

## Question 4 – July 2015 – Selected Answer 1

### **1A. Both David and Credit's actions violated the Deceptive Trade Practices Act.**

The issue is whether David and Credit's actions violated the Deceptive Trade Practices Act. The Deceptive Trade Practices Act protects consumers from certain actions including breach of warranty and unconscionability. A breach of warranty occurs where the consumer has been assured by a company or other sort of merchant that a certain agreement exists between the parties that protects the consumer and the company subsequently fails to uphold that warranty. Unconscionability occurs where the consumer lacks particular knowledge of a subject, that lack of knowledge is taken advantage of to a grossly unfair degree and the consumer is harmed.

Here, Lisa has a claim under the DTPA for David's and Credit's actions. Credit had warranted to Lisa that she would not be responsible for unauthorized charges on her card and yet, Credit pursued her for payment on the unauthorized charges anyway. David, as Credit's employee, acted unconscionably when he told Lisa that she would be criminally charged and lose everything from a civil lawsuit. It was also unconscionable for him to tell her that the agreement between Lisa and Credit was "worthless" having no basis for saying that. David knew these things weren't true, and also knew or was counting on the fact that Lisa did not understand the intricacies of the law. By using this information to get her to pay the debt, David took advantage of Lisa's lack of knowledge on the subject in a grossly unfair way and it was to Lisa's detriment since Lisa's reliance on David's statements caused her to seek medical attention for anxiety. Thus, both David and Credit's actions violate the DTPA.

### **1B. Both David and Credit's actions violated the Texas Debt Collection Act.**

The issue is whether Credit or David's conduct and actions violate the Texas Debt Collection Act. Violations of the TDCA can be brought in under the DTPA as a tie in statute. The TDCA protects consumers from certain behaviors by debt collectors. A consumer is defined as a person or entity that purchases or leases goods or services. A debt collector is a person who regularly collects debts of another. The TDCA prohibits certain actions by debt collectors including 1) telling a consumer that certain actions or criminal charges will occur if the debt is not paid when such actions cannot actually be taken; 2) misrepresentation by the debt collector as to who they are; 3) contacting people who know the consumer and telling them that the consumer owes a debt; 4) contacting a consumer's employment after the debt collector is told that such contact is prohibited. Where a consumer is made aware of a debt by the debt collector and notifies the debt collector that the amount of debt owed is in dispute, the debt collector must cease all debt collecting actions until the dispute is solved.

Here, both Credit and David were in violation of the TDCA. As David's employer, Credit will be held liable for the actions of David. In his employee capacity, David called Lisa and stated to her that he was from the Credit Card Bureau - which suggests that Lisa was being contacted by a government agency rather than a private debt collector. This is not allowed under the TDCA. Additionally, David told Lisa that she would be subject to criminal and civil actions if she did not pay the \$5,000. This is in violation of the TDCA because such action could not actually be taken based on the valid written agreement between Lisa and Credit that Lisa was not liable for unauthorized charges and also the fact that Lisa had provided notice that the charges were unauthorized, which meant David or Credit were not allowed to pursue the disputed charges until the matter was resolved by Credit. It was also likely a violation of the TDCA for David to continuously call Lisa's employer when such calls were going unanswered - this should have suggested they were unwelcome phone calls - and it was certainly a violation to tell a third party, Lisa's supervisor, that she owed a debt. Because David's and Credit's actions violated the TDCA, they can be brought in for violations of the DTPA as well as the TDCA is a tie in statute.

### **2A. Under the DTPA, Lisa can seek injunctive relief, actual damages, mental anguish damages, attorney's fee and costs from both Credit and David as well as, possibly, treble damages.**

The issue is what remedies are available to Lisa under the DTPA. Where a violation of the DTPA has occurred, a consumer may seek remedies in the amount of actual damages, mental anguish, attorney's fees and costs. A consumer may also seek an injunction. A consumer may also be awarded treble damages if they can show that the debt collector, in this case, acted knowingly or intentionally. A debt collector acts knowingly when they act with the knowledge that certain result will occur. A debt collector acts intentionally when they act to bring about a specific result. If a debt collector is found to have acted knowingly, the consumer receives 3x their actual damages plus any mental anguish damages. If the debt collector is found to have acted intentionally, the consumer will receive 3x both their actual and mental anguish damages.

As discussed above, both Credit and David violated the DTPA. Here, Lisa can seek an injunction against Credit to ensure that they stop pursuing her while the debt is being disputed. Lisa will also be able to receive any actual damages, mental anguish, attorneys fees or costs she suffers by bringing an action against David and Credit.

