Commentary

Liability Insurance Coverage For Fair Debt Collection Practices Act Claims

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Companies in the financial services industry, debt collectors, law firms and others have been faced with the threat of individual and class action liability under the federal Fair Debt Collection Practices Act ("FDCPA") since it became effective in 1978.[1] The FDCPA is popular with consumer attorneys for a number of reasons. It prohibits certain broad categories of debt-collection conduct and imposes relatively technical requirements on the debt collector; violations of either the conduct rules or technical requirements can lead to liability. It is relatively easy to define a plaintiff class under the FDCPA, and members of the class can recover statutory damages in addition to actual damages suffered as a result of improper debt-collection practices. Also, violations of the FDCPA can entitle plaintiffs' counsel to attorney fees.

FDCPA claims, however, create some difficult and largely unanswered questions of insurance coverage if the debt-collector insured tenders the claim to its liability insurer. What types of liability coverage — if any — will respond to these claims? Are coverage defenses based on the insured's intentional or fraudulent conduct triggered? Is an insured which collects its own debts covered for such a claim? Are there any unique questions of coverage under "claims made" policies? What types of damages are covered?

There has been limited reported case authority addressing these insurance coverage questions under the FDCPA. This article examines some of the issues which have been raised and may be raised in the future, using as guidance analytical tools available for other types of liability insurance claims.

The Structure Of The FDCPA

Before the coverage issues presented by the FDCPA can be analyzed, it is important to understand the structure of the statute.

Persons Covered

The FDCPA applies to "debt collectors," defined to include "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, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."[2] Although this definition focuses on those persons or entities who collect debts for another for fees, a person who collects his or her own debts under a name which indicates that a third party is doing the collecting also can be liable under the FDCPA.[3] Any person who uses the mails or an instrumentality of interstate commerce to enforce security interests also can be liable under

the FDCPA.[4] The principals of a business engaged in debt collection can be held personally liable under the FDCPA.[5]

The FDCPA excepts from the definition of "debt collector": (a) an officer or employee of the creditor who collects a debt in the creditor's name; (b) persons collecting debts for another person, related by corporate ownership or affiliated by corporate control (but only if debt collection is not performed for parties who are not so related or affiliated); (c) officers or employees of the United States or any state collecting debts as part of their official duties; (d) process servers; (e) non-profit consumer credit counseling services and (f) other miscellaneous situations, including debts owed under fiduciary obligations or escrow agreements, debts originated by the collector and debts involving secured transactions.[6]

The body of case law identifying who can and cannot be a "debt collector" is of critical importance in determining exactly what types of liability policies may be called upon to respond to a claim under the FDCPA.[7] Because the statutory language and case law interpreting it are fairly clear that a party collecting its own debts is not generally a "debt collector" (except for the "false name" claims or if a party is collecting debts as an assignee of debts which are already in default[8]), an entity whose business is not regularly the collection of debts is unlikely to have occasion to submit a claim under the FDCPA to its liability insurer.

The types of entities which potentially could submit FDCPA claims to their liability insurers include:

Traditional Debt Collectors: These are, of course, the primary targets of the legislation.

Law Firms: There is a great variation among the reported decisions about when a law firm is considered a "debt collector" under the FDCPA. The standard in the statute is whether debt collection is either the "principal purpose" of the defendant's business or whether the defendant "regularly" engages in debt collection. With law firms, there are a number of possible tests which the courts have used: the number of creditor clients, the number of dunning letters sent, the number of collection suits filed, the proportion of firm revenue derived from collection work,[9] and the number of employees devoted to it. Courts have reached widely differing results, with one court suggesting that an attorney who engages in debt collection "more than a handful of times per year" is a debt collector.[10] Other courts have applied a more stringent standard.[11]

Banks and Credit Card Issuers: The general weight of authority under the FDCPA is that banks and credit companies, which are in the business of lending money to consumers, are not "debt collectors."[12] It is possible, though, based on the corporate structure governing the collection portion of the business, that a business engaged in consumer finance may be deemed to be a debt collector.[13]

Printing, Mailing and Delivery Services: Some cases have held that printers and similar providers of services to the debt-collection industry can themselves be considered "debt collectors" under the FDCPA. Particularly likely to be held to be "debt collectors" are those printers which provide "urgent telegrams" to debtors for the purpose of capturing the debtor's phone number.[14] Printers of dunning letters also have been sued under the FDCPA, but if they are paid only for their printing service, do not have contact with the debtors and are not identified in their letters as a party for the debtor to respond to, they are unlikely to be held liable.[15] The same result has been reached regarding delivery services.[16]

Other Businesses: Other businesses which have been defendants in FDCPA claims and have been asserted to have been "debt collectors" have included skip tracers,[17] check authorization businesses,[18] private detectives,[19] and even insurers enforcing subrogation rights.[20]

Prohibited Practices

The various sections of the FDCPA contain prohibitions — often detailed in nature — on what debt collectors can and cannot do in collecting debts.

Learning The Debtor's Location: In obtaining information about the debtor from a third party, the debt collector must identify himself or herself, must not state that the debtor owes a debt, must not contact the third party more than once unless asked to do so, must not communicate by post card, must not use mailings which suggest that a debt was being collected, and

must not contact a third party for this information if he or she is represented by an attorney.[21]

Communicating With The Debtor: The FDCPA sets strict limits on a debt collector's communications with a debtor.[22] The debt collector cannot contact the debtor "at any unusual time or place" or at a time or place known to be inconvenient for the debtor.[23] Nor can the debt collector contact a debtor represented by an attorney.[24] The FDCPA prevents the debt collector from contacting the debtor at his or her place of employment if the debt collector has reason to know that the employer does not allow such communications.[25] If the debtor tells the debt collector that he or she refuses to pay the debt or does not wish to communicate further with the debt collector, the collector must cease communications, subject to certain exceptions.[26]

Within five (5) days of the initial contact, the debt collector must send the debtor a notice including the name of the creditor, the amount of the debt, a statement that the debt will be presumed valid if the debtor does not contest it within thirty (30) days and a statement that if the debtor disputes the debt within that time, the collector will provide verification of the debt.[27]

