




SUBROGATION, DEBT COLLECTION, AND CONSUMER PROTECTION

Presented By:
Timothy S. Mentkowski
Matthiesen, Wickert & Lehrer, S.C.

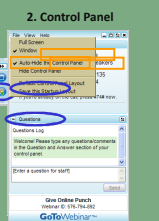


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2



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FAIR DEBT COLLECTION PRACTICES ACT (FDCPA)

15 U.S.C. § 1692, *et seq.*

Purpose: 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 collections abuses." § 1692(d).

- Abusive Practices
- Debt Collector
- Consumer Transaction
- Abusive Practices



4

CONSUMER DEBT

Debt: "[A]ny obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." § 1692a(5).

Consumer Transaction:


Money for...	Personal
Property	Family
Insurance	Household
Services	

Note: Consumer debts reduced to judgment still fall under FDCPA.


5

DEBT COLLECTOR

Debt Collector: "[A]ny person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." § 1692a(6).



6



PERTINENT EXCEPTIONS


“Debt Collector” does not include:

“Any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor.” § 1692a(6)(A);

OR

“Any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity...concerns a debt which was not in default at the time it was obtained by such person.” § 1692a(6)(F)(iii).


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LAWYERS AS DEBT COLLECTORS


- Attorneys are not exempt from the FDCPA – any person who regularly collects debts owed or due another.
 - “Regular” collection of debts, two approaches:
 - **Frequency:** Requires only “steady” collection of debts, regardless of whether it is a substantial portion of the attorney or firm’s business. See *Silvia v. Mid Atlantic Management Corp.*, 277 F. Supp.2d (E.D. Pa. 2003).
 - **Aggregate:** Looks to the percentage of the alleged debt collector’s business. See *Schroyer v. Frankel*, 197 F.3d 1170 (6th Cir. 1999).

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REQUIREMENTS AND PROHIBITED PRACTICES

- **Disclosure:** The “debt collector” must disclose in communications with the debtor, written or oral, *“that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose....”* §1692e(11).
 - Applies to both initial and subsequent communications, except formal pleadings.



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REQUIREMENTS AND PROHIBITED PRACTICES

- **Verification:** Within five (5) days of the initial communication to the debtor, the debt collector must send a written notice containing:
 - The amount of the debt;
 - The name of the creditor;
 - A statement that if the consumer notifies the debt collector within thirty (30) days that the debt is disputed, the debt collector will send verification of the debt or a copy of a judgment; and
 - A statement that upon the consumer’s written request within thirty (30) days, the debt collector will provide the name and address of the original creditor. §1692g(a).

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REQUIREMENTS AND PROHIBITED PRACTICES


- **False Or Misleading Representations**
 - Threat to take action that cannot legally be taken or is not intended to be taken. §1692e(5).
 - False representation or implication that documents are legal process. § 1692e(13).

Note: This is not an exhaustive list. See the Act for further details.



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REQUIREMENTS AND PROHIBITED PRACTICES

- **Is contacting the debtor’s attorneys subject the Act?**
 - **Answer:** It depends on the jurisdiction.
 - **Yes:** Communication is defined broadly and includes the conveying of information both directly and indirectly. *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226 (4th Cir. 2007).
 - **No:** The Act aims to protect unsophisticated debtors, and their attorney acts as an intermediary with the desired level of sophistication. *Guerrero v. RJM Acquisitions, LLC*, 499 F.3d 926 (9th Cir. 2007).

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PENALTIES AND ENFORCEMENT
§ 1692k

- Actual Damages
- Additional Damages Up To \$1,000
- Costs And Attorneys' Fees




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SUBROGATION CLAIMS AS "DEBTS"
I: PURSUING THE TORFEASOR

- *Hawthorne v. Mac Adjustments, Inc.*, 140 F.3d 1367 (11th Cir. 1998).
 - Motor Vehicle Accident
 - Liberty Mutual Paid Insured Driver's Claim
 - Subrogation Claim Referred to Third-Party Administrator (TPA)
 - TPA Sent Demands To Negligent Driver, Hawthorne.



