DOCTORS AS DEBT COLLECTORS? HEALTHCARE PROVIDERS AND THE FLORIDA CONSUMER COLLECTION PRACTICES ACT

*Anthony J. Palermo**

INTRODUCTION

Beginning in the 1960s, state legislatures across the country enacted consumer protection acts that "were originally designed to supplement the Federal Trade Commission's (FTC) mission of protecting consumers from 'unfair or deceptive acts or practices' and are referred to as 'Little-FTC Acts.'"[1] As the area of consumer collection continues to grow in Florida, various healthcare providers are finding themselves subject to or threatened with a lawsuit for alleged violations of the Florida Consumer Collection Practices Act (FCCPA) and its federal counterpart, the Fair Debt Collection Practices Act (FDCPA), as well as the Telephone Consumer Protection Act (TCPA).[2] Communications with patients—often sent in accordance with collection policies and procedures, patient agreements, form patient statements, dunning messages, and collection agency contracts—are becoming vehicles for consumer collection claims and exposing healthcare providers to liability. Healthcare providers should become familiar with Florida's consumer collection laws and implement strategies to increase compliance with and decrease exposure under the FCCPA, FDCPA, and the TCPA.

CONSUMER COLLECTION LAWS IN FLORIDA: PROHIBITIONS, DAMAGES, AND DEFENSES

The FCCPA, FDCPA, and the TCPA aim to prohibit various conduct related to debt collection and provide for civil penalties for violations thereof. Violations can prove costly as the FCCPA and FDCPA contain provisions that provide for the award of court costs and attorneys' fees for prevailing parties, and liability under TCPA can reach up to $500 *per violation*. The FCCPA, FDCPA, and the TCPA allow defendants to raise affirmative defenses based upon their internal policies and procedures designed to safeguard against violations, but in the face of exposure to costly claims, relying solely upon such defenses in litigation is a risky proposition.

---

* Associate, Holland & Knight LLP; J.D., Harvard Law School; B.A., The University of North Carolina at Chapel Hill.

1. *See* Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 164–65 (2011) (citations omitted).

2. Kaplan v. Assetcare, Inc., 88 F. Supp. 2d 1355, 1358 (S.D. Fla. 2000).

Florida Consumer Collection Practices Act & Fair Debt Collection Practices Act

The FCCPA and FDCPA were enacted with similar goals, and the FCCPA requires courts interpreting and applying its provisions to give "due consideration and great weight" to federal case law construing the FDCPA.[3] The "purpose and intent of the FCCPA, like the FDCPA, is to eliminate abusive and harassing tactics in the collection of debts."[4] The FCCPA and FDCPA prohibit any person or debt collector,[5] *in collecting consumer debts,* from engaging in the following practices:

1. claiming, attempting, or threating to enforce a debt with knowledge that the debt is not legitimate, or asserting the existence of some other legal right with knowledge that the right does not exist;[6]

2. willfully communicating with a debtor or his or her family with such frequency as can reasonably be expected to harass, or willfully engaging in other conduct that can reasonably be expected to abuse or harass;[7]

3. communicating with a debtor whom the person knows is represented by counsel with respect to the debt, unless the debtors initiates the communication;[8]

4. communicating with a debtor after the debtor notifies the person in writing that the debtor refuses to pay the debt or the debtor requests that the person cease further communicating with the debtor;[9]

5. using or threatening force or violence, or using

3. FLA. STAT. § 559.77(5) (2010); *see also* Gann v. BAC Home Loans Servicing LP, 145 So. 3d 906, 908 (Fla. Dist. Ct. App. 2014).

4. Trent v. Mortg. Elec. Registration Sys., Inc., 618 F. Supp. 2d 1356, 1361 (M.D. Fla. 2007), *aff'd*, 288 Fed. Appx. 571 (11th Cir. 2008); *Gann*, 145 So. 3d at 908–09; *see also* 15 U.S.C. § 1692 (2012).