Communicating With Third-Parties About The Debt: Except with the debtor's consent or with court permission or to collect a judgment, a debt collector cannot communicate with a third party about the debt other than the creditor, the debtor's counsel, a consumer credit reporting service, or counsel for the creditor or the debt collector.[28]

Avoiding Harassment or Abuse: The FDCPA prohibits "any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt."[29] It provides a non-exclusive list of harassing or abusive practices, which include:

- use or threat of violence or other criminal means to harm a person or his or her reputation or property[30];
- use of obscene or profane language or language "the natural consequence of which is to abuse the hearer or reader"[31];
- publishing a list of non-paying debtors (except to a consumer reporting agency or other qualifying persons);
- advertising a debt for sale to coerce payment of the debt;
- repeated telephone ringing or calling "with intent to annoy, abuse, or harass any person at the called number;" or
- making telephone calls without meaningfully disclosing the caller's identity.[32]

Avoiding False or Misleading Representations: The FDCPA also prohibits "any false, deceptive, or misleading representation or means" to collect a debt.[33] Without limitation, those practices include:

- falsely representing that the debt collector is vouched for, bonded by, or affiliated with the government, including using a badge or uniform;
- falsely representing the character, amount, or legal status of any debt; or any compensation which the debt collector may receive for collecting the debt;
- falsely misrepresenting that any person is an attorney;
- suggesting that nonpayment will result in the debtor's arrest or imprisonment or the seizure, garnishment, attachment or sale of his or her property or wages (unless that is true and the collector intends to do so);
- threatening to take any action that cannot legally be taken or that is not intended to be taken[34];
- falsely representing or implying that the consumer committed any crime or other conduct "in order to disgrace the consumer;"
- communicating credit information known to be false;
- using communications which simulate official government documents or representing that they are legal process;

- failing to disclose in initial communications that a debt is being collected;
- falsely representing that accounts have been turned over to innocent purchasers for value;
- using a name other than the true name of the debt collector's business, company, or organization; and
- falsely representing that the debt collector is associated with a consumer reporting agency.[35]

Avoiding Unfair or Unconscionable Means to Collect Debts: The FDCPA prohibits the use of "unfair or unconscionable means" to collect a debt.[36] Examples include:

- collecting unauthorized amounts[37];
- accepting postdated checks without giving appropriate notice of the intent to deposit it, soliciting postdated checks to threaten or institute criminal prosecution, or depositing or threatening to deposit postdated checks prior to their dates;
- communicating with the debtor in such a way as to conceal charges made to the debtor for those communications (such as collect telephone calls and telegram fees);
- taking or threatening to take any nonjudicial action against property if it is not supported by a present right to possession, if there is no present intent to take the property, or the property is exempt from that action;
- communicating with a consumer by post card regarding a debt; and
- using any language or symbol, other than the debt collector's address, on any envelope (except that the debt collector can use his or her business name as long as it does not indicate that he or she is in the debt collection business.)[38]

Miscellaneous Acts Prohibited: The FDCPA prohibits several other activities by debt collectors which do not fall under the general descriptions above. A debt collector may not apply a debtor's payments to the disputed portion of a debtor's multiple debts.[39] Debt collectors may bring collection actions only in certain venues.[40] And they are not allowed to use forms suggesting that a person other than the creditor is attempting to collect a debt, when that is not true.[41]

Damages and Penalties: The FDCPA has a singular scheme for compensating consumers and penalizing debtors. It provides for damages for violations of its provisions equal to the sum of the following:

> (1) "any actual damage" sustained by the plaintiff; and
>
> (2) (A) (for individual actions) "additional damages" which the court may allow, up to $1,000 or
>
> (2) (B) (for class actions) the amount in (2)(A) to named plaintiffs and a share in an award of the lesser of $500,000 or 1% of the net worth of the debt collector for all other class members; and
>
> (3) costs and attorney's fees.[42]

In determining the amount of the debt collector's liability, the court "shall consider" the "frequency and persistence of noncompliance" by the debt collector, the nature of the noncompliance and the extent to which the noncompliance "was intentional."[43] A debt collector can avoid liability if he or she shows by a preponderance of the evidence that the violation "was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."[44]

Potential Coverages Implicated By Claims Under The FDCPA

A creditor or debt collector could turn in litigation under the FDCPA as a claim to his or her liability insurers to seek a defense and potentially indemnity for the matter. There are a number of types of coverages which could respond to such a matter; which one(s) would respond would depend greatly on the nature of the business in which the defendant participates. The most likely responsive coverages for such a matter

include businessowners (general liability) and professional liability coverages, which we discuss below.

General Liability Coverage[45]

The initial question in an analysis of applicable general liability coverage is what type of insuring agreement may respond to an FDCPA claim.

Bodily Injury And Property Damage

Coverage A and Coverage B of the typical general liability policy's insuring agreement provide "bodily injury" and "property damage" liability coverage, although these coverages likely would not provide defense or indemnity coverage for an FDCPA claim, for a number of reasons.

First, the types of "damages" which an FDCPA claimant typically seeks would be economic in nature and likely would not fall within the definition of either "bodily injury" or "property damage." Although a debtor may claim to have suffered emotional distress, such damages are, under the law of most jurisdictions, not "bodily injury"[46] without physical manifestations. Even under the rare circumstances in which a debtor claims to have suffered "bodily injury," either because the emotional distress produced by the debt collection conduct was so severe that it produced physical manifestations, or because the debt collector "used violence," the debt collector's conduct is unlikely to have resulted from an "occurrence" (see discussion below). Also, economic losses do not constitute "property damage" under the law of most jurisdictions.[47]

Second, the "bodily injury" or "property damage" must be caused by an "occurrence," which is defined in standard (Insurance Services Offices) general liability forms as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[48] The types of conduct which would subject a debt collector to liability under the FDCPA are most likely to be characterized as intentional in nature — even if not necessarily deliberately deceptive or dishonest — and the results of such conduct may not be viewed as the product of an occurrence. Indeed, the FDCPA expressly provides that a debt collector cannot be liable if he or she can prove that the violation of the FDCPA was the result of a *bona fide* error,[49] and thus much of the debt collection conduct which would fall within the general description of "negligence" (thereby, potentially being an "occurrence") would not rise to the level of culpability under the FDCPA in the first place.

