

Question 11 – February 2018 – Selected Answer 1

(1) David committed several violations under the Texas Debt Collection Act which will be imputed on Dr. Smith's office under vicarious liability as he was acting within the scope of his employment.

At issue are the violations that David committed under the TDCA. Pursuant to the TDCA, any person who has a consumer debt primarily for personal, family, or household purposes can bring a cause of action under the TDCA. Here, Connie sought medical treatment from her physician for personal reasons. Therefore, she is a proper plaintiff to bring an action under the TDCA.

The TDCA applies to any person or business who engages directly or indirectly in debt collection. Here, Dr Smith and his office are actively engaging in debt collection, so they are proper defendants under the TDCA. The acts of David, the employee of the doctor's office, will also be liable and impute his violations onto Dr. Smith's office under vicarious liability because he was acting in the scope of his employment. Thus, both David and the office will be jointly and severally liable here.

There are several violation that one can assert under the TDCA. First, the debt collector must give a mini miranda warning in their initial communications that they are attempting to collect a debt, and anything that is obtained will be used primarily for that purpose. Any attempt to collect a debt by communication without the mini miranda warning is a \$100 penalty per violation. Here, although Dr. Smith's office indicated that it was a credit bureau the first time they called, they did not give the mini miranda. This was a violation, and every other time they called Connie without giving the mini miranda warning is another \$100 penalty as well.

Second, the debt collector must post a \$10,000 bond in order to engage in debt collection. If the debt collector fails to post a bond, it is a \$100 violation. Here, there is no indication that Dr. Smith's office has posted a bond before engaging in debt collection practices. Therefore, this is another violation.

Third, if the consumer objects to the debt in good faith in writing, the debt collector must cease all debt collection activities and begin a reasonable investigation into the debt before commencing debt collection activities again. It is a \$100 violation if the debt collector fails to do so. There is no indication that Connie disputed the debt in writing so there is no violation here.

Furthermore, there are several other violations under the TDCA, such as making repeated phone calls with intent to harass or annoy. Here, the facts indicate that Dr. Smith's office called Connie repeatedly and began increasing in frequency as well up to three or four times per day before Connie called David. Therefore, this is a patent violation of the TDCA.

Another violation is accusing someone falsely of a crime when the debtor has not committed a crime. Here, David told Connie that failure to pay the charges was a felony when it was obviously not a felony. Therefore, this is another violation of the TDCA.

It is another violation to repeat to a third party, or threaten to repeat to a third party, that the debtor is refusing to pay an undisputed debt when the debtor has in fact disputed the debt in writing. Here, there is no indication that David nor Dr. Smith's office contacted anyone else other than Connie about the debt, nor has Connie disputed the debt in writing. Therefore, there is no violation here.

It is yet another violation to threaten to take legal action when there is no basis in contract or law for the legal action. Here, David told Connie that it was felony, and that he could have her arrested with one phone call. He further told her that her car and house would be subject to repossession. This is another violation of the TDCA.

Another violation is using threats or threatening to use violence of force against the debtor. Here, although the threats to take illegal action is not a violent threat, it is in fact a threat, and is another violation. Furthermore, the threat that David would call her clients and tell them about her illness is also another threat violation under the TDCA.

Another violation is representing to the debtor that the debt collector is going to increase the debt when there is no basis in contract or law to do so. There is no indication that David or Dr. Smith's office indicated that they were going to increase the debt.

Finally, it is also a violation to deceptively use a credit bureau name. Here, David called Connie and stated that has was with the "Credit Bureau Manager for Dr. Smith". This is deceptively using a credit bureau name, as it was a false statement, and is yet another violation of the TDCA.

(2) Connie is entitled to \$100 per violation for the mini-miranda and bond requirement violation, she is entitled to actual damages, additional damages, reasonable attorney fees, and injunctive relief.

At issue are the rights and remedies available for Connie under the TDCA. Since David is the employee of Dr. Smith, and he was acting within the scope of his employment, Dr. Smith's office is going to be vicariously liable for David's TDCA violations. Thus, both will be jointly and severally liable and Connie can sue either one of them for full recovery. That is assuming that Dr. Smith himself did not engage in any TDCA violations and is not protected by limited liability.

Nevertheless, there are several rights and remedies available under the TDCA. Other than the \$100 per violation penalty for violating the mini-miranda warning requirement and the bond requirement, Connie can also recover actual damages. Actual damages are damages that are recoverable under common law. Here, Connie's actual damages include her hospital bills and any mental anguish damages that he has suffered. Mental anguish damages are damages for a substantial disruption in daily routine. Here, if she can prove that she had a substantial disruption in daily routine from the violations of the TDCA, then she will be able to recover those damages.

A consumer can also recover additional damages under the TDCA. Additional damages are discretionary damages up to 3x the amount of actual damages. However, there must be a

"knowingly predicate". Knowingly means actual awareness of the violations or deceptive conduct when committed. Here, all of David's acts would be grounds to bring an action for additional damages. He knew what he was doing was wrong and had actual awareness that he was doing them. He knew that he wasn't a credit bureau, he knew that Connie didn't commit a felony, and he knew that he couldn't repossess her car or house. Therefore, Connie will be entitled to additional damages for up to 3x her actual damages.

