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PARTIES TO DEBT RECOVERY PROCESS

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ABSTRACT

New financial institutions and innovative lending instruments have necessitated the need to restate the rules of privity of contract in the parties dealing with debt collection. Accordingly, parties to debt recovery processes are either created by statute, the primary obligors or their assignees, heirs and delegates. This article has therefore considers the various types of debt collectors, and the means of debt collection from a commercial perspective this. This paper does not navigate into cultural "debts" of cooperative societies, town unions using unorthodox means of colleting fines, dues levied for commercial derelictions and defaults. The U.S. Federal fair debt collection Practices Act is considered a compass for other jurisdictions. Also, this paper does not consider debt collectors appointed by Government and its agenciesto recover debts avid to government for regulatory dues, and services.

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INTRODUCTION

The US Supreme Court ruled that a consumer claimant under the Federal Fair Debt Collection Practices Act ("FDCPA") has one year from the alleged violation to file a suit.[i] The one-year statute of limitation begins at the time of the alleged wrongful act, even if the consumer is unaware of the purported violation. The court did, however leave the door open for a consumer to bring suit beyond one year if the debt collector fraudulently conceals its actions. The court rejected an expansion of the period of time by which a victim of unlawful debt collection must file suit. Section 1692k(d) thereof states that a lawsuit "may be brought . . . within one year from the date on which the violation occurs." The debtor argued that the court should interpret the statute to give a victim one year from the time that he or she learned of the wrongful act to commence litigation. Since Congress enacted statutory limitation periods that begin to run at the time of the wrongful act's discovery but failed to include such language in the Fair Debt Collection Practices Act, the court refused to create an exception that congress itself elected not to include. On May 15, 2017, the United States Supreme Court in Midland Funding, LLC v. Johnson**,** held that a debt collector who files a bankruptcy proof of claim on a time-barred debt does not violate the FDCPA.[ii] The dispute in Midland arose after debt collector Midland Funding, LLC ("Midland"**)** filed a proof of claim in a debtor's Chapter 13 proceeding. The debt upon which Midland based its claim was outside the applicable state statute of limitations. Following an objection by Johnson, the bankruptcy court denied Midland's claim, and the debtor later brought suit for an FDCPA violation.

The District Court dismissed the debtor's case after holding that the FDCPA did not apply in bankruptcy. However, the U.S. Court of Appeals for the 11th Circuit later reversed the decision and determined that Midland's conduct in filing the proof of claim on clearly time-barred debt was in fact an FDCPA violation.[iii] The Supreme Court found that Midland's conduct was neither unfair nor deceptive under the FDCPA. Specifically, the Court explained that pursuant to the plain language of the Bankruptcy Code, a proof of claim does not have to be enforceable at the time of its filing. Thus, the court reasoned that, filing a proof of claim on a time-barred debt was contemplated by the Bankruptcy Code, and would therefore not be considered deceptive. The filing a proof of claim on a time-barred debt did not rise to the level of unfair or unconscionable conduct prohibited under the FDCPA. Relying on holdings from a number of federal appellate courts that previously determined that filing a collection lawsuit on time-barred debt violated the FDCPA, the debtor argued that the filing of a proof of claim is the equivalent of filing a collection lawsuit, and as such should be considered a violation. The Court disagreed, and pointed to the following key factors which distinguish a collection action from filing a proof of claim in a bankruptcy: (1) the customer initiates the bankruptcy and would therefore not be at risk of paying a time-barred debt to avoid a collection lawsuit; (2) the trustee's supervision and the procedural rules in place in a bankruptcy would prevent a bankruptcy estate from paying out on time-barred or otherwise unenforceable claims; and (3) there is the possibility that the filing of the claim will actually benefit the debtor because the debt would be discharged if the debtor is able to successfully complete his/her bankruptcy plan. The Supreme

Court's holding in Midland reaffirms the Seventh Circuit's position in Owens v. LVNV Funding, LLC, 832 F.3d 726 (7th Cir., 2016), whereby the Seventh Circuit Court of Appeals held that a "claim" under the Bankruptcy Code encompassed more than legally enforceable obligations under the relevant state law, and therefore the act of filing a proof of claim on stale debt was not an automatic FDCPA violation.

