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*Abstract*

Congress was clear about its purposes and motivations behind enacting the Fair Debt Collection Practices Act of 1977. Namely, it set out to protect consumers from abusive debt collectors and to protect ethical debt collectors from being competitively disadvantaged by those who employ abusive tactics. Although Congress gave much time and effort to crafting the definition of “debt collectors” at the time of the Act’s passage, changes in the debt collection industry over the last four decades have greatly impacted the scope and reach of the FDCPA. Specifically, the advent and rise of debt purchasing have introduced an entirely new form of debt collection that was not in existence at the time of the Act’s passage.

American consumer protection laws have been criticized for their failure to provide adequate protection to consumers from the growing debt collection industry. Yet, the Court’s strict textual interpretation of the FDCPA in *Henson* despite these mammoth evolutions, failed to close an unfair loophole that facilitates abusive debt collection practices by debt buyers. This Comment examines the implications of *Henson* and argues that it eviscerates the main thrust of the FDCPA by subjecting both consumers and debt collectors to the unethical and unfair practices that the Act was designed to prevent from one of the primary offenders. This is precisely the type of “injustice, oppression, [and] absurd consequence” that the Court has cautioned against when applying a textual interpretation of a statute.
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I. INTRODUCTION

While checking out at the grocery store one afternoon, a forty-eight-year-old man from the Bronx was shocked when his debit card was declined.¹ He immediately contacted his bank and discovered that his account had been frozen by a debt buyer who had sued him and obtained an $18,000 default judgment against him.² The only problem: he never owed the money, and the debt buyer “served him at an address where he had never lived” and got his name wrong in the court documents.³

On the other side of the country in Los Angeles, a woman began receiving repeated phone calls from one of the biggest debt purchasing companies in America.⁴ It was chasing her for a $5,000 default judgement on what it claimed was originally a $3,500 loan in her name.⁵ Despite knowing that she had never taken out such a loan, the woman pawned her wedding ring and attempted to pay off the debt in an effort to make the phone calls stop and avoid further legal repercussions.⁶

Stories like these have become common in America through the convergence of several trends.⁷ First, consumer debt has risen to record highs.⁸ For example, revolving debt has been growing at an annual rate of 4.9% and set an all-time record of $1.021 trillion in June 2017.⁹ At the same time, over one-third of adults in America with credit files—around 77 million—have debts that are now in collections.¹⁰ The amount of these debts varies from less

² Id.
³ Id.
⁴ Terry Carter, Debt-Buying Industry and Lax Court Review are Burying Defendants in Defaults, ABA J. (Nov. 2015), http://www.abajournal.com/magazine/article/debt_buying_industry_and_lax_court_review_are_burying_defendants_in_default.
⁵ Id.
⁶ Id.
⁷ See THE LEGAL AID SOC’Y ET AL., supra note 1, at 8–10; infra notes 8–13 and accompanying text.
⁹ Id.
¹⁰ CONSUMER FIN. PROT. BUREAU, FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL
than $25 to more than $125,000, with an average of $5,178.\footnote{Report 2015, at 7 (2015), http://files.consumerfinance.gov/f/201503_cfpb-fair-debt-collection-practices-act.pdf. Consequentially, debt collection has become a $13 billion industry in America. Id.} Finally, the practice of debt buying has experienced a meteoric rise over the past three decades.\footnote{Caroline Ratcliffe et al., Delinquent Debt in America 4 (2014), https://www.urban.org/sites/default/files/publication/228111/413191-delinquent-debt-in-america_0.pdf.} Today, nearly one-third of the revenue in the debt collection industry ($4.22 billion) comes from debt buyers.\footnote{See infra Section II.D.}

The Fair Debt Collection Practice Act (the Act or FDCPA) was enacted by Congress in 1977 to prevent debt collectors from employing abusive, unfair, or deceptive conduct when attempting to collect debts.\footnote{Consumer Fin. Prot. Bureau, supra note 10, at 7–8.} It proscribes a broad range of tactics from calling outside the hours of 8:00 AM through 9:00 PM,\footnote{15 U.S.C. § 1692(a) (2018). For a discussion of what is, or should be regarded as abusive, unfair, or deceptive conduct under the FDCPA, see Judith Fox, Rush to Judgment: How the Fair Debt Collection Practices Act Fails to Protect Consumers in Judicial Debt Collection, 13 Fla. St. U. Bus. Rev. 37 (2014).} to threatening to sue on time-barred debts.\footnote{15 U.S.C. § 1692c(a)(1) (2018).} The FDCPA provides consumers with a cause of action against debt collectors who fail to comply with the Act whereby they can collect actual damages such as lost wages and medical bills resulting from the abusive behavior, as well as legal fees and court costs.\footnote{Time-Barred Debts, U.S. Fed. Trade Comm’n (July 2013), https://www.consumer.ftc.gov/articles/0117-time-barred-debts. “Time-barred” debts are those for which the statute of limitations has run. Id. “This gets tricky for consumers because the statute of limitations varies from state to state and for different kinds of debts. It is also tricky because, under certain circumstances, the clock can be reset, and the time period can be started fresh.” Id.} Despite the passage of the FDCPA and other federal and state regulations governing debt collection, debt collectors still commonly employ abusive practices against consumers.\footnote{See U.S. Fed. Trade Comm’n, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration, at i–ii (2010), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf.} The Federal Trade Commission (FTC) has stated that “neither litigation nor arbitration currently provides adequate protection for consumers. The system for resolving disputes about consumer
debts is broken.”

In an ironic twist, these various statutes are not providing adequate protection to those in the debt collection industry either, such that many view the entire debt marketplace as “lawless.” A gamut of players—including debt buyers, collectors, brokers, street hustlers and criminals—all work together, and against one another, to recoup every penny on every dollar.” Needless to say, the collectors who resort to more abusive collection techniques undercut those who employ less abusive techniques, leaving the ethical collectors disadvantaged. Large portfolios of debt are bought and sold repeatedly, and sometimes even stolen, allowing smaller, more nimble, less ethical collectors to simply collect the debt out from under the true owner. In such circumstances, the rightful debt owners are left with little legal recourse.

Even worse, the Supreme Court’s 2017 decision in Henson v. Santander Consumer USA, Inc. is likely to further decrease this protection. It held that a debt purchasing company did not technically fall within the statutory definition of a “debt collector” under the FDCPA as one who collects debts “owed or due another.” Thus, it found that a consumer class action against debt buyers who engaged in debt collection methods proscribed by the FDCPA was properly dismissed. This case resolved a substantial circuit split on the interpretation of the definition and narrowed the FDCPA’s protection of consumers considerably by providing a strong basis for defending FDCPA claims against companies that buy debts in default.

19. Id. at 1.
21. Id.
24. See id.
26. See infra Sections V.A, V.C.
27. Henson, 137 S. Ct. at 1721–22.
28. Id. at 1726.
30. R. Aaron Chastain & J. Riley Key, Two Key Takeaways from the Defendant’s FDCPA Win in Henson v. Santander, FIN. SERVS. PERSP. (June 15, 2017), https://www.financialservicesperspectives
This Comment examines the implications of *Henson* and argues that it failed to close an unfair loophole that eviscerates the main thrust of the FDCPA by subjecting both consumers and debt collectors to the unethical and unfair practices that the Act was designed to prevent from one of the primary offenders.\(^{31}\) Part II discusses the development of debt collection law in America, tracing the rise of debt purchasing as a new form of debt collection and the resulting circuit split that developed regarding the FDCPA’s applicability in that space.\(^{32}\) Part III reviews the current state of the law as it has developed from the FDCPA’s enactment through the recent Supreme Court decision.\(^{33}\) Part IV analyzes and critiques the rationale underlying the *Henson* decision.\(^{34}\) Part V discusses the impact and significance of *Henson* on American consumers, the larger body of law, and the debt collection industry as a whole.\(^{35}\) Part VI proposes solutions to close the loophole including judicial consideration of issues specifically left unanswered in *Henson*, a congressional amendment to the FDCPA, or more thorough and protective state statutes.\(^{36}\) Finally, Part VII concludes.\(^{37}\)

II. BACKGROUND

A. *Pre-FDCPA*\(^ {38}\)

In 1948, the average American had a mere $1,186 in personal debt, not including real estate debt.\(^ {39}\) This was just “credit cards, auto loans, student

\(^{31}\) See infra Part V.