A consumer will also recover reasonable attorney fees if the consumer prevails. Attorney fees are calculated by the Lodestar method pursuant to [El Apple]. Here, Connie can recover her attorney fees.

A consumer can also recover injunctive relief under the TDCA. Here, Connie will be able to enjoin David and Dr. Smith's office from ever contacting her again.

Question 11 – February 2018 – Selected Answer 2

I. David's actions violated both the Texas Debt Collection Act (TDCA), as well as the Deceptive Trade Practice Act (DTPA).

The issue is how a debt collector can violate the TDCA and the DTPA.

The Texas Debt Collection Act prohibits debt collectors from engaging in harassing and abusing debt collection practice. A debt collector is one, under the TDCA, who attempts to collect from a consumer a debt that is owed. Under TDCA, a debt collector can be the original creditor, a third party creditor, or an attorney regularly involved in debt collecting practice. A debt collector cannot misrepresent himself to be someone that he is not. A debt collector cannot misrepresent a debt to a consumer, cannot threaten criminal liability and prosecution where not available, may not contact a consumer directly if aware of representation by counsel, and may be liable for each violation between \$100-500.

The Deceptive Trade Practices Act (DTPA) is to be liberally construed in favor of consumers with the purpose of protecting consumers from fraudulent, misleading or deceptive business practices. A consumer is one who seeks or acquires goods or services for purchase or lease. Only a consumer and the Attorney General can bring suit under DTPA for the following four reasons: Violation of a laundry list claim, breach of implied or express warranty, unconscionability, and violation of insurance code chapter 541. DTPA also recognizes Tie-In Statutes which include the TDCA as violative of the DTPA. Where one violates the TDCA, they can use the DTPA as a vehicle to recover.

Connie sought treatment from Dr. Smith for an illness and was unable to pay for the services. Upon ignoring phone calls from Dr. Smith's office, she began receiving phone calls from David, Dr. Smith's employee regarding the debts and necessity to pay them. When David began contacting Connie, he became a debt collector under the TDCA. Regardless of his employment through Dr.

Smith, he was a debt collector and he violated the TDCA by claiming to be a 3rd party. When a debt collector initially contact with a debtor, the debt collector must not mislead or falsify information to the debtor, which is exactly what David did. He threatened action against Connie in the form of arrest and charges of a "felony crime," both of which are accurate remedies for failure to pay a debt. Further, he stated that failure to pay would result in repossession of her home and vehicle, which are also not remedies for failure to pay debt. David repeatedly violated the TDCA. David's violations continued until Connie suffered a panic attack requiring hospitalization. The violation of the TDCA allows for Connie to bring her claim under the DTPA as a tie-in statute, which will allow her to recover not only damages allowed at common law for the violation of the TDCA, additional damages under DTPA (see below).

David's Actions violated both the TDCA as well as the DTPA

II. Under the TDCA and DTPA, Connie can seek remedies from David and Dr. Smith.

The issue is who is liable for violating the TDCA and DTPA and what remedies are available to a consumer.

A principal is liable for the actions of his agent when the agent has express or implied authority. Where one violates the TDCA, he is liable for each violation between \$100-500. For violations under the DTPA, a consumer is entitled to economic damages, as well as reasonable attorneys fees and cost. Further, if a consumer can show that the defendant acting knowingly, then the consumer may recover three times (treble damages) the economic damages. If the consumer can show that the defendant acted knowingly AND intentionally the consumer can recover three times both the economic and mental anguish damages. If the defendant not only violated the DTPA but violated the TDCA under a tie in, such as TDCA, then proving knowingly and intentionally will give the consumer a recovery of three times the economic, mental anguish, and actual damages which are allowed in tie in statutes.

David's attempted collection and misrepresentations to Connie made him a debt collector and liable for any false, misleading or deceptive practices under both TDCA and DTPA. Dr. Smith, as David's principal, is also liable under agency theory in the tort context. He had direct supervision of David and gave David either express or implied authority to collect on his debts. Both David and Dr. Smith are liable to Connie under TDCA and DTPA. If Connie can prove that she suffered mental anguish Connie will be able to recover actual damages under TDCA, economic damages and mental anguish through DTPA, reasonable attorneys. If it is shown that it was due to knowing and intentional acts by David, and Dr. Smith through David, she will be able to recover treble damages on actual damages, mental anguish, and economic damages. Connie can seek remedies from both David and Dr. Smith through TDCA and DTPA.

Question 11 – February 2018 – Selected Answer 3

(1)

Yes, David's actions violated a variety of Texas consumer protection laws, including: the Texas Debt Collection Act (TDCA) and the Deceptive Trade Practices Act (DTPA).

TDCA violations:

The TDCA was enacted to protect consumers and any person harmed by abusive and harrasing debt collection activities. For the provisions of the TDCA to apply, a defendant must be a first or third party debt collector seeking to collect consumer debt. The party must also violate one of the TDCA's exclusive enumerated violation provisions, which causes the plaintiff to suffer damages.