TYPES OF DEBT COLLECTORS

The types of debt collection agencies include:

- First-party Agencies: These are usually subsidiaries or departments of the company that owns the debt; or the creditor. They are called first party because they are a part of the original contract.
- Third-party Agencies: A third-party agency is usually not a party to the original contract. The creditor assigns accounts directly to such an agency on a contingency-fee basis. The collection or third party agency makes money only if money is collected from the debtor (often known as a "No Collection - No Fee" basis).
- Debt Buyers: The debt buyer purchases accounts and debts from creditors for a percentage of the value of the debt and may subsequently pursue the debtor for the full balance due, including any interest that accrues under the terms of the original loan or credit agreement. This is most times the case when Asset Management Corporation of Nigeria (AMCON) is involved in a debt recovery situation. The agency purchases debts from banks or financial houses at a particular percentage which may have reduced the value of the debts, but bears some risks involved in the recovery of the debt.
- A debt collector must be careful not to employ any of the following means or methods for debt recovery: harassment, abuse or oppression of the debtor, use of threat or violence, use of obscene languages, employ the use of thugs, mystical, occultism or any diabolical methods; and most of all, the use of the police or other security agents to arrest a debtor. The Police are not empowered by any statutes to recover debts as they are not debt collectors. The court expressly mentioned that;

"it has been stated many times that the police have no business in enforcement of debt settlements or recovering of civil debts for banks or anybody".[iv]

In Henson v. Santander Consumer, USA, Inc., [v]Santander purchased the plaintiffs' defaulted debt from the loan originator after acting as the loan servicer. After Santander began its collection efforts, Henson and the accompanying class of plaintiffs brought suit, claiming that Santander's debt collection practices violated the FDCPA. Santander moved to dismiss the claim on the basis that it was exempted from the FDCPA because it was not acting as a third party debt collector, but was instead seeking repayment on its own debt. The District Court agreed with Santander, with the Fourth Circuit Court of Appeals also affirming the District Court's decision. Henson appealed to the United States Supreme Court". The Supreme Court's review comes in the face of a circuit split on this issue, with the Fourth, Ninth and Eleventh circuits holding that collectors of debt purchased after default are not debt collectors subject to the FDCPA, while the Third, Fifth, Sixth and Seventh circuits, and the District of Columbia Court of Appeals have taken the contrary position. Not surprisingly, April's oral arguments focused primarily on the definition of "debt collector" under the FDCPA. The Act defines a "debt collector" as "any person…who regularly collects…debts owed or due…another." Henson took the position that debts were "owed" to the originator of the loan, but "due" to the debt buyer. Thus, under such reasoning, a debt purchaser could be considered a "debt collector" under the FDCPA because it was collecting on a debt "owed" to the originator of the loan (notwithstanding the fact that it was also collecting on a loan now "due" to the debt purchaser). Conversely, Santander took the position that as the current holder of the debt, it was merely collecting on its own debt (the same as any creditor would) and was therefore not subject to the purview of the FDCPA. With little guidance from past precedents as to the definition of "debt collector" under the Act, both sides also argued steadfastly for consideration of the policy implications or their respective positions. Henson and the consumer plaintiffs argued that debt collectors could circumvent the requirements of the FDCPA by simply purchasing debt they intended to collect on. Conversely, Santander argued that a purchaser of debt has very different motives than that of a debt collector, and it was for this reason that debt purchasers were intentionally excluded from the FDCPA.