Personal Injury Coverage

If an FDCPA claim is to find any place within a general liability insuring agreement, it most likely would be within one of the "personal injury" offenses, which include the following:

- "Malicious prosecution";
- "Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services";
- "Oral or written publication of material that violates a person's right of privacy."[50]

Malicious prosecution: The case law interpreting general liability policies is fairly consistent that the personal injury offense of "malicious prosecution" is congruent with the common law tort of "malicious prosecution."[51] Its elements are: the institution of an action against the plaintiff by or at the insistence of the defendant, and with malice; the resolution of the action in the plaintiff's favor; the lack of probable cause for the action, and special damages suffered by the plaintiff.[52] In light of these common law elements, it is unlikely that this "personal injury" offense would provide much coverage for an FDCPA claim, except in the relatively limited circumstances in which suit is brought based on a non-existent debt. For example, it has been held that a mere threat of legal action — which could certainly describe a wider range of potential FDCPA claims — does not constitute "malicious prosecution" for purposes of general liability coverage.[53]

Slander or Libel: The two hallmarks of the "personal injury" offenses of libel and slander are: (1) the publication of a statement about the plaintiff to a third party; and (2) the statement's falsity. There are a number of scenarios under the FDCPA in which the elements of traditional libel or slander could be met, thus triggering this prong of the "personal injury" coverage. For example, a debt collector may make a prohibited communication to a third party which contains false

information about the debtor — such as, that the debtor owes money when he or she does not.[54] This coverage, though, will be of no assistance to insureds who are charged with violating the FDCPA without making a false statement about the debtor. In Aetna Cas. & Sur. Co. v. O'Rourke Bros, Inc.,[55] allegations that an insured damaged its customers' credit reputations by contacting credit bureaus or credit agencies did not fall within the "personal injury" coverage for libel or slander, since the customers did not allege that the information provided by the insured was false.[56] As such, it appears that these "personal injury" offenses could be invoked in a relatively limited group of FDCPA cases.[57]

Invasion of Privacy: A number of sections of the FDCPA are violated when communications with third-parties disclose information about the debtor — false or not. Because of the absence of the "falsity" requirement, it would appear to be easier for an FDCPA claim to fall under this type of "personal injury" offense than under the libel and slander offense.[58] An example is St. Paul Fire & Marine Ins. Co. v. Green Tree Financial Corp. — Texas,[59] in which a lender's repeated phone calls to the borrower (including calls at inappropriate hours and threats to contact the borrower's employer) imposed on the general liability insurer the duty to defend under the invasion of privacy "personal injury" offense.[60] The Green Tree court reached this result even though there was no specific cause of action for invasion of privacy or request for damages resulting from the same. Finally, it should be noted that there is authority suggesting that because certain invasion of privacy torts such as false light privacy require "publication" to "the public generally or a large number of persons," an allegation that an insured told a customer's lender that the customer was not paying his bills did not trigger this coverage.[61]

Non-Standard Or Manuscript Language: Insureds should be aware that some non-ISO or manuscript general liability forms may provide "personal injury" coverage under terms which may be more expansive, and perhaps better suited to covering certain FDCPA claims, than that contained in ISO forms. One example is the term "humiliation," which could certainly be used to describe a number of the types of conduct which could violate various sections of the FDCPA. In examining this language, it must be kept in mind, though, that the placement of these terms will be key in determining how expansively or restrictively the courts will read them.[62]

Professional Liability Coverage

While the general liability policy affords some possibility for coverage for an FDCPA claim, the far more likely coverage would be available through an errors and omissions policy covering the insured for "Loss" resulting from "Wrongful Acts" in a particular profession. Because, as noted above, there is a wide variety of prospective defendants in FDCPA claims, the language of the pertinent policies can vary significantly. There are, however, some common issues presented in the professional liability policies under which such claims may be tendered.

Professional Services

The threshold issue under any professional liability is whether the professional is alleged to have committed wrongful acts in connection with the performance of services "for others." With limited exceptions, any defendant alleged to be responsible under the FDCPA is likely to be charged with violations in connection with the collection of debts of others. Also, while a number of professional liability insuring agreements require that these services are performed "for a fee," that requirement should not be difficult to meet, because in order for a defendant to be a "debt collector," he or she must regularly engage in the business of debt collection.

Most professional liability policies list the particular profession;[63] others require that the "professional" activities fall within an itemized list of activities[64] or a list of particular statutes or types of statutes which the insuring agreement insured against violations of.[65] Under either type of policy, one question would be whether the particular "debt collection" activities at issue in the claim fall within the enumerated profession or, if applicable, within the specific list of activities. For some professions, this inquiry would be fairly obvious, as, for example, when an attorney is charged with improper activities in pursuing debt collection litigation.[66]

One coverage question which may arise under the FDCPA involves the use of an attorney to send collection letters as a "ministerial" task, which is itself

a violation of the FDCPA.[67] The attorney's professional liability insurer facing such a claim may be able to argue that the sending of collection letters in such a manner does not involve the provision of "professional services" by the attorney, although it does not appear that such an argument has been considered in any reported decision.

Claims-Made Issues

Virtually all professional liability policies are written on a claims-made basis. Most of the "claims-made" and claims reporting issues in FDCPA claims are identical to those presented in other types of claims. A discussion of the general body of that case law is beyond the scope of this article.

However, one case has discussed a claims-made issue in the context of an FDCPA claim, and because it involves one aspect of the FDCPA which appears to recur — the statement of successive and potentially overlapping consumer classes involving the same debt collector — it is worth examining in some detail. In CheckRite, Ltd. v. Illinois Nat'l Ins. Co.,[68] the insurer issued two successive miscellaneous errors and omissions policies to a debt collector for the policy periods of November 1, 1996/97 and November 1, 1997/98.