5. The FCCPA applies to any person, while the FDCPA is limited to debt collectors. *Compare* FLA. STAT. § 559.72 (2010), *with* 15 U.S.C. § 1692c (2012). Although the FDCPA does not apply to original creditors by its own terms, one federal judge has still discussed its potential applicability to a health care facility. Bacelli v. MFP, Inc., 729 F. Supp. 2d 1328, 1344–45 (M.D. Fla. 2010).

6. FLA. STAT. § 559.72(9) (2010); *see also* 15 U.S.C. § 1692e(5), (7) (2012).

7. 15 U.S.C. § 1692d(5), 1692e(8) (2012); FLA. STAT. § 559.72(7) (2010).

8. 15 U.S.C. § 1692c(a)(2) (2012); FLA. STAT. § 559.72(18) (2010).

9. 15 U.S.C. § 1692c(c) (2012). The FDCPA exempts further communications if done to notify the debtor that the person will be terminating further communications or that the person may or will invoke specified remedies. *Id.* at § 1692c(c)(1)–(3).

profane, obscene, vulgar, or abusive language;[10]

6. simulating law enforcement, a representative of a government agency, an attorney or affiliate of one, or the legal or judicial process in writing or orally;[11]

7. telling a debtor who disputes a debt that the person will disclose information affecting the debtor's reputation for creditworthiness without also disclosing that the debt is disputed by the debtor, or disclosing information to others about the existence of a debt known to be disputed without disclosing that the debtor disputes it;[12]

8. communicating or threatening to communicate with a debtor's employer;[13]

9. communicating with anyone other than the debtor, the debtor's attorney, or a consumer reporting agency,[14] or disclosing information to someone other than the debtor or his or his family that affects the debtor's reputation, whether or not for creditworthiness, with knowledge or reason to know that the information is false or that the recipient does not have a business need for the information;[15]

10. falsely representing the character, amount, or legal status of a debt, or the services rendered or compensation that may be received by the person for collecting the debt, or using any other false or deceptive means to attempt to collect a debt or information about a debtor;[16]

---

10. *Id.* at § 1692d(1)–(2); FLA. STAT. § 559.72(2) (2010).

11. FLA. STAT. § 559.72(1) (2010). This includes using communications that appear authorized, issued, or approved by a government agency or an attorney when they are not; using stationary, instruments, or forms that only attorneys are authorized to prepare to communicate with a debtor as a guise; and orally communicating so as to give the false impression that the person is an attorney or associated with one. *Id.* at § 559.72(10–12); 15 U.S.C. § 1692e(1), (3-4), (9), (13) (2012). Also, misrepresenting that a document is not legal process or does not require action is prohibited. *Id.* at § 1692e(15) (2012).

12. FLA. STAT. § 559.72(3), (6) (2010).

13. 15 U.S.C. § 1692c(a)(3) (2012). Communicating with an employer is not prohibited, however, with a debtor's written permission or acknowledgment of the existence of the debt after it has been placed for collection. FLA. STAT. § 559.72(4) (2010).

14. 15 U.S.C. § 1692c(b) (2012).

15. FLA. STAT. § 559.72(5) (2010); *see also* 15 U.S.C. § 1692e(8) (2012).

16. *Id.* § 1692e(2)(A, B), (10). Similarly, the FDCPA requires a debt collector to disclose in its initial communication to a debtor that it is attempting to collect a debt and in its subsequent communications that they are being sent from a debt collector. *Id.* at § 1692e(11). The FDCPA

11. communicating with a debtor between 9 p.m. and 8 a.m. without prior consent,[17] or causing a debtor to be charged for a communication by concealing its purpose;[18]

12. advertising or threatening to advertise for sale any debt to enforce payment;[19]

13. publishing, posting, or threatening to publish or post to the public the name(s) of debtors,[20] or mailing communications in an envelope or postcard that has writing on the outside of it that is "calculated to embarrass [a] debtor";[21] and,

14. refusing to identify one's self, one's employer, or the entity that one otherwise represents or acts on behalf of when requested to do so by a debtor.[22]