Lisa may be able to show Credit acted knowingly and intentionally in causing damage to her because Lisa has a valid written agreement between herself and Credit regarding unauthorized charges and it could be presumed that Credit was aware of this agreement and also aware that Lisa had notified them of the disputed charges. Lisa may also be able to show David acted knowingly and intentionally since she can show that David was aware of the agreement and notice Lisa provided.

**2B. Under the TDCA, Lisa can seek injunctive relief, actual damages, mental anguish damages, attorney's fee and costs from both Credit and David as well as, possibly, treble damages and criminal charges.**

The issue is what remedies are available to Lisa under the TDCA. When a violation of the TDCA occurs, a consumer has a number of remedies. First, the consumer can seek criminal charges as a violation of the TDCA is a misdemeanor offense subject to the \$500 fine. The consumer may also seek an injunction as well as actual damages, mental anguish, attorney's fees and costs. As in the DTPA, a consumer may obtain treble damages as well which are discussed above.

As discussed above, both Credit and David violated the TDCA. Here, Lisa will likely be able to obtain criminal charges against David given that his behavior was quite egregious and a clear violation of the TDCA. Lisa can also seek an injunction, actual damages, mental anguish, attorney's fees and costs against Credit and David. It is likely Lisa would be able to obtain treble damages at least for David and Credit acting knowingly since David, as Credit's employee, represented to Lisa that she would be subject to criminal and civil actions for her noncompliance which was known to be untrue. Lisa can also obtain treble damages in the amount of 3x both actual and mental anguish damages if she can show that David, and Credit, acted intending to cause damage and emotional distress to Lisa.

#### **Question 4 – July 2015 – Selected Answer 2**

1. Yes, the conduct of Credit and David violates numerous provisions of the Texas Debt Collection Act, the Deceptive Trade Practices Act, and the Texas Common law. The issue is the remedies available to an individual for wrongful debt collection activities under Texas consumer laws.

The Deceptive Trade Practices Act (DTPA) is designed to protect "consumers" from unfair or deceptive trade practices. Its provisions are to be widely construed. Waiver of the Deceptive Trade Practices Act is only permitted when the party is represented by attorney, the two parties are not in substantially disparate bargaining positions, and the waiver is signed and in writing. Actionable violations of the DTPA include (i) violations of the "laundry list" of specified practices, including misrepresentations by the party, fraud, failure to disclose where the other party relies on it, (ii) violation of express or implied warranties, and (iii) unconscionability. The violations must occur "in connection with" the transaction.

The Texas Debt Collection Act (TDCA) is intended to protect consumers from unfair debt collection practices. Its list of violations is exclusive. It applies to any party attempting to collect a "consumer" debt. There is also the Fair Debt Collection Practices Act (FDCPA), a federal statute, but the question makes it unnecessary to analyze its provisions here. It applies only to third-party debt collectors and its list of violations is not exhaustive.

The Texas Debt Collection Act is a tie-in statute covered by the DTPA. This makes a violation of the TDCA actionable under the DTPA.

Credit is liable directly for David's activities because they were in the scope of his employment. Credit would arguably even be liable for the intentional torts of David because of the nature of his work and that intentional torts are likely to occur (wrongful debt collection is a common law tort in Texas). David is also directly liable for any of his own violations of the Texas consumer laws.

The DTPA and TDCA both apply to "consumers." A business can be a consumer if they have less than \$25 million in assets, which it appears is the case here. Additionally, Robert charged "personal purchases" which will likely be considered "consumer" goods. Consumer goods are anything for family or household purposes, which is a very broad category. The TDCA only applies to consumer debts, but again, Robert's debt would be considered a consumer debt. The Texas Debt Collection Act applies to both third party collectors and the actual creditor, as is the case here.

Credit and David violated the TDCA in several ways. First, it is unlawful under the TDCA to misrepresent the legal consequences of not paying one's debts. The initial letter from Credit to Lisa violated this provision. Additionally, because this was Lisa's first notice of the debt, she had 30 days to respond before Credit or David could contact her further. It is unclear if sufficient time passed. Credit or David will argue that they had received her letter and therefore they were permitted to contact her, which is probably correct here. Next, David contact her at her home by telephone. This is permitted only between reasonable hours of 8PM and 9AM, which may or may not have been the case here. David also misrepresented that he was the credit card bureau, which is a violation of the TDCA, and misrepresented that criminal charges were available, another violation of the TDCA, misrepresented the validity of a written agreement between Lisa and Credit and misrepresented the legal consequences of a potential civil lawsuit because Lisa's home would be protected under Texas homestead law. Both Credit and David are liable for all of these violations because David committed them in the scope of his employment with credit and cannot escape liability for his own violations.

