question of the status of a purchaser of defaulted debts, it posed an equally important question about a debt purchaser's principal business purpose.[61]

II. Analysis

Henson v. Santander created a near-ironclad defense for debt purchasers named in FDCPA lawsuits.[62] Among other requirements, a plaintiff's FDCPA claim must contain enough facts to establish that the defendant attempting to collect the debt meets the statutory definition of a debt collector.[63] Even if a defendant qualified as a debt collector under the statute, it could succeed on a motion to dismiss if the plaintiff's complaint did not properly allege that the defendant was a debt collector.[64] *Henson v. Santander* makes it probable that a debt purchaser will successfully move to dismiss FDCPA claims filed against it simply by citing *Henson v. Santander* even if the debt purchaser engaged in egregious misconduct, and the complaint properly alleges that the defendant has violated the Act and made the plaintiff the object of collection activity. Although *Henson v. Santander* provided debt purchasers with a new argument in a motion to dismiss, the debt purchasers face another challenge: how will courts address and resolve the assertion that a debt purchaser's principal business purpose is the collection of debt?[65] Further, debtor-plaintiffs could face additional hurdles in the courts.

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enforcement of security interests.' 15 U.S.C. § 1692a(6) (emphasis added). Not '*a* principal purpose of which,' but '*the* principal purpose of which.'").

61. Rosenkoff, *supra* note 12, at 48.

62. *See id.*

63. Frazier v. Absolute Collection Serv., Inc., 767 F. Supp. 2d 1354, 1363 (N.D. Ga. 2011). A plaintiff must also establish that: (1) "she has been the object of collection activity arising from a consumer debt;" and (2) "the defendant has engaged in a prohibited act or has failed to perform a requirement imposed by the FDCPA." *Id.*

64. *E.g.*, Ramsay v. Sawyer Prop. Mgmt., LLC, 948 F. Supp. 2d 525, 531, 537 (D. Md. 2013) (granting defendants' motions to dismiss because plaintiff's complaint did not demonstrate that defendants were debt collectors).

65. Rosenkoff, *supra* note 12, at 48.

A. The Principal Purpose Prong

Before *Henson v. Santander*, a company could acquire defaulted debts while having a principal business purpose of collecting those debts and, technically, fall into the FDCPA's creditor and debt collector classifications at the same time.[66] The Supreme Court stated that the status of the debt is irrelevant because the only inquiry that matters is whether the debt owner "seeks to collect debts for its own account or does so for 'another.'"[67] With the new standard, it does not matter how the debt owner became the debt owner—whether through origination or subsequent purchase.[68]

1. A New Kind of Mutual Exclusivity

At least for the "owed . . . another" prong, *Henson v. Santander* renders the previous circuit split about mutual exclusivity for the acquisition of defaulted debt irrelevant. However, in jurisdictions that previously used the mutual exclusivity approach, *Henson v. Santander* may have a more severe impact on debt collection than in jurisdictions that held the determination of creditor versus debt collector is not mutually exclusive. In jurisdictions that applied mutual exclusivity, a strong argument exists that *Henson v. Santander* eliminates the principal business purpose argument.[69] As explained earlier, in those jurisdictions an entity is either a creditor or a debt collector.[70] Because *Henson v. Santander* classifies debt purchasers collecting their own debts as creditors, the mutual exclusivity approach would permanently classify these entities as creditors as long as the debt subject to dispute or litigation is one that the entity purchased for itself. The Court seems to adopt its own version of mutual exclusivity with respect to the collection efforts for

66. Cuaresma et al., *supra* note 20, at 2.

67. Henson v. Santander Consumer USA, Inc., 137 S. Ct. 1718, 1721 (2017).

68. *Id.*

69. Rosenkoff, *supra* note 12, at 48.

70. Thomas et al., *supra* note 21, at 488. The CFPB and the FTC have also adopted the mutually exclusive approach. Cuaresma et al., *supra* note 20, at 2.

a single debt—the company either collects a debt owed to itself or collects a debt owed to someone else.[71]

2. Problems with Asserting a Principal Purpose Argument

Historically, it has been easier for consumer attorneys to prove the defaulted status of a debt rather than the principal business purpose of the debt collector.[72] Now that the status of the debt essentially does not matter, attorneys will have to present the principal purpose argument in FDCPA lawsuits against debt purchasers, but it is not clear how courts will address these arguments. Plaintiffs usually lack sufficient information about a debt collector to assert enough facts to prove an entity's principal purpose is debt collection.[73] This results in conclusory statements and "threadbare allegations" that modern courts do not accept.[74]

Some of the nation's largest debt purchasers, seemingly, are at least cognizant of the problems plaintiffs run into when attempting to assert a principal purpose argument.[75] Encore Capital Group (Encore) is the nation's largest debt buyer.[76] The company's "About Encore"

