Updates
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Caveat Emptor: Debt Buyers Beware!

Companies whose primary business purpose is to collect debts—**whether or not they actually participate in the debt collection activities**—suffered a setback recently. Despite a debt purchaser's not having any direct contact with the consumer or even approving the debt collection agency's communications with the consumer, the U.S. Court of Appeals for the Third Circuit found the debt purchaser to be a "debt collector" under the terms of the Fair Debt Collection Practices Act (FDCPA) and therefore vicariously liable for the actions of its collection agencies. *Barbato v. Greystone Alliance, LLC*, No. 18-1042, 2019 WL 847920 (3d Cir. Feb 22, 2019).

The *Barbato* opinion followed the reasoning set forth in another recent Third Circuit case, *Tepper v. Amos Fin. LLC.*, 898 F.3d 364 (3d Cir. 2018), and capitalized on a loophole in the U.S. Supreme Court decision in *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017), which held that someone who purchases a defaulted debt is not a "debt collector" for purposes of the FDCPA.

The Supreme Court's opinion in *Henson* focused on one definition of "debt collector" under the FDCPA, which concerns whether the party "regularly collects or attempts to collect . . . debts owed or due . . . another," and held that a bank that purchased a defaulted debt originated by another lender was not a debt collector subject to the FDCPA. Importantly, in delivering the *Henson* opinion, the Supreme Court specifically declined to make any holding as to whether a debt purchaser could be subject to the FDCPA based on an alternate definition of a debt collector, which would include a party "**in any business the principal purpose of which is the collection of any debts**," because such argument had not been raised by the parties below.

In *Barbato*, the debt buyer was in the business of purchasing charged-off receivables and hiring a collection agency to perform **all** of the collection work. In her opinion for the Third Circuit, and in following the reasoning previously set forth in *Tepper* using the "principal purpose" test, Judge Cheryl Ann Krause looked at the "plain meaning of the statutory text" to find that an entity that collects debts as its "most important" goal is, in fact, a debt collector, regardless of the existence of a "middleman." To put a finer point on this issue, Judge Krause stated that "an entity that is itself a 'debt collector' . . . should bear the burden of monitoring the activities of those it enlists to collect debts on its behalf."

To ward off future appeals, the *Barbato* opinion went on to further state that "vicarious liability" does **not** depend on a showing of actual control of the activity that is allegedly in violation of the FDCPA and that liability does not depend on a finding that the collection agent was itself a "debt collector."

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