Dumping the Fair Debt Collection Practices Act

The Case for Using State Law to Fight Abusive Debt Collection Practices

By Justin P. Nichols*

Introduction

Corruption runs rampant in the debt collection industry and federal law has proved ill equipped to stop it.[1] This article explores the history and prognosis of the debt collection industry, compares and contrasts federal debt collection laws with Texas law, examines the effectiveness of seeking redress under each statutory scheme, and advocates Texas practitioners use state law rather than federal law to pursue relief for Texas consumers aggrieved by debt collectors.

History & Background

From 1950 to 1971 consumer credit in the United States rose from $21.5 billion to $137.2 billion.[2] In November 1957, when Americans owed $48.4 billion in consumer debt,[3] the Georgia Supreme Court held "a consumer who voluntarily applies for and obtains credit impliedly consents for her creditor to take all reasonable action needed to collect the bill."[4] Today, Americans owe some $2.5 *trillion* in consumer debt,[5] and the business of collecting the debt has grown exponentially.

In 1976 there were 5,000 debt collection firms across the country, collectively returning some $5 billion in outstanding debt; each firm employing an average of eight employees.[6] By 2005 there were 6,500 debt collection agencies, collectively returning $39.3 billion in debt, and each hiring an average of 70 debt collectors.[7] While many industries are contracting, the debt collection industry is expected to continue to grow steadily; by 19.34% from 2008 to 2018.[8]

The path to the massive consumer credit and debt collection industries is not without a colorful history. In 1973 the Texas Legislature, citing the need to address unethical debt collection practices and harassment of consumers[9] by "control[ing] and curtail[ing] the practices used in the collection of debts,"[10] enacted the Texas Debt Collection Act ("TDCA").[11] In 1978 Congress took up the issue. While some felt a federal law would infringe on states' rights, others argued state laws intended to protect consumers from debt collectors were inadequate.[12] In the end Congress, finding "abundant evidence" of abusive, deceptive, and unfair debt collection practices,[13] enacted the Fair Debt Collection Practices Act ("FDCPA").[14] Prior to the enactment of the FDCPA, states were left to their own devises to regulate debt collection practices.[15] Today, it is not so much the right to collect a debt in issue, but rather the manner in which the right is exercised.[16]

Two major events triggered the furious growth of the debt collection industry. During the 1980's the Federal Deposit Insurance Corporation began selling the debts previously owed to failed banks to third parties.[17] Secondly, the nation's largest bank at the time, Bank of America, also began selling and assigning old credit card debt to third party collectors.[18] Thus began the widespread practice of trading old debt, which continues to grow today. And, because hundreds of companies buy old debt with outdated, insufficient, or inaccurate information about debtors,[19] the number of consumer complaints about the debt collection industry is growing faster than the industry itself.[20]

The Federal Trade Commission ("FTC") receives more complaints about the debt collection industry than any other category,[21] and complaints are on the rise. In 2009 the FTC received 119,609 complaints about in-house debt collectors; a number which increased by 17% to a whopping 140,036 complaints in 2010.[22] As for complaints involving third-party debt collectors, the FTC processed 88,326 complaints in 2009 and 108,997 complaints in 2010; an increase of 23.4% in just a year's time.[23] All in all, nearly half of all consumer complaints handled by the FTC involve debt collectors.

Comparison of the FDCPA and the TDCA

There are some important similarities, differences, advantages, and disadvantages to the FDCPA and Texas law, which includes the TDCA and common law torts unique to our state.

Application

The FDCPA applies to a person who "collects or attempts to collects debts… owed… or asserted to be owed [to] *another*."[24] In short, the FDCPA applies only to third party, professional debt collectors.[25] Conversely, the TDCA applies to both debt collectors (anyone who collects debts[26]) with special designation for third party debt collectors.[27] In 1995 the Supreme Court extended the definition of "debt collector" in the context of the FDCPA to include attorneys who regularly collect debts,[28] and the TDCA largely follows the Supreme Court's decision when attorneys become subject to law regulating debt collection practices.

Licensing and Bonding

The FDCPA does not have any licensing requirement for third party debt collectors. Conversely, the TDCA requires any third party debt collector that collects debts from Texas consumers to obtain a $10,000 surety bond in favor of any person damaged by a violation of the TDCA, and register the bond with the secretary of state.[29] Texas law also allows the surety to be sued along with the third party debt collector,[30] and a consumer need not show a cognizable interest in the bond to maintain a cause of action for relief.[31]

Verification & Disputes

Both the federal and Texas statues provide procedures for a consumer to dispute a debt. While both statutes only apply to disputes with third-party debt collectors, the procedures vary significantly.