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 - **Holding:** The FDCPA does not apply to a TPA's communications to an alleged tortfeasor because the payment obligation is not a "debt."
 - There must be a debt to state a claim under the FDCPA, which requires a consumer transaction.
 - "[A]t a minimum, a 'transaction' under the FDCPA must involve some kind of business dealing or other consensual obligation..." *Id.* at 1371.
 - Hawthorne's obligation arose out of tort – negligent driving – not a consumer transaction.

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POST-HAWTHORNE TORT BASIS DECISIONS


- *Shaw v. Credit Collection Services*, 2008 WL 2941261 (M.D. La. 2008) (*not reported*) (TPA's subrogation claim against driver liable for Allstate's loss sustained in motor vehicle accident was based in tort and was not "debt," citing *Hawthorne*).
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 - **Holding:** The FDCPA may apply because the health Plan's subrogation lien claim does constitute a "debt" under the FDCPA.
 - Hamilton's father purchased group health insurance for himself and his dependents, which falls under "personal, family, or household use."
 - The obligation arose out of that purchase – a consumer transaction.
 - Remanded on issue of


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SUBROGEEES AS “DEBT COLLECTORS”

- *Hamilton v. Trover Solutions, Inc.*, 2003 WL 21105100 (E.D. La. 2003).
 - **Question on Remand:** The subrogation claim is a “debt,” but is the TPA a “debt collector”?
 - **Opinion and Order:** No, it is not because the TPA acquired the debt prior to “default.”
 - Look to the exclusion from § 1692a(6)(F)(iii):
 “Any person collecting or attempting to collect any debt owed or due another to the extent such activity...concerns a debt which was not in default at the time it was obtained by such person.”


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SUBROGEEES AS “DEBT COLLECTORS”

- *Hamilton v. Trover Solutions, Inc.*, 2003 WL 21105100 (E.D. La. 2003).
 - “Default” occurs when the insured receives settlement or judgment proceeds and refuses to pay the subrogation or reimbursement claim.
 - The Plan transmitted the claim to the TPA prior to the insured’s receipt of settlement funds.
 - The TPA is not a “debt collector” by virtue of the exception.
- Affirmed by the 5th Circuit in *Hamilton v. Trover Solutions, Inc.*, 10 Fed. Appx. 942 (2004) (*not reported*).


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SUPPLEMENTAL “PRE-DEFAULT” CASES

- *Healy v. Jzanus, Ltd.*, 2006 WL 898067 (E.D. N.Y. 2006) (*not reported*) (TPA was exempt from “debt collector” status for purposes of FDCPA where TPA obtained medical billing “debt” “pre-default”, even though TPA was a registered debt collector and included FDCPA verification language in letters to plaintiff).
- *Kesselman v. The Rawlings Co., LLC*, 668 F. Supp.2d 604 (S.D. N.Y. 2009) (TPAs for ERISA Plans asserting subrogation and reimbursement rights against Plan participants were not “debt collectors” where “debts” were obtained prior to “default”).
- *Dantin v. Rawlings Co., LLC*, 2005 WL 6075786 (M.D. La. 2005) (*not reported*) (FDCPA did not apply to a TPA’s subrogation recovery efforts against insured where debt obtained prior to “default”).


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ANOTHER NOTEWORTHY EXCEPTION

- *Vasquez v. Allstate Ins. Co.*, 937 F. Supp. 773 (N.D. Ill. 1996).
 - Allstate’s subrogation personnel sent subrogation demand letters to alleged tortfeasor, which contained FDCPA language.
 - Insurer’s own personnel fall under § 1692a(6)(A), as employees or agents of the creditor.
 - Expresses non-controlling opinion that claim against the third party is likely a “debt,” but this pre-dates *Hawthorne*.


22



FDCPA AND SUBROGATION OVERVIEW

- Can the FDCPA apply to actions of:
 - A Subrogee’s Employee? – NO
 - A Third-Party Administrator (TPA)? – YES
 - An Attorney? – YES
- Claims Against:
 - A Third Party? – NO
 - An Insured? – YES
- When the claim is obtained:
 - Prior To Settlement or Judgment? – NO
 - After Settlement or Judgment? - YES


23



EXAMPLE 1

- Ivan Insured is rear-ended by Tom Tortfeasor. His auto carrier, Acme Casualty, pays for the damage to Ivan’s vehicle. After the claim is paid, Sally Subro sends several subrogation letters to Tom, demanding payment for the property damage. Are Sally’s activities subject to the FDCPA?
 - No. Sally is an employee of Acme Casualty, and therefore excepted from the definition of “debt collector.” Additionally, Acme’s claim against Tom arose out of a tort, not a consumer transaction, so there is no “debt.”