\(^{32}\) See infra Part II.

\(^{33}\) See infra Part III.

\(^{34}\) See infra Part IV.

\(^{35}\) See infra Part V.

\(^{36}\) See infra Part VI.

\(^{37}\) See infra Part VII.


loans, personal loans, and other non-real estate consumer debt." Even more noteworthy is the fact that individual credit card debt remained virtually non-existent until about 1970.

With the rise of consumer debt in the 1960s and 1970s, an increasing number of cases came before courts by consumers suing debt collectors. The suits detailed abusive practices and collection techniques such as "[c]onsumers subjected to midnight phone calls, letters falsely threatening court action, or other harassments." In its own words, Congress was faced with "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors" that contributed "to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."

B. Passage of the FDCPA

In response to these increasing issues, Congress enacted the FDCPA. The stated purpose of this legislation was to protect two parties: consumers and honorable debt collectors. Among other things, the Act generally seeks to prohibit "abusive" and "deceptive" conduct when attempting to collect debts. Prohibited conduct includes tactics such as incessant calls, using abusive or profane language, contacting debtors at their place of employment, and misrepresenting the debt or the identity of the debt collector. The Act also requires debt collectors to take certain affirmative steps while they are attempting to collect debts such as identify themselves, provide verification of the debt, and pursue legal action, if any, in the proper venue.

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40. Id.
41. Id.
43. Id. at 979.
45. See id. § 1692(a), (e).
46. Id. § 1692(e). "It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors and to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged . . . ." Id. (alteration in original).
47. See id. § 1692(a), (e).
Popular thought and discussion of the FDCPA tends to focus on the protection of consumers.\textsuperscript{50} As early as the 1970s when the Act was passed, debt collectors had already developed a very negative reputation.\textsuperscript{51} Even today, with the Act in place, stories of shocking, unethical behavior by persons attempting to collect debts are pervasive.\textsuperscript{52} Take, for example, the story of a debt collector who called a mother and threatened to dig up her dead daughter and hang her from a tree unless the woman paid the debt she still owed for her daughter’s funeral service.\textsuperscript{53} In another case, a debt collector identified himself as an “officer” to the 10-year-old daughter of a debtor and said: “You better kiss your daddy goodbye. He’s going to be arrested tomorrow or the next day.”\textsuperscript{54} Congress observed that “[w]hile unscrupulous debt collectors comprise only a small segment of the industry, the suffering and anguish which they regularly inflict is substantial.”\textsuperscript{55} The egregious nature of stories like these understandably promulgates the negative stereotypes of debt collectors and reinforces the need for consumer protection.\textsuperscript{56}

Although it receives less popular attention, the FDCPA’s second goal of ensuring “that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged” also serves a critical function.


\textsuperscript{52} See infra notes 53–56 and accompanying text.

\textsuperscript{53} Ben Popken, Debt Collector Threatens to Shoot and Eat Your Dog, CONSUMERIST (Nov. 12, 2010, 1:00 PM), https://consumerist.com/2010/11/12/debt-collector-threatens-to-dig-up-daughters-body-hang-up-from-tree/.


\textsuperscript{55} S. Rep. No. 95-382, at 2 (1977), as reprinted in 1977 U.S.C.C.A.N. 1695, 1696. Congress attributed this abusive conduct primarily to two facts:

Unlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer’s opinion of them. Collection agencies generally operate on a 50-percent commission, and this has too often created the incentive to collect by any means.

\textit{Id.}

\textsuperscript{56} See Yaverbaum, supra note 54. The author observed that this reputation is nevertheless well-deserved, because these stories are just the ones we hear about. \textit{Id.} “[H]ow many people did not complain because they felt ashamed about their debt, scared about the consequences of complaining, or simply thought that nothing would happen if they reported the abuse?” \textit{Id.}
function. The problem being that if several debt collectors are attempting to collect from the same individual, the individual is more likely to pay the abusive collector first to eliminate the threats and abuse, leaving the ethical collector unpaid. Thus, by providing consumers with a cause of action against these unethical debt collectors, it allows ethical debt collectors to remain competitive.

C. Ambiguity Under the FDCPA

In litigation brought under the Act since its passage, courts have consistently sought to strike a balance between these two distinct purposes of the FDCPA. While the dual purposes are not mutually exclusive, proponents of the two often end up on opposing sides of the issue arguing for divergent public policy goals. Critics have argued that, as a result, the Act accomplishes neither well.

One reason for the differences of opinions and battling agendas has been

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57. 15 U.S.C. § 1692(c), see infra notes 58–59 and accompanying text.
58. See Watts, supra note 50.
59. Id.
60. See, e.g., Beattie v. D.M. Collections, Inc., 754 F. Supp. 383, 388, 390–91 (D. Del. 1991) (discussing how to resolve the issue of “whether a collector is required to send the validation notice when it discovers that it has begun collection activities against the wrong individual within five days” while remaining true to both stated purposes of the FDCPA); Hubbard v. Nat’l Bond and Collection Assocs., Inc., 126 B.R. 422, 427–28 (D. Del. 1991) (analyzing whether a debt collector investigating a debtor’s financial background before contacting the debtor is “contrary to the intentions of Congress and the purpose behind § 1692g of the FDCPA”).

Debtor-creditor laws are important to our country’s economic development because they influence almost every facet of our economy, including consumers’ lifestyles, by controlling the supply and demand for credit. Accordingly, lawmakers face the difficult task of striking a delicate balance between consumer protection and creditor recovery to ensure that our economy continues to prosper. Strict laws, such as those that impose imprisonment for debtors, tend to discourage entrepreneurs from experimenting. On the other hand, laws that allow debtors to easily discharge their debt increase risk for creditors and thereby reduce the supply of credit.

Id. (footnotes omitted).

62. See id. at 722–23; see also Mike Voorhees, Definitional Issues for Debt Collectors Under the FDCPA, 58 CONSUMER FIN. L.Q. REP. 83, 83 (2004) (describing the FDCPA as “a misdirected and poorly drafted statute”).

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a lack of clarity as to who is included in the category of “debt collectors.” Early versions of the FDCPA specifically included all debt collectors, including those third parties who were collecting debts owed to others as well as creditors who were collecting their own bills. The sponsors of the bill argued that it should be limited only to the first group. They reasoned that retail stores and other businesses that offer credit and collect on it have an inherent interest in maintaining good reputations, which motivates them to refrain from abusive practices. Debt collection agencies, on the other hand, were responsible for most of the consumer collection abuse because they had no motivation to preserve a future relationship with the debtors. Ultimately, this argument won out. When the FDCPA was enacted, it excluded creditors who were collecting their own bills by defining a debt collector as any person who “regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”

Despite this lengthy discussion at the time the FDCPA was enacted, the question of who qualified as a “debt collector” under the Act has continued to be a frequent point of debate over the past four decades.

Over that span, the average American’s credit card debt has more than quadrupled to approximately $5,000. This increase in consumer debt lead to a corollary increase in debt collection. Today, debt collection is estimated

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63. See Chastain & Key, supra note 30.
64. Woodbury & Ogban, supra note 42.
65. Id.
66. Id.
67. See id.
69. Id.
70. See Chastain & Key, supra note 30. There has been a plethora of other questions related to this definition included within the Act as well. See, e.g., J. R. Zeppin, Are You a Debt Collector Under the Fair Debt Collection Practices Act? You’d Better Be Sure . . ., Va. B. Ass’n J., Spring 1994, at 4, 4–5. The Act also originally excluded from the term debt collector “any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client.” Id. at 4. Congress repealed the exemption in 1986, leading to strong warnings to attorney debt collectors of significant consequences and potential major risks related to non-compliance. Id. at 4–5; see also Lucas et al., supra note 29, at 625–26 (discussing a circuit split regarding the statutory definition of “debt”).
to be a $13 billion industry.\textsuperscript{73} Recent studies have estimated as many as one in three Americans with credit history have debts in collections.\textsuperscript{74} Despite these drastic changes in the consumer debt landscape, the primary federal legislation governing debt collection practices, the FDCPA, has remained largely unchanged since it was enacted in 1977.\textsuperscript{75}

\textbf{D. The Advent and Growth of Debt Buying}

The debate over who qualifies as a “debt collector” under the Act has frequently revolved around the practice of debt buying, which became prevalent in the 1990s.\textsuperscript{76} Debt buying is the practice of purchasing debts from creditors and then attempting to collect the debt as your own.\textsuperscript{77} During the savings and loan crisis of the late 1980s and early 1990s, almost one-third of American savings and loan associations failed and hundreds of banks were closed.\textsuperscript{78} The Federal Deposit Insurance Corporation (FDIC) received the assets of these banks and associations, and the federal government created the Resolution Trust Corporation (RTC) in order to liquidate the nearly $500 billion in unpaid loans.\textsuperscript{79} The purchasers who bought those debts for pennies on the dollar were

\textsuperscript{73} Consumer Fin. Prot. Bureau, supra note 10, at 7. Debt collection companies are companies who specialize in collecting delinquent debts and take many forms including collection companies, law firms, and debt buyers. Charles L. Basch II, Debt Collectors in the US You Need to Know, Nat’l Bankrk. F. (Apr. 21, 2017), http://www.natbankruptcy.com/top-debt-collection/. Some of the key players in the debt collection industry in America are NCO Financial, Portfolio Recovery, LVNV Funding, and Encore Capital Group. Id. Due to the nature of their work, however, these names may be unfamiliar to the average consumer because the companies do not want them to know who, what, or where they are. Id.