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71. *Henson*, 137 S. Ct. at 1724. The Court explained that under the FDCPA, as written, an entity has to attempt to collect a debt owed to another entity before the collecting entity can even qualify as a debt collector. *Id.*; *see also* 15 U.S.C. § 1692a(6) (2012). The presence of the conjunction "or" makes quite a difference for interpreting the definition of a debt collector because, naturally, it means that an entity cannot fall into more than one statutory definition. Rosenkoff, *supra* note 12, at 47. Additionally, the Court points out that in other parts of the FDCPA's definition section, Congress used "or" when it wished to differentiate between originators of credit and purchasers of debt. *Henson*, 137 S. Ct. at 1723. Specifically, the statute differentiates between debts "originated by" a debt collector and debts owed to someone else. 15 U.S.C. § 1692a(6)(F)(iii) (2012); *Henson*, 137 S. Ct. at 1723. The Court could not ignore these distinctions, pointing out that when one engages in statutory interpretation, there is a strong presumption that differences in language like the ones discussed above tend to convey differences in meaning. *Henson*, 137 S. Ct. at 1723.

72. Rosenkoff, *supra* note 12, at 48.

73. *E.g.*, Ramsay v. Sawyer Prop. Mgmt., LLC, 948 F. Supp. 2d 525, 532 (D. Md. 2013) ("Plaintiff's Amended Complaint falls short of alleging that debt collection is the primary purpose of [the defendant's] business.").

74. *Id.*

75. *About Cavalry*, CAVALRY PORTFOLIO SERVS., http://www.cavalryportfolioservices.com/about [https://perma.cc/FMB3-EEA8] (last visited Oct. 16, 2018); *Our Mission*, ENCORE CAPITAL GRP., https://www.encorecapital.com/about/our-mission [https://perma.cc/DY7D-4VT3] (last visited Oct. 16, 2018); *Who is MCM?*, MIDLAND CREDIT MGMT., INC., https://www.midlandcreditonline.com/who-is-mcm/midland-funding-llc/ [https://perma.cc/8NTM-L2D4] (last visited Oct. 16, 2018).

76. *CFPB Takes Action Against the Two Largest Debt Buyers for Using Deceptive Tactics to Collect*

page on its website indicates that its subsidiaries "purchase portfolios of consumer receivables from major banks, credit unions, utility providers, and municipalities[] and partner with individuals as they repay their obligations and work toward financial recovery."[77] The statement indicates that Encore's principal business purpose is debt collection, but the company's mission statement creates some ambiguity.[78] Encore states that its mission is to "help people recover from financial difficulty and turn toward a path of economic empowerment."[79] The conflicting statements on Encore's website represent conflicting facts for attorneys seeking to make the principal business purpose argument.

A consumer attorney would likely read the mission statement to mean that Encore's principal business purpose is debt collection, but Encore would likely insist that its principal business purpose is to provide financial recovery assistance.[80] An inquiry into one of Encore's largest subsidiaries, Midland Credit Management, yields similar results. Midland Credit states that it "is dedicated to helping consumers find their way back to financial stability and relieve the emotional stress that can accompany unpaid debt."[81] The debate

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Bad Debts, CFPB (Sept. 9, 2015), https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-the-two-largest-debt-buyers-for-using-deceptive-tactics-to-collect-bad-debts/ [https://perma.cc/3LN8-GWSP]. In its suit against Encore Capital Group, the CFPB alleged that the company purchased debts without confirming their validity and pressured consumers into payments. Yuka Hayashi, *CFPB Settles with Debt-Collection Giants*, WALL ST. J. (Sept. 9, 2015, 4:14 PM), https://www.wsj.com/articles/cfpb-settles-with-debt-collection-giants-1441829640 [https://perma.cc/JAL4-SLBA]. Encore and the CFPB reached an agreement in which the company agreed to pay a $10 million fine and repay $42 million to consumers. *Id.*

77. *About Encore*, ENCORE CAPITAL GRP., https://www.encorecapital.com/about [https://perma.cc/9XQY-ASPX] (last visited Oct. 16, 2018). Although it does not seem like an important distinction, it is interesting to note that Encore Capital Group states that "[its] subsidiaries," not Encore itself, purchase consumer debt. *Id.*

78. *Id.*; ENCORE CAPITAL GRP., *supra* note 75. The ambiguity exists in trying to decipher the conflicting statements that indicate Encore's principal business purpose is debt collection while simultaneously identifying its goal (e.g., its business purpose) is to help consumers recover from financial hardship. ENCORE CAPITAL GRP., *supra* note 75.

79. ENCORE CAPITAL GRP., *supra* note 75.

80. *Id.*

81. MIDLAND CREDIT MGMT., *supra* note 75. Language like this appears to be the industry standard. *See id.*; CAVALRY PORTFOLIO SERVS., *supra* note 75. Cavalry Portfolio Services, another of the nation's largest debt purchasers, describes its "commitment to resolving each customer's financial situation" and ability to "work with customers to identify solutions that improve their financial fitness." CAVALRY

about a debt buyer's principal business purpose could focus on mission statements and pledges found on a company's website. However, the more pressing issue for consumers is whether courts will accept these statements as sufficient proof of the company's principal business purpose being the collection of debt.[82] Federal courts have dismissed FDCPA claims in the past when the plaintiff made conclusory allegations about the nature of a debt collector's business.[83] It remains to be seen how a court will characterize statements like those described above in an assertion about a defendant's principal business purpose; it also remains to be seen whether a court will afford deference to those statements.[84]