The FDCPA provides that a consumer may, within 30 days of receiving an initial communication from the collector, write the collector and demand verification of the alleged debt and the name and address of the original creditor.[32] Generally, a debt collector must disclose the right to demand verification in its initial communication to a consumer.[33] However, debt collectors always want consumers to pay more attention to the demand for money than to the notice of the right to demand validation,[34] which can create confusion for consumers. Once the initial 30-day period passes the debt collector is no longer obligated to provide verification, and the consumer loses the means by which to dispute a debt; a problem which has led the FTC to recommend Congress amend the FDCPA to require a more conspicuous notice to consumers of their rights.[35]

In contrast, the TDCA permits a consumer to dispute the accuracy of an alleged debt being collected by a third party debt collector, but does not prescribe any particular timeframe.[36] Upon receipt of a dispute under the TDCA the debt collector has 30 days in which to admit the alleged inaccuracy, deny the alleged inaccuracy, or state it has not had enough time to complete its investigation (in which case the debt collector must correct its file as requested by the consumer).[37] While the debt collector may not have to produce validation documents to the consumer under the TDCA, the absence of a time period in which to file a dispute allows Texas consumers to demand a debt collector investigate the alleged debt at any point during the debt collection process – a significant advantage over the FDCPA.

Enforcement Schemes and Remedies of the FDCPA, the TDCA, and Texas Common Law

Both the FDCPA and the TDCA create a private cause of action for a consumer aggrieved by violations and also provides a mechanism of administrative enforcement.

Administrative Enforcement

Until recently, the FTC was charged with enforcing the FDCPA. Following the enactment of Dodd-Frank, the FTC and the Consumer Financial Protection Bureau [CFPB] share responsibility for enforcing the Act, with the CFPB having primary authority.[38] Because the CFPB has just begun to function, however, the FTC is still very active in its enforcement role. Conduct by debt collectors that peaks the interest of the FTC, however, must typically be extreme and repetitive, and individual complaints, no matter how valid, may often go unnoticed or unaddressed.[39] Although the FTC is forbidden from issuing additional rules beyond the language of the FDCPA,[40] the CFPB now has the authority to do so. The FTC, unlike the CFPB, may only treat violations of the FDCPA as violations of trade rules and seek injunctive relief.[41] And while the FTC may seem to have great power to stop abusive debt collection practices by turning to the courts, the FTC filed only three debt collection enforcement actions in 2010 and seven in 2011.[42] Only time will tell if the CFPB takes a more active enforcement role.

Similarly, the TDCA allows the attorney general to sue for injunctive relief to prevent a violation of the TDCA.[43] However, though receiving 3,390 consumer complaints regarding debt collectors in 2010,[44] the attorney general's office estimates it filed only one suit in 2010 based on the TDCA.[45] There is also at least one administrative regulation, applying only to lenders regulated by the Office of the Consumer Credit Commission, which prohibits using physical force or violence in an attempt to collect a debt.[46]

While both federal and state statutes authorize action to be taken by administrative agencies, in practice, an extremely small number of suits are ever filed against debt collectors.

Private Causes of Action, Torts, & Remedies

Strict Liability & Statutory Damages

Both the FDCPA and the TDCA are generally strict liability statutes; that is, a consumer need not show actual damages to be entitled to a statutory award for a violation.[47] The FDCPA allows a court to award up to $1,000 *per case* involving debt collection violations,[48] even without any proof of damages.[49] Conversely, the TDCA allows a court to award not less than $100 *per violation* of certain provisions of the TDCA.[50] Unlike the FDCPA, which establishes maximum relief, the TDCA establishes only a minimum statutory award for violations of certain provisions. It should be noted, too, that the statutory award of not less than $100 per violation only comes into play when a violation is proven but actual damages are not shown,[51] though a plaintiff is entitled to statutory damages when she sues for and obtains injunctive relief irrespective of damages.[52] However, the bounds of how high the maximum can go has not been tested in Texas courts. An important difference between the two laws is that a single FDCPA case, without a showing of actual damages, is worth only up to $1,000, while a TDCA case is worth not less than $100 per certain violation, which can easily amount to more than $1,000 per case.

Further, both statutes allow for actual damages to be awarded to a consumer,[53] but actual damages can be difficult to prove. For example, it may be difficult to quantify the cost of a debt collector who calls at 7:00 a.m. on a Sunday, or a debt collector who threatens a consumer with arrest if he fails to pay his phone bill. This is where Texas law has a leg up on the FDCPA.