\textsuperscript{75} See Hector, supra note 22, at 1604.

\textsuperscript{76} See Fox, supra note 72, at 357–61, for a thorough review of the creation and evolution of the debt buying industry.

\textsuperscript{77} See Fed. Trade Comm’n, The Structure and Practices of the Debt Buying Industry, at i (2013), https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf. The FTC defines it as “the sale of debt by creditors or other debt owners to buyers that then attempt to collect the debt or sell it to other buyers.” Id.


\textsuperscript{79} See id. at 26, 28, 33. They liquidated the assets in order to help the FDIC cover the cost of
able to turn around and collect much more than they had paid, even if not the full amount owed.80 “The success of these sales in producing revenue persuaded other creditors to commence selling their debts.”81

Today, nearly one-third of the revenue in the debt collection space ($4.22 billion) comes from debt buyers.82 Because debt buyers collect on old, bad debts, they generally do not have a relationship with the debtor to preserve.83 Hence, debt purchasing companies have developed a reputation for resorting to even more aggressive collection tactics than ordinary debt collectors.84 These tactics include flooding state courts with lawsuits against debtors in hopes of winning substantial default judgments by sheer numbers85 and preying on “very low-income, elderly, or disabled individuals [who] cannot effectively defend themselves.”86

E. A Circuit Split Develops

Despite the advent and growth of debt buying occurring well after the FDCPA was enacted in 1977, the definition of who qualifies as a “debt collector” has not been updated to clarify its inclusion or exclusion of debt

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80. See Fed. Trade Comm’n, supra note 77, at 12; Peter A. Holland, Defending Junk-Debt-Buyer Lawsuits, 46 Clearinghouse Rev. 12, 13 (2012). Today, these old, delinquent debts that the original creditor has given up hopes of collecting are commonly referred to as “junk debt.” Holland, supra, at 13.


83. See Holland, supra note 80, at 13.

84. See id. at 15–23, for a discussion about defending against junk debt buyer lawsuits.

85. See id. at 12.

They are filing these lawsuits based on two historically accurate assumptions: (1) the vast majority of consumers will not show up or contest the lawsuits, and (2) a majority of judges will award a default judgment in the vast majority of cases, based on documents, often inaccurately described as affidavits, submitted by the plaintiff.


86. The Legal Aid Soc’y et al., supra note 1, at 1 (alteration in original). A recent study conducted on 457,322 lawsuits in the New York City Civil Court over a two-and-a-half-year span found that 69% of the debtors sued by debt buyers were black or Latino and 35% of the cases were “clearly meritless.” Id. at 1–2. Despite this, the “[d]ebt buyers prevailed in more than nine out of ten lawsuits (94.3%), usually by obtaining default judgments” and “[v]irtually all (95%) of people with default judgments . . . resided in low- or moderate-income neighborhoods.” Id. at 1.
buyers.\textsuperscript{87} A circuit split developed regarding this issue.\textsuperscript{88} The Third, Fifth, Sixth, Seventh, and D.C. Circuits held that, debt buyers are debt collectors and must comply with the restraints set forth in the FDCPA or may be held liable by the debtor.\textsuperscript{89} This argument was first presented in \textit{Kimber v. Federal Financial Corp.}.\textsuperscript{90} There, the court found that debt buyers “are simply independent collectors of past due debts and thus clearly fall within the group Congress intended the Act to cover.”\textsuperscript{91} The court reasoned that Congress excluded creditors from the FDCPA because they “generally are restrained by the desire to protect their good will when collecting past due accounts,” but debt collectors “are likely to have no future contact with the consumer and often are unconcerned with the consumer’s opinion of them.”\textsuperscript{92} Since debt buyers do not have an ongoing relationship with the debtor, they have no desire to maintain good will when seeking to recover debts.\textsuperscript{83} The

\begin{itemize}
  \item \textsuperscript{89} See Brief of Amici Curiae National Consumer Law Center et al. in Support of Petitioners at 9–10, Henson v. Santander Consumer USA, Inc., 137 S. Ct. 1718 (2017) (No. 16-349), 2017 WL 818311, at *9–10, (citing Miller v. BAC Home Loans Servicing, L.P., 726 F.3d 717 (5th Cir. 2013); Bridge v. Ocwen Fed. Bank, 681 F.3d 355, 359 (6th Cir. 2012); Fed. Trade Comm’n v. Check Inv’rs, Inc., 502 F.3d 159, 173 (3d Cir. 2007); Schlosser v. Fairbanks Capital Corp., 323 F.3d 534, 536 (7th Cir. 2003); Perry v. Stewart Title Co., 756 F.2d 1197 (5th Cir. 1985)). These Circuits held “that the operative question for the purposes of determining whether an entity is a creditor or ‘debt collector’ is the status of the debt at the time it was acquired.” \textit{Id.} at 9. “Put simply, ‘the Act treats assignees as debt collectors if the debt sought to be collected was in default when acquired by the assignee, and as creditors if it was not.’” \textit{Id.} at 10 (quoting \textit{Schlosser}, 323 F.3d at 536).
  \item \textsuperscript{90} 668 F. Supp. 1480 (M.D. Ala. 1987).
  \item \textsuperscript{91} \textit{Id.} at 1486.
  \item \textsuperscript{92} \textit{Id.} (quoting \textit{S. REP. NO. 95-382}, at 2 (1977), \textit{as reprinted in 1977 U.S.C.C.A.N.} 1695, 1696).
  \item \textsuperscript{93} See \textit{id.} The balance between when you need to pay your creditors and when you receive payment from your debtors has a major effect on the cash flow of your business. Getting the balance
court found, therefore, that debt buyers are properly categorized as “debt collectors” within the meaning of the FDCPA. 94

On the other side, the Fourth, Ninth, and Eleventh Circuits held that debt buyers did not qualify as debt collectors because according to the plain meaning of the statute, they were collecting debts that they themselves own, not debts that were “owed to another.” 95 Rather, they are “creditors” who are immune to suit under the FDCPA and have no obligation to abide by the requirements of the Act. 96

III. CURRENT STATE OF THE LAW

The matter of whether debt buyers are considered “debt collectors” came to a head in Henson v. Santander Consumer USA, Inc. 97 In this case, four Maryland consumers purchased cars and financed them with installment payments through a creditor, CitiFinancial Auto. 98 Each of the four consumers defaulted on their loans. 99 Santander Consumer USA, Inc. (Santander), a debt purchasing corporation, then purchased the delinquent accounts from CitiFinancial Auto 100 and began efforts to collect the outstanding debts. 101 The four consumers brought a class action lawsuit against Santander, accusing it of misrepresenting the amount of debt owed and its authority to collect such debt, both of which are prohibited by the FDCPA. 102