Liquidators

A liquidator is a person appointed by the court to wind up the affairs of a company and distribute the assets among creditors and contributories in accordance with the law and the articles of the company. Under S. … CAMA, Liquidators have extensive powers and duties to investigate a company's affairs and in some cases to pursue its directors. However, the primary duty of the liquidator is to increase the assets of the company, collect in all the assets and realise it at the best possible price to maximize the funds available for distribution to the creditors. In Johnson v Odeku[vi], the defendant's account ceased to be in credit in 1958 and he made his last withdrawal in 1960. The bank then went into liquidation and in 1966, the liquidator instituted proceedings on the bank's behalf against the defendant to recover the amount of the overdraft plus interest. It must be pointed out that when a registered company goes into liquidation, it is no longer run by its owners and the liquidator must work out who the business owes money to, and pays them back using any assets or money left in the business. Those owed money are called creditors. In the case of AKAHALL & SONS LTD V NDIC[vii]. "Under the Companies Winding Up Rules 1983, a debt is proved against a wound-up Company by delivering or sending through post to the liquidator an affidavit verifying the debt, which must contain or refer to the statement of account showing the particulars of the debt and whether the creditor is or is not a secured creditor. The liquidator has the power to examine and admit or reject every proof lodged with it. It is only when a creditor is dissatisfied with the decision by the liquidator that he can apply to the Court to reverse or vary the decision."[viii] In addition to resolving the current circuit court split, the Supreme Court's decision is also expected to drastically impact state collection agency and debt collection laws that mirror the FDCPA's provisions.

Receivership: A receivership is a court-appointed tool that can assist creditors to recover funds in default. Having a receivership in place makes it easier for a lender to recover funds that are owed to them if a borrower defaults on a loan.

Generally, the receiver's role is to:

- collect and sell enough of the secured assets to repay the debt owed to the secured creditor (this may include selling assets or the company's business)
- pay out the money collected in the order required by law
- According to the provisions of S582(1) of Companies and Allied Matters, an official receiver means the Deputy Chief Registrar of the Federal High Court or an officer designated for that purpose by the Chief Judge of the Court.

In the case of OlawaleAkoni SAN v ASCON Oil Company Limited[ix], Rainoil Limited, the lawful owner of the property including the Petrol Station located at Block 36 Admiralty Way, Lekki, Lagos, acquired the property which was formerly owned by ASCON Oil Company Limited from Stanbic IBTC Bank Plc, in exercise of the Bank's right of sale under a duly registered Deed of Legal Mortgage. STANBIC's Right of Sale pursuant to the Deed of Legal Mortgage was legally and duly triggered, after ASCON failed to pay their debts to the bank, and upon crystallisation, STANBIC duly appointed a Receiver Mr Olawale Akoni, SAN over the said assets of ASCON by STANBIC. The Receiver sought and obtained a subsisting Mandatory Order of the Federal High Court dated 15/5/20.[x] via which order, the Assistant

Inspector General (AIG) of Police, Zone 2 Police Command was mandated by the Court to grant Police Protection to the Receiver in the execution of his powers as duly appointed by STANBIC with respect to the said Property. Consequently, and upon payment of the consideration sum for the purchase of the Property, STANBIC assigned and out rightly transferred all its interests, and rights over the said property to Rainoil Limited, by virtue of which Rainoil became the lawful and rightful owners of the Property, including Petrol Station. As new owners of the Property, Rainoil were put in vacant and peaceable possession by the Receiver on 20/5/20. ASCON, being dissatisfied with the actions of the Receiver with the take over and sale of the said property, filed a motion at the Federal High Court to challenge the acts of the Receiver and bank's right to sell the said property to Rainoil, and to set aside the Mandatory Order of the Federal High Court. On the 24/7/20, Justice Liman of the Federal High Court gave his ruling and validated the actions of the Receiver. He further posited that the prayer of ASCON to set aside, reverse, nullify and or suspend the steps taken pursuant to the actions and powers of the Receiver in the sale of the said property to Rainoil, can only be reversed or considered upon the institution of a substantive suit. Suffice it to say that ASCON who are affiliated with Quest Oil, having failed in challenging the Ruling of the Federal High Court, have resorted to fraudulent and illegal means to deprive Rainoil of their legitimate proprietary rights, by making attempts to forcefully take over the property through fictitious and malicious means, notably on 4/8/20, 16/12/20 and more recently, on 13/8/21, when some unidentified Officers of ASCON and QUEST accompanied by 20 armed Mobile Policemen from the office of AIG, Zone 2, Onikan, in the company of hoodlums invaded the above mentioned property once again, under the guise of executing the same Ruling of the Federal High Court dated 24/7/20 per Liman J in the said case, which they have already appealed against.