The Common Law Tort of Unreasonable Collection in Texas

Because of Texas's long-standing statutory provisions protecting debtors (e.g. homestead provisions and a wide range of property exempt from levy upon judgment[54]), interstate creditors are more likely to rely on harassment, abuse and high interest rates when collecting from Texas consumers.[55] So, in addition to the remedies prescribed by the TDCA, Texas recognizes the common law cause of action of wrongful/unreasonable debt collection.[56]

In the beginning, the cause of action for unreasonable collection was an intentional tort with unlimited room to grow and develop.[57] But in 1953, *Duty v. General Finance*,[58] the Texas Supreme Court recognized a debt collector may not resort to any cruel device which can be imagined simply to collect a debt.[59] By 1956, Texas appellate courts had held reckless conduct, combined with malice, but absent intent, was sufficient to sustain an award for unreasonable collection.[60] In 1963, in *Moore v. Savage*,[61] Texas courts held a plaintiff who proves negligence, coupled with physical injury, could be entitled to judgment without any showing of recklessness.[62] Modern cases hold the elements of a claim for unreasonable collection amount to "a course of harassment that [is] willful, wanton, malicious, and intended to inflict mental anguish and bodily harm,"[63] though courts have not foreclosed on the possibility of a consumer obtaining a judgment based on a lesser measure of culpability.

Injunctive Relief

While both the FDCPA and the TDCA grants standing to a state agency to sue for injunctive relief, only the TDCA entitles an individual consumer to seek an injunction against a debt collector.[64] And, unlike the traditional requirements imposed on a plaintiff seeking injunctive relief, under the TDCA no proof of irreparable injury need be presented – only that a violation occurred in the past.[65] An injunction, when properly pled, can be quite broad, and extend beyond a debt collector's action toward a single consumer, and apply to a debt collector's general activity within the state.[66] In this sense, and in terms of injunctive relief, the TDCA gives individual consumers equal power as the attorney general to enforce the TDCA. And, with the lower threshold necessary to be entitled to an injunction, the likelihood of prevailing and recovering attorney fees (discussed below) is much higher than other civil suits.

Culpability, Exemplary & Punitive Damages

One of the most pronounced ways in which the Texas tort of unreasonable debt collection differs from the statutory scheme of the FDCPA is in the area of exemplary damages and damages for emotional distress. The FDCPA does not provide any explicit authorization for exemplary damages. Conversely, exemplary damages may be awarded for unreasonable debt collection[67] if the offending conduct is proven by clear and convincing evidence.[68] In considering whether to award exemplary damages and the amount, if any, courts are to consider 1) the nature of the wrong, 2) the character of the offender's conduct, 3) the situation and sensibilities of the parties, 4) the extent to which the conduct offends the public's senses, and 5) the culpability of the offender.[69] Ultimately, the amount of damages to which a party is entitled is left to the jury.[70] Further, reckless behavior by a debt collector, coupled with a showing of proximate cause can support an award for mental suffering.[71] Also, in addition to the common law tort for wrongful debt collection, a violation of the TDCA's is automatically a violation of the Texas Deceptive Trade Practices Act[72] ("DTPA"), which entitles a consumer to mental anguish damages and treble economic damages if the offender acted knowingly, and both treble mental anguish and economic damages if the offender acted intentionally.[73] Further, a dispute over the degree of culpability is enough to survive a motion for summary judgment and proceed to trial to resolve the intent issue.[74] In *Household Credit v. Driscol*,[75] the court held even if a debt collector stops abusive conduct after a consumer complains, evidence of prior conduct is factually sufficient to find gross or reckless conduct.[76] The ultimate correction of the error does not excuse a debt collector's previous compounding of the problem.[77] In short, Texas law specifically contemplates consideration of the degree of culpability of an offending debt collector – an element notably absent from the FDCPA.

Modern Methods of Evading Debt Collection Laws and Possible Remedies

Deregulation of the credit industry, resulting largely from the Supreme Court's decisions in two important cases effectively nullifying state usury laws,[78] enables subprime borrowers to easily obtain credit, and high risk borrowers (including minorities, rural, poor, and elderly consumers[79]) are often the targets of deceptive debt collection practices.[80] And, more and more debt collectors are using creative tactics to minimize the effectiveness of the FDCPA.[81] The FDCPA has simply become ineffective and incapable of protecting consumers from unscrupulous debt collectors.[82]

Debt collectors are using technology to identify and target vulnerable debtors,[83] which can yield a higher rate of return on collection efforts versus more sophisticated consumers. This method of pseudo discrimination is prohibited by the ACA International's (the largest trade organization for the debt collection industry) code of ethics,[84] but the ACA recently ended its practice of facilitating and investigating complaints filed by consumers against members of ACA International.[85] In the past ACA International proactively pursued complaints, made findings, and conditioned membership in the association on compliance with ethical practices, including not discriminating against certain groups of debtors. Now, the ACA merely forwards the complaint to the company without any follow-up or investigation whatsoever. Perhaps if the FDCPA was supplemented to include the ethical provisions of ACA's Code of Ethics,[86] the consumer or the CFPB may have a means of prosecuting discriminatory practices which intentionally target unsophisticated consumers who are more likely to pay.