The first prohibited practice set forth above—asserting a legal right that one knows does not exist or claiming a debt that one knows is not legitimate—has proven to be one of the most problematic for many clients. In determining whether a debt is legitimate or whether a legal right was misrepresented pursuant to section 559.72(9) of the FCCPA, courts must refer to other statutes that define legal rights and establish the legitimacy of debts.[23] Courts have interpreted this provision broadly to incorporate a wide array of other laws, such that the following actions could trigger liability under the FCCPA:

- attempting to collect payment from a patient for services covered by an HMO;[24]

---

also prohibits a debt collector from using a name other than the actual debt collector's business' name. *Id.* at § 1692e(14).

17. The debtor's last known time zone applies for this determination. 15 U.S.C. § 1692c(a)(1) (2012); FLA. STAT. § 559.72(17) (2010).

18. *Id.* at § 559.72(19) (2010) (including "collect telephone calls and telegram fees").

19. The FCCPA provides an exception when acting pursuant to a court order or as an assignee for the benefit of a creditor. FLA. STAT. § 559.72(13) (2010); 15 U.S.C. § 1692d(4) (2012). Falsely representing that a sale, referral, or transfer of the debt would cause a debtor to lose a claim or defense is also prohibited. *Id.* at § 1692e(6)(A).

20. *Id.* at § 1692d(3). This is "commonly known as a deadbeat list." FLA. STAT. § 559.72(14) (2010).

21. *Id.* at § 559.72(16) (2010).

22. *Id.* at § 559.72(15) (2010); 15 U.S.C. § 1692d(6) (2012).

23. Cliff v. Payco Gen. Am. Credits, Inc., 363 F.3d 1113, 1126 (11th Cir. 2004) ("To determine whether a debt is legitimate or whether a legal right exists, courts must refer to other statutes that establish the legitimacy of a debt and define legal rights.").

24. Kaplan v. Assetcare, Inc., 88 F. Supp. 2d 1355, 1362 (S.D. Fla. 2000) (finding that the plaintiff stated a cause of action under section 559.72(9) of the FCCPA based on allegations that defendant sent a bill for services covered by patient's HMO and thus violated section 641.315(3)

- sending a bill to a patient with knowledge that it would be covered by patient's workers' compensation insurer;[25]
- claiming the right to deny hearing request and garnish wages to collect a debt in violation of statutory requirements regarding garnishment;[26]
- attempting to collect a debt with knowledge that the debtor has filed for bankruptcy, *e.g.*, hospital sending a patient a bill despite a bankruptcy notice being previously mailed to the hospital;[27]
- "attempt[ing] to collect postjudgment interest in an amount greater than the statutory rate";[28] and,
- attempting to collect a debt that has already been paid, *e.g.*, hospital sending letters to collect from patient on a bill that patient and her insurance company had paid.[29]

The second prohibited practice set forth above—abusing or harassing a debtor or his or her family—has also generated a significant amount of claims. Courts have not given clear guidance on the parameters of what conduct is prohibited, and instead evaluate the context of each alleged violation presented. As one federal court interpreting Florida law announced: "There is no exact formula or checklist to determine whether a communication is abusive or harassing in nature; rather, to violate the statue, the behavior must be evaluated as a whole under the circumstances."[30]

---

of the Florida Insurance Code). The Eleventh Circuit has cited the Southern District's decision in *Kaplan* approving gly. *See Cliff*, 363 F.3d at 1126.

25. Florida's workers' compensation statute and the rules promulgated thereunder prohibit health care providers from "collect[ing] or receiv[ing] a fee from an injured employee within this state." FLA. STAT. § 440.13(13)(a) (2015); *see also* FLA. STAT. § 440.13(3)(g) (2015) ("The employee is not liable for payment for medical treatment or services provided pursuant to this section . . . ."); Fla. Admin. Code R. 69L-7.710(4)(a), (5)(j); *OMS Frequently Asked Questions*, My Florida CFO, http://www.myfloridacfo.com/Division/wc/provider/oms-faqs.pdf.