B. Debt Purchasers Are Not Completely Out of the Woods

The Supreme Court concluded that a debt purchaser collecting its own debts is more akin to a creditor, exempting it from the FDCPA.[85] However, exemption from FDCPA liability does not give debt purchasers "carte blanche" to engage in whatever conduct they choose, nor does it preclude them from facing liability for misconduct stemming from other laws.[86] Laws exist in all fifty states that provide protection for consumers by prohibiting unfair, deceptive, and abusive acts and practices (commonly called UDAP statutes).[87] However, a glaring lack of uniformity exists among these

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PORTFOLIO SERVS., *supra* note 75.

82. *E.g.*, Ramsay v. Sawyer Prop. Mgmt., 948 F. Supp. 2d 525, 530 (D. Md. 2013) (reasoning that the plaintiff failed to show that the defendant regularly collected debts on behalf of another entity because the complaint only contained a conclusion that the defendant collected such debts and did not include sufficient evidence to support the claim).

83. *Id.*

84. *Id.* at 532 (citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)).

85. Henson v. Santander Consumer USA, Inc., 137 S. Ct. 1718, 1721 (2017). A creditor becomes subject to the FDCPA as a debt collector only if, "in the process of collecting [its] own debts," it "uses any name other than [its] own which would indicate that a third person is collecting or attempting to collect such debts." 15 U.S.C. § 1692a(6) (2012).

86. The FDCPA is not the only law that applies to financial misconduct. *See* 12 U.S.C. § 5563(a)(1)(B) (2012). The Dodd-Frank Act prohibits any unfair, deceptive, or abusive act or practice. *Id.* The CFPB may act to enforce this statute, but the statute does not create a private right of action. Beider v. Retrieval Masters Creditors Bureau, Inc., 146 F. Supp. 3d 465, 472 (E.D.N.Y. 2015).

87. CAROLYN L. CARTER, NAT'L CONSUMER L. CTR., CONSUMER PROTECTION IN THE UNITED STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 5 (Feb.

state laws.[88] On one hand, some laws, like California's Rosenthal Act, "mimic[] or incorporate[] by reference the FDCPA's requirements," including available remedies for misconduct.[89] On the other hand, some laws, like Georgia's Industrial Loan Act, only apply to entities that provide loans less than $3,000.[90] State-level consumer protection laws can be effective, but the inconsistencies from state to state, when coupled with the limits placed on federal law by *Henson v. Santander*, have the potential to limit a consumer's available remedies just by virtue of the state he lives in.

1. Vicarious Liability

The requisite for imposing vicarious liability under the FDCPA also hinges on whether an entity is a debt collector or a creditor.[91] For the most part, when a company qualifies as a debt collector under the FDCPA, courts have found the company liable for FDCPA violations committed by its third-party attorneys.[92] However, when the

2009), https://www.nclc.org/images/pdf/car_sales/UDAP_Report_Feb09.pdf [https://perma.cc/Z6XD-F9N2]. Although Carter published this source in 2009, before the passage of The Dodd-Frank Act and the creation of the CFPB, the FDCPA had been in effect for over thirty years. *See* S. REP. NO. 95-382, at 1 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1695.

88. *See* CARTER, *supra* note 87, at 5. As of 2009, the states varied greatly in the scope of UDAP statutes. *See id.* at 7–10. Some states, like Rhode Island, had statutes that provided strong consumer protection for post-sales acts but provided weak protection for credit, insurance, utilities, and real estate, whereas other states, like Nevada, had statutes that provided strong protection in each of these types of transactions. *Id.* at 9.

89. Riggs v. Prober & Raphael, 681 F.3d 1097, 1100 (9th Cir. 2012). The Rosenthal Act provides that all debt collectors must comply with Sections 1692b through 1692j of the FDCPA and states further that debt collectors are subject to the remedies found in Section 1692k of the FDCPA. CAL. CIV. CODE § 1788.17 (West 2017). There are even more inconsistencies, however, as the Rosenthal Act references the incorporated federal sections "as they read" on January 1, 2001. *Id.* A 2006 amendment to the FDCPA states that "[a] communication in the form of a formal pleading in a civil action shall not be treated as an initial communication" for the purposes of triggering certain action upon a debt collector's initial communication with a debtor. 15 U.S.C. § 1692g(d) (2012). This inconsistency is beyond the scope of this Note, but it illustrates another issue with debt collection.

90. O.C.G.A. § 7-3-4 (2015).

91. *See* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 600 (2010) (stating that some courts have held clients vicariously liable for their lawyer's violations of the FDCPA).