Another means by which debt collectors are circumventing the FDCPA is the use of small claims courts. Debt collectors hire lawyers, many of which are paper-mill law firms, who use the lax pleading requirements of small claims courts to obtain default judgments that would surely be more thoroughly scrutinized in a court of record.[87] Consumers are starting to fight back, and learning they can often win suits brought by third party debt assignees by simply contesting the suits.[88] But by filing suit, debt collectors are often exempt from the disclosure requirements.[89]

Finally, while the FDCPA may have been effective against combating the debt collection abuses of the past, it needs to be amended to account for the new modern-day tricks.[90] Collectors are now outsourcing activities oversees, where foreign debt collectors flatly ignore the provisions of the FDCPA and consumers have little or no recourse.[91] And, where the FDCPA fails to offer adequate remedies to consumer's whose debts are collected on foreign soil, the TDCA offers a special opportunity for relief. Not only does the TDCA create liability for debt collectors, but a rarely used provision also creates liability for a creditor who hires a debt collector when the creditor has actual knowledge that the debt collector repeatedly violates the TDCA.[92] By imposing liability on the creditors who hire the unscrupulous debt collectors, even if the debt collector is oversees, a consumer is far more likely to be able to reach a viable defendant in the United States under the TDCA instead of the FDCPA.

Attorney Fees

As a final note on remedies, and of great importance to practitioners, both the FDCPA and the TDCA prescribe the mandatory recovery of attorney fees to a prevailing party.[93] And, under the TDCA and its tie-in to the DTPA, even when a creditor countersues for money owed, the mere establishment of the violation will justify an award for attorney fees, regardless of whether the case yields the consumer a net recovery.[94]

Forums in Which to Litigate and Their Implications

Consumer Awareness

In the past, a major hindrance to the effectiveness of the FDCPA was unawareness of the act.[95] Until recently, the FTC engaged in a comprehensive consumer education program, including an animated video regarding consumer rights,[96] and in 2010, the FTC distributed more than 65,000 brochures to consumers, and the electronic version of the brochure was accessed online approximately 680,000 times.[97] The brochure encourages consumers to file complaints with their state attorney general,[98] but that can often be unhelpful for consumers. For example, even though there were more than 50,000 visits in 2010 to the Texas attorney general's website on debt collection, which yielded 3,390 complaints,[99] only one debt collection case was filed for certain.[100] The attorney general's website advises consumers to send written notification to collectors to cease communications, and explains they may sue collectors for injunctions and damages,[101] but no information is given on how exactly to accomplish this task. Thus, many consumers enter the courts without representation in an attempt to obtain relief.

Proceeding Pro Se

Many practitioners are reluctant to accept debt collection cases because fees are typically contingent and lawyers will not front costs if they do not feel there is a likelihood of success.[102] In many cases, even though consumers are aware of the FDCPA they remain unwilling to bring lawsuits.[103] But there are plenty of consumers who do sue on their own, and they are faced with doing battle against large debt collection firms with disproportionate resources, and a plethora of procedural challenges.

There is a perception pro se lawsuits lack merit because of a belief that good claims attack legal representation and bad claims do not.[104] But this may not be the case. However, while the pleadings of pro se complaints are viewed with some leniency,[105] they are held to the same procedural requirements as attorneys.[106] Now, after the Supreme Court's holding in *Bell Atlantic v. Twombly*[107] in 2007, which requires trial courts to disregard conclusory allegations in pleadings without any presumption of truth,[108] and more recently, *Ashcroft v. Iqbal*[109] in 2009, which effectively emasculated the doctrine of liberal construction of pro se pleadings under *Haines*,[110] pro se lawsuits are dismissed in federal courts 85% of the time based on Fed. R. Civ. P. 12(b)(6)[111] – twice the rate of other suits.[112] And, if a litigant survives initial motions to dismiss, courts are generally reluctant to provide any further leniency, especially at the summary judgment stage, and hold pro se litigants to strict procedural rules.[113] This trend gives little assurance that pro se litigants will have adequate access to the courts.[114]

Pro se claims comprise a substantial portion of federal court dockets[115] – 37% to be exact[116] – and often find themselves confused, scared, and uncertain when trying to navigate the complicated federal court system,[117] or when negotiating with big debt collection companies. These consumers need legal representation, and it is worthwhile for lawyers to accept these types of cases if they carefully develop a strategy in approaching suits against debt collectors.

