CARLTON FIELDS

Subrogation Claims Aren't 'Consumer Debts' Under Fla. Law

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Property and casualty insurers using collection agencies to collect subrogation claims in Florida can now cite a case to insulate them from consumer claims based on collection activities of their agencies. A Florida district court recently dismissed a class action against State Farm Mutual Automobile Insurance Co. and a collection agency engaged to collect subrogation claims for violations of the Florida Consumer Collection Practices Act (FCCPA).[1] The court found, as a matter of first impression in Florida, that insurance subrogation claims are not "consumer debts" as defined in, and are therefore not subject to, the FCCPA.[2] The FCCPA prohibits certain acts and practices in connection with collecting consumer debts from Florida residents. Many of its prohibitions mirror those set forth in the Federal Fair Debt Collection Practices Act (FDCPA).[3] While the FDCPA is primarily targeted at third party debt collectors, the FCCPA also applies to creditors collecting their own debts. Both the FDCPA and the FCCPA authorize recovery of actual and statutory damages, attorneys' fees and class relief for violations, incentivizing the filing of FCCPA claims against third party debt collectors as well as the often deeper-pocketed creditors themselves. And so in Amanda Schaefer v. Seattle Service Bureau Inc. d/b/a National Service Bureau and State Farm Mutual Automobile Insurance Co., the plaintiff filed a complaint in state court against State Farm and National Service Bureau (NSB), the collection agency used by State Farm to collect subrogation claims, alleging that correspondence sent by NSB violated prohibitions in §559.72 of the FCCPA, as well as the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).[4] The plaintiff alleged that State Farm was also liable for the acts of NSB as its agent, and sought damages, declaratory and injunctive relief and attorneys' fees under the FCCPA, damages under FDUTPA and to certify the class of individuals involved in auto accidents with State Farm insureds in which subrogation claims were referred to NSB for collection. While driving without liability insurance, Schaefer had been in an auto accident with State Farm's insured and was cited by law enforcement for causing the accident. State Farm's insured made a claim for damages to the vehicle and bodily injuries sustained in the accident which State Farm paid. It then referred its subrogation claim against Schaefer to NSB for collection. The plaintiff claimed that collection letters sent by NSB violated §559.72(9) and §559.72(10) of the FCCPA because, inter alia, no right of subrogation or debt had been adjudicated

by a court and therefore, the letters constituted illegal activity to "enforce a debt known not to be legitimate." After removing the case to the district court under the Class Action Fairness Act,[5] State Farm and NSB moved to dismiss the complaint on grounds, among others, that a subrogation claim is not a consumer "debt" as defined the FCCPA and that Schaefer lacked standing to sue under FDUTPA because the collection letters sent to her did not meet the trade or commerce requirement needed to sustain the claims for violation of FDUTPA. **Dismissal of FCCPA Claims**
State Farm and NSB relied on Hawthorne v. MAC Adjustment Inc., 140 F.3d 1367 (11th Cir. 1998) to argue that the subrogated claim was not a "consumer debt" as defined in the FCCPA, rendering the FCCPA counts subject to dismissal. The FCCPA, in tandem with the FDCPA, regulates activities of persons collecting consumer debt. Prohibited consumer debt collection practices under the FCCPA are contained in Fla. Stat. § 559.72. The FCCPA also provides that "due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to the federal Fair Debt Collection Practices Act." Fla. Stat. § 559.77(5). As set forth on State Farm's motion, both the FCCPA and the FDCPA define "consumer debt" as follows:

> *any obligation or alleged obligation of a consumer to pay money arising out of a transaction* in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family or household purposes, *whether or not such obligation has been reduced to judgment*." (Emphasis added) 15 U.S.C. 1692a(5); Fla Stat. § 559.55(6).

Thus, to be subject to either the FDCPA or the FCCPA, the "consumer debt" must therefore arise out of a "transaction." Although neither statute defines "transaction," the Eleventh Circuit held in Hawthorne that, "at a minimum, a transaction under the FDCPA must involve some kind of business dealing or other consensual obligation." Hawthorne v. Mac Adjustment Inc., 140 F.3d 1367, 1371 (11th Cir. 1998). See also Baggett v Law Offices of Daniel Consuegra,(M.D. Fla. 2015) (transaction under FDCPA must involve some kind of business dealing or consensual obligation that creates and obligation to pay); Durso v. Summer Brook Preserve Homeowners' Association, 641 F. Supp. 2d 1256 (M.D. Fla. 2008 (debt must arise out of a transaction, necessarily meaning some type of business dealing between the parties; FDCPA's reach limited to consensual transactions between parties). Hawthorne also involved a subrogation claim on similar facts. The Hawthorne plaintiff was also in a car accident with a third party, the third party's insurer paid its insured's claim, the defendant collection service attempted to collect the subrogation claim and the plaintiff unsuccessfully sued for violations of the FDCPA. In construing the FDCPA in Hawthorne, the Eleventh Circuit held that an obligation to pay a subrogation claim arising out of a car accident was not a consumer "debt" within the meaning of the FDCPA, because it did not arise from a transaction, and affirmed the lower court's order dismissing the claim:

> Because [plaintiff's] alleged obligation to pay [defendant] for damages arising out of an accident does not arise out of any consensual or business dealing, plainly it does not constitute a "transaction under the FDCPA" because the FDCPA applies only to "debts arising from *consumer* transactions." Id at 1371. Rather, the

> plaintiff's obligation to pay the insurance company arose out of [plaintiff]'s negligence in the car accident. Because the obligation to pay arose from a car accident and not a consumer transaction, it was not a "debt" triggering application of the FDCPA, See id. at 1371, 1373.