Here, David could properly be considered either a first party debt collector or a third party debt collector. A first party debt collector is someone who seeks to collect consumer debts owed to them on their own account. A third party debt collector is someone who regularly collects or a significant portion of their business is derived from collecting comsumer debts on behalf of another. Consumer debt is any debt incurred primarily for personal, household, or family use. The characterization of debt is assessed at the time it was incurred.

David is a first party debt collector because he is an employee of Dr. Smith's office and was seeking to collect debt owed to the doctor's office. David also could probably be considered a third party debt collector because he appears to have represented that he was collecting the debt under a different name or entity. Because David is a debt collector, the provisions of the TDCA will apply to him.

Under the TDCA, it is a violation for any debt collector to engage in abusive, threatening, or harrasing behavior in person or over the phone; to misrepresent criminal penalties that do not exist; and to represent collection rights that the debt collector does not have. Here, David made several violations, including: making frequent phone calls multiple times per day; misrepresenting that Connie had committed a felony; misrepresenting that he had the right to have her arrested; misrepresenting that he had the right to reposses her house and car when he was not a secured creditor in either of those items; and threatening to disclose her personal medical information to third parties if she did not pay immediately. All of these actions are violations of the TDCA and expose David and his employer to liability.

To be successful on her claim, Connie will also have to show that the David's violations caused her to suffer damages. Here, Connie was extremely distraught after the frequent abusive and harrasing phone calls by David. The violations also caused her to suffer a panic attack that required hospitalization -- giving rise to economic damages (the costs of treatment) and mental anguish damages (the substantial disruption of her daily routine caused by the panic attack). These damages are more than sufficent to support a TDCA claim.

Accordingly, Connie will be able to bring a standalone TDCA claim based on the violations committed by David.

DTPA:

The Texas DTPA provides a broad remedy in favor of consumers that protects them from deceptive and unfair business practices.

To properly bring a claim under the DTPA a person must establish they are: (1) a consumer; (2) a violation of the DTPA; (3) the violation was a producing cause some damage to them. A

consumer is anyone that seeks or acquires, by purchase or lease, goods or services. A violation of the DTPA can be shown through: specifically enumerated conduct in the statute, breach of warranty, unconscionable action taken by the seller, or a violation of chapter 541 of the insurance code. Producing cause is established if the violation was a substantial factor in bringing about the consumer's injuries.

Here, Connie can bring a DTPA claim on a variety of bases. First she is a consumer because she acquired medical services by purchase. Second, there was a laundry list violation when David asserted that the contract between Connie and the Dr. Office (the purchase of the medical services) conveyed rights and remedies that it did not. This can be shown by David's claims that he was entitled to foreclose on her house and car to satisfy the debt. These violations were produced Connie's damages when she had to incur medical expenses and suffered severe anxiety. Under the DTPA damage formulation, a plaintiff can recover economic damages, which represent pecuniary loss. However, if the plaintiff can show a knowing violation of the DTPA, she can recover up to: (3 x economic damages) + mental anguish damages. If the plaintiff can show an intentional violation, she can recover up to: 3 x (economic damages + mental anguish damages). Mental anguish damages occur when a violation causes the plaintiff to suffer severe emotional distress that causes a substantial disruption in her daily routine. Additionally, the DTPA provides a prevailing plaintiff shall recover their court costs and attorney's fees from the defendant seller -- regardless of whether the violation was knowing or intentional.

Tie In:

Additionally, Connie could bring her TDCA claim through the tie in provision of the DTPA. A tie in statute specifically gives rise to a cause of action under the DTPA. The TDCA is a tie in statute.

The benefit of bringing a TDCA claim through the DTPA tie in, is that Connie would be able to recover more damage without having to carry the same burden of showing intentional conduct. Under the TDCA, a plaintiff is entitled to "actual damages" and actual damages include economic damages and loss, as well as damages for personal injury or mental anguish. The DTPA tie in provision states that any "actual damages" under the tie in statute will be treated as economic damages under the DTPA. Essentially, this allows a tie in plaintiff to recover up to 3x (economic damages + mental anguish damage) just by showing the violation was knowing.

(2)

(a)

Connie will be able to recover damages from David under any of the claims she chooses to bring. Based on the conduct in the phone calls and the fact that David knew that he didn't have a right to carry out any of his threatened actions, Connie should easily be able to establish a knowing violation.

Thus, her biggest recovery would come under a DTPA claim based on the TDCA as a tie in statute. She would be entitled to recover up to 3 x (economic damages and mental anguish), plus court costs and attorney's fees. This would include the medical costs from her hospitalization

after the anxiety attack, damages for mental anguish that resulted from the anxiety attack itself, etc.

(b)

Even though Dr. Smith didn't personally make any violations under the DTPA or TDCA, he will still be held strictly liable for David's actions. One who employs a person to collect debts on their behalf cannot avoid liability because they didn't personally violate the provisions. Thus, Dr. Smith will be liable to the same extent as David, but she will only be entitled to one recovery between them.