26. *Cliff*, 363 F.3d at 1126–31.

27. Read v. MFP, Inc., 85 So. 3d 1151, 1155 (Fla. Dist. Ct. App. 2012) (citing Bacelli v. MFP, Inc., 729 F. Supp. 2d 1328, 1337 (M.D. Fla. 2010)).

28. *Read*, 85 So. 3d at 1155 (citing N. Star Capital Acquisitions, LLC v. Krig, 611 F. Supp. 2d 1324, 1336–37 (M.D. Fla. 2009)).

29. *Read*, 85 So. 3d at 1155 (citing Williams v. Streeps Music Co., 333 So. 2d 65, 67 (Fla. Dist. Ct. App. 1976)); Scott v. Fla. Health Scis. Ctr., Inc., No. 8:08-CV-1270-T-24EAJ, 2008 WL 4613083, at *2 (M.D. Fla. Oct. 16, 2008).

30. *Id.* at *2 (citing Story v. J.M. Fields, Inc., 343 So. 2d 675, 677 (Fla. Dist. Ct. App. 1977)). Thus, whether one's actions constitute harassment or abuse is usually a jury question. *Bacelli*, 729 F. Supp. 2d at 1343.

Telephone Consumer Protection Act

The TCPA prohibits:

1. using an automatic telephone dialing system to make calls (other than for emergency purposes or with prior, express consent) to an emergency phone line, to a guest or patient room at a hospital, health care facility, elderly home, or similar establishment, or to a cell phone, paging service, or any service for which the recipient of the call is charged;[31]
2. calling a residential phone using an artificial or prerecorded voice without prior, express consent unless for emergency purposes;[32] and,
3. using a fax machine, computer, or other device to send an unsolicited advertisement to a fax machine, unless the sender has an established business relationship with the recipient or the recipient made its fax number available for public distribution.[33]

Damages and Attorneys' Fees

Any person who fails to comply with the FCCPA or FDCPA "is liable for actual damages [sustained by the plaintiff] and for additional statutory damages as [a] court may allow, but not exceeding $1,000, together with court costs and reasonable attorney's fees incurred by the plaintiff."[34] In contrast to the prevailing party attorneys' fees available to plaintiffs, courts may only penalize plaintiffs for their FCCPA claims when such claims lack merit—not merely when they are unsuccessful. According to the FCCPA: "*If* the court finds that *the suit fails to raise a justiciable issue of law or fact*, the plaintiff is liable for court costs and reasonable attorney's fees incurred by the defendant."[35]

Any person who violates the TCPA is liable for actual monetary loss caused by the violation, or $500 *per violation*, whichever is greater.[36] Additionally, if a court finds that a defendant willfully or knowingly violated the TCPA, the court may increase the award of damages up to three times the amount otherwise available.[37]

---

31. 47 U.S.C. § 227(b)(1)(A)(i)–(iii) (2012). The TCPA also prohibits using an auto-dialer to engage two or more phone lines at a business at the same time. *Id.* at § 227(b)(1)(D).

32. *Id.* at § 227(b)(1)(B).

33. *Id.* at § 227(b)(1)(C)(i)–(ii).

34. FLA. STAT. § 559.77(2) (2010); 15 U.S.C. § 1692k(a)(1)–(3) (2012).

35. FLA. STAT. § 559.77(2) (2010) (emphasis added).

36. 47 U.S.C. § 227(b)(3)(B) (2012).

37. *Id.* at § 227(b)(3). Violators of the TCPA can also be liable for civil forfeiture penalties and criminal penalties, including additional fines. *Id.* at § 227(e)(5)(A)–(B).

