

Question 11 – February 2013 – Selected Answer 1

1. Yes, Hospital is liable for Dan's wrongful debt collection under the TDCA.

The Texas Debt Collection acts prohibits a specifically enumerated list of specific violations that constitute wrongful debt collection, such as false or misleading or deceptive acts and practices, or harassment. The TDCA applies to consumers with consumer debts, defined as an obligation arising out of a transaction or purported transaction undertaken primarily for personal or household benefit. Carolina's hospital bills were a personal expense, and thus qualify as a consumer debt. The TDCA applies to debt collectors, defined as a person who directly or indirectly engages in debt collection (including the original creditor), and third party debt collectors, defined as a person who regularly collects or attempts to collect, debts owed another. Hospital is a debt collector because it is the original creditor and is attempting to collect a debt from Carolina. Dan is an employee of Hospital, so Hospital is vicariously liable for his actions and his wrongful conduct that occur while Dan is attempting to collect a debt on behalf of the Hospital. Dan will also be directly liable for his violations. Carolina may argue that Dan is a third party debt collector, and if he is found to be employed by Hospital solely for collection of debts or as an independent contractor, he may qualify as a third party debt collector, in which case additional requirements will apply to him. Namely, he must file a bond and must preface the initial communication with a statement that he is seeking to collect a debt and that any information obtained will be used for that purpose, and any subsequent communications must state that it is from a debt collector. Even if Dan is found to be a third party debt collector and thus an independent contractor, Hospital will still be liable for Dan's violations because the duty to not engage in wrongful debt collection is non-delegable. Dan violated several specific provisions of the TDCA, and Hospital is liable for his violations. If Dan is found to be a third party debt collector, his voicemails and email may violate the TDCA because he did not state that it was an attempt to collect a debt and that any information obtained can be used for that purpose. Regardless of whether he is a third party debt collector, the voicemail violates the TDCA because he used a fake name, which is a specific violation. Unlike the Federal Fair Debt Collection Act, the TDCA does not specifically prohibit third party communications, so a third party hearing the voicemail may not necessarily violate the TDCA, except it may fall within the "catchall" unfair or deceptive act provision, but there is no evidence that anyone heard it. Also unlike the FDCA, the TDCA does not place specific time limits on when a debt collector can call, but the TDCA does prohibit calling continuously with intent to harass, so his frequent calls and extremely late and early calls are violations because they were clearly intended to harass (why else would he call so late or so early?). Dan threatened that Carolina would be sued, have criminal charges filed against her, and be arrested and thrown in jail. Under the TDCA, a debt collector is allowed to threaten to file a civil lawsuit to collect a debt, regardless of whether he intends to file suit or not (unlike the FDCA, which requires that the debt collector actually intend to file suit). Thus, Dan did not violate the TDCA by threatening to sue Carolina. However, a debtor collect may not threaten that a debtor may or will be arrested or thrown in jail without use of conditional language. If Dan had said that Carolina "may be arrested after proper court proceedings if she is found to have violated a criminal law," there would have been no violation. Because he did not, the threats of arrest, jail time, and a visit by a police officer are all violations. Additionally, it is a specific violation to accuse or threaten to accuse the debtor falsely of fraud or any crime if they debtor has not committed a crime. Because Carolina has not committed any crime, it was also a violation to threaten to file criminal charges. Also, calling her a "deadbeat" and accusing her of the high cost of healthcare likely qualifies as abusive language intended to harass. Unlike under the FDCA, which prohibits calling a debtor's place of employment if the debt collector has reason to know that the employer prohibits such calls, the TDCA has no comparable provision. However, under the TDCA a creditor cannot falsely represent the debtor's debt status to third parties and cannot falsely accuse the debtor of a crime, and thus his statements to Ellen that Carolina was in serious legal

trouble and would likely go to jail were violations. Finally, Dan's threat to sue Ellen over the debt was a specific violation because it was a threat to take an action that cannot legally be taken, as Hospital would have no basis for suing Ellen over Carolina's personal obligation.