The debt collector was the subject of an FDCPA class action complaint filed on September 29, 1993, and purporting to involve a class of debtors injured during the previous year (*i.e.*, from September 29, 1992 to September 29, 1993).[69] On January 27, 1994, the plaintiffs filed an amended complaint on behalf of a class of debtors who were injured during the year before the filing of that complaint (*i.e.*, from January 27, 1993 to January 27, 1994). The court eventually certified a class of plaintiffs injured from September 29, 1992 to January 27, 1994. These two complaints were tendered to the debt collector's previous insurer.

On May 8, 1996, the plaintiffs filed a second class action complaint, which asserted a cause of action on behalf of persons injured between January 27, 1994 and December 31, 1996. The court allowed the litigation to proceed as to this class.

The insured then tendered the action to its new insurer on February 20, 1997. That insurer disclaimed coverage, stating that the "claim" which was submitted was made when the initial complaint was filed against the debt collector.

The court, applying New York law, held that the second amended complaint was a new "claim" as defined in the policies[70] because, even though it was technically an amendment of the prior proceeding, it asserted a cause of action on behalf of "a new and distinct group of claimants" on whose behalf no claim had been asserted before. As the court put it, before the filing of the second amended complaint, "[t]here was no judicial proceeding against [the debt collector] in which it could have been subjected to damages to these persons."[71]

The CheckRite court cited Home Ins. Co. of Illinois v. Spectrum Information Technologies, Inc.,[72] in support of its conclusion that the class action allegations in the second amended complaint were a new "claim." In Spectrum, the insurer argued that because one of four securities class action lawsuits (which were ultimately consolidated) was filed before the policy incepted, no "claim" was made during the insurer's policy period. The four suits related to four wrongful acts — the nondisclosure of several specific items relating to the insured corporation's business, and alleged insider trading based on nondisclosed information.

The Spectrum court held that even though the four class action matters ultimately were consolidated in the same suit, each class action, with its different allegations, was a separate "claim" under the policy, which defined that term as "a written demand by a third party for damages, including the institution of suit or a demand for arbitration." In other words, each separate complaint was a "written demand by a third party for damages." The Spectrum court also declined to consider the four suits to be based on "the same wrongful act or interrelated, repeated or continuous wrongful acts," relying on authorities which held similar phrases to be ambiguous.[73] Finally, the Spectrum court declined to apply the policy's pending litigation exclusion to "relate" the three later complaints back to the earlier complaint, on the theory that the nondisclosures represented a larger "scheme" to inflate the insured corporation's share prices.

Intentional And Fraudulent Conduct Issues

The Insuring Agreement: The initial question a professional liability insurer or insured must ask if

considering coverage for an FDCPA claim is what type of language is used in the insuring agreement and pertinent definitions to describe the covered "wrongful acts." Many insuring agreements use the broader term "act, error or omission," which suggests that the insuring agreement itself does not present any restrictions on providing coverage for intentional acts — which would describe a considerable portion of the conduct likely to violate the FDCPA. Other insuring agreements which require "*negligent* acts, errors or omissions," or similar language, suggesting that intentional acts are not covered.[74]

As applied to the FDCPA, the question of what is "negligence" but is still actionable is a tricky one, because the Act contains an exception which provides that a debt collector may not be held liable if he or she can establish that the violation was "not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."[75] Some courts have construed the "bona fide error" defense narrowly, excluding mistakes of law or reliance on the advice of counsel[76] and limiting it to such clerical mistakes as transposition of numbers.[77] Other courts have construed it somewhat more generously, allowing a lawyer to rely on unintentional errors of law.[78] In any event, the "bona fide error" defense is generally a question of fact,[79] and even if the debt collector is ultimately unsuccessful in asserting it, insurers with "negligent acts" insuring agreements are still likely to have an obligation to provide a defense.

The Fraud and Dishonesty Exclusion: Many professional liability policies contain exclusions for "Claims" or "Loss" "based on, directly or indirectly arising out of or resulting from any actual or alleged criminal, fraudulent, or discriminatory act or omission." Typically, such exclusions contain "in fact" language or an express adjudication requirement, which would not preclude a professional liability insurer from providing a defense. As discussed above, the FDCPA prohibits a wide variety of conduct, which can include technical violations (such as the use of a postcard to communicate with the debtor) as well as truly fraudulent and abusive conduct. In the latter types of claims, a fraud and dishonesty exclusion may relieve a professional liability insurer from a duty to indemnify its insured for a judgment against it.[80]

The Improper Personal Profit Exclusion: Another common exclusion in professional liability policies is for "Claims" or "Loss" based upon "any Insureds gaining any profit, advantage or remuneration to which they were not entitled." Again, as with the fraud and dishonesty exclusion, the "improper personal profit" exclusion typically requires an adjudication, and therefore is likely to be of relevance principally in determining a liability insurer's duty to indemnify its insured for a judgment. Furthermore, it appears that given the scope of the FDCPA as limited to "debt collectors" who are acting for others — only in a few circumstances does it extend to creditors collecting their own debts — this exclusion may be of limited use to insurers. It is the *creditor's* funds which are being collected, and even if the collector obtains money from a debtor which the debtor should not have given up, that money is likely not to belong to the debt collector. There are circumstances under which a debt collector may be found to have obtained funds to which it is not entitled, such as the collection of unauthorized or excessive charges, and to that extent, the exclusion may bar coverage for a portion of a judgment against the collector.[81] The exclusion, though, is not likely to preclude coverage for most FDCPA judgments in their entirety.