24



EXAMPLE 2

- Ivan Insured is rear-ended by Tom Tortfeasor. As a result, he has soft tissue injuries requiring chiropractic treatments. Acme Casualty pays the chiropractor bills under its medical payments coverage. Ivan later files a claim against Tom’s liability carrier and receives a generous settlement. Sally demands repayment of Acme’s subrogation lien from the proceeds. Are her actions subject to the FDCPA?
 - No. Again, as an employee of Acme, she is not a “debt collector.”


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EXAMPLE 3

- Ben O’Ficiary has just eaten at his favorite ice cream parlor, Banana Splitz, and on his way to the parking lot, he slips on a banana peel and breaks his leg. His health insurer, Group General, pays for a number of surgeries. Recognizing subrogation potential, Group General refers the claim to Reliable Recovery, a TPA. Reliable sends subrogation notices to Banana Splitz, Ben, and Ben’s attorney. Ben later receives a moderate settlement and refuses to pay the lien. Are Reliable Recovery’s activities subject to the FDCPA?
 - No. Reliable obtained the “debt” prior to “default” because they took over the subro efforts before Ben settled the claim. Hence, they are not a “debt” collector.


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EXAMPLE 4

- Same facts as Example 3, but rather than referring the file to Reliable Recovery, Group General pursues subro on its own, prior to and throughout Ben’s lawsuit. After settling with the adverse carrier, Ben still refuses to reimburse Group General. Needing some assistance, Group General retains Reliable Recovery, who contacts Ben to demand reimbursement. Are Reliable Recovery’s activities now subject to the FDCPA?
 - Yes, at least in theory. Reliable is not an employee or agent of Group General, the “debt” is based on a consumer transaction for health insurance, and they began handling the file after Ben received the settlement funds and refused to pay. However, note that there is currently no case law with these particular facts, and no published decision to date has held a subrogation agent liable under the FDCPA.


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STATE DEBT COLLECTION, TRADE PRACTICES, AND CONSUMER PROTECTION

- **Texas:** Twice rejected application of Texas Debt Collection Act. Tex. Fin. Code § 392.001, *et seq. Dickey v. Healthcare Recoveries, Inc.*, 1998 WL 20728 (Tex. Ct. App. 1998); *Trevino v. Credit Collection Services*, 2007 WL 2265069 (Tex. Ct. App. 2007).
- **Florida:** In *Antoine*, 662 F. Supp. 1318 (M.D. Fla. 2009), *supra*, the Court held that there is no claim for Florida Consumer Collection Practices Act where the obligation is based in tort.
- **Louisiana:** *Shaw*, 2008 WL 2941261 (M.D. La. 2008) held that the Louisiana Uniform Trade Practices Act did not apply where the claim arose from tort.


28



STATE DEBT COLLECTION, TRADE PRACTICES, AND CONSUMER PROTECTION

- **California:** *Camacho v. Automobile Club of Southern California*, 142 Cal.App.4th 1394 (Cal. Ct. App. 2006).
 - TPA and auto insurers sent subrogation demand letters to an uninsured driver to recoup UM benefits.
 - Suit brought under Cal. Bus. And Prof. Code § 17200 [Unfair Competition].
 - Fact-intensive three-prong test applied to determine “unfairness.”
 - The consumer injury must be substantial;
 - The injury must not be outweighed by any countervailing benefits to consumers or competition; and
 - The injury must be one that consumers themselves could not reasonably have avoided.