95. See Fed. Trade Comm’n, supra note 77, at 3; Lluberas & Mathless, supra note 88, at 2; Chastain & Key, supra note 30; Buyers of Loans, supra note 88.
96. See Fed. Trade Comm’n, supra note 77, at 3; Lluberas & Mathless, supra note 88, at 2; see also supra notes 64–69 (discussing the legislative history relating to the definition of “Debt Collector” for the FDCPA).
98. See id. at *1.
99. Id.
100. Id. at *2.
101. Id.
Santander filed a motion to dismiss saying that it was not constrained by the restrictions of the FDCPA because it was properly categorized as a creditor, not debt collector.\textsuperscript{103} Both the district court and Fourth Circuit agreed and held that Santander did not trigger the statutory definition of debt collector because it was collecting debts it had purchased and therefore owned at the time of the collection attempts.\textsuperscript{104}

A. \textit{Supreme Court Weighs In}

The Supreme Court granted certiorari to consider the narrow question: “how to classify individuals and entities who regularly purchase debts originated by someone else and then seek to collect those debts for their own account.”\textsuperscript{105}

The Court addressed this issue in three parts.\textsuperscript{106} In Justice Gorsuch’s first published Supreme Court opinion, he wrote for a unanimous court\textsuperscript{107} and said, “we begin, as we must, with a careful examination of the statutory text.”\textsuperscript{108} In true textualist fashion,\textsuperscript{109} he relied heavily on the importance of the statute’s text, parsing the grammatical meaning of the exact words and phrases within the boundaries of the FDCPA itself.\textsuperscript{110}

\begin{itemize}
  \item[Henson v. Santander Consumer USA, Inc., 817 F.3d 131, 134 (4th Cir. 2016).]
  \item[Id. at 140; \textit{Henson}, 2015 WL 433475, at *5.]
  \item[Henson v. Santander Consumer USA, Inc., 137 S. Ct. 1718, 1721 (2017).]
  \item[Id. at 1721–26.]
  \item[Todd E. Pettys, \textit{From Playgrounds to Plavix: Civil Cases in the Supreme Court’s October 2016 Term}, 53 CT. REV. 98, 98 (2017).]
  \item[\textit{Henson}, 137 S. Ct. at 1721.]
  \item[Strict textualism is an approach to statutory interpretation championed by the late Justice Antonin Scalia that “[t]he text is the law.” Jonathan R. Siegel, \textit{The Legacy of Justice Scalia and His Textualist Ideal}, 85 GEO. WASH. L. REV. 857, 858 (2017) (quoting Antonin Scalia, \textit{Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in A Matter of Interpretation: Federal Courts and the Law} 3, 22 (Amy Gutmann ed., 1997)). This means that the court’s job is to read the statutory text and do exactly what it says even if what it says contradicts the statute’s known purpose and legislative history. \textit{See id.}]
\end{itemize}
1. **Henson** First Argument: “Owed”

The opinion begins by honing in on the interpretation of a single word in the statute: “owed.”\(^\text{111}\) The FDCPA specifies that collectors are those who at least attempt to collect debts “owed,” which “is the *past* participle of the verb ‘to owe.’”\(^\text{112}\) The petitioners argued that Congress’s use of the past tense verb suggests that it applies to any debts that were previously owed to another.\(^\text{113}\) They contended, in other words, that this was meant only to exclude loan originators and should apply to anyone attempting to collect any debt that either currently is or previously was owed to another.\(^\text{114}\) The Court found that the grammatical foundation of this argument was erroneous and the more straightforward reading of the statute would include only debts currently owed to another.\(^\text{115}\)

2. **Henson** Second Argument: “Owed or Due Another”

Widening their view, the Court next considered the entire statutory phrase, which specifies collectors as those who at least attempt to collect debts “owed or due another.”\(^\text{116}\) The petitioners’ argument regarding this phrase was that the inclusion of both “owed” and “due” meant that it included two categories of debts: those that were *previously owed* to another and those that are *currently due* to another.\(^\text{117}\) Gorsuch wrote that “such a surreptitious subphrasal shift in time” would be “a bit much” and would be an unnatural

\(^{111}\) *Henson*, 137 S. Ct. at 1721.

\(^{112}\) *Id.* at 1721–22.

\(^{113}\) *See id.* at 1722. Petitioners in this case were the consumers who originally purchased cars on credit from Citifinancial Auto and whose delinquent debts were then purchased by Santander. *Id.* at 1720–21.

\(^{114}\) *Id.* at 1722. They argue that “if Congress wanted to exempt all present debt owners, . . . it would have used the *present* participle ‘owing.’” *Id.*

\(^{115}\) *Id.* It reasoned that past participles “are routinely used as adjectives to describe the present state of a thing,” for example “*burnt* toast is inedible” and “*fallen* branch blocks the path.” *Id.* It also cited BRYAN A. GARNER, GARNER’S MODERN ENGLISH USAGE 666 (4th ed. 2016), as saying “*owing . . . is an old and established usage . . . the more logical course is simply to write owed.*” *Henson*, 137 S. Ct. at 1722.

\(^{116}\) *Henson*, 137 S. Ct. at 1722.

\(^{117}\) *See id.* Petitioners noted in their brief, however, that this “‘may not be the most natural interpretation of the phrase.’” *Id.* (quoting Brief of Petitioners at 26–27, *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017) (No. 16-349), 2017 WL 695299, at *26–27).
interpretation. This was because it would be unreasonable to believe that Congress put two words closely together in the statutory phrase, intended them to speak to two completely different periods of time, and left no clue that this was their intent.

Additionally, he observed that contextual clues throughout the Act, and even this very section, demonstrate that Congress was aware of the nuanced differences between loan originators and collectors. He also discussed three different areas in the statute where Congress drew distinctions between the two, while failing to do so here. Thus, according to the plain meaning of this phrase and the context provided in the Act itself, the debt buyers qualified as creditors because they were collecting debts that they own.

3. Henson Third Argument: Congressional Intent

Finally, the Court considered the petitioners’ contention that “[f]aced with so many obstacles in the text and structure of the Act,” the Court should consider public policy arguments. Pointing to legislative intent at the time the FDCPA was passed, the petitioners asserted that public policy dictated that the statute should be interpreted in a manner to protect consumers from

118. Id.
119. Id.

To say that Congress did not use the most precise language, however, does not necessarily aid the court in determining what the less precise language means in its statutory context. Some statutes may not be well drafted, but others represent conscious choices, born of political compromise, that may or may not signal that a different result is intended or that Congress is leaving final interpretation to agencies, courts, or future legislatures. It may be inappropriate question begging to assume, therefore, that “[f] Congress had intended such an irrational result, surely it would have expressed it in straightforward English.”

Id. (footnotes omitted) (quoting FMC Corp. v. Holliday, 498 U.S. 52, 66 (1990)).

121. Henson, 137 S. Ct. at 1723. In various provisions of the statute Congress expressly differentiated between “a person ‘who offers’ credit (the originator) and a person ‘to whom a debt is owed,’” (the present debt owner),” between “a debt ‘originated by’ the collector and a debt ‘owed or due’ another,” and between “the ‘original’ and ‘current’ creditor.” Id. (citing 15 U.S.C. §§ 1692a(4), 1692a(6)(F)(ii), 1692g(a)(5) (2018)).

122. See id.
123. Id. at 1724.
unscrupulous parties attempting to collect any debt.124 By excluding debt buyers from the definition of debt collectors, this decreased consumer protection by not requiring debt buyers to comply with the FDCPA and removing consumers’ cause of action against abusive parties.125 They relied on the reasoning of the Third, Fifth, Sixth, Seventh, and D.C. Circuits arguing that the potential for abuse was magnified by the fact that the debt buyers have no inherent motivation to protect good will with the consumers like traditional creditors do.126 The Court dismissed this line of reasoning as “speculative” due to the fact that debt buyers were not contemplated by the framers of the act.127 Thus, it declined to speculate, saying that the Court’s role is limited to interpreting and applying the statute as written.128

B. Debt Buyers are Not Debt Collectors

Gorsuch summarized the analysis by writing that the “proper role of the judiciary . . . [is] to apply, not amend, the work of the People’s representatives.”129 As such, the Court unanimously held that according to the plain meaning of the definition in the statute, debt buyers may collect debts which they have purchased without triggering the statutory definition in dispute.130 In doing so it affirmed the judgment of the Fourth Circuit and settled the longstanding circuit split.131 It clarified that debt buyers are not collecting debts owed to another, and therefore do not fall under the definition of debt collectors under the FDCPA.132