The Wilful Violation of Statute Exclusion: As discussed above, there are other statutes which a debt collector may violate in the context of violating the FDCPA. These may include, for example, telephone anti-harassment statutes. Thus, while the FDCPA does not require proof of a "wilful" violation of statute, other statutes may require such a finding. In that case, proof of that violation could preclude coverage and, if all of the conduct alleged to violate the FDCPA also falls within that other statute, there could be an argument that a defense is precluded as well.[82]

Fee Exclusions

Many professional liability policies contain exclusions for the return or restitution of fees.[83] It is arguable that if a claim under the FDCPA is based exclusively or largely on the debt collector attempting to collect fees to which he or she is not entitled, such exclusions could be applicable. On the other hand, if the claim is coupled with allegations of other types of misrepresentation or other actionable conduct on the FDCPA, such exclusions may not bar coverage for the claim in its entirety.[84]

Coverage For Statutory Damages

One issue which is unique to the FDCPA is what "damages" provided for by statute would be covered "Loss" under the typical professional liability insurance policy. 15 U.S.C. §1692k(a)(1) allows for recovery of "any actual damage" sustained by the plaintiff; these damages are compensatory in nature and do not present any serious coverage issue. However, §1692k(a)(2)(A), applicable to individual actions, allows an award of up to $1,000 in "additional damages" which the court may allow, and §1692k(a)(2)(B), applicable to class actions, allows the "additional damages" to the named plaintiffs, and, to the other class members, a share in an award of the lesser of $500,000 or 1% of the net worth of the debt collector. Under many professional liability policies, the question about the Section 2(A) and 2(B) awards is whether they constitute "fines or statutory penalties" so that they are excluded under the applicable policy's definition of "loss" or "damages."

While there appears to be no applicable case law under the FDCPA, there is some pertinent case law from other statutes, upon which analogies can be drawn. This case law draws a distinction between statutes providing remedial relief (which is usually deemed covered) and those assessing damages which are punitive in nature (which is usually deemed not covered). In Mortenson v. National Union Fire Ins. Co.,[85] the court found a penalty of 100% of the past-due taxes for "willfully" failing to pay company income tax to be punitive, excluding coverage under a directors and officers policy for "fines or penalties imposed by law [ ]."[86] The Mortenson court described the penalty at issue as the "civil counterpart of a fine."[87] On the other hand, where a statutory award is said to be remedial in nature, it has not been found to be barred under policies with similar exclusionary language.[88]

Case law construing the FDCPA consistently finds the Section 2(A) and 2(B) damages to be punitive rather than remedial, largely because the claimant already has been "made whole" by the application of the "actual damages" provision in Section 1. In Thomas v. Pierce, Hamilton and Stern, Inc.,[89] the court denied an individual plaintiff's request for a separate punitive damage award under the FDCPA, holding that the "only reasonable reading" of the term "additional damages" used in Section 2(A) "includes punitive damages and [ ] the discretionary statutory award is meant to preclude a separate award of punitive damages." Subsequent federal cases have supported this interpretation, and also apply it to an award under Section (2)(B), which applies to unnamed plaintiffs in class action suits.[90]

Under these authorities it is likely that an award under these sections would be considered "punitive" because such an award is in addition to actual damages, with the apparent goal of punishing defendants' improper conduct and discouraging future FDCPA violations. Mortenson suggests that such a statutory award is excluded as a "fine[ ] or statutory penalty[ ]" under the language of such policies which exclude such matters. Additionally, where a state's public policy precludes coverage for "punitive damages" as a matter of statute or common law, an insurer may argue that those principles extend to the awards available under Sections 2(A) and 2(B).

Conclusions

The FDCPA presents some opportunities for liability coverage, but due to the contours of the Act, those possibilities are somewhat limited. Under a general liability policy, the personal injury coverage may apply to such a claim if the common law elements of torts such as malicious prosecution, slander, libel or — most likely — invasion of privacy are found within the allegations of (or accompany as a separate cause of action) the statutory claim. Professional liability coverage is much more likely to respond to an FDCPA claim if it falls within the requirements of the particular insuring agreement, but in this coverage, willful and intentional conduct exclusions may preclude indemnity — and perhaps a defense, depending on the law of the particular jurisdiction.

Endnotes

1. 15 U.S.C. §1692, *et seq.*
2. 15 U.S.C. §1692a(6).
3. Id.
4. Id.

5. Randle v. GC Servs., L.P., 25 F. Supp. 2d 849 (N.D. Ill. 1998); Ditty v. CheckRite, Ltd., Inc., 973 F. Supp. 1320 (D. Utah 1997).

6. 15 U.S.C. §1692a(6)(A)-(F).

7. For a more comprehensive discussion of this case law, see generally, Annot., "What Constitutes 'Debt Collector' For Purposes Of Fair Debt Collection Practices Act (15 U.S.C.A. § 1692a(6))," 173 A.L.R. Fed. 223 (2001).

8. Pollice v. National Tax Funding, L.P., 225 F.3d 379 (3rd Cir. 2000) (collector of debt which was defaulted at time of assignment was a "debt collector"); 15 U.S.C. § 1692a(6)(F)(iii).

9. *But see,* Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carrol & Bertolotti, 374 F.3d 56 (2d Cir. 2004) (if law firm "regularly" renders debt collection services, it would be considered a "debt collector" under FDCPA even if services do not constitute significant portion of firm's revenue).

10. Crossley v. Lieberman, 868 F.2d 566 (3rd Cir. 1989). *See also* Silva v. Mid Atlantic Mgmt. Corp., 277 F. Supp. 2d 460 (E.D. Pa. 2003) (law firm was "debt collector" where it accepted at least 10 collection matters a year for several years, even though they amounted to 1% of the firm's case volume and revenue).

11. *See* Von Schmidt v. Kratter, 9 F. Supp. 2d 100 (D. Conn. 1997) (6% of law firm's new cases being collection-related did not make law firm a debt collector, where they produced less than $1,000 in revenue out of $500,000); White v. Simonson & Cohen, P.C., 23 F. Supp. 2d 273 (E.D.N.Y. 1998) (sending 35 collection letters but not litigating any did not make law firm a debt collector).