State Farm also cited Antoine v. State Farm Mutual Auto Insurance Co., 662 F. Supp. 2d 1318 (M.D. Fla. 2009), a case asserting violations of the FDCPA and FCCPA in connection with efforts to collect a judgment on a subrogation claim. In Antoine, the Middle District found that the insurer's judgment on a subrogation claim was not a "consumer debt" as defined in the FDCPA and the FCCPA, so as to support the plaintiff-judgment debtor's claim for violations of the FDCPA or the FCCPA based on State Farm's actions to collect the judgment. Finding that the case presented a matter of first impression in Florida, the Schaefer court adopted the defendants' reasoning and reliance on Hawthorne, holding that a subrogation claim is not a consumer debt under the FDCPA or the FCCPA, and dismissed the FCCPA claims:

> ... the FDCPA may be triggered only when an obligation to pay arises out of a specified transaction. Hawthorne, 140 F. 3d at 1371; Anderson v. Singletary, 111 F.3d 801, 804 (11th Cir.1997) (citing Perrin v. United States, 444 U.S. 37, 42, 100 S. Ct. 311, 314, 62 L. Ed. 2d 199 (1979)) ... "The ordinary meaning of 'transaction' necessarily implies some type of business dealing between parties ... In other words, when we speak of 'transactions,' we refer to consensual or contractual arrangements, not damage obligations thrust upon one as a result of no more than her own negligence." Hawthorne, 140 F. 3d at 1371 (citing Bass, 111 F.3d at 1326 ("[T]he FDCPA limits its reach to those obligations to pay arising from consensual transactions, where parties negotiate or contract for consumer-related goods or services.")) ... Schaefer's debt arose out of a tort created by her own negligence and not a transaction which would have created a consumer debt as required by the FCCPA ... and so does not constitute a consumer transaction. Accordingly, the court finds — applying Hawthorne — that Schaefer's claim does not fall under the protections established by the FCCPA because there was no transaction and no consumer debt.

Dismissal of FDUTPA Claims

The court also agreed with the defendants that Schaefer's FUDTPA claims failed because they lacked the "trade or commerce" component required to state such a claim citing[6] Economakis v. Butler & Hosch PA, No. 2:13-CV-832-FTM-38DN, (M.D. Fla. Mar. 3, 2014) and Kelly v. Palmer, Reifler & Associates PA, 681 F.Supp.2d 1356, 1374 (S.D.Fla.2010) ("FDUPTA prohibits unfair or deceptive acts or practices 'in the conduct of any trade or commerce.'"); Fla. Stat. § 501.204(1)). This "trade or commerce" component is defined as "the advertising, soliciting, providing, offering or disturbing, whether by sale, rental or otherwise, of any good or service or any property, whether tangible or intangible, or any other article, commodity or thing of value, wherever situated." Id.; Acosta v. James A. Gustino PA, No. 6:11–cv–1266–Orl–31GHK, (M.D. Fla. Sept.13, 2012) (defendants were not engaged

in “trade or commerce” because “attempt[ing] to collect a debt by exercising one’s legal remedies does not constitute ‘advertising, soliciting, providing, offering or distributing’ as those terms are used in Fla. Stat. § 501.203(8)”):

> Here, Schaefer’s complaint does not rise to the level of a FDUPTA (sic) claim. While Schafer argues that NSB violated FDUPTA by sending letters regarding the alleged subrogated debt, there is no evidence of any trade or commerce between Schaefer and NSB or State Farm. Instead, NSB sent letters attempting to collect on the alleged subrogated debt which arose from a tort committed by Schaefer. Letters sent by collection agencies to the debtor do not arise to the level of trade and commerce as defined by FDUPTA. ... The purpose of the FDUPTA was to protect consumers from illegal and/or unscrupulous practices of debt collectors not to provide a safe harbor or weapon to be used in response to one’s own tortious conduct. As such, Count V for violating FDUPTA is due to be dismissed.

In conclusion, the court said:

> Based upon the terms of the FCCPA and FDUPTA no set of facts or circumstances set forth by Schaefer in her complaint can state a claim for which relief may be granted. Schaefer cannot establish under the FCCPA or FDUPTA that a transaction or consumer debt existed between herself, the putative class members and/or State Farm and NSB. Since Schaefer’s case arose out of her negligent behavior rather than a transaction, consumer debt, trade or commerce, she fails to satisfy the requirements of the statutes at issue in this case. Consequently, Schaefer’s complaint is due to be dismissed with prejudice.

DISCLAIMER: Carlton Fields represented State Farm in this matter. *Republished with permission by Law360 (subscription required).* ___ [1] Fla. Stat. §559.55 et seq.

[2] Amanda Schaefer v. Seattle Service Bureau Inc.

[3] 15 U.S.C. §1601 et seq.

[4] Fla. Stat. § 501.204

[5] Schaefer’s Motion to Remand to the state court was denied.

[6] State Farm also argued other grounds for dismissal of the FDUTPA claim, including that these claims against it failed because it is regulated by the Department of Financial Services, and FUDTPA explicitly excluded from its scope: “(4) Any person or activity regulated under laws administered by: ... (d) Any person or activity regulated under the laws administered by the former Department of Insurance which are now administered by the Department of Financial Services.” Fla. Stat. § 501.212(4)(d). However, the court did not need to reach or rule on that argument.

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