124. See id. at 1724–25.
125. See id.
126. See id.; supra notes 89–94 and accompanying text.
127. Henson, 137 S. Ct. at 1725.
128. Id.
129. Id. at 1726 (alteration in original).
130. See id. at 1721–22.
131. See id. at 1721; supra Section II.E. “[W]e find it hard to disagree with the Fourth Circuit’s interpretive handiwork.” Henson, 137 S. Ct. at 1721.
132. See Henson, 137 S. Ct. at 1721–22.
IV. ANALYSIS

A. The Dangers of Textualism in Evolving Arenas

The Henson v. Santander Consumer USA, Inc. decision was made based on very nuanced grammatical rules, which themselves garner substantial debate.\textsuperscript{135} This hardly seems like the foundation for sweeping decisions with broad implications such as exempting the collectors of roughly one-third of all debts in collection from the requirements and implications of the FDCPA.\textsuperscript{134} According to the Supreme Court, “It has often been said that punctuation is not decisive of the construction of a statute. . . . Upon like principle we should not apply the rules of syntax to defeat the evident legislative intent.”\textsuperscript{135} This is particularly true, where, as here, the particular grammatical nuance would not have made much of an impact at the time the language was chosen.\textsuperscript{136} Recall that debt purchasing did not become prevalent until over a decade after the passage of the FDCPA.\textsuperscript{137} Moreover, the FDCPA was not written to anticipate future problems as much as remedy existing maladies.\textsuperscript{138} “While [the] FDCPA initially provided necessary relief to debtors and strived to balance the inequalities between creditors and debtors, it quickly became static legislation. . . . Congress created a law intended only to remedy previous abusive behavior and not to prospectively adapt to a changing industry.”\textsuperscript{139} Applying a textual approach to legislation written only to correct specific problems that existed at the time of enactment and not to adapt to changing trends invites inconsistent and nonsensical results, as demonstrated here, where the chief abusers are exempt from the law enacted

\begin{thebibliography}{9}

\bibitem{133} See id. at 1721–23.

\bibitem{134} See United States v. X-Citement Video, Inc., 513 U.S. 64, 68–69 (1994) (opting not to adopt “[t]he most natural grammatical reading” of a statute in order to avoid an interpretation that would raise issues of constitutionality); Hammock v. Loan & Trust Co., 105 U.S. 77, 84–85 (1881) (relying on an old English law that “[p]unctuation is no part of the statute,” and stating that “[c]ourts will . . . disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute” to support disregarding a comma (quoting Hamilton v. Steamboat R. B. Hamilton, 16 Ohio St. 428, 432 (Ohio 1866)).

\bibitem{135} Costanzo v. Tillinghast, 287 U.S. 341, 344 (1932).


\bibitem{137} See supra Section II.D.

\bibitem{138} See Goldberg, supra note 61, at 718.

\bibitem{139} Id. (alteration in original).

\end{thebibliography}
to protect against them.\textsuperscript{140}

Furthermore, the Court’s reliance on Garner’s Modern English Usage is
dangerous.\textsuperscript{141} Judge Learned Hand, widely regarded as the greatest judge who
was never appointed to the Supreme Court, “cautioned against the mechanical
examination of words in isolation.”\textsuperscript{142} “[I]t is one of the surest indexes of a
mature and developed jurisprudence not to make a fortress out of the diction-
ary.”\textsuperscript{143} This is because the availability of reference materials and dictionaries
with varying options is so broad, that it is easy for judges to find a definition
or support that highlights a particular point they want to make.\textsuperscript{144} While courts
do use dictionaries—and with increasing frequency in matters of statutory inter-
pretation\textsuperscript{145}—the Court’s reliance on a resource published in 2016 is not
dispositive regarding the common meaning of the word when Congress chose
it in 1977.\textsuperscript{146}

Finally, even on a purely grammatical level, the argument that debts
“owed or due another” includes both debts previously owed and debts cur-
cently due to another would seem more logical.\textsuperscript{147} The Supreme Court re-
jected this as an unnatural “surreptitious subphrasal shift in time.”\textsuperscript{148} The alter-
native interpretation, however, which the Court ultimately adopted,
translates this phrase redundantly as: debts that are currently owed to another

\begin{footnotesize}
\begin{enumerate}
\item See id. at 723–24.
\item Perhaps FDCPA’s biggest flaw is that it is static legislation. Its sole purpose is to correct
the harassment problems that haunted the country’s debt-collection industry before its en-
actment. The most successful legislative regimes are open-ended and worded to anticipate
future behavior. By contrast, FDCPA is written to correct only specific problems and it
fails to adapt to changing trends. While FDCPA encompasses a broad range of explicit
abuses, it fails to address many categories of subtler new forms of debtor mistreatment
\ldots.
\item Id. (footnote omitted).
\item See supra note 115 and accompanying text; infra notes 142–46 and accompanying text.
\item Adam Liptak, Justices Turning More Frequently to Dictionary, and Not Just for Big Words,
\item Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945).
\item See Liptak, supra note 142.
\item Id.
\item See, e.g., United States v. Lopez, 514 U.S. 549, 585–86 (1995) (Thomas, J., concurring) (re-
ferencing dictionaries from 1773, 1789, and 1796 to determine what the framers of the Constitution
meant by “commerce”). “At the time the original Constitution was ratified, ‘commerce’ consisted of
selling, buying, and bartering, as well as transporting for these purposes.” Id. at 585.
\item See infra notes 148–52 and accompanying text.
\item Henson v. Santander Consumer USA, Inc., 137 S. Ct. 1718, 1722 (2017).
\end{enumerate}
\end{footnotesize}
or currently due to another. Thus this redundancy is even more senseless and unnatural than a grammatical shift in time. The Court has expressly stated as much in the past saying, “[w]e assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.” Since both elements—“owed” and “due”—were purposefully included in the phrase, it is more logical and proper to assume that they were intending to broaden the scope of the timeframe for when or to whom the debts were due.

B. Support for Looking to Legislative Intent

This strict grammatical interpretation leads to the most substantial problem with the Henson decision. The Court stated simply that the “proper role of the judiciary . . . [is] to apply, not amend, the work of the People’s representatives.” In fact, Gorsuch went so far as to say that “it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone’s account, it never faced.”

This is an oversimplification of a well-established principle. In Cammetti v. United States, the Supreme Court held that “the meaning of a statute must, in the first instance, be sought in the language in which the act is framed.” The Court elaborated that “if that is plain, . . . the sole function of

149. Id.
151. Bailey, 516 U.S. at 146; see also Astonia Fed. Sav. & Loan Ass’n v. Solimeno, 501 U.S. 104, 112 (1991) (warning that statutes should be construed, “where possible, so as to avoid rendering superfluous any parts thereof”).
152. See Sprietsma, 537 U.S. at 63; Bailey, 516 U.S. at 146; Astoria, 501 U.S. at 112.
153. See infra notes 154–66 and accompanying text.
154. Henson, 137 S. Ct. at 1726 (alteration in original).
155. Id. at 1725.
156. See infra text accompanying notes 157–65.
157. 242 U.S. 470, 485 (1917); see also Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) (explaining that courts should consider “the language itself, the specific context in which that language is used, and the broader context of the statute as a whole”); King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (“[W]hen deciding whether the language is plain, we must read the words ‘in their context and
the courts is to enforce it according to its terms.”158 The serious debate regarding the meaning of the statute, which spawned the circuit split and leaves lingering questions, discussed above,159 demonstrates that that language of the FDCPA is anything but plain.160 Moreover, the outside sources the Court relied on to adopt one interpretation of "owed" themselves imply that the word itself is ambiguous.161

In such cases, there is substantial support for the Court interpreting and ruling in favor of furthering legislative intent where the language is not plain.162 This often takes the form of a multi-step process that involves considering both the text of the statute as well as the legislative intent in turn.163 The method is: “1. Read the text; if it is not clear, then proceed to step two. 2. Consider the overall structure and purpose of the statute as written and, where relevant, other related statutes.”164 Such a process is appropriate where “the pathologies of politics and the indeterminacy of language are important, but not so pervasive that they require abandonment of the interpretive project.”165

There is also longstanding precedent for the Court’s adoption of this approach to statutory interpretation.166 For example, in 1868 the Court held: “General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be

with a view to their place in the overall statutory scheme.”” (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

158. Caminetti, 242 U.S. at 485 (emphasis added).
159. See supra Section II.E.
161. See supra notes 115, 141–46 and accompanying text.
162. See infra notes 166–71 and accompanying text.
164. Id. at 5.
165. Id. at 4.
166. Siegel, supra note 109, at 901–02; see, e.g., Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) (holding that (1) “the authoritative statement is the statutory text” and (2) “Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms.”).
presumed that the legislature intended exceptions to its language, which would avoid results of this character."  