12. Thomasson v. Bank One, Louisiana, N.A., 137 F. Supp. 2d 721 (E.D. La. 2001) (banks); Claussen v. Chase Manhattan VISA, Div. of Chase Manhattan Bank USA (N.A.), 1989 WL 87996 (D. Kan. 1989) (credit card company); McGrady v. Nissan Motor Acceptance Corp., 40 F. Supp. 2d 1323 (M.D. Ala. 1998) (auto finance company).

13. Pressman v. Southeastern Financial Group, Inc., 1995 WL 710480 (E.D. Pa. 1995) (question of fact about whether financing company was acting for another party in collecting debt).

14. Silva v. National Telewire Corp., 2000 WL 1466149 (D.N.H. 2000); Romine v. Diversified Collection Servs., Inc., 155 F.3d 1142 (9th Cir. 1998).

15. Trull v. Lason Systems, Inc., 982 F. Supp. 600 (N.D. Ill. 1997); Laubach v. Arrow Service Bureau, Inc., 987 F. Supp. 625 (N.D. Ill. 1997).

16. Aquino v. Credit Control Servs., 4 F. Supp. 2d 927 (N.D. Cal. 1998).

17. Goldstein v. Chrysler Financial Co., 276 F. Supp. 2d 687 (E.D. Mich. 2003).

18. Ballard v. Equifax Check Servs., Inc., 27 F. Supp. 2d 1201 (E.D. Cal. 1998).

19. Tragianese v. Blackmon, 993 F. Supp. 96 (D. Conn. 1997).

20. Vasquez v. Allstate Ins. Co., 937 F. Supp. 773 (N.D. Ill. 1996).

21. 15 U.S.C. §1692b.

22. For purposes of these prohibited communications, this section of the FDCPA defines the debtor, or "consumer" as including "the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator." 15 U.S.C. §1692c(d).

23. 15 U.S.C. §1692c(a)(1).

24. 15 U.S.C. §1692c(a)(2). One common issue involves the extent to which the collector knows that the debtor is represented by an attorney with respect to all of his or her debts, or only some of them. *See, e.g.*, Graziano v. Harrison, 950 F.2d 107 (3d Cir. 1991).

25. 15 U.S.C. §1692c(a)(3).

26. 15 U.S.C. §1692c(c). Those exceptions allow the debt collector to tell the debtor that collection efforts are to be stopped or that the collector will initiate certain remedies.

27. 15 U.S.C. §1692g(a)(1)-(4).

28. 15 U.S.C. §1692c(b). Under this section, claims that the debt collector communicated about the debt with a co-worker or family member are common. Austin v. Great Lakes Collection Bureau, Inc., 834 F. Supp. 557 (D. Conn. 1993). At least one case has held that a debt collector can be liable for the resulting humiliation or embarrassment from such activity. Kleczy v. First Federal Credit Control, Inc., 21 Ohio App. 3d 56, 496 N.E.2d 204 (1984) (envelope sent to debtor's work, referencing amount of debt, and through which "final demand for payment" notation could easily be read, created circumstances under which reasonable person would be humiliated and embarrassed).

29. 15 U.S.C. §1692d.

30. In one strained reading, a debtor asserted (unsuccessfully) that a creditor's use of a notice advising of an "opportunity to settle this in a friendly manner," implied that if settlement were not reached, "un-friendly" or violent means would be used. Gaetano v. Payco of Wisc., Inc., 774 F. Supp. 1404 (D. Conn. 1990).

31. A debt collector is liable for using obscene or profane language whether or not he or she intends to abuse the listener. Horkey v. J.V.D.B. & Assocs., Inc., 333 F.3d 769 (7th Cir. 2003). On the other hand, courts have acknowledged that some inconvenience or embarrassment is the natural consequence of debt collection, and will not impose liability under the FDCPA for embarrassing or intrusive questions or inappropriate language. Bieber v. Associated Collection Servs., Inc., 631 F. Supp. 1410 (D. Kan. 1986) (collector asked debtors if they were going to file bankruptcy after being told they were represented by counsel). Some courts have found debt collectors liable for emotional distress damages under the FDCPA as a result of harassing or abusive practices. *See* Teng v. Metropolitan Retail Recovery, Inc., 851 F. Supp. 61 (E.D.N.Y. 1994); Venes v. Professional Service Bureau, Inc., 353 N.W.2d 671 (Minn. App. 1984).

32. 15 U.S.C. §1692d(1)-(6).

33. 15 U.S.C. §1692e. One example of a misleading practice was an attorney's use of form letters which gave the debtor the impression that the attorney had actually reviewed the file with the creditor, who had told the attorney to pursue the matter to the fullest extent. Clomon v. Jackson, 988 F.2d 1314 (2d Cir. 1993).

34. In this regard, a threat to file suit is not prohibited if the debt collector or the creditor intend to do so. Pearce v. Rapid Check Collection, Inc., 738 F. Supp. 334 (D.S.D. 1990). However, if the debtor or debt collector does not intend to do so, or has not obtained the appropriate permission to do so, the Act can be violated. This can lead to fact questions regarding the defendant's intent to follow up. *See e.g.*, Graziano v. Harrison, 763 F. Supp. 1269 (D.N.J. 1991), *rev'd in part, vacated in part,* 950 F.2d 107 (3d Cir. 1991).

35. 15 U.S.C. §1692e(1)-(16).

36. 15 U.S.C. §1692f.

37. This has been interpreted to include an attempt to collect any amount in excess of the principal amount of the loan plus collection charges expressly authorized by the agreement creating the indebtedness and by state law. Patzka v. Viterbo College, 917 F. Supp. 654 (W.D. Wis. 1996).

38. 15 U.S.C. §1692f(1)-(8). The debt collector's lack of knowledge that he or she is violating these requirements is not a defense. Rutyna v. Collection Accounts Terminal, Inc., 478 F. Supp. 980 (N.D. Ill. 1979).

39. 15 U.S.C. §1692h.

40. 15 U.S.C. §1692i(a).

41. 15 U.S.C. §1692j.

42. 15 U.S.C. §1692k(a).