29



STATE DEBT COLLECTION, TRADE PRACTICES, AND CONSUMER PROTECTION

- **California:** *Camacho v. Automobile Club of Southern California*, 142 Cal.App.4th 1394 (Cal. Ct. App. 2006).
 - Camacho did not dispute his liability, so there was no violation of his rights and therefore no injury.
 - Societal benefit of collecting sums owed by an uninsured motorist outweighed any alleged “injury” the plaintiff may have suffered.
 - Plaintiff’s “injury” could have been reasonably avoided by procuring insurance as the law requires. Thus the practices complained of were not “unfair.” *Id.* at 1405-06.


30



STATE DEBT COLLECTION, TRADE PRACTICES, AND CONSUMER PROTECTION

- **California:** *Camacho v. Automobile Club of Southern California*, 142 Cal.App.4th 1394 (Cal. Ct. App. 2006).
 - Plaintiff alleged non-compliance with California’s FDCPA, Cal. Civ. Code § 1788, *et seq.*, but did not bring claim. Therefore, the Court expressed no opinion on the Act’s application.
 - California Attorney General filed an amicus brief in the case which argued that the subrogated defendants should be liable.
 - No distinction made between tort and contract basis for subrogation claim.


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STATE DEBT COLLECTION, TRADE PRACTICES, AND CONSUMER PROTECTION

- **Colorado:** An informal staff advisory opinion from the Colorado Administrator of the Collection Agency Board (a subdivision of the Department of Law) rejected the federal rationale with regard to the Colorado Fair Debt Collection Practices Act. C.R.S. §§ 12-14-101, *et seq.* (2003). The Administrator reasoned that a tort constitutes a “transaction” under the Act, so it may be a basis for a “debt,” or alternatively that “the transaction may be considered the insured’s insurance purchase.”


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STATE DEBT COLLECTION, TRADE PRACTICES, AND CONSUMER PROTECTION

- **Hawaii:** *Flores v. Rawlings Co., LLC*, 117 Haw. 153 (Haw. 2008) held that subrogation TPAs must register with the State as “collection agencies,” but denied the right to bring suit in the absence of an “injury.”
 - May be distinguishable because the decision relied on the fact that the subrogated carrier made the insureds sign “loan agreements” after receiving treatment, which granted subrogation rights (*i.e.*, “consumer transaction”).
 - No injury to plaintiff and enforcement of registration requirements “is in the hands of the Attorney General and the Director of the Office of Consumer Protection.” *Id.* at 171.
 - No violation of statutes other than failure to register.


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STATE DEBT COLLECTION, TRADE PRACTICES, AND CONSUMER PROTECTION

- **Washington:** Liberal Construction of State Law
- *Stephens v. Omni Ins. Co.*, 138 Wash. App. 151 (Wash. Ct. App. 2007), two alleged tortfeasors brought suit against a pair of insurers and their common TPA for violation of the Washington Consumer Protection Act (CPA), RCW § 19.86.020. The TPA had sent the plaintiffs a number of demands which appeared to be formal collection notices, displayed increasing urgency, and threatened a number of legal actions.
 - The CPA outlaws “unfair or deceptive acts or practices in the conduct of any trade or commerce.” Additional elements of the claim include public interest impact and injury to the plaintiff’s business or property.


34



STATE DEBT COLLECTION, TRADE PRACTICES, AND CONSUMER PROTECTION

- **Washington:** *Stephens v. Omni Ins. Co.*, 138 Wash. App. 151 (Wash. Ct. App. 2007).
 - The styling of the letters as collection notices was “deceptive.”
 - No privity requirement - “trade or commerce” was construed extremely liberally. That the TPA was selling any assets or services to anyone which indirectly affected the people of the State of Washington suffices.
 - Injury requirement may be satisfied by the time and expense of procuring a credit report or speaking with an attorney.
 - Recognized that neither the FDCPA, the Washington Collection Agency Act (CAA), nor Washington’s Insurance Code applied to subro recovery efforts, but still reasoned that the CPA should address what those Acts do not.

35





STATE DEBT COLLECTION, TRADE PRACTICES, AND CONSUMER PROTECTION

- **Washington:** *Panang v. Farmers Ins. Co. of Washington*, 166 Wash.2d 27 (2009), *Stephens* taken up on appeal by the Supreme Court.
 - Rejects distinction between “tort adversaries” and consumer relationships.
 - Circular reasoning that the CPA should apply to subrogation recoveries because consumers believe that the FDCPA and CAA will protect them. See the dissent for a poignant rebuke of the majority’s “reasoning.”