Critically, it concluded that “[t]he reason of the law in such cases should prevail over its letter.”

Courts adopt this approach particularly often in evolving areas. For example, in King v. Burwell, a case regarding statutory interpretation of the Affordable Care Act, Chief Justice Roberts wrote: “Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter.” Since the section in question could “fairly be read” in a manner consistent with Congress’s plan, the Court adopted that interpretation.

As discussed above, the market for defaulted debts represents a major change in the debt collection market since the passage of the FDCPA. The petitioners in Henson argued that since the definition for “debt collector” could also be read consistent with Congress’s stated plan, it called for interpretation that provides consistent application of principles set forth in the FDCPA. Nevertheless, a unanimous Supreme Court rejected this argument. It held that the meaning of the statute is plain and thus excludes debt buyers from its purview.

An examination of legislative intent would have revealed Congress’s

167. United States v. Kirby, 74 U.S. (7 Wall.) 482, 486–87 (1868). In that case, a state police officer arrested a mail carrier for allegedly committing murder and was himself charged with violating a statute that made it a crime “if any person shall knowingly and wilfully [sic] obstruct or retard the passage of the mail.” Id. at 483 (emphasis added). The statutory text contained no exceptions for such a case. See id.
168. Id. at 487.
169. See McNollgast, supra note 163, at 4–5; see also Epstein, supra note 136, at 719 (concluding that in many cases “[t]he basic task of constitutional interpretation, then, must of necessity go far beyond textualism in order, ironically, to be faithful to the text”).
171. King, 135 S. Ct. at 2496.
172. See supra Section II.D.
173. Henson v. Santander Consumer USA, Inc., 137 S. Ct. 1718, 1724–25 (2017); see also Suesz v. Med-1 Sols., L.L.C., 757 F.3d 636, 646–49 (7th Cir. 2014) (en banc) (finding that because ambiguity exists, purposive construction of the FDCPA is appropriate).
175. See id. at 1725–26.
stated purpose of the FDCPA was “to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.”  

It was also intended to “ensure that ‘every individual, whether or not he owes a debt, has the right to be treated in a reasonable and civil manner’” and “to prevent the loss of jobs and the debtors’ embarrassment which can arise during the collection process.” Some scholars have gone so far as to argue that the vagueness was an intentional tactic to achieve these objectives and combat future creative methods debt collectors attempt to employ. “The legislature intentionally wrote these provisions in extremely broad language to avoid any misunderstanding and to encompass any unconventional collection methods that may cause distress to the debtor.”

V. SIGNIFICANCE

The impact of this decision has yet to be fully realized; however, it promises to have wide-ranging impacts on a variety of realms, including American consumers, the larger body of law, and the debt collection industry.

A. Impact on American Consumers

The first, and most obvious impact of the Henson decision is decreased protection of consumers from abusive debt buyers. At first blush, Henson seems to leave consumers wide open to abuse by debt buyers seeking to

179. See Goldberg, supra note 61, at 722.
180. Id.
181. See infra Sections V.A–V.C.
collect purchased debts. Consumers who previously sued under the prevalent theory that debt purchasers were debt collectors can no longer do so. This will have an especially significant impact on consumers because many consumer attorneys view debt purchasers as having the “deep pockets,” increasing the likelihood of a favorable outcome for the consumer.

While this is likely true, some argue that this impact is more theoretical than it will actually play out to be because debt buyers are still subjected to various state laws and private organization standards. For example, according to Receivables Management Association International, “over 80 percent of consumer receivables in the United States that have been sold on the secondary market are owned by companies who are RMCP certified.” This certification program requires its members to abide by standards that exceed the requirements of the FDCPA, thus it asserts that the Henson decision does not practically lessen consumer protections. Nevertheless, it is almost universally recognized that “[w]ithout question, the Supreme Court’s ruling is seen as a boon to the debt purchasing industry.”

In addition to lessening consumers’ protection, Henson also places an additional burden on all consumers wanting to bring a claim under the FDCPA. “Now, consumers will need to prove who contacted them in a questionable manner and who owned the loan at the time of the contact. The former is much easier to determine than the latter.” Placing this heavy

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183. See ACA Int’l, supra note 182.
184. Rosenkoff, supra note 182.
185. Id. “Due to the significant values being traded in this market place, buyers of such debts have been required to have deep pockets in order to participate in the market. This has been the primary barrier to market entry and a major factor in this market place originally being structured as an oligopoly with a small number of debt purchasing companies making profits in a highly concentrated market.” Commercial Debt Sale: Commercial Debt Purchase, CREDIT AGENCY (2003), http://www.thecreditagency.co.uk/debt-sale/commercial-debt-sale.html.
188. Id.
189. Rosenkoff, supra note 182.
190. Buyers of Loans, supra note 88.
191. Id.
burden on consumers, while at the same time reducing its potential payoff by reducing possible avenues of recovery, will likely discourage consumers from bringing the claim at all.192 This decrease will only embolden aggressive debt buyers to engage in questionable collection tactics leading to further abuse of consumers.193

B. Impact on Larger Body of Law

First, this decision promises to burden the already overburdened state courts with suits against unscrupulous debt buyers.194 In addition to the federal FDCPA, many states have also passed statutes providing consumers with a cause of action against abusive debt collectors.195 For example, in the same year the FDCPA was enacted federally, the California legislature enacted the Rosenthal Fair Debt Collection Practices Act.196 This prohibits certain abusive conduct by debt collectors such as threats of physical force or violence, use of obscene or profane language, and other practices while attempting to collect debts.197 Although this act bears many resemblances to the FDCPA, it defines the term “debt collector” in a manner that clearly includes debt buyers.198 “The term ‘debt collector’ means any person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection.”199 Other states have passed similar statutes such as the Florida Consumer Collection Practices Act200 and the Colorado Fair Debt Collection Practices Act.201

192. Id.
193. See id.
199. Id.
Prior to the *Henson* decision, debt buyers in these jurisdictions were governed by both the state laws as well as the FDCPA. This gave consumers a cause of action to sue violators in their choice of either state court or federal court. Now that debt buyers are excluded from the FDCPA, consumers in these jurisdictions are limited to suing errant debt buyers in state courts. This will likely increase the burden on state courts substantially, which are already overburdened with abusive debt collection actions.

In addition to over-burdening the state courts, this change will bring additional burdens to many state legislatures. Many states have shaped their debt collection laws in reliance on the FDCPA’s protections. For example, violations of the FDCPA are *per se* violations of the [Massachusetts Debt Collection Practices Act]. If Debt buyers are exempted as creditors under the federal FDCPA, they will also escape liability under state law. Thus, states with provisions like these must either amend their statutes to define debt collectors and include debt buyers, or let debt buyers’ debt collection practices go unrestricted.

C. **Impact on the Debt Collection Industry**

Some critics have argued that the *Henson* holding is actually quite narrow, because the Court did not rule conclusively that debt buyers are not subject to the FDCPA, but that they do not meet one of the two statutory definitions of “debt collector.” “Nothing in *Henson* disturbs the [FDCPA’s]

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203. Consumer Information: Debt Collection FAQs, supra note 50.

204. See Nazzaro, supra note 202.


206. See infra notes 207–09 and accompanying text.


208. Id. at 23 (alteration in original) (emphasis added).

209. See id.

inclusion of businesses whose ‘principal purpose’ is the collection . . . of ‘any’ consumer debts, in the definition of ‘debt collector.’” Thus, the definition and application of the “principal purpose” prong is likely to become the new battleground for FDCPA litigation over whether a debt holder is a “debt collector.” Since Henson, this has already proven to be true with varying degrees of success and varying results.

Irrespective of how this debate turns out, Henson is still poised to make a dramatic impact on the debt collection industry as it demonstrates a clear loophole for debt buyers to leverage. They need only affiliate with larger companies that are not engaged in debt collection or divide the divisions of their company into separate entities so they can argue that debt collection is not the “principal purpose” of their business. Doing so will allow debt buyers to escape any liability under FDCPA as they will not satisfy either definition. As such, they will be permitted to engage in abusive collection tactics subject

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.” Id. (quoting 15 U.S.C. § 1692a(6) (2018)).