92. *E.g.*, Polanco v. NCO Portfolio Mgmt., Inc., 132 F. Supp. 3d 567, 584–85 (S.D.N.Y. 2015). Courts have previously held that principals or corporate parents can be vicariously liable for their agents' or subsidiaries' FDCPA violations when the principals are themselves debt collectors. *Id.* Conversely, attorneys are generally not vicariously liable for the misconduct of their debt collector-clients. Clark v. Capital Credit & Collection Servs., Inc., 460 F.3d 1162, 1173 (9th Cir. 2006).

company is not a debt collector under the FDCPA, some courts have refused to impose vicarious liability for the actions of its attorneys.[93] The United States District Court for the District of Maryland provided the rationale for this theory:

> A debt collector should not be able to hire an attorney to engage in illegal debt collection practices on its behalf as a means of avoiding liability under the FDCPA. On the other hand, if the client is not a debt collector subject to liability under the FDCPA itself, then its decision to hire an attorney to engage in debt collection practices on its behalf would not be predicated on evading FDCPA liability, and imputing liability under those circumstances would not further the interests of the Act.[94]

The disagreements between courts about when a debt collector or creditor should be vicariously liable for its agent's FDCPA violations could gain more traction soon.[95] Not only are circuit courts split on the appropriate test, but certain district courts within some circuits do not agree on how to determine vicarious liability under the FDCPA.[96] Given the restrictions that *Henson v. Santander* imposed on a consumer's ability to seek redress, vicarious liability is just one

93. Wadlington v. Credit Acceptance Corp., 76 F.3d 103, 108 (6th Cir. 1996). *But see* Huy Thanh Vo v. Nelson & Kennard, 931 F. Supp. 2d 1080, 1090 (E.D. Cal. 2013) (citing 15 U.S.C. § 1692a(6)) (holding that, even though subjecting creditors to vicarious liability will extend the FDCPA's coverage to "non-'debt collectors,'" doing so creates necessary "incentives for creditors to monitor their attorneys' compliance with fair debt collection laws" because attorneys acting as the creditor's agent "allow[s] the creditor to say, 'I didn't do it; my attorney did it,'" thus allowing "the creditor to collect under 'a name other than his own which would indicate that a third person is collecting or attempting to collect such debts'").

94. Ramsay v. Sawyer Prop. Mgmt., LLC, 948 F. Supp. 2d 525, 533 (D. Md. 2013).

95. *Compare Polanco*, 132 F. Supp. 3d at 584 (concluding that, in accordance with the findings of other courts in that circuit, "principals or corporate parents may be held vicariously liable for their agents' or subsidiaries' actions that violated the FDCPA where the principals are themselves 'debt collectors'"), *with Wadlington*, 76 F.3d at 108 ("We do not think it would accord with the intent of Congress . . . for a company that is not a debt collector to be held vicariously liable for a collection suit that violates [the FDCPA] only because the filing attorney is a 'debt collector.'").

96. *Polanco*, 132 F. Supp. 3d at 585.

theory of liability that courts may start to use to hold debt buyers accountable for their actions.

2. The Uncertain Future of the CFPB

Growing opposition to the CFPB poses perhaps the greatest threat to consumer protection on a federal level.[97] As the FDCPA is currently written, the FTC has the authority to enforce compliance with the Act, but it does not have rulemaking authority.[98] The CFPB is the only government agency that has the authority to create rules and regulations for debt collectors and the debt collection industry.[99] If the CFPB is eventually ruled unconstitutional, the FTC would be severely limited in its ability to enforce compliance with the FDCPA because it would not have the authority to create new financial protection rules that regulate creditor-debt buyers.[100] In July 2016, before *Henson v. Santander* reached the Supreme Court, the CFPB released an Outline of Proposals Under Consideration and

97. *See* Barber, *supra* note 36. In addition to federal judges cracking down on the CFPB by dismissing its claims and awarding significantly less damages, the agency also lost one of its longest-standing advocates in the United States Justice Department when he withdrew from all of the CFPB enforcement cases assigned to him. C. Ryan Barber, *The CFPB Is Losing a Trial Court Ally in the U.S. Justice Department*, NAT'L L.J. (Aug. 9, 2017), https://www.law.com/sites/almstaff/2017/08/09/the-cfpb-is-losing-a-trial-court-ally-in-the-us-justice-department/ [https://perma.cc/4GF8-XXQ2] .

98. 15 U.S.C. § 1692*l*(a) (2012).

99. *Id.* § 1692*l*(d).

100. *Id.* § 1692*l*(a). The main constitutional challenge to the CFPB is its structure as an independent agency headed by a single director, rather than a multi-member board, who is removable by the President only for good cause. Neil J. Kinkopf, *Alternative Facts & History, and Alarming Implications, in DOJ's CFPB Brief*, TAKE CARE BLOG (Apr. 17, 2017), https://takecareblog.com/blog/alternative-facts-and-history-and-alarming-implications-in-doj-s-cfpb-brief [https://perma.cc/2ZNX-XSN7]. The House of Representatives passed a bill, the CHOICE Act, that would replace the CFPB's single director with a bipartisan five-member commission that would subject the agency to congressional funding and oversight. Megan Leonhardt, *Buried in Trump's Budget: A New Attempt to Kill a Powerful Consumer Watchdog*, TIME (May 23, 2017), http://time.com/money/4790486/trump-budget-2018-cuts-cfpb-consumers/ [https://perma.cc/XYD6-YRHP]. The House of Representatives passed the CHOICE Act by a 233–186 vote. Donna Borak, *House Votes to Kill Dodd-Frank. Now What?*, CNN MONEY (June 8, 2017, 6:11 PM), https://money.cnn.com/2017/06/08/news/economy/house-dodd-frank-repeal/index.html [https://perma.cc/8E6J-5544]. As of December 15, 2017, there was no reported action on the bill since July 13, 2017, when the Senate Committee on Banking, Housing, and Urban Affairs held a hearing on the bill. *See Financial CHOICE Act of 2017: Hearing on H.R. 10 Before the Comm. on Banking, Hous., & Urban Affairs*, 115th Cong. (2017).