Selecting a Forum in Which to File Suit

Consumers can sue a debt collector under state law, federal law, or both,[118] but the forum and law chosen can have a profound impact on the outcome of a lawsuit. Typically, plaintiffs regard federal courts as a less favorable forum[119] and instead prefer state courts.[120]

When filing a debt collection lawsuit in state courts, lawyers should be careful not to include any claim based on the FDCPA. Because the FDCPA is based on federal law, a defendant sued in state court for violations of the FDCPA will likely remove the suit to federal court[121] and invoke the court's federal question jurisdiction.[122] Only 37% of plaintiffs whose cases are removed to federal court based on federal question jurisdiction prevail on their FDCPA claims.[123] Federal courts have not been expansive when interpreting the FDCPA,[124] and, therefore, it is better to rely solely on state law claims, which, in the case of the TDCA are often more stringent than the provisions of the FDCPA.[125]

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Also, to avoid federal court a suit must seek realistic damages when suing a diverse defendant. A diverse debt collector can remove the case to federal court and invoke the court's diversity jurisdiction if the suit seeks more than $75,000 in damages.[126] In cases removed to federal court based on diversity, only 34% of plaintiff's win.[127] Diversity may be destroyed in suits against third party debt collectors by adding TDCPA claims against the debt collector's surety,[128] if any, and the original creditor,[129] which may be Texas citizens for diversity purposes.

Because plaintiffs tend to be so unsuccessful in federal court, whether based on FDCPA claims or diversity, practitioners filing suit against debt collectors (and other parties, if need be) should do so in state court, for reasonable damages, and for state law claims.

Conclusion

When the FDCPA was enacted critics complained it would preempt state laws, and arguing Congress should stay out of an issue that, in the 1970's, was viewed as only affecting a small portion of the population.[130] But the consumer credit industry has always been plagued with abuses,[131] and the problems are only getting worse as consumer credit card debt continues to grow.[132] While creditors do have a right to expect to be paid, their right to collect is not unlimited.[133] No ethical or professional business interest justifies the outrageous conduct[134] so many consumers witness today. Texas has been on the forefront of protecting consumers through the TDCA, its tie-in to the DTPA, and the common law tort of unreasonable collection. By carefully drafting a pleading to include only state law claims, practitioners can avoid a costly federal forum and pursue remedies unique to Texas law, including injunctive relief, statutory and treble damages, exemplary damages, and attorney fees. The TDCA is a far better choice for consumers, pro se or otherwise, and practitioners, who might otherwise be leery of accepting such a case. The TDCA and the common law tort of unreasonable collection offers Texas consumers all the tools necessary to successfully combat abusive debt collectors, and makes it worthwhile for practitioners to accept debt collection cases.

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1 Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. Cal. L. Rev. 711, 713 (2006).

2 William R. Crow, Jr., Comment, *The Texas Debt Collection Practices Act: Relief for the Harassed Consumer?*, 8 St. Mary's L. J. 773, 773 n.1 (1977).

3 Fed. Res., *Federal Reserve Statistical Release: G.19 Consumer Credit* (Dec. 7, 2011), *available at* http://www.federalreserve.gov/releases/g19/Current/ (last visited Dec. 27, 2011).

4 Gouldman-Taber Pontiac, Inc. v. Zerbst, 100 S.E.2d 881, 883 (Ga. 1957) (concluding a creditor who wrote a consumer's employer regarding a private debt did not act unreasonably).

5 Fed. Res., *Federal Reserve Statistical Release: G.19 Consumer Credit* (Dec. 7, 211), *available at* http://www.federalreserve.gov/releases/g19/Current/ (last visited Dec. 27, 2011).

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11 Act of May 22, 1973. 63rd Leg., R.S., ch. 547., Gen & Sp. Laws of Tex. (now codified as Tex. Fin. Code. Ann. § 392 (West 2010)).

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13 15 U.S.C. § 1692, sec. 802(a).

14 15 U.S.C. § 1692.

15 Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. Cal. L. Rev. 711, 718 (2006).