43. 15 U.S.C. §1692k(b).

44. 15 U.S.C. §1692k(c).

45. This general liability analysis is equally applicable to any other general liability policy a creditor or debt collector may have, such as a homeowners' or

personal umbrella policy, except that those policies typically have "business pursuits" exclusions which likely would preclude coverage for all debt collection activities other than those which arise out of collection of a personal debt. Because a party collecting his or her own debts is generally liable under the FDCPA only if he or she uses the name of a third party to collect the debts or if acting as an assignee of a debt taken after it was in default, the circumstances under which personal liability policies would respond to FDCPA claims are quite limited.

46. *See, e.g.*, SL Indus., Inc. v. American Motorists Ins. Co., 128 N.J. 188, 607 A.2d 1266 (1992). There is, however, a minority view. *See* Lavanant v. General Acc. Ins. Co. of America, 79 N.Y.2d 623. 595 N.E.2d 819, 584 N.Y.S.2d 744 (1992).

47. *See, e.g.*, Giddings v. Industrial Indem. Co., 112 Cal. App. 3d 213, 169 Cal. Rptr. 278 (1980). While property damage includes "loss of use," that definition is customarily limited to loss of use of "*tangible property* that is not physically injured," rendering it of little use in an FDCPA claim. *See* Insurance Services Offices, Inc. ("ISO"), form CG 00 01 07 98, Section V, Definitions, 17. "Property Damage" b. Also, one would expect that it is the *creditor* which would be able to claim loss of use of property, not the debtor.

48. ISO form CG 00 01 07 98, Section V, Definitions, 13. "Occurrence."

49. 15 U.S.C. §1692k(c).

50. ISO form CG 00 01 07 98, Section V, Definitions, 14. "Personal and Advertising Injury" b., d. and e.

51. Heil Co. v. Hartford Acc. & Indem. Co., 937 F. Supp. 1355 (E.D. Wis. 1996); William J. Templeman Co. v. Liberty Mut'l. Ins. Co., 316 Ill. App. 3d 379, 735 N.E.2d 669 (2000); Pennsylvania Pulp & Paper Co., Inc. v. Nationwide Mut'l. Ins. Co., 100 S.W.3d 566 (Tex. App. 2003).

52. Heil Co., *supra*, note 53.

53. Regency Motors of Metairie, Inc. v. Hibernia-Rosenthal Ins. Agency, L.L.C., 868 So.2d 905 (La. App. 2004).

54. In Bankwest v. Fidelity & Deposit Co. of Md., 63 F.3d 974 (10th Cir. 1995), allegations that a bank sent letters to other banks falsely stating that those banks were "estopped" from extending further credit to the clients triggered libel and slander coverage.

55. 333 Ill. App. 3d 871, 776 N.E.2d 588 (2002).

56. *See also* Hardy v. Hartford Ins. Co., 236 F.3d 287 (5th Cir. 2001) (claimant's negligent misrepresentation claim against law firm, in response to collection action, asserting that the collection action improperly suggested that claimant — rather than his company — owed the legal fees, held not to constitute a personal injury offense of defamation).

57. Also, the standard ISO-form commercial general liability policy excludes from coverage any personal injury "arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity." ISO form CG 00 01 07 98, Coverage B., Personal and Advertising Injury Liability, 2., Exclusions, a.(2).

58. *See* Collection Bureau of Orlando, Inc. v. Continental Cas. Co., 342 So.2d 1019 (Fla. App. 1977) (holding, with little discussion, that invasion of privacy coverage in debt collector's liability policy extended to actions under Florida debtor harassment act).

59. 249 F.3d 389 (5th Cir. 2001).

60. The primary policy had an exclusion for knowing violation of penal statutes, which the insured arguably committed under a Texas statute prohibiting harassing phone calls. *See also* Mroz v. Smith, 261 N.J. Super. 133, 617 A.2d 1259 (1992) (applying violation of penal law exclusion to preclude coverage for lawsuit arising out of harassing calls). However, the umbrella policy had no such exclusion and it appears that the court required that insurer to drop down and furnish the defense.

61. Marleau v. Truck Ins. Exchange, 333 Or. 82, 37 P.3d 148 (2001).

62. American Motorists Ins. Co. v. Allied-Sysco Food Servs., Inc., 19 Cal. App. 4th 1342, 24 Cal. Rptr. 2d 106 (1993), *disapproved on other grounds*, Buss v. Su-

perior Court, 16 Cal. 4th 35, 939 P.2d 766 (1997) (coverage for "humiliation" must be construed in context of libel, slander and invasion of privacy with which it was grouped).

63. At least one reported decision, which is discussed in greater detail in text, involved a debt collectors errors and omissions policy. CheckRite, Ltd. v. Illinois Nat'l Ins. Co., 95 F. Supp. 2d 180 (S.D.N.Y. 2000).

64. A listing of enumerated "professional services" should not present any ambiguity in the abstract. *See, e.g.*, Terramatrix, Inc. v. U.S. Fire Ins. Co., 939 P.2d 483 (Colo. App. 1997) (finding "no ambiguity" in policy providing professional services coverage "for damages resulting from performance of specifically stated services.").

65. John Markel Ford, Inc. v. Auto-Owners Ins. Co., 543 N.W.2d 173 (Neb. 1996) (no coverage for car dealer, who was not a "creditor" under the Consumer Credit Protection Act, which was the only statute covered under policy's E&O coverage); Tynan's Nissan, Inc. v. American Hardware Mut'l. Ins. Co., 917 P.2d 321 (Colo. App. 1995) (policy covering Truth-in-Lending Act violations provides no coverage for Uniform Consumer Credit Code claims).

66. *See e.g.*, Abrams v. State Farm Fire & Cas. Co., 306 Ill. App. 3d 545, 714 N.E.2d 92 (1999) (lawyers' making of false auto insurance claims and filing suit based on those claims excluded under "professional services" exclusion in general liability policy, demonstrating that litigation conduct is inherently within the profession of "lawyer").