Alternatives Considered (Outline).[101] Pursuant to its rulemaking authority, the CFPB released the outline as a response to contradictory court decisions in various jurisdictions that have resulted in different interpretations of the FDCPA.[102] The CFPB realized the significance of the Fourth Circuit's ruling and announced that it would consider using its rulemaking authority to issue rules that "regulate unfair, deceptive, and abusive acts and practices" engaged in by not only debt collectors but also entities that fall outside the FDCPA's reach.[103]

The CFPB's proposals would apply to collection agencies, debt purchasers, debt collection law firms, and loan servicers.[104] However, many, if not all, of the proposals considered would require the debt collector to take more steps in verifying the validity of the information it receives from the debt owner.[105] The CFPB asserts that the proposed changes stem from its belief that debt collectors conduct only a limited review of the information received from the debt owner before starting collection activity.[106] It is entirely possible, however, that some within the CFPB saw internal confusion and chaos, and feared that its ability to reach debt owners might expire.[107]

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101. Thomas et al., *supra* note 21, at 493.

102. CFPB, *supra* note 31, at 2. Despite the limitations to the CFPB's authority created by *Henson v. Santander*, the agency continues to push "for a narrow interpretation of the debt collector definition . . . that enlarges its enforcement power over the debt collection industry." Thomas et al., *supra* note 21, at 493.

103. Thomas et al., *supra* note 21, at 493. The Outline points out that the Dodd-Frank Act, which created the CFPB, covers "creditors who are collecting or attempting to collect on debts that relate to a consumer financial product or service." CFPB, *supra* note 31, at 3.

104. CFPB, *supra* note 31, at 4. Specifically, the proposals would affect "small entities" in the categories listed but would not have an impact on every small entity in every line of business. *Id.*

105. *Id.* at 8. The proposals under consideration would require debt collectors to review the information contained in the debt portfolio to look for indications of uncertainty about the adequacy or accuracy of the information for a particular debtor or for the portfolio information as a whole. *Id.*

106. *Id.*

107. Yuka Hayashi, *White House Criticizes CFPB for Naming Own Temporary Chief*, WALL ST. J. (Nov. 25, 2017, 8:52 PM), https://www.wsj.com/articles/white-house-criticizes-cfpb-for-naming-own-temporary-chief-1511631996 [https://perma.cc/R6T6-P3L9]. The power struggle between the Trump Administration and the CFPB intensified when CFPB Director Richard Cordray resigned from his position without giving a reason for his departure. Yuka Hayashi, *CFPB Head Cordray to Step down, Paving Way for Change at Watchdog*, WALL ST. J. (Nov. 15, 2017, 2:35 PM), https://www.wsj.com/articles/cfpb-director-richard-cordray-to-step-down-1510766617 [https://perma.cc/LRD3-F9JR]. On his way out, Mr. Cordray, relying on language in the Dodd-Frank

The CFPB wanted to do something to ensure that the collection of these debts remain regulated. The CFPB could effectively regulate debt purchasers by proposing additional requirements on the debt collectors that service the purchased debt portfolios.[108] However, the Bureau will have to figure out its own internal power struggle before it can make any progress on rulemaking.

III. Proposal

Consumer protection laws and financial regulations need to evolve to reflect the large role that debt purchasers play in the debt collection industry. Congress should provide clarity about the types of entities that are subject to the requirements of the FDCPA. Without adapted statutes and regulations that provide clarity, the current state of the law requires debt purchasers to play a guessing game that questions how vulnerable they might be to liability. Similarly, millions of debtors have few options for seeking compensation if they feel harmed by the actions of debt purchasers.[109]

Act, named Deputy Director Leandra English as the interim director, but President Donald Trump used the Federal Vacancies Reform Act of 1998 to appoint Mick Mulvaney, the director of the White House Office of Management and Budget, to the interim position. Miles Parks, *Who's in Charge? An Awkward Monday Is Coming for This Federal Agency*, NPR (Nov. 25, 2017, 5:40 PM), https://www.npr.org/sections/thetwo-way/2017/11/25/566477507/whos-in-charge-an-awkward-monday-is-coming-for-consumer-financial-protection-bur?utm_source=dlvr.it&utm_medium=twitter [https://perma.cc/QDV7-E84C]. Ms. English and Mr. Mulvaney jockeyed for position as acting director on the Monday after Thanksgiving 2017 with Mr. Mulvaney arriving at the CFPB office with a bag full of donuts and later meeting with top officials before holding a press conference, and Ms. English sent an e-mail to employees saying that she is the director before meeting with Senate Democrats. Yuka Hayashi & Lalita Clozel, *Trump Asserts Control over Agency*, WALL ST. J., Nov. 28, 2017, at A1, A4.