16 EMC Mortg. Corp. v. Jones, 252 S.W.3d 857, 870 (Tex. App.—Dallas 2008, no pet.).

17 Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes*

World of Debt Collection After FDCPA, 79 S. Cal. L. Rev. 711, 725 (2006).

18 Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. Cal. L. Rev. 711, 725 (2006).

19 Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors*, 16 Elder L. J. 135, 155 (2008).

20 *See* Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors*, 16 Elder L. J. 135, 157 (2008).

21 Fed. Trade Comm'n, *Annual Report 2011: Fair Debt Collection Practices Act*, at 4 (2011), *available at* http://www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf (last visited Oct. 12, 2011).

22 Fed. Trade Comm'n, *Annual Report 2011: Fair Debt Collection Practices Act*, at 5 (2011), *available at* http://www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf (last visited Oct. 12, 2011).

23 Fed. Trade Comm'n, *Annual Report 2011: Fair Debt Collection Practices Act*, at 5 (2011), *available at* http://www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf (last visited Oct. 12, 2011).

24 15 U.S.C. §1692a, sec. 803(5) (emphasis added).

25 Atty. Gen. of Tex., http://www.oag.state.tx.us/consumer/debt_collection.shtml (describing the differences between the FDCPA and the TDCA) (last visited Oct. 24, 2011).

26 Tex. Fin. Code Ann. § 392.001(6) (defining the term "debt collector").

27 *See* Tex. Fin. Code Ann. § 392.001(7) (defining the term "third party debt collector"); *see also* Atty. Gen. of Tex., http://www.oag.state.tx.us/consumer/debt_collection.shtml (describing the application of the) (last visited Oct. 24, 2011).

28 Heintz v. Jenkins, 514 U.S. 291, 292 (1995) (affirming the Seventh Circuits' application of the FDCPA to lawyers who regularly collect debts, including initiating litigation for the purposes of collection consumer debts).

29 Tex. Fin. Code Ann. § 392.101

30 Tex. Fin. Code Ann. § 392.102 (authorizing a plaintiff to sue both the third party debt collector and the surety).

31 Marauder Corp. v. Beall, 301 S.W.3d 817, 820-21 (Tex. App.—Dallas 2010, no pet.)

32 15 U.S.C. § 1692g, sec. 809(a)(4) and (5).

33 15 U.S.C. § 1692g, sec. 805(a).

34 Elwin Griffith, *Identifying Some Trouble Spots in the Fair Debt Collection Practices Act: A Framework for Improvement*, 83 Neb. L. Rev. 762, 787 (2005).

35 Elwin Griffith, *Identifying Some Trouble Spots in the Fair Debt Collection Practices Act: A Framework for Improvement*, 83 Neb. L. Rev. 762, 826 (2005).

36 Tex. Fin. Code Ann. § 392.202(a).

37 Tex. Fin. Code Ann. § 392.202(b).

38 See 15 U.S.C. § 1692l, sec. 814(a). In January 2012, the CFPB and the FTC entered into a Memorandum of Understanding ("MOU") to coordinate efforts to protect consumers and avoid duplication of federal law enforcement and regulatory efforts. Memorandum of Understanding Between the Consumer Financial Protection Bureau and the Federal Trade Commission (Jan. 2012). The MOU is available at, http://ftc.gov/os/2012/01/120123ftc- cfpb-mou.pdf.

39 Lauren Goldberg, Note, Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA, 79 S. CAL. L. REV. 711, 722 (2006).

40 15 U.S.C. § 16921l, sec. 814(d).

41 Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors,* 16 Elder L. J. 135, 146 (2008).

42 See generally, CFBP Annual Report 2012, Fair Debt Collection Practices Act, (2012), available at http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf; FTC, Annual Report 2011: Fair Debt Collection Practices Act, at 11 (2011), available at http://www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf (also noting the FTC settled with West Asset Management in March 2011 for $2.8 million – the largest penalty ever assessed in a debt collection case)

43 Tex. Fin. Code Ann. § 392.403(d).

44 Email from Jordan Hale, Assistant Pub. Info. Coordinator, Office of the Attorney General of Texas, to Justin P. Nichols (Nov. 9, 2011) (responding to a request for public information, No. 11-32042, regarding debt collector complaints) (on file with author).

45 Email from Jordan Hale, Assistant Pub. Info. Coordinator, Office of the Attorney General of Texas, to Justin P. Nichols (Dec. 15, 2011) (responding to a request for public information, No. 11-32311, suits filed by the attorney general's office in 2010 based on TDCA violations) (on file with author).