36

POTENTIAL ISSUES AND PROBLEMS


- Workers' Compensation
- ERISA
- Practical Aspects of FDCPA Application
- Interaction of State and Federal Law



37

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tmentkowski@mw-law.com
www.mw-law.com



38


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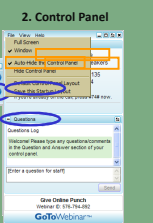


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 - **Question on Remand:** The subrogation claim is a “debt,” but is the TPA a “debt collector”?
 - **Opinion and Order:** No, it is not because the TPA acquired the debt prior to “default.”
 - Look to the exclusion from § 1692a(6)(F)(iii): “Any person collecting or attempting to collect any debt owed or due another to the extent such activity...concerns a debt which was not in default at the time it was obtained by such person.”


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SUBROGEEES AS “DEBT COLLECTORS”

- *Hamilton v. Trover Solutions, Inc.*, 2003 WL 21105100 (E.D. La. 2003).
 - “Default” occurs when the insured receives settlement or judgment proceeds and refuses to pay the subrogation or reimbursement claim.
 - The Plan transmitted the claim to the TPA prior to the insured’s receipt of settlement funds.
 - The TPA is not a “debt collector” by virtue of the exception.
- Affirmed by the 5th Circuit in *Hamilton v. Trover Solutions, Inc.*, 10 Fed. Appx. 942 (2004) (*not reported*).


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SUPPLEMENTAL “PRE-DEFAULT” CASES

- *Healy v. Jzanus, Ltd.*, 2006 WL 898067 (E.D. N.Y. 2006) (*not reported*) (TPA was exempt from “debt collector” status for purposes of FDCPA where TPA obtained medical billing “debt” “pre-default”, even though TPA was a registered debt collector and included FDCPA verification language in letters to plaintiff).
- *Kesselman v. The Rawlings Co., LLC*, 668 F. Supp.2d 604 (S.D. N.Y. 2009) (TPAs for ERISA Plans asserting subrogation and reimbursement rights against Plan participants were not “debt collectors” where “debts” were obtained prior to “default”).
- *Dantin v. Rawlings Co., LLC*, 2005 WL 6075786 (M.D. La. 2005) (*not reported*) (FDCPA did not apply to a TPA’s subrogation recovery efforts against insured where debt obtained prior to “default”).


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ANOTHER NOTEWORTHY EXCEPTION

- *Vasquez v. Allstate Ins. Co.*, 937 F. Supp. 773 (N.D. Ill. 1996).
 - Allstate’s subrogation personnel sent subrogation demand letters to alleged tortfeasor, which contained FDCPA language.
 - Insurer’s own personnel fall under § 1692a(6)(A), as employees or agents of the creditor.
 - Expresses non-controlling opinion that claim against the third party is likely a “debt,” but this pre-dates *Hawthorne*.


22



FDCPA AND SUBROGATION OVERVIEW

- Can the FDCPA apply to actions of:
 - A Subrogee’s Employee? – NO
 - A Third-Party Administrator (TPA)? – YES
 - An Attorney? – YES
- Claims Against:
 - A Third Party? – NO
 - An Insured? – YES
- When the claim is obtained:
 - Prior To Settlement or Judgment? – NO
 - After Settlement or Judgment? - YES


23



EXAMPLE 1

- Ivan Insured is rear-ended by Tom Tortfeasor. His auto carrier, Acme Casualty, pays for the damage to Ivan’s vehicle. After the claim is paid, Sally Subro sends several subrogation letters to Tom, demanding payment for the property damage. Are Sally’s activities subject to the FDCPA?
 - No. Sally is an employee of Acme Casualty, and therefore excepted from the definition of “debt collector.” Additionally, Acme’s claim against Tom arose out of a tort, not a consumer transaction, so there is no “debt.”