108. CFPB, *supra* note 31, at 8. The proposal "address[es] attempts to shift responsibility for the accuracy of information about debts in portfolios from debt owners to collectors." *Id.* "As with the fundamental information, collectors need not obtain the representation of accuracy [to] possess a reasonable basis for claims of indebtedness, but they would have to justify an alternative approach." *Id.*

109. *See* S. REP. NO. 95-382, at 2 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1697. Part of Congress's reason for the FDCPA was that nearly forty percent of Americans had no legitimate way to respond to debt collection abuse. *Id.* There was a glaring lack of state law at the time, with thirteen states having no debt collection laws and another eleven states having laws that provided little to no protection. *Id.* at 2–3.

A. Option One: Statutory Clarity

Congressional amendment provides the best solution. In concluding its opinion in *Henson v. Santander*, the Supreme Court called on Congress to fix the problem, hinting that this is the favored solution.[110] There are certainly questions about whether institutions like Santander are more likely to engage in abusive conduct when they profess their principal business purpose to be lending rather than debt purchasing.[111] The Court did not offer any solutions or answers to questions like this one but only provided that the answer is a matter for Congress, not the Supreme Court.[112]

1. Limiting the Debt Collector Definition and Implementing New Requirements

Congress could follow the Supreme Court's lead and completely exclude debt purchasers from the reach of the FDCPA and do nothing to regulate them. However, this solution runs the risk of returning a significant portion of debt collection activity to its pre-FDCPA state: debt collectors calling debtors at dinnertime, using obscene and profane language, and threatening the use of violence while attempting to collect debts.[113]

Congress could provide the most clarity by enacting an entirely new statute that applies only to debt purchasers. This seems to be the type of statute that the Supreme Court contemplates in the conclusion of *Henson v. Santander*.[114] In the process, Congress should amend

110. Henson v. Santander Consumer USA, Inc., 137 S. Ct. 1718, 1726 (2017) ("[T]he proper role of the judiciary . . . [is] to apply, not amend, the work of the People's representatives.").

111. *Id.* at 1725.

112. *Id.*

113. *Id.* at 1720; S. REP. NO. 95-382, at 1. Before Congress enacted the FDCPA, the Consumer Affairs Subcommittee held hearings that revealed that independent debt collectors caused the most severe "suffering and anguish" on the debtors that they contact. S. REP. NO. 95-382, at 1–2. In addition to the forms of abuse mentioned above, Congress reported that debt collectors frequently revealed a consumer's personal information to family members, friends, neighbors, and employers; the debt collectors also obtained personal consumer information via pretending to be a public or government official and imitating legal processes. *Id.* at 2.

114. *Henson*, 137 S. Ct. at 1725 ("We have no difficulty imagining, for example, a statute that applies the Act's demands to anyone collecting any debts, anyone collecting debts originated by another, or to

the FDCPA by eliminating the clause that defines a debt collector as any entity having a principal business purpose of collecting debts.[115] This would remove any confusion and speculation about an entity's principal business purpose, making it irrelevant to the debt collector inquiry. Determining an entity's principal business purpose could be far too difficult.[116] Thus, the FDCPA would only define a debt collector as one who "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."[117] The Supreme Court decided that debt purchasers are not debt collectors, so they should not be subject to a statute that only applies to debt collectors.[118]

This does not mean that debt purchasers would go completely unregulated. A new statute should impose requirements on debt purchasers at the time that they acquire a debt portfolio to ensure that debt purchasers do not engage in discriminatory or abusive behavior. Debt purchasers often obtain very little information about the debts within a portfolio, sometimes receiving only a computerized summary of the creditor's business records.[119] A new statute should make debt purchasers directly liable for not verifying certain data points before they either collect or attempt to collect the debt for themselves or send it to a debt collection attorney to do so.[120] Verifying account media, including monthly statements, charge off dates, and recent payments for credit debts, as well as indicating the presence of any recent complaints, would go a long way to ensure that debt purchasers are not attempting to collect on bad debts. Further, the new statute should be a strict liability statute, whose imposed liability mimics those imposed under the FDCPA.[121]

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some other class of persons still.").

115. 15 U.S.C. § 1692a(6) (2012).

116. *See supra* discussion Part II.A.2.

117. *See supra* discussion Part II.A.2.

118. *Henson*, 137 S. Ct. at 1721–22.

119. ROBERT J. HOBBS ET AL., FAIR DEBT COLLECTION VOL. 1, 24 (9th ed. 2018).

120. The National Consumer Law Center points out that one of the largest problems with debt purchasers is that companies selling debt portfolios do not guarantee the accuracy of the information contained in a portfolio, but debt purchasers maintain that the information received is correct. *Id.*

121. 15 U.S.C. § 1692k (2012); McCall v. Drive Fin. Servs., 440 F. Supp. 2d 388, 390 (E.D. Pa.