46 Tex. Admin. Code § 83.859 (West 2010).

47 Bruce N. Menkes and Anna-Katrina S. Christakis, *The FDCPA Take a New Direction: Federal Review of State Court Litigation Practices*, 63 Bus. Law. 717, 717 (2008); *see also* Marauder Corp. v. Beall, 301 S.W.3d 817, 822 (Tex. App.—Dallas 2010, no pet.) (holding proof of actual damages is not a pre-requisite to recovery of statutory damages under the TDCA).

48 15 U.S.C. § 1692k, sec. 813(a)(2) (emphasis added).

49 Fed. Trade Comm'n., *Debt Collection FAQs: A Guide for Consumers*, at 4 (2009), *available at* http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre18.pdf (last visited Oct. 12, 2011).

50 Tex. Fin. Code Ann. § 392.403(e) (providing minimum damages which shall be awarded to a consumer who successfully maintains an cause of action against a debt collector for violating §§ 392.101 (bonding requirement), 392.202 (dispute procedures), or 392.301(a)(3) (representing or threatening to represent to a third party that the consumer is willfully refusing to pay a debt when the consumer has filed a written dispute regarding the debt)).

51 Marauder Corp. v. Beall, 301 S.W.3d 817, 822 (Tex. App.—Dallas 2010, no pet.).

52 Marauder Corp. v. Beall, 301 S.W.3d 817, 823 (Tex. App.—Dallas 2010, no pet.)

53 15 U.S.C.§ 1692k, sec. 813(a)(1); and Tex. Fin. Code Ann. § 392.403(a)(2).

54 *See generally* Tex. Prop. Code Ann. §42 *et. seq.* (outlining the types of personal property exempt from seizure, execution, garnishment, or attachment).

55 William R. Crow, Jr., Comment, *The Texas Debt Collection Practices Act: Relief for the Harassed Consumer?*, 8 St. Mary's L. J. 773, 776 (1977).

56 *See* Duty v. Gen. Fin. Co., 273 S.W.2d 64, 65 (Tex. 1954) (first recognizing the common law tort of wrongful debt collector); *see also* Boe W. Martin, *A Creditor's Liability for Unreasonable Collection Efforts: The Evolution of a Tort in Texas*, 9 S. Tex. L. J. 127, 135 (1967) (clarifying that it is more accurate to call the cause of action "unreasonable collection").

57 Boe W. Martin, *A Creditor's Liability for Unreasonable Collection Efforts: The Evolution of a Tort in Texas*, 9 S. Tex. L. J. 127, 132 (1967); *see also* EMC Mortg. Corp. v. Jones, 252 S.W.3d 857, 868 (Tex. App.—Dallas 2008, no pet.)

58 273 S.W.2d 64.

59 Duty v. Gen. Fin. Co., 273 S.W.2d 64, 66 (Tex. 1954).

60 Indus. Fin. Serv. Co. v. Riley, 295 S.W.2d 498, 506 (Tex. Civ. App.—Dallas 1956, writ granted) (suggesting a finding of recklessness, combined with malice, will support a judgment against a debt collector for unreasonable collection efforts), *aff'd*