Credit and David further violated the TDCA when David called Lisa's place of employment (this is only permitted to attempt to locate the debtor, and here David already had been in contact with Lisa on her home phone) and harassing phone calls at either home or work are expressly prohibited. One is also prohibited from contacting Lisa's employer and telling the employer that Lisa has a debt. Therefore, both Credit and David would again liable under the TDCA.

All of the misrepresentations above are also actionable under the DTPA as to both Credit and David because Lisa is a "consumer" with respect to the debt because it is for consumer goods. There is no evidence of any breach of warranty or unconscionable behavior, however. Unconscionable behavior refers to taking advantage of the person to a gross degree, and we would need to know more about Lisa's personal characteristics to determine whether this was the case.

All of the violations of the TDCA are also independently actionable under the DTPA because the TDCA is a "tie-in statute" which means that the DTPA provides a cause of action for its violations. The consumer is limited to only one recovery, however.

2. Lisa can recover economic damages under the DTPA, actual damages under the TDCA, damages for mental anguish and up to three times economic damages if Credit or David acted knowingly under the DTPA, and up to three times damages for mental anguish if Credit and/or David acted intentionally under the DTPA, and for the common law tort in Texas of wrongful debt collection. The issue is what damages are available to a consumer under the DTPA, TDCA, and Texas common law.

The DTPA provides for all economic damages which includes pain and suffering but does not include mental anguish. The party may recover damages for mental anguish if it proves that the violations were committed "knowingly," which means the violating party was aware of the actions they were taking and that they were in violation. In order to recover mental anguish damages, there must also be a substantial disruption of the parties daily routine. The wronged party may also recover up to three times economic damages if the party acting knowingly. These are referred to as treble damages. If the violating party acting "intentionally," the wronged party may also recover up to three times damages for mental anguish. "Intentionally" is defined as acting knowingly, plus having the specific intent to induce the party into the transaction using the wrongful conduct. It may be inferred from the party's conduct that they were acting both knowingly and intentionally. The wronged party is also entitled to recover reasonable costs and attorney's fees, with the attorney's fees considered on the basis of hours billed, rather than the fees under any contingency agreement.

A party wronged under the TDCA is entitled to recover all actual damages. Actual damages include pain and suffering and also mental anguish, if the mental anguish substantially disrupts the daily routine of the wronged party. The wronged party can also recover reasonable attorney's costs and attorneys fees, again on the basis of hours billed or time spent, rather than the fees described under a contingency agreement.

While all of these claims are validly actionable, the party can only recover the full amount of damages once. However, all the parties found liable will be jointly and severally liable for the damages.

There is also a common law tort for wrongful debt collection where it consists of intentional infliction of emotional distress.

Therefore, Lisa is entitled to all actual damages under the TDCA for any violations, including pain and suffering and damages for lost wages and the loss of her job.

She has a separate claim for the economic damages from the loss of her job because of the "tie-in" statute in the DTPA. She also has a separate independent claim for the same economic damages under the DTPA. From the circumstances, it is likely that a court would infer that David and/or Credit had acted "knowingly." They are a credit card company and the violations should be obvious to anyone in the industry. Plus, it is clear that they were expressly used to apply pressure to Lisa. Therefore, Credit and David should be liable for up to three times economic damages. Additionally, the mental anguish from their actions caused substantial disruption of her daily routine, so if such actions were taken "knowingly" then they will be liable for her mental anguish damages. Further, it is likely that a court will include they were acting intentionally, meaning knowingly plus the specific intent to induce action from Lisa. They stated, among other things, that she had to pay right away or lose her house and that she could face serious criminal charges. A court could certainly find these statements were made intentionally to induce payment from Lisa. If a court so finds, Lisa may recover up to three times damages for mental anguish because it substantially disrupted her daily life. All of these damages are applicable to both the tie-in claim and the independent DTPA claim.

Lisa may also recover any reasonable attorney's fees (on the basis of hours worked) and court costs associated with Credit and David's debt collection practices under both the TDCA and the DTPA.

As explained above, David is liable for any of his own violations, Credit is liable for David's violations in the scope of his employment (with some question as to any intentional torts here), and Credit is liable for its own violations in the letter. Generally speaking, an employer is not liable for an employee's intentional torts, but they may make an exception given the nature of David's job and his and Credit's behavior here.

Lisa may also sue under the Texas common law based on the tort for wrongful debt collection and intentional infliction of emotional distress. Lisa will be limited to one recovery, despite all these causes of action.