2. New Requirements Benefit Debt Purchasers and Collection Attorneys

Imposing liability for failing to meet the required verification points would benefit the debt purchasers. By requiring debt purchasers to verify information about the debts they receive from creditors, debt purchasers will know that they are purchasing valid debts.[122] This would prevent debt purchasers from spending money on a debt portfolio only to find that a significant portion of the portfolio contains bad or expired debts.[123]

The benefits of the new requirements would improve the efficiency of collection attorneys as well, should a debt purchaser choose to use a law firm to attempt to collect its debts.[124] First, by imposing verification requirements on debt purchasers at the time of debt portfolio acquisition, lawyers and law firms will be in a better position to make appropriate decisions about each debt. Verification from the debt purchaser will allow the collection attorneys to pursue only valid debts, which would lower the chance that collection attorneys will file a claim that eventually gets dismissed due to a statute of limitations issue or a previous discharge in bankruptcy.

Second, as claims on bad debts decrease in frequency, the debt collection law firms and their attorneys will become less vulnerable to lawsuits defending FDCPA allegations, resulting in more time and money spent on the lawful collection of debts.[125]

2006) (explaining that the maximum potential liability of debt collectors is $1,000 for an individual plaintiff).

122. A result of the lack of information received by debt purchasers is the prevalence of debts already settled, debts belonging to another person, or debts in the wrong amount. HOBBS ET AL., *supra* note 119, at 25.

123. *Id.* at 13.

124. The law firms that collect debt for debt purchasers are, right now, subject to the FDCPA because they collect debt "owed . . . another." 15 U.S.C. § 1692a(6) (2012). However, Michigan Congressman David Trott proposed a bill, the Practice of Law Technical Clarification Act of 2017, that would amend the FDCPA to exclude "law firms and licensed attorneys who are engaged in activities related to legal proceedings from the definition of a debt collector," thus making law firms exempt from the FDCPA. Practice of Law Technical Clarification Act of 2017, H.R. 1849, 115th Cong. (2017). The proposed legislation would also limit the CFPB's power to reach attorneys acting in this manner. *Id.*

125. *See* Miljkovic v. Shafritz & Dinkin, P.A., 791 F.3d 1291, 1304 (11th Cir. 2015) ("Guided by Supreme Court precedent and the plain language of the FDCPA, we find that the Act applies to the

Finally, the new requirements will continue to further the FDCPA's purpose.[126] Debt collection law firms and lawyers that adhere to the FDCPA should not have to face unfair competition from law firms that intentionally commit prohibited acts or choose to ignore the statute when attempting to collect debts. The verification requirements for debt purchasers will effectively keep frequent violators out of the debt collection market.

B. Option Two: CFPB Regulations for Debt Purchasers

The CFPB can provide a smaller-scale solution by issuing regulations that apply to debt purchasers outside the reach of the FDCPA. Just as the Supreme Court calls on Congress to provide statutory clarity, the Court also seems to call on the CFPB to issue regulations that reach debt purchasers.[127] Pursuant to its rulemaking authority, the CFPB can issue the specific requirements contemplated in Option One.[128] Even though debt purchasers are exempt from the FDCPA, the CFPB would not be outside of its authority by regulating debt purchasers because Dodd-Frank covers creditors who are collecting or attempting to collect on debts that relate to a consumer financial product or service.[129] One of the CFPB's practices in the

litigating activities of lawyers and law firms engaged in consumer debt collection, subject only to the limited exceptions Congress has chosen to include in the statute.").

126. Cuaresma et al., *supra* note 20, at 2.

127. Henson v. Santander Consumer USA, Inc., 137 S. Ct. 1718, 1725–26 (2017). The Court points out that it is "hardly unknown for new business models to emerge in response to regulation and for regulation in turn to address new business models." *Id.* In this statement, the Court almost takes the position of "you caused this problem, now it is your job to fix it." *See id.*

128. 15 U.S.C. § 1692l(d) (2012); *see also supra* Part II.B.2 and accompanying text.

129. CFPB, *supra* note 31, at 3. Under the proposed Financial CHOICE Act, the CFPB would become the Consumer Law Enforcement Agency and have no control over its budget or the ability to pursue unfair, abusive, and deceptive practices of financial services companies, but it is unclear whether the Consumer Law Enforcement Agency would continue to have similar rulemaking authority possessed by the CFPB. Erik Sherman, *GOP Takes Aim at a Consumer Protection Agency and Post-Collapse Bank Regulations*, FORBES.COM (June 8, 2017, 6:31 PM), https://www.forbes.com/sites/eriksherman/2017/06/08/gop-takes-aim-at-a-consumer-protection-agency-and-post-collapse-bank-regulations/#50274c5a4b24 [https://perma.cc/XLF7-QNLL]. The Financial CHOICE Act would accordingly replace any reference to the CFPB within the FDCPA with references to the Consumer Law Enforcement Agency. Financial CHOICE Act of 2017, H.R. 10, 115th Cong. § 711 (2017).

past has been imposing limits on future actions of debt collection law firms as part of settlements reached between the Bureau and the law firm.[130] However, the CFPB should not regulate the practice of law by enjoining law firms from filing collection lawsuits on behalf of debt purchasers without attaching "a chronological listing of the names of all the prior owners of the [d]ebt and the date of each transfer of ownership of the [d]ebt."[131] Instead, the CFPB should regulate the debt purchasers only by requiring each debt purchaser to obtain information reflecting the opening of a debtor's account and any payments made to the account.