2. Carolina, as a consumer with a consumer debt can recover for all of the above TDCA violations by Dan against Hospital because they were committed by Dan in his attempt to collect a consumer debt.

Under the TDCA, Carolina can recover:

(1) actual damages caused by a violation of the Act, defined as anything recoverable under common law, including mental anguish damages with a knowingly finding. As actual damages, Carolina will recover the cost of her doctor's bills and prescription for the migraine she suffered from the stress, pain and suffering for the migraine, lost wages for the three days she was absent, and lost wages for her termination which was caused by Dan's TDCA violation. Because Ellen fired Carolina solely because of Dan's phone call, Dan's wrongful acts were the proximate cause of Carolina being fired, and it was foreseeable that Dan threatening to file a lawsuit against Carolina's supervisor for Carolina's personal debt would result in her being fired, thus she will be able to recover these damages. There is not enough evidence to determine whether Carolina can recover for mental anguish, as she must introduce direct evidence of the nature, severity, and duration of the mental anguish, establishing a substantial disruption of her daily routine. Here, the facts state that she suffered stress and a migraine, but absent other facts this is insufficient to establish mental anguish. However, if she does have direct evidence, she will be able to recover since Dan acting knowingly, with knowledge or with reckless disregard of the falsity or deceptiveness of his acts.

(2) A minimum statutory penalty of \$100 for specific violations, like failure to post a bond.

(3) An injunction prohibiting Dan and Hospital from committed further violations - and she will not have to prove the common law elements.

(4) Reasonable attorney's fees and court costs. Finally, Carolina can bring her TDCA claim as a tie-in through the Deceptive Trade Practices Act. The DTPA prohibits false, misleading or deceptive acts or practices, and provides that violations of certain statutes, the TDCA being one, can be brought as a claim through the DTPA, leading to increased damages. If she does this, she will recover actual damages, attorney's fees, and additional damages of up to three times actual damages with a knowingly finding (the court has discretion in how much additional damages to award). As stated above, Dan acted knowingly. However, case law indicated that Carolina may not be able to bring a TDCA case through the DTPA unless she can establish consumer standing (seek or acquire goods or services by purchase or lease, and the goods or services form the basis of the complaint). While she did acquiring medical services at the hospital, it is not the services themselves forming the basis of her complaint, but rather the actions of the Hospital in attempting to collect an amount due for hospital bills.

3. Ellen has standing to bring a claim under the TDCA because any person harmed by a violation of the TDCA can bring suit, not just the debtor. Thus, because Dan made statements directly to Ellen that violated the TDCA, she can bring suit against the Hospital. Like Carolina, Ellen will be able to recover actual damages, a minimum statutory penalty of \$100 for specific violations, an injunction, and reasonable attorney's fees. Ellen's actual damages will include any damages arising from the termination of Carolina, such as a substitute's salary and the lost contract. While Hospital will argue that the lost contract was not a foreseeable consequence of Dan's acts, Ellen will argue that it was foreseeable that she would fire Carolina due to Dan's threat to sue Ellen over Carolina's personal debt, and that loss of the services of an employee could foreseeably cause the employer to lose a contract or other income. While Ellen was "distraught," there is insufficient evidence to establish a claim for mental anguish damages. Ellen also may be able to bring her claim as a tie-in through the DTPA, but if the court requires her to have consumer standing, she will have an even harder time than Carolina as she never

sought or acquired Hospital's services. Thus, if the court requires consumer standing, Ellen cannot bring her claim through the DTPA and will not recover additional damages.

4. Carolina and Ellen can also bring suit under the common law tort of wrongful debt collection for any abusive, deceptive, or otherwise wrongful conduct committed by Dan in his attempt to collect Carolina's debt. Again, Hospital will also be vicariously liable for the acts of Dan. However, it is unclear whether Ellen can rely on the tort because she is not the debtor. If a common law action is brought, the available remedies will be an injunction (must prove substantial harm), and actual damages. They can also recover for intentional infliction of emotional distress for Dan's extreme and outrageous comments and Carolina can recover for defamation, but negligent IED is not recognized in Texas (Dan acted intentionally anyways).