in part and rev'd in part on other grounds, 302 S.W.2d 652 (Tex. 1957).
61 359 S.W.2d 95.
62 Moore v. Savage, 359 S.W.2d 95, 96 (Tex. Civ. App.—Waco 1962, writ ref'd n.r.e.) (concluding a cause of action for unreasonable collection efforts does not require willfulness or maliciousness, but a showing of negligence causing physical injury is enough to sustain damages); *see also* Boe W. Martin, *A Creditor's Liability for Unreasonable Collection Efforts: The Evolution of a Tort in Texas*, 9 S. Tex. L. J. 127, 134 (1967).
63 EMC Mortg. Corp. v. Jones, 252 S.W.3d 857, 868–69 (Tex. App.—Dallas 2008, no pet.) (citing Montgomery Ward & Co. v. Brewer, 416 S.W.2d 837, 844 (Tex. App.—Waco 1967, writ ref'd n.r.e.)).
64 Tex. Fin. Code Ann. § 392.403(a)(1).
65 Marauder Corp. v. Beall, 301 S.W.3d 817, 820 (Tex. App.—Dallas 2010, no pet.).
66 Marauder Corp. v. Beall, 301 S.W.3d 817, 821 (Tex. App.—Dallas 2010, no pet.) (reversing the trial court's issuance of a statewide injunction against a debt collector when the plaintiff only plead for individual relief, but suggesting had the plaintiff sought statewide relief in her pleadings the court would have upheld the broad injunction).
67 Pullins v. Credit Exchange of Dallas, Inc., 538 S.W.2d 681, 683 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.).
68 EMC Mortg. Corp. v. Jones, 252 S.W.3d 857, 873 (Tex. App.—Dallas 2008, no pet.).
69 Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908, 910 (Tex. 1981).
70 EMC Mortg. Corp. v. Jones, 252 S.W.3d 857, 871 (Tex. App.—Dallas 2008, no pet.) (citing Grogan v. Santos, 617 S.W. 2d 312, 315-16 (Tex. Civ. App.—Tyler 1981, no writ).
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72 Tex. Fin. Code Ann. § 392.404(a) (making a violation of the TDCA a deceptive trade practice actionable under the Texas Deceptive Trade Practices Act).
73 Tex. Bus. & Comm. Code § 17.50(b)(1).
74 Blanche v. First Nationwide Mortg. Corp., 74 S.W.3d 444, 445-46 (Tex. App.—Dallas 2002, no pet.) (concluding a consumer's informal notice of bankruptcy to mortgagee raised a fact issue as to the mortgagee's degree of culpability which needed to be resolved by the fact finder at trial in order to determine the amount of possible damages which could be awarded); *see also* EMC Mortg. Corp. v. Jones, 252 S.W.3d 857 (Tex. App.—Dallas 2008, no pet.) (requiring a showing that the plaintiff was actually denied credit or was offered a higher interest rate in order to support an award for loss of credit reputation).
75 989 S.W.2d 72.
76 Household Credit Servs., Inc. v. Driscol, 989 S.W.2d 72, 88–89 (Tex. App.—El Paso 1998, pet. denied)
77 EMC Mortg. Corp. v. Jones, 252 S.W.3d 857, 870 (Tex. App.—Dallas 2008, no pet.).
78 *See generally* Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 297, 313 (1978) (holding a bank may charge customers any rate allowed by the home state of the bank, even when the maximum allowable interest rate in the bank's home state exceeds that of the consumer's home state), and Smiley v. Citibank, 517 U.S. 735, 745 (1996) (declaring fines, charges, dues, and fees are all considered "interest," and banks are bound by the maximum interest allowed in the bank's home state, not the state of the consumer).
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80 Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors*, 16 Elder L. J. 135, 137–38 (2008).
81 Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. Cal. L. Rev. 711, 734 (2006).
82 Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. Cal. L. Rev. 711, 724 (2006).
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85 ACA Int'l. http://www.acainternational.org/about-file-an-ethics-complaint-209.aspx (informing consumers effective Sept. 19, 2011, ACA International will no longer directly mediate consumer complaints against debt collectors) (last visited Dec. 27, 2011).
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89 15 U.S.C. §1692g, sec. 809(d).
90 Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors*, 16 Elder L. J. 135, 157 (2008).
91 Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. Cal. L. Rev. 711, 732-34 (2006).
92 Tex. Fin. Code Ann. § 392.306.
93 15 U.S.C. § 1692k, sec. 813(a)(3); and Tex. Fin. Code Ann. § 392.403(b).
94 McKinley v. Drozd, 685 S.W.2d 7, 9 (Tex. 1985).
95 John Tavormina, Comment, *The Fair Debt Collection Practices Act: The Consumer's Answer to Abusive Collection Practices*, 52 Tul. L. Rev. 584, 599 (1978).
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105 Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curium).
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107 Bell Atlantic Corp. v. Twomldy, 550 U.S. 544, 555 (2007) (holding a plaintiff must allege more than mere conclusions and speculation in order to survive summary judgment, and must allege facts which, if true, would be grounds for relief).
108 Roy K. Schneider, Comment, *Illiberal Construction of Pro Se Pleadings*, 159 U. Pa. L. Rev. 585, 610 (2011).
109 *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (holding the allegations of facts which create the possibility of misconduct is not enough, but rather the pleadings must allege facts which are plausible).
110 *See generally* Haines v. Kerner, 404 U.S. 519 (1972).
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128 Tex. Fin. Code Ann. § 392.102 (authorizing a plaintiff to sue both the third party debt collector and the surety).
129 Tex. Fin. Code Ann. § 392.306 (imposing liability on a creditor who has actual knowledge that the debt collector it hires regularly violates the TDCA).
130 John Tavormina, Comment, *The Fair Debt Collection Practices Act: The Consumer's Answer to Abusive Collection Practices*, 52 Tul. L. Rev. 584, 587(1978).
131 Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors*, 16 Elder L. J. 135, 137 (2008).
132 *See* Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors*, 16 Elder L. J. 135, 147-48 (2008) (noting credit card debt increased by 89% from 1992 to 2011).
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