211. Id. (alteration in original) (emphasis added).


214. Sovern, supra note 186.


   Up to this point, the overwhelming number of courts appeared to focus solely on the default status. Litigants routinely argued the default status rather than the principal purpose prong of the definition. Naturally, it is much easier (and cheaper) for both litigants and courts to prove whether a debt was in default than what the principal purpose of an entity is. This seemingly shifted the focus away from the principal business purpose, and resulted in a substantial number of decisions addressing the defaulted status.

Rosenkoff, supra note 182.

216. See Sovern, supra note 215.
only to the restraints presented by other federal or state statutes.\textsuperscript{217}

A similar loophole existed when the FDCPA was first enacted because it did not include lawyers in its definition.\textsuperscript{218} "Collection lawyers advertised that they could do things non-lawyers couldn’t in debt collection, at least in part because of their immunity from the FDCPA, and so got a lot of business that might otherwise have gone to other collectors."\textsuperscript{219} In 1986, Congress changed the statute to provide that it applied to lawyers because debt collectors were arguing "that there were more lawyers advertising their debt collection services than non-lawyers."\textsuperscript{220}

If this exception follows the same pattern, we will see a substantial increase in debt buyers buying and collecting defaulted loans outside the governance of the FDCPA.\textsuperscript{221} This has the potential to be harmful to both consumers as well as the traditional debt collection industry as a whole.\textsuperscript{222}

There are a number of jurisdictions that dismiss the principal purpose argument altogether, reasoning that the terms "creditor" and "debt collector" are mutually exclusive.\textsuperscript{223} The FDCPA defines a "creditor" as:

any person who offers or extends credit creating a debt or to whom a debt is owed, but such 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.\textsuperscript{224}

Thus, in these jurisdictions, Henson is believed to conclusively eliminate debt

\begin{footnotesize}
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217. See id.
218. Id. "The original Act exempted attorneys from the statutory definition of ‘debt collector’ because their debt collection activities were considered incidental to the practice of law. Local bar associations thereby inherited the duty to protect consumers from attorneys engaged in abusive collection practices." David Hilton, As If We Had Enough to Worry About . . . Attorneys and the Federal Fair Debt Collection Practices Act: Supreme Court Rules on Former Attorney Exemption, 18 Campbell L. Rev. 165, 167 (1996).
219. Sovern, supra note 215.
220. Id.; see Hilton, supra note 218, at 167. The exemption previously excluded "any attorney-at-law collecting debts on behalf of, or in the name of a client" from the statutory definition of "debt collector." Hilton, supra note 218, at 167.
221. See Sovern, supra note 215.
222. See id.; supra Section V.A.
223. Rosenkoff, supra note 182; see also Schlosser v. Fairbanks Capital Corp., 323 F.3d 534, 536 (7th Cir. 2003) (holding that "[f]or purposes of applying the Act to a particular debt, these two categories—debt collectors and creditors—are mutually exclusive").
\end{footnote}
\end{footnotesize}
buyers from the constraints of the FDCPA once and for all.\textsuperscript{225}

Regardless of whether debt buyers are still subject to the strictures of the
FDCPA (or state statutes that rely on the FDCPA’s definition), there are still
some restrictions on debt buyers’ collection tactics.\textsuperscript{226} As demonstrated
above, many states have laws that are more inclusive than the FDCPA and
specifically include debt buyers within their definition of debt collectors.\textsuperscript{227}
Thus, debt buyers in these states will still be subject to suit in state court for
actions that violate that state’s statute.\textsuperscript{228}

Additionally, under the Dodd-Frank Wall Street Reform and Consumer
Protection Act of 2010 (Dodd-Frank), debt collectors are “legally required to
refrain from committing unfair, deceptive, or abusive acts or practices . . . in
violation of the Act.”\textsuperscript{229} In 2016, the Consumer Financial Protection Bureau
(CFPB) published new regulations it was considering, and therein specifically
clarified that “debt collectors” includes debt buyers under Dodd-Frank.\textsuperscript{230}
This pre-\textit{Henson} publication, however, was premised on the understanding
that debt buyers were also included in the FDCPA.\textsuperscript{231} Additionally, unless or
until these regulations are passed, this guidance from the CFPB is just that—
guidance.\textsuperscript{232} It would be easily revocable by whatever new director is ap-
pointed to replace the current acting director, Mick Mulvaney, and “is likely
that a Trump-named director would be more friendly to the industry.”\textsuperscript{233}

\textsuperscript{225} Rosenkoff, \textit{supra} note 182. “Even in those jurisdictions where it remains a possibility or an
open question, the principal business purpose argument may not get much traction.” \textit{Id}.\textsuperscript{226} See Nazzaro, \textit{supra} note 202.
\textsuperscript{227} See \textit{supra} notes 196–01 and accompanying text.
\textsuperscript{228} See \textit{supra} notes 196–05 and accompanying text.
Dodd-Frank in the wake of the 2008 financial crisis “to address various risks identified in the U.S.
financial system.” Luberas & Mathless, \textit{supra} note 88, at 3. “One of the key features of Dodd-Frank
was the creation of the CFPB, which consolidated most federal consumer financial protection authority
into one regulator, thereby increasing the number, and effectiveness, of regulations.” \textit{Id}.
\textsuperscript{230} Consumer Fin. Prot. Bureau, Small Business Review Panel for Debt Collector and
Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives
\textsuperscript{231} \textit{Id}. at 1.\textsuperscript{232} See Sovern, \textit{supra} note 215.
\textsuperscript{233} \textit{Id}. It is unclear now how these proposed regulations will proceed or whether the \textit{Henson}
decision will have any effect on whether debt buyers are subject to Dodd-Frank. \textit{See CFPB Announces
Despite these remaining restrictions, Henson is viewed overall as a positive decision for those in the debt collection industry, particularly those who use abusive practices.234 “For parties wanting to prevent and discourage FDCPA claims, this decision means that by purchasing the loan, whether in default or not, the purchaser will have the shield of Henson to stand behind and reduce, or possibly eliminate, any FDCPA claims.”235

D. Overall Impact

In sum, as it stands today, debt buyers do not qualify as “debt collectors” because they are not collecting debts owed to another.236 On its face, this leaves the collectors of one-third of consumer debt outside of the purview of the FDCPA—the legislation created to control this space at the federal level.237

Left unaddressed, the Henson decision leaves consumers with minimal remedies consisting of claims for civil liability.238 They may still be able to sue under Dodd-Frank; however, with the future of this definition and the Act’s provision in flux, it is unclear as to how viable this option will remain.239 Consumers in certain states that do not rely on the FDCPA to define “debt collectors” may sue in state courts;240 however, this may have limited effectiveness across state lines.241 Finally, consumers can still sue abusive debt


234. See ACA Int’l, supra note 182.
235. Buyers of Loans, supra note 88 (emphasis added).
237. See CONSUMER FIN. PROT. BUREAU, supra note 10, at 7–8.
238. See ACA Int’l, supra note 182; Rosenkoff, supra note 182. Even prior to Henson, many argued that FDCPA was failing to adequately protects consumers as intended. See Goldberg, supra note 61, at 723. Most consumers are unaware of their rights under FDCPA, because it does not require debt collectors to provide debtors with “information regarding their rights.” Id.

Moreover, critics believe that even when debtors are aware of the statute, they are unlikely to bring a lawsuit under FDCPA for many reasons. First, it will likely be less costly and time-consuming to pay the small debt than to litigate. Second, if a debtor’s suit is brought in bad faith, the court may award attorney’s fees to the debt collector. Finally, the debt collector can easily escape liability for violating FDCPA by showing that the violation was either unintentional or not easily preventable.