Question 11 – February 2013 – Selected Answer 2

1. Yes. Dan's acts did expose Hospital to liability for violation of the Texas Debt Collection Act. At issue is a creditor's liability for the violative actions of a debt collecting employee. The TDCA applies to debt collectors of all kinds, including creditor debt collectors, collecting any kind of debt. The TDCA provides an exclusive list of potential violations for which an action may be brought under the Act, including: (1) Threats or coercion, (2) harassment or abuse, (3) Unconscionable acts or conduct, and (4) false or misleading statements. Although as to threats or coercion, the ability to threaten a debtor with legal action is specifically protected (a collector may do so), a debt collector is never able to threaten any actions that are illegal or not within the scope of the law, such as jail time (there is no prison time for debts or criminal liability), arrest, or other unlawful remedies to which the debtor is not entitled. Harassment or abuse specifically includes harassing phone calls (phone calls made before 7 am or after 9 pm) or phone calls in excessive quantities, and also includes phone calls made to a debtor's workplace when the debt collector is aware that such calls are prohibited. As to unconscionable acts or conduct, such conduct includes harassing words or verbal abuse, with significant overlap with the other categories under the exclusive list. The final category, false or misleading statements, includes representations that an individual is calling from a fake company, is an attorney when the individual is in fact not an attorney, or any other false statements made in the course of attempting to collect the debt. A debt collector may not communicate with a third party regarding a debtor's debt; he may only do so in order to obtain information regarding the debtor's whereabouts. Here, the hospital was acting as a debt collector and seeking to collect a debt accrued by Carolina. The hospital is vicariously liable for the actions of its employee, Dan, in violating the act during the collection of the debt. Thus, the hospital is likely liable under each of the exclusive list's potential sections for the various communications he made to both Carolina and Ellen. The statements in the mail requesting immediate payment of unpaid medical bills are likely acceptable, as they do not violate the exclusive list under the act (and a violation must be found under the exclusive list in order to violate the act). However, Dan's incessant phone calls and calling at extremely early hours (before 6 am) and extremely late hours (after 11 pm) would result in a violation of the "harassment or abuse" prong of the exclusive list. Next, Dan's statements to Carolina that Credit Bureau would sue her were acceptable under the act, as the act explicitly permits threats of lawsuits where such action is legal. However, the threats to have her arrested, file criminal charges against her, and have her "thrown in jail for a very long time," or thrown in "debtor's prison," are in direct violation of the act. Because these are not legal remedies available to a debt collector, Dan could not legally threaten to perform any of these punishments against Carolina. He also could not threaten legal action against Ellen or her company, as a debt collector has no cause of action against a debtor's employer absent other facts not in existence here. These false statements likely also violated the false or misleading statements prohibition in the exclusive list of the act. Dan's comment that she was the type

of deadbeat that caused the high cost of healthcare could also constitute harassment or abuse. In addition, Dan's statements that he was part of a nonexistent "Credit Bureau" also resulted in a violation of the "false or misleading statements" part of the exclusive list in the act, as could Dan's statements to Ellen, which were false. Any of the above could be found to constitute unconscionable acts or conduct. In addition, Dan's calling of Ellen's place of employment, while not improper given that he was not informed that he was not allowed to do so by either Ellen or by Carolina, was likely improper because he spoke to Ellen, a third party, regarding Carolina's debt and in order to gain more information from her than solely Carolina's whereabouts, as is prohibited by the TDCA.