They unleashed acts of brigandage and malicious disruption of Rainoil's business operations, including forcefully removing Staff dispensing petrol from the Forecourt, damaging property, the canopy, pylon signages, and illegally and forcefully seizing two Trucks loaded with 90,000 litres of petrol, belonging to Rainoil which was and parked within the premises. Preceding the above, the office of the Commissioner of Police Lagos State and AIG of Police Zone 2 Onikan, had written to the Deputy Chief Registrar of the Federal High Court, Ikoyi, Lagos on three occasions, requesting the court to confirm the order granted by Justice Liman in the said Suit No. FHC/L/CS/567/2020 – OlawaleAkoni (SAN) v Ascon Oil Company Limited and permission to execute. The Deputy Chief Registrar in reply to their letters dated 4/8/21 and 9/8/21 respectively, replied to the request of the AIG, Zone 2, Onikan, and confirmed that the said Ruling of Justice Liman in the suit is valid and subsisting until it is set aside by the court; and that there were pending motions and a Notice of Appeal filed in respect of the aforementioned suit by ASCON; and the fact that the Court Order had been executed, further established that Sheriff's office could enforce/ execute the said order twice.

Accordingly, it came as a shock to learn that the Police disregarded all responses of the Deputy Chief Registrar /Admiralty Marshal Sub, and opted to act in contempt of the court. More appalling is that there was no substantive court order or legal justification for the actions of ASCON and Policemen from the office of the AIG, Zone 2, Onikan, including the forceful entry and unlawful repossession of Rainoil's property. The Federal High Court has since disassociated itself from this illegal act of brigandage and lawlessness, exhibited by the Police and Officers of ASCON and QUEST.

The Company Administrators

A company administrator is one of the agents that can assist in the recovery of debt. The Company Administrator for an organization can manage organization profile information, manage the roster, view and update account information for organization members, and register members for events, and manage billing for the organization. Section 505 of the CAMA gives the company administrator the power to manage the affairs of the company. The administrator's main role is to promote the recovery of the company, it may be that he feels it is more suitable to come to arrangement with the company's creditors, sell the business as a going concern or realize assets to pay the company's creditors.

Recommendations & Conclusions

- Due process and Rule of Law require that debtors and creditors be given fair attention and recognition in the loan recovery process.
- The various debt collectors have their various legal obligations, powers and rights as provided by the Law, some of which are to protect assets against dissipation and diminution. The due process of the law must always be followed.
- The more the debts, the more the complexity and amount of debts to GDPs which require longitudinal regulation and legal surveillance to ensure economic well being. The law should ensure that funds are maintained as common wealth for utilization by all for economic development.

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[i] *In Rotkiske v. Klemm*, 589 U.S. (2019) ,
[ii] No. 16-348, 2017 WL 2039159 (U.S. May 15, 2017),
[iii] *See Johnson v. Midland Funding, LLC,* 823 F.3d 1334 (11th Cir. 2016)*, cert. granted,* 137 S. Ct. 326, 196 L. Ed. 2d 212 (2016).
[iv] Oceanic Securities Int. Ltd V. Balogun&Ors (2012) LPELR-9218
[v] 817 F.3d 131, 136 (4th Cir. 2016), *cert. granted*, 137 S. Ct. 810, 196 L. Ed. 2d 595 (2017)
[vi] [1967] NCLR 361
[vii] (2017) LPELR-41984
[viii] *Per* AKA'AHS, JSC *(Pp. 8-9, paras. E-A)*
[ix] FHC/L/CS/567/2020
[x] Suit No. FHC/L/CS/567/2020 OlawaleAkoni SAN v ASCON Oil Company Limited,

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