24



EXAMPLE 2

- Ivan Insured is rear-ended by Tom Tortfeasor. As a result, he has soft tissue injuries requiring chiropractic treatments. Acme Casualty pays the chiropractor bills under its medical payments coverage. Ivan later files a claim against Tom’s liability carrier and receives a generous settlement. Sally demands repayment of Acme’s subrogation lien from the proceeds. Are her actions subject to the FDCPA?
 - No. Again, as an employee of Acme, she is not a “debt collector.”


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EXAMPLE 3

- Ben O’Ficiary has just eaten at his favorite ice cream parlor, Banana Splitz, and on his way to the parking lot, he slips on a banana peel and breaks his leg. His health insurer, Group General, pays for a number of surgeries. Recognizing subrogation potential, Group General refers the claim to Reliable Recovery, a TPA. Reliable sends subrogation notices to Banana Splitz, Ben, and Ben’s attorney. Ben later receives a moderate settlement and refuses to pay the lien. Are Reliable Recovery’s activities subject to the FDCPA?
 - No. Reliable obtained the “debt” prior to “default” because they took over the subro efforts before Ben settled the claim. Hence, they are not a “debt” collector.


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EXAMPLE 4

- Same facts as Example 3, but rather than referring the file to Reliable Recovery, Group General pursues subro on its own, prior to and throughout Ben’s lawsuit. After settling with the adverse carrier, Ben still refuses to reimburse Group General. Needing some assistance, Group General retains Reliable Recovery, who contacts Ben to demand reimbursement. Are Reliable Recovery’s activities now subject to the FDCPA?
 - Yes, at least in theory. Reliable is not an employee or agent of Group General, the “debt” is based on a consumer transaction for health insurance, and they began handling the file after Ben received the settlement funds and refused to pay. However, note that there is currently no case law with these particular facts, and no published decision to date has held a subrogation agent liable under the FDCPA.


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STATE DEBT COLLECTION, TRADE PRACTICES, AND CONSUMER PROTECTION

- **Texas:** Twice rejected application of Texas Debt Collection Act. Tex. Fin. Code § 392.001, *et seq. Dickey v. Healthcare Recoveries, Inc.*, 1998 WL 20728 (Tex. Ct. App. 1998); *Trevino v. Credit Collection Services*, 2007 WL 2265069 (Tex. Ct. App. 2007).
- **Florida:** In *Antoine*, 662 F. Supp. 1318 (M.D. Fla. 2009), *supra*, the Court held that there is no claim for Florida Consumer Collection Practices Act where the obligation is based in tort.
- **Louisiana:** *Shaw*, 2008 WL 2941261 (M.D. La. 2008) held that the Louisiana Uniform Trade Practices Act did not apply where the claim arose from tort.


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STATE DEBT COLLECTION, TRADE PRACTICES, AND CONSUMER PROTECTION

- **California:** *Camacho v. Automobile Club of Southern California*, 142 Cal.App.4th 1394 (Cal. Ct. App. 2006).
 - TPA and auto insurers sent subrogation demand letters to an uninsured driver to recoup UM benefits.
 - Suit brought under Cal. Bus. And Prof. Code § 17200 [Unfair Competition].
 - Fact-intensive three-prong test applied to determine “unfairness.”
 - The consumer injury must be substantial;
 - The injury must not be outweighed by any countervailing benefits to consumers or competition; and
 - The injury must be one that consumers themselves could not reasonably have avoided.


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29



STATE DEBT COLLECTION, TRADE PRACTICES, AND CONSUMER PROTECTION

- **California:** *Camacho v. Automobile Club of Southern California*, 142 Cal.App.4th 1394 (Cal. Ct. App. 2006).
 - Camacho did not dispute his liability, so there was no violation of his rights and therefore no injury.
 - Societal benefit of collecting sums owed by an uninsured motorist outweighed any alleged “injury” the plaintiff may have suffered.
 - Plaintiff’s “injury” could have been reasonably avoided by procuring insurance as the law requires. Thus the practices complained of were not “unfair.” *Id.* at 1405-06.