2. Carolina may sue the Hospital for any and all actual damages that result from these improper violations of the TDCA. At issue is the type of civil remedies and rights a debtor may have against a creditor who violates the TDCA in attempting to collect a debt. The remedies available under the TDCA to a debtor are actual damages; that is, the debtor can recover any and all damages that she could recover under any theory of liability whatsoever. At a minimum, the violating creditor is liable for \$100 per violation of the act. In addition, a successful debtor will be entitled to attorneys' fees and costs incurred in bringing the action. At a minimum, the Hospital is liable for several hundred dollars, depending on how many violations the court determines there have been. This will be a fact-intensive finding. However, Carolina is also entitled to actual damages. Here, that means that she will be able to recover for her termination (lost wages, bonuses, cost of finding a new job, etc.), any mental anguish or emotional damages (for example, the cost of her doctor's visit and any resulting medication, any lost work days (at least four, it appears) and resulting lost income, and any other pain and suffering she suffered). Assuming she is successful, Carolina will also be entitled to an award of attorneys' fees and costs under the Act. Punitive damages are possible in such a situation, but rarely given by courts.

3. Ellen will be able to sue the Hospital for any actual damages resulting from the Hospital's wrongful behavior. At issue is a third party's ability to recover from a debt collector who is acting to collect a debt that does not belong to the third party in violation of the TDCA. A third party may recover against the debt collector for improper debt collection practices as long as the debt collector's communication or violation reached that third party and the third party has suffered actual damages. Here, Dan's words obviously reached Ellen, as he spoke to her directly on the phone. He may have caused her actual damages (the loss of the contract resulting from Carolina's termination out of fear created by Dan's false statements) as well as mental anguish or other emotional damages, as Ellen was "distracted" after the phone call. In addition, Ellen's actual damages may include any losses that her company sustained both in loss of productivity after Carolina was terminated and in searching for Carolina's replacement. Ellen has therefore suffered at least actual and potentially mental anguish or emotional damages as well, and will be entitled to recovery against the Hospital for such damages. Punitive damages are possible in such a situation, but rarely given by courts.

4. Under Texas common law, Carolina and Ellen may be able to recover against the Hospital for a common law tort arising from Dan's attempted unfair debt collection. Although the TDCA has allowed for statutory recovery for such actions under the exclusive list, there likely remains a common law tort claim for the same improper actions in furtherance of collection of a debt. Again, a violator's employer can be liable under vicarious liability for the actions of its employer under such a claim. They will both be entitled to recover standard tort remedies as a result, including actual damages, consequential damages, pain and suffering, and potentially punitive damages, based on the facts set forth in section 1 of this question.

Question 11 – February 2013 – Selected Answer 3

(1) Dan's acts did expose the hospital (and Dan) to liability under the Texas Debt Collection Act (TDCA), as he violated the TDCA in several ways with his conduct. At issue, is whether a party who hires (or directly employs) a debt collector who violates the TDCA is also liable for the debt collector's conduct.

A debt collector is defined under the TDCA as a party who directly or indirectly engages in the collection of consumer debts. Consumer debt is defined as an obligation of a party arising out of a transaction for personal, household or family purposes. Here, Dan is a debt collector since he was directly engaged in collection of consumer debts, and, since he was employed by (or hired by) the hospital to collect the Carolina's debts, it is also liable. Dan and the hospital would be jointly and severally liable under the DCA for any damages caused by Dan's acts under ordinary agency principles and respondent superior. Finally, as a threshold matter, Carolina's hospital debt qualifies as a "consumer debt" since it was incurred for personal purposes, i.e., medical treatment. Several of Dan's acts violated the TDCA. First, the TDCA prohibits a debt collector from harassing a consumer over the phone, including by making repeating phone calls. Here, the facts suggest that Dan was making these calls and leaving voice message "frequent[ly]" and "early in the morning" and "late at night." Since he was making the phone calls frequently, presumably he was doing this for harassment. This is only compounded with the fact that he was calling late at night and early in the morning. Although the TDCA does prescribe hours which are considered reasonable for phone calls like the federal debt collection statute, calling before 6AM and 11PM would be harassing to reasonable persons, and thus would constitute a violation under the TDCA. Next, the TDCA prohibits debt collectors from using a false company name and purporting to be someone else. Here, Dan claimed to be with the "Credit Bureau," which was not the case---he was a debt collector working for the hospital. This is a clear violation of the TDCA. Thirdly, although threatening to sue the consumer is not a violation of the TDCA, threatening that they will be put in jail without proper court proceedings, as well as threatening to file criminal charges if the consumer failed to pay her debt are violations under the TDCA. Here, Dan stated that they were going to "have her arrested," "thrown in jail for a very long time," and that she "would end up in 'debtor's prison'." These statements are all violations of the TDCA as Carolina likely did not violate any criminal laws, and Dan's statements were not conditioned upon the fact that proper court proceedings would have to take place prior to any of these consequences coming to fruition. Fourth, the TDCA prohibits the debt collector from using harmful or offensive language in the collection of debts. Here, Dan called Carolina a "debt beat," which is offensive and likely would be construed as a violation of this provision of the statute. Finally, the TDCA prohibits a debt collector from communicating with third persons regarding the consumer's debt. Here, Dan called Carolina and told her that she owed the hospital a lot of money, was going to jail for a very long time (also a violation of the prohibition of criminal threats noted above) and was in serious legal trouble/ this was a clear violation of the TDCA.