67. *See generally,* Nielsen v. Dickerson, 307 F.3d 623 (7th Cir. 2003).

68. 95 F. Supp. 2d 180 (S.D.N.Y. 2000).

69. The one-year classes stem from the one-year limitation period applicable to FDCPA claims, dating from the date on which the violation occurs. 15 U.S.C. § 1692k(d).

70. The policies had two definitions of "claim": a "judicial, administrative, or arbitration proceeding" in which the insured may be held liable for damages, and written notice from a client, customer or consumer that it was their intention to hold one or more insureds responsible for liability arising out of professional services.

71. 95 F. Supp. 2d at 190.

72. 930 F. Supp. 825 (E.D.N.Y. 1996).

73. *See* McCuen v. American Casualty Co. of Reading, 946 F.2d 1401, 1407-08 (8th Cir. 1991) (Iowa law) (commenting that the terms "similar" and "interrelated" in the phrase "same act, interrelated acts, or one or more series of similar acts ... shall be considered a single [l]oss" were "so elastic, so lacking in concrete content, that they import into the contract, in our opinion, substantial ambiguities") (emphasis added).

74. *See, e.g.*, Golf Course Superintendents Assoc. v. Underwriters at Lloyd's of London, 761 F. Supp. 1485 (D.Kan. 1991) (retaliatory discharge is not a "negligent act, error or omission"); St. Paul Fire & Marine Ins. Co. v. National Real Estate Clearinghouse, Inc., 957 F. Supp. 187 (D. Minn. 1997), aff'd., 141 F.3d 1170 (8th Cir. 1998) (intentional interference with prospective economic advantage is not covered under an insuring agreement which referenced "errors, omissions and negligent acts.").

75. 15 U.S.C. §1692k(c).

76. Baker v. G.C. Servs. Corp., 677 F.2d 775 (9th Cir. 1982); Sibley v. Firstcollect, Inc., 913 F. Supp. 469 (M.D. La. 1995) (noting that debt collector's inquiries to counsel were not evidence of procedures reasonably adapted to avoid errors, but were in fact evidence of the error itself – failure to obtain proper state license).

77. Patzka v. Viterbo College, 917 F. Supp. 654 (W.D. Wis. 1996).

78. Taylor v. Luper, Sheriff & Niedenthal Co., L.P.A., 74 F. Supp. 2d 761 (S.D. Ohio 1999).

79. McDowall v. Leschack & Grodensky, P.C., 279 F. Supp. 2d 197 (S.D.N.Y. 2003); Narwick v. Wexler, 901 F. Supp. 1275 (N.D. Ill. 1995).

80. Compare St. Paul Ins. Co. v. Bonded Realty, Inc., 578 S.W.2d 191 (Tex. Civ. App. 1979) (state law deceptive trade practices claim, based on realtor's knowing misrepresentation of home condition held to be within fraud and dishonesty exclusion) with Thomas J. Sibley, P.C. v. National Union Fire Ins. Co., 921 F. Supp. 1526 (E.D. Tex. 1996) (fraud and dishonesty exclusion in lawyers' professional liability policy did not bar coverage for state unfair trade practices act claim).

81. *See, e.g.*, Steadfast Ins. Co. v. Stroock Stroock & Lavan, L.L.P., 277 F. Supp. 2d 245 (S.D.N.Y. 2003) (personal profit exclusion applied to a creditor's claim against a law firm for fraudulently transferring a debtor-client's assets where the firm received shares in the client to pay for fees).

82. *See* St. Paul Fire & Marine Ins. Co. v. Green Tree Financial Corp. — Texas, 249 F.3d 389 (5th Cir. 2001).

83. Continental Cas. Co. v. Black & Black, P.A., 674 So.2d 163 (Fla. App. 1996); Contintental Cas. Co. v. Brady, 907 P.2d 807 (Idaho 1995).

84. Hartford Cas. Ins. Co. v. Chase Title, Inc., 247 F. Supp. 2d 779 (D. Md. 2003) (fee exclusion did not preclude insurer's duty to defend title company in consumer class action involving excessive fees where suit also alleged other misrepresentations in real estate settlement documents).

85. 249 F.3d 667 (7th Cir. 2001).

86. 249 F.3d at 669. *But see,* St. Paul Fire & Marine Ins. Co. v. Briggs, 464 N.W.2d 535 (Minn. App. 1990), which held that the same tax provision was not a penalty because it was civil rather than penal in nature. The Briggs court, however, refused to allow the tax penalty to be covered under public policy grounds.

87. 249 F.3d at 671. *See also,* Hofco Inc. v. National Union Fire Ins. Co., 482 N.W.2d 397 (Iowa 1992) (excess tax for improper stock transactions in connection with company's employee profit sharing plan was punitive because it raised very little money but would automatically increase from 5% to 100% in the event that the tax was not paid).

88. *See, e.g.,* Carey v. Employers Mut'l. Cas. Co., 189 F.3d 414 (3rd Cir. 1999) (applying Pennsylvania law) (statutory surcharge not excluded as "fine[ ] or penalty[ ] imposed by law" because it only assessed actual loss (amount of over billing plus interest)).

89. 967 F. Supp. 507, 509 (N.D. Ga. 1997).

90. *See, e.g.,* Scott v. Universal Fidelity Corp., 42 F. Supp. 2d 837, 840 (N.D. Ill. 1999) ([Section (2)(B)] damages are "punitive in nature" and "intended to deter future misconduct by defendants"); In re Trans Union Corp. Privacy Litigation, 211 F.R.D. 328, 341-342 (N.D. Ill. 2002) (quoting Thomas to support a finding that "additional damages" under another statute includes punitive damages "because the statutory damages are allowed in addition to compensatory (actual) damages [ ] they are considered a penalty."); Johnson v. Eaton, 80 F.3d 148, 152 (5th Cir. 1996); Boyce v. Attorney's Dispatch Service, 1999 WL 33495605, at *2 (S.D. Ohio, April 27, 1999) ("courts have indicated that statutory damages are punitive in nature"). ■