Defenses

In addition to rebutting factual allegations that would otherwise give rise to liability, the FCCPA and FDCPA provide another defense: "[a] person may not be held liable . . . if the person shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid such error."[38] Similarly, the TCPA allows a defendant to raise the affirmative defense that "the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations" that violate the TCPA.[39]

THE RISE OF CONSUMER COLLECTION CLAIMS AND PLAINTIFF'S COUNSEL AS REPEAT PLAYERS

The potential reward of attorneys' fees for a prevailing party looms over collection related claims under the FCCPA and FDCPA. This statutory incentive has birthed a cottage industry of consumer collection litigation in Florida, which—coupled with law firms designed for high-volume practices and bolstered by advertising—leads to those not traditionally thought of as debt collectors, such as health care providers, becoming subject to consumer collection claims.

Attorneys' Fees as an Incentive for Plaintiffs—and Mutual Deterrent

Because the FCCPA requires a defendant to pay the attorneys' fees of a prevailing plaintiff, and further litigating and defending against an action increases a plaintiff's attorneys' fees, prudent healthcare providers should attempt to resolve claims promptly unless the facts clearly do not expose the doctor or hospital to liability under the FCCPA or FDCPA. Litigating close factual questions is an increasingly risky proposition with mounting attorneys' fees.[40]

In practice, defense counsel often deal with the same plaintiffs' firms prosecuting FCCPA, FDCPA, and TCPA claims. Often, plaintiff's counsel will dismiss a case if apprised of its weaknesses upon defendant's investigation of the facts and averment of same to plaintiff's counsel. To

38. FLA. STAT. § 559.77(3) (2010); 15 U.S.C. § 1692k(c) (2012).

39. 47 U.S.C. § 227(c)(5) (2012).

40. *See* In re Burdett, No. 8:09-bk-00816-KRM, 2015 WL 150848, at *4, *6 (Bankr. M.D. Fla. 2015) (requiring defendant to pay plaintiff's counsel $57,371.00 in fees despite only recovering $1,000 in statutory damages for the plaintiff at trial); R. Martin Salzgeber, D.D.S., v. Kelly, 826 So. 2d 366, 367 (Fla. Dist. Ct. App. 2002) (awarding plaintiff's attorney an amount of fees that exceeded the contingency fee contained in the contract with plaintiff because an FCCPA suit is a "public policy enforcement case" and "the primary purpose of [such] fee authorizing statutes is to encourage individual citizens to bring civil actions that enforce statutory policy.") (citations and quotations omitted).

proceed otherwise, based upon only a plaintiff's recollection in the face of defendant's corporate records, could subject a plaintiff to costly defense counsel fees. Resolving these claims fairly and efficiently is in both parties' interests.

Rapport and Reputation: Informal Defenses and Deterrents

Providers should vigilantly hire counsel who will not antagonize plaintiff's counsel by either unnecessarily litigating claims in which factual investigation reveals defendant bears liability or by litigating—or engaging in settlement communications—in an overly aggressive manner. In the course of their repeat dealings in addressing consumer collection claims, not only will plaintiff and defense counsel build a rapport, plaintiff's counsel will often learn which defendants simply factor settlements into their bottom lines as operating costs and which take compliance seriously to avoid consumer collection claim exposure. By monitoring and continually enhancing its compliance program, a healthcare provider will keep business costs down by reducing the litigation expense involved in defending these claims.

In addition to retaining professional defense counsel, providers should establish and maintain strong compliance programs, which will in turn develop the provider's reputation as an entity that makes an unattractive target for consumer collection claims—one that could come with a hefty attorneys' fee award if the claim is belied by the compliant company's corporate records.

No compliance regime, however, is perfect. Even the best processes will not prevent a business from receiving demand letters or occasional lawsuits, as *bona fide* errors are inevitable and statutory attorneys' fees provisions incentivize claims. Even so, reputational deterrence is possible and a provider committed to complying will reap benefits. Once strong compliance and monitoring processes are in place, defense counsel is able respond to lawsuits and demand letters by proffering evidence demonstrating compliance efforts as well as facts that negate a plaintiff's allegations. As a result, plaintiffs' counsel will be more likely to reevaluate their claims against particular providers going forward and should be less likely to rush to file or threaten suit. Once opposing counsel becomes aware that the provider takes these laws seriously and has gone to great lengths to curb violations, the provider will be better prepared to resolve claims early on and will have ready defenses to claims that do go forward.