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30



STATE DEBT COLLECTION, TRADE PRACTICES, AND CONSUMER PROTECTION

- **California:** *Camacho v. Automobile Club of Southern California*, 142 Cal.App.4th 1394 (Cal. Ct. App. 2006).
 - Plaintiff alleged non-compliance with California’s FDCPA, Cal. Civ. Code § 1788, *et seq.*, but did not bring claim. Therefore, the Court expressed no opinion on the Act’s application.
 - California Attorney General filed an amicus brief in the case which argued that the subrogated defendants should be liable.
 - No distinction made between tort and contract basis for subrogation claim.


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31



STATE DEBT COLLECTION, TRADE PRACTICES, AND CONSUMER PROTECTION

- **Colorado:** An informal staff advisory opinion from the Colorado Administrator of the Collection Agency Board (a subdivision of the Department of Law) rejected the federal rationale with regard to the Colorado Fair Debt Collection Practices Act. C.R.S. §§ 12-14-101, *et seq.* (2003). The Administrator reasoned that a tort constitutes a “transaction” under the Act, so it may be a basis for a “debt,” or alternatively that “the transaction may be considered the insured’s insurance purchase.”


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32



STATE DEBT COLLECTION, TRADE PRACTICES, AND CONSUMER PROTECTION

- **Hawaii:** *Flores v. Rawlings Co., LLC*, 117 Haw. 153 (Haw. 2008) held that subrogation TPAs must register with the State as “collection agencies,” but denied the right to bring suit in the absence of an “injury.”
 - May be distinguishable because the decision relied on the fact that the subrogated carrier made the insureds sign “loan agreements” after receiving treatment, which granted subrogation rights (*i.e.*, “consumer transaction”).
 - No injury to plaintiff and enforcement of registration requirements “is in the hands of the Attorney General and the Director of the Office of Consumer Protection.” *Id.* at 171.
 - No violation of statutes other than failure to register.


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STATE DEBT COLLECTION, TRADE PRACTICES, AND CONSUMER PROTECTION

- **Washington:** Liberal Construction of State Law
- *Stephens v. Omni Ins. Co.*, 138 Wash. App. 151 (Wash. Ct. App. 2007), two alleged tortfeasors brought suit against a pair of insurers and their common TPA for violation of the Washington Consumer Protection Act (CPA), RCW § 19.86.020. The TPA had sent the plaintiffs a number of demands which appeared to be formal collection notices, displayed increasing urgency, and threatened a number of legal actions.
 - The CPA outlaws “unfair or deceptive acts or practices in the conduct of any trade or commerce.” Additional elements of the claim include public interest impact and injury to the plaintiff’s business or property.


34



STATE DEBT COLLECTION, TRADE PRACTICES, AND CONSUMER PROTECTION

- **Washington:** *Stephens v. Omni Ins. Co.*, 138 Wash. App. 151 (Wash. Ct. App. 2007).
 - The styling of the letters as collection notices was “deceptive.”
 - No privity requirement - “trade or commerce” was construed extremely liberally. That the TPA was selling any assets or services to anyone which indirectly affected the people of the State of Washington suffices.
 - Injury requirement may be satisfied by the time and expense of procuring a credit report or speaking with an attorney.
 - Recognized that neither the FDCPA, the Washington Collection Agency Act (CAA), nor Washington’s Insurance Code applied to subro recovery efforts, but still reasoned that the CPA should address what those Acts do not.

35





STATE DEBT COLLECTION, TRADE PRACTICES, AND CONSUMER PROTECTION

- **Washington:** *Panang v. Farmers Ins. Co. of Washington*, 166 Wash.2d 27 (2009), *Stephens* taken up on appeal by the Supreme Court.
 - Rejects distinction between “tort adversaries” and consumer relationships.
 - Circular reasoning that the CPA should apply to subrogation recoveries because consumers believe that the FDCPA and CAA will protect them. See the dissent for a poignant rebuke of the majority’s “reasoning.”

36

POTENTIAL ISSUES AND PROBLEMS

- Workers' Compensation
- ERISA
- Practical Aspects of FDCPA Application
- Interaction of State and Federal Law



37

**SUBROGATION, DEBT COLLECTION,
AND CONSUMER PROTECTION**

Presented By:
Timothy S. Mentkowski
Matthiesen, Wickert & Lehrer, S.C.
tmentkowski@mw-law.com
www.mw-law.com



38