C. Option Three: Wait and See

Congress and the CFPB could always wait and see how courts will interpret the practical implications of *Henson v. Santander*. An interpretation is not likely to come from the Supreme Court given the conclusion of its opinion.[132] As noted above, the Court does not seem inclined to answer any further questions about how the principal purpose prong applies to a debt purchaser.[133] Accordingly, interpretation of the FDCPA in the wake of *Henson v. Santander*, as applied to debt purchasers, would have to come from federal district and appellate courts. This "solution" has one crucial practical implication: more confusion in the search for clarity.

If Congress and the CFPB defer to district and appellate courts, the answer will likely yield results that return debt collection to the same position it occupied before *Henson v. Santander* when the debate over mutual exclusivity created a circuit split.[134] *Henson v. Santander* virtually eliminated the inquiry into the defaulted status of a debt for

130. Stipulated Final Judgment & Order at 6, CFPB v. Frederick J. Hanna & Assocs., P.C., 114 F. Supp. 3d 1342 (N.D. Ga. 2016) (No. 1:14-cv-02211-AT).

131. *Id.* at 7. The Consent Order in the *Hanna* case also imposed requirements on individual attorneys acting for the law firm. *Id.* at 7–9.

132. *Henson*, 137 S. Ct. at 1725; *see* discussion *supra* Part I.C.

133. *Henson*, 137 S. Ct. at 1725.

134. *See generally* Cuaresma et al., *supra* note 20, at 2 (explaining that the FDCPA does not address instances when an entity meets the statutory standards for both a creditor and a debt collector, creating a circuit split on how to classify purchasers of "nonperforming or defaulted accounts").

purposes of determining an entity's role in debt collection.[135] Thus, district and appellate courts are no longer bound by their precedents regarding mutual exclusivity and are free to decide however they choose whether a debt purchaser's principal business purpose is debt collection.

The potential that circuits will answer this question in different ways makes it plausible that a court in one circuit would determine a debt purchaser's principal business purpose to be debt collection, whereas a court in a different circuit would determine that the same debt purchaser's principal business purpose is something other than debt collection. This creates an inconsistency where a given debt purchaser, like Midland Credit Management, could be subject to the FDCPA in "Circuit A," but exempt from it in "Circuit B."[136] Consequently, the remedies provided by the FDCPA would be available to a harmed consumer in Circuit A but not available to a harmed consumer in Circuit B.

CONCLUSION

Henson v. Santander seemingly exempted a significant portion of the debt collection industry from the reach of the FDCPA.[137] A debt purchaser is not a debt collector because it owns the debts it is attempting to collect instead of owing it to another entity.[138] However, the Supreme Court decision did not address whether a debt purchaser collecting on debts that it owns qualifies as a debt collector if its principal business purpose is the collection of debt.[139]

The presence of debt purchasers in the debt collection industry has drastically increased in recent years, leaving millions of American

135. *Henson*, 137 S. Ct. at 1721 ("Neither does [the statute's] language 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.").

136. *See* ENCORE CAPITAL GRP., *supra* note 77 and accompanying text.

137. *Henson*, 137 S. Ct. at 1721–22.

138. *Id.* at 1724.

139. 15 U.S.C. § 1692a(6) (2012); *Henson*, 137 S. Ct. at 1725.

debtors subject to demands for payment.[140] With such a large group of entities exempt from the FDCPA, millions of American debtors are without a definite remedy if they feel harmed by a debt purchaser.

First, Congress should amend the FDCPA to eliminate the principal business prong from the section defining a debt collector.[141] Second, Congress should enact a law that imposes consequences on debt purchasers if they fail to verify certain data points about each debt within a portfolio at the time of acquisition. The proposed changes will provide some reassurance to debtors that debt purchasers are contacting them about legitimate debts while simultaneously improving the efficiency of collection by debt purchasers. Many questions exist, but it is quite certain that the Supreme Court does not wish to address this topic in the near future.[142] Without solutions from Congress and the CFPB, the lower courts are sure to resurrect the circuit split in a new form, leaving millions of American consumers seeking a remedy for their harm in legal purgatory.

140. HOBBS ET AL., *supra* note 119, at 13. In the ten years between 1993 and 2004, the amount of consumer debt sold to debt purchasers increased from an estimated $660 million to $57 billion. *Id.* The face value of the purchased debts was $110 billion. *Id.*

141. 15 U.S.C. § 1692a(6).

142. *Henson*, 137 S. Ct. at 1725.