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Arguments In Debt Collection Case To Focus On Law's Reach

By **Evan Weinberger**

Law360, New York (April 17, 2017, 5:23 PM EDT) -- The U.S. Supreme Court on Tuesday will hear oral arguments in a case that will determine what types of debt buyers are covered by federal debt collection statute and could potentially exempt some of the country's largest banks if the court limits that law's reach.

The arguments in Henson v. Santander Consumer USA Inc. are expected to explore whether banks or consumer finance firms that purchase defaulted debt and then collect from consumers on the debt they then own are covered by the consumer protections listed in the Fair Debt Collections Practices Act.

A ruling in favor of those firms, which perform debt collection activities along with a host of other consumer finance-related transactions, could make it more difficult for consumers and state attorneys general to bring lawsuits challenging debt collection practices that consumer advocates call abusive.

"If debt buyers can evade application of the FDCPA, they will face fewer restraints on misconduct," said Jeff Sovern, a professor at St. John's University School of Law.

The central fight in the litigation between consumers Ricky Henson, Ian Matthew Glover, Karen Pacouloute and Paulette House, who filed their proposed class action against Santander in 2012, and the U.S. unit of the Spanish banking giant is whether the FDCPA covers consumer finance companies that purchase debt but do not consider themselves to be debt collection firms.

The 1977 law applies consumer protection standards, including protections against the use of faulty documents and limitations on when and how often debt collectors can contact consumers, to third-party debt collectors acting on behalf of another firm.

The FDCPA was written before the buying and selling of consumer debt, including defaulted consumer debt, was a prevalent industry practice. The practice only began to truly gain steam during the late 1990s and early 2000s, topping out at about $130 billion in defaulted debt being sold in 2005, according to data from the Federal Trade Commission, one of two federal regulators with authority over debt collection.

Because of that, consumer finance firms that purchase debt and then collect on it were not included in the definitions provided by the FDCPA and, according to Santander and its supporters in the financial services industry, should not be touched by the law.

“This case involves an effort to dramatically expand one of those definitions and sweep in a whole lot of financial institutions that don’t look like the independent debt collectors that Congress was concerned about,” said Joseph Palmore, the co-chair of Morrison & Foerster LLP’s appellate and Supreme Court practice, who was one of the authors of a U.S. Chamber of Commerce amicus brief supporting Santander.

Santander was accused in the 2012 putative class action of violating the FDCPA by misrepresenting its authority to collect the debt and the amount of the debt allegedly owed and by communicating directly with consumers it knew were represented by counsel. Santander had purchased the debt at issue — auto loans — from CitiFinancial Auto, which had issued the loans.

Santander moved to dismiss the case on the grounds that it did not qualify as a “debt collector” under the statutory definition because it had purchased the defaulted debt it was seeking to collect, an argument with which the district court agreed. The Fourth Circuit subsequently upheld the dismissal, and the consumers filed their petition for a hearing before the Supreme Court soon after.

Several other circuits, including the Third, Fifth, Sixth, Seventh and D.C. circuits, had previously ruled that debt buyers like Santander were covered by the FDCPA while the Ninth and Eleventh circuits had reached rulings similar to the Fourth Circuit’s, according to the petitioners’ petition for a writ of certiorari.

If the Supreme Court were to side with Santander, and the minority of circuits, big banks that purchase debt would be immune from consumer claims under the FDCPA, according to April Kuehnhoff, an attorney with the National Consumer Law Center.

A ruling for Santander could also limit state attorneys general from being able to go after debt buyers like the bank. A brief from the attorneys general of Oregon, New York, California, Florida, Alaska and about two dozen other states and the District of Columbia said that while state law enforcement authorities can bring their own lawsuits, many states either model their debt collection statutes on the FDCPA or simply use the federal law as the justification for their enforcement actions.

Without that federal floor in place, the threat of a nationwide class action loses its force, the state attorneys general said.

“States sometimes can address that concern by pooling resources to collaborate on multistate enforcement actions. But to do so effectively, states must generally focus only on areas where the same legal standards apply, which can limit their reach,” the state attorneys general said.

Consumer advocates like Kuehnhoff fear that the abusive practices that the FDCPA was meant to stamp out at third-party debt collectors could also be present at firms that purchase and collect on defaulted debt but do not consider themselves to be debt collectors.

“I think that a lot of the same concerns about the debt buying industry would apply to debt buyers like Santander,” she said.

Whether the Supreme Court sees it that way could depend on if it uses the full text of the FDCPA as its guide or congressional intent since backers of the petitioners say there was no way for Congress to anticipate the growth of debt buying.

“It will probably help the consumers if the argument revolves more around the legislative purpose and administrative interpretations,” Sovern said.

Henson is represented by Kevin K. Russell of Goldstein & Russell PC and Cory L. Zajdel of Z Law LLC.

Santander is represented by Matthew A. Fitzgerald and Katherine Mims Crocker of McGuireWoods LLP, and Kannon K. Shanmugam, Allison Jones Rushing, Masha G. Hansford, Barrett J. Anderson and Meng Jia Yang of Williams & Connolly LLP.

The case is Henson et al. v. Santander Consumer USA Inc., case number 16-349, in the U.S. Supreme Court.

--Additional reporting by Allison Grande. Editing by Christine Chun and Jack Karp.

Correction: An earlier version of this story imprecisely stated what types of consumer litigation could be affected by the case. The error has been corrected.