Thus, not only would effective compliance policies and procedures result in a decreased volume of claims and less exposure to liability, they would also enhance a provider's ability to defend against claims if and when they do arise. Enhancing one's compliance and monitoring policies and procedures also increases a provider's ability to effectively negotiate

with opposing counsel when such claims arise. And, although establishing that a violation was an unintentional, *bona fide* error, which occurred in spite of procedures adopted to avoid such errors, may not summarily resolve an existing claim,[41] this defense does provide an additional barrier to liability if a claim goes to trial.

Common Consumer Collection Claims

Among the more common consumer collection claims are the first three items set forth above under the FCCPA and the first under the TCPA: (1) willfully abusing or harassing a debtor (usually through frequent calls); (2) knowingly asserting an illegitimate debt or legal right that does not exist; (3) contacting a debtor represented by an attorney when you know of the representation; and (4) using an auto-dialer to call a debtor's cell phone. Notably, these claims arise in various fora. Counsel for a bankruptcy trustee may file suit on a debtor's behalf in federal bankruptcy court, plaintiff's counsel may file suit in county or circuit state court, or plaintiff's counsel may send a health care provider a demand letter directly.

Representative Claims

In order to highlight reoccurring issues for which this article will include remedial recommendations below, the following provides an overview of a few sample claims asserted against a health care provider, their statutory bases, and the underlying factual allegations.

1. **FCCPA, Fla. Stat. § 559.72(7)—abuse/harassment** (multiple calls to debtor's cell phone after debtor told to stop calling and could not pay, and to debtor's place of employment after told not allowed to call there).

2. **FCCPA, Fla. Stat. § 559.72(9)—illegitimate debt/legal right** (communicating via letter in an attempt to collect illegitimate debt and urging patient to contact health care provider after receiving notice of patient's bankruptcy, including by sending an account statement).

3. **FCCPA, Fla. Stat. § 559.72(9)—illegitimate debt/legal right** (sending patient an

41. Bacelli v. MFP, Inc., 729 F. Supp. 2d 1328, 1338–39 (M.D. Fla. 2010) (rejecting *bona fide* error defense at summary judgment stage); *see also* N. Star Capital Acquisitions, LLC v. Krig, 611 F. Supp. 2d 1324, 1337 (M.D. Fla. 2009) (quoting Niven v. Nat'l Action Fin. Servs., No. 8:07-cv-1326-T-27TBM 2008 WL 4190961, *3 (M.D. Fla. 2008)); Kelemen v. Prof'l Collection Sys., 2011 WL 31396, *6 (M.D. Fla. 2011) (rejecting summary judgment on bona fide error defense regarding debts incurred for care received at Florida Hospital).

invoice/statement when provider knew services provided should have been billed to/paid for by workers' compensation insurer after provider received email from workers compensation insurer explaining it would be responsible for care).

4. **FCCPA, Fla. Stat. § 559.72(18)—represented by attorney** (communicating directly via letter, and *indirectly* via letter sent by collection agency, with patient after receiving notice that patient retained legal counsel via fax from plaintiff's counsel).

5. **TCPA, 47 U.S.C. § 227(b)(1)(A)(iii)—using automatic phone system to call cell** (calls to debtor's cell phone after debtor told to stop calling, could not pay, and did not have permission to call debtor).

OPPORTUNITIES TO HEALTH CARE PROVIDERS FOR INCREASING COMPLIANCE AND REDUCING LIABILITY

To establish a strong compliance program and develop a reputation for having a strong compliance program, healthcare providers should—with the assistance of counsel—assess their policies, procedures, and practices and consider implementing various precautionary measures.

Revise and Enforce Contracts with Collection Companies

In an FCCPA case prosecuted by Lash & Wilcox, the plaintiff sued Florida Health Sciences Center ("FHSC") after being contacted by FHSC and two debt collection agencies working on its behalf: Merchants Association Collection Division ("MAF") and Preferred