Id. (footnotes omitted).
239. See supra notes 229–33 and accompanying text.
240. See supra notes 195–04 and accompanying text.
241. See Brief for the States, supra note 194, at 12–13, 2017 WL 818307, at *12–13; infra notes
buyers under common law claims, “such as intentional infliction of emotional
distress, invasion of privacy, and defamation,” but those are generally only
effective in extreme cases.242 Ultimately this has potential to result in a com-
petitive disadvantage to ethical debt collectors and increased abuse of con-
sumers—the two parties the FDCPA was created to protect.243

VI. Outlook

There are several viable and advisable courses of action that will help to
alleviate the issues discussed above.244 These include judicial consideration
of the issues that were specifically left unanswered in Henson, a congressional
amendment to the FDCPA, or more thorough and more protective state stat-
utes.245

A. Judicial Consideration of Henson’s Unanswered Questions

First, the Court could alter the landscape substantially if it addresses ei-
thother of the questions it specifically excluded from its decision.246 The Court
specifically noted that it was not considering the alternative argument that
Santander was a debt collector “because it regularly acts as a third party col-
lection agent for debts owed to others,” even though this was not its role with
the specific debts at issue.247 Debt collection companies that have acquired
servicing rights to debts in default but have not purchased the debts still qual-
ify as debt collectors because they seek to collect debts owed to another.248
The petitioners in Henson argued that because Santander also services loans
for others, even though it was not doing so in this case, it is always subject to
suit under FDCPA regardless.249 Further clarification on the viability of this
argument will help define the contours of the outlook moving forward.250

259–61 and accompanying text.
242. Sovern, supra note 215.
243. See supra note 46 and accompanying text.
244. See infra Sections VI.A–C.
245. See infra Sections VI.A–C.
246. See Rosenkoff, supra note 182; infra notes 247–54 and accompanying text.
248. See Rosenkoff, supra note 182.
249. See Henson, 137 S. Ct. at 1721.
250. See Rosenkoff, supra note 182.
The Court also did not consider the argument that Santander should qualify as a “debt collector” under a second statutory definition—the “principle purpose” argument.251 According to the Act, a debt collector is “any person who [(1)] uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or [(2)] who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”252 The petitioners “briefly allude” to the argument that the principal purpose of Santander’s business is the collection of any debts, thus they are debt collectors under this part of the definition.253 The Court specifically declined to address this argument because the parties had not thoroughly litigated it below, and thus the matter was not properly before it.254

B. Congressional Amendment to the FDCPA

Congress may amend the language of the FDCPA to specifically include (or exclude) debt buyers.255 This would be the quickest and most effective solution because it eliminates the need for the Court to wait until the issues discussed above arise in a future case.256 The Supreme Court advised as much in Henson.257 It concluded its opinion saying that both parties and their amici presented “many and colorable arguments . . . , a fact that suggests to us for certain but one thing: that these are matters for Congress, not this Court, to resolve.”258

Additionally, federal courts, as opposed to state courts, are the proper forum to regulate debt collection activities.259 “As Congress recognized in enacting the FDCPA, debt collectors can harass consumers from across state

251. Henson, 137 S. Ct. at 1721; see supra notes 210–13 and accompanying text. See generally Udell & Caton, supra note 212, for a full discussion of the “principle purpose” argument.
253. Henson, 137 S. Ct. at 1721.
254. Id.; see supra note 210 and accompanying text.
256. See id.; see generally Brett J. Boskey, Mechanics of the Supreme Court’s Certiorari Jurisdiction, 46 Colum. L. Rev. 255 (1946) (discussing how the mechanics of the Supreme Court’s discretionary power to grant certiorari results in a low likelihood that a petition will be granted).
258. Id. at 1725.
lines, and state Attorneys General may find it hard to enforce their more protective laws in those circumstances. Thus, the enforcement resulting from federal regulation will likely be more effective in actually punishing or deterring violative debt collection.

For example, in 2017 U.S. Representative Mia Love introduced the “Stop Debt Collection Abuse Act of 2017 [(H.R. 864)]” for consideration by the House Financial Services Committee. The bipartisan bill included, among other things, a proposal to amend the definition of “debt collector” in the FDCPA. The proposed definition would include any person “who regularly collects or attempts to collect . . . debts owed or due or asserted to be owed or due another or that have been obtained by assignment or transfer from another.” Such an amendment would go a long way towards solving the issues raised in this Comment, yet despite enjoying bipartisan support, it is still far from becoming law.

C. State Statutes

Despite the limitations discussed above, many consider state statutes to be the main lines of defense for consumers. As previously mentioned, many states have shaped their debt collection laws in reliance on the FDCPA’s protections. Hence—as a result of Henson—these states must amend their statutes to categorize debt buyers as debt collectors in order to protect their consumers and ensure that debt buyers do not escape liability.

260. Id. at 12, 2017 WL 818307, at *12.
263. The bill also subjects debt collectors for federal agencies to the FDCPA, prevents them from charging fees that are more than ten percent of the amount collected, and requires the Government Accountability Office (GAO) to study debt collection practices at the federal, state and local levels. Id. §§ 2(3)(A), 4–5.
264. Id. § 2(3).
265. Id. § 2(3)(A) (emphasis added).
267. See supra notes 255–61 and accompanying text.
268. See, e.g., CARTER, supra note 195, at 5.
269. See supra notes 207–08 and accompanying text.
270. See supra notes 206–09 and accompanying text.
Many states also have Unfair and Deceptive Acts and Practices (UDAP) statutes that protect consumers within their borders from abusive debt collection practices.\textsuperscript{271} The problem is that UDAP laws vary widely from state to state, and legislation or court decisions have gutted the statutes and undermined their effectiveness.\textsuperscript{272} While consumer advocacy groups have been pushing for states to reform their UDAP statutes for years,\textsuperscript{273} they have received renewed attention since \textit{Henson} left these state laws as the primary fallback provision to protect consumers against unscrupulous debt buyers.\textsuperscript{274} Since \textit{Henson}, industry publications, blogs, and certification agencies have reminded debt buyers to “remain cognizant of the legal requirements of the environment in which they operate.”\textsuperscript{275}

\textbf{VII. Conclusion}

Congress was clear about the purposes and motivations informing its drafting of the \textit{FDCPA}.\textsuperscript{276} Namely, it set out to protect consumers against abusive debt collection practices by debt collectors and to protect ethical debt collectors from being competitively disadvantaged by those who employ abusive tactics.\textsuperscript{277} Although Congress gave much time and effort to crafting the definition of “debt collectors” at the time of its passage,\textsuperscript{278} changes in the debt collection industry over the last four decades have greatly impacted the scope and reach of the \textit{FDCPA}.\textsuperscript{279} Specifically, the advent and rise of debt purchasing have introduced an entirely new form of debt collection that was not in existence at the time of the Act’s passage.\textsuperscript{280}

The Court’s strict textual interpretation of the \textit{FDCPA}, despite these mammoth evolutions, created an unfair loophole in legislation that will facilitate abusive debt collection practices by debt buyers.\textsuperscript{281} It effectively

\begin{footnotesize}
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\item \textsuperscript{271} See, e.g., \textit{Carter}, supra note 195, at 5.
\item \textsuperscript{272} Id. at 3.
\item \textsuperscript{273} See, e.g., id. at 23.
\item \textsuperscript{274} See \textit{Lluberas & Mathless}, supra note 88, at 3.
\item \textsuperscript{275} Id.
\item \textsuperscript{277} Id. § 1692(e).
\item \textsuperscript{278} See supra notes 64–69 and accompanying text.
\item \textsuperscript{279} See supra Section II.D.
\item \textsuperscript{280} See supra Section II.D.
\item \textsuperscript{281} See supra Part V.
\end{itemize}
\end{footnotesize}
excluded the collectors of over a third of the debts in collection in the United States, despite a plethora of evidence that debt buyers are frequently among the most abusive collectors in the industry. Construing the definition in this manner has the potential to harm both consumers and conscientious debt collectors as well as over-burden state courts if left unaddressed. This is precisely the type of “injustice, oppression, [and] absurd consequence” that the Supreme Court has cautioned against when applying a textual interpretation of a statute.

American consumer protection laws have been criticized for their failure to provide adequate protection to consumers from the growing debt collection industry. The great potential for abuse created by Henson will only exacerbate this issue. It should be addressed through judicial consideration of the issues that were specifically left unanswered in Henson, a congressional amendment to the FDCPA, or through more protective state statutes. These solutions will close or severely restrict the newly created loophole and be significant steps toward rehabilitating and reenergizing consumer protection legislation in America.

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282. See CONSUMER FIN. PROT. BUREAU, supra note 10, at 7–8.
283. See supra notes 82–86 and accompanying text.
284. See supra Part V.
286. See, e.g., U.S. FED. TRADE COMM’N, supra note 18.
287. See supra Part V.
288. See supra Part VI.
289. See supra Part VI.

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