(2) Carolina has several rights and remedies available against Dan and the Hospital, including under the TDCA and the Texas Deceptive Trade Practices Act, which allows TDCA violations to be pleaded through it. At issue, is what rights a consumer has against a debt collector who has violated the TDCA. Under the TDCA, a debt collector who is found to have violated the terms of the statute is liable to a debtor for actual damages, injunctive relief and attorney's fees. Actual damages are defined as damages that were available under the common law, and include, inter alia, economic damages, pain and suffering, mental anguish and lost wages. In addition to actual damages, the TDCA provides for injunctive relief and the recovery of reasonable attorney's fees. The TDCA provides that a debtor can also plead any violations of the statute through the DTPA, which is beneficial because the DTPA provides for "additional damages" that are discretionary by the fact finder of up to three times a party's actual damages (the DTPA

normally provides for only economic damages, however, since it is a TDCA violation in this case, actual damages would be recoverable). Here, Carolina's actual damages are significant. First, she experienced a "debilitating migraine headache." This would likely constitute pain and suffering and would be recoverable under the TDCA. The migraine headache precluded her from going to work, which would constitute lost wages and would also be recoverable. In addition, the headaches caused Carolina to have to incur medical bills since she went to see a doctor and was prescribed her pain medication, which would all be recoverable under the TDCA. Carolina lost her job as a result of the phone call to Ellen, thus she would also be able to recover damages for future earnings. Finally, if Carolina could establish that Dan had acted with a heightened culpability and that she experienced a "substantial disruption of daily routine," she would be entitled to mental anguish damages. Assuming Carolina has consumer standing as required by some Texas courts, she could bring these actual damages through the DTPA. This would be beneficial to her because, assuming she can prove Dan acted "knowingly," actual awareness of his conduct, these actual damages would be subject to enhancement through the DTPA's additional damages of up to an amount not exceeding three times her actual damages. Her attorney should plead the violations through the DTPA for this reason. Finally, Carolina would also be entitled to reasonable attorneys' fees, and would be entitled to get an injunction against Dan and the hospital.

(3) Ellen has rights and remedies against Dan and the Hospital under the TDCA. At issue, is what rights and remedies are available to a party where a debt collector violates the TDCA?

Ellen would similarly be able to recover the damages prescribed under the TDCA (as described in question 2 above). However, Ellen would not be able to establish consumer standing presumably, so her causes of action would not be subject to enhancement under the DTPA. Here, the facts indicate that Ellen was "distracted" as a result of the call, thus she could potentially recover for mental anguish if she can show a substantial disruption of daily routine and that Dan acted with a heightened culpability. In addition, Ellen was forced to lose a major customer, and she could likely recovery for this under the TDCA.

(4) Carolina and Ellen could sue the Hospital and Dan for several torts. At issue, is what causes of action are available at Texas common law against a debt collector and his employer for egregious behavior. Texas common law includes a tort for unreasonable debt collection, as well as intentional infliction of emotional distress. Here, Dan and the Hospital could be liable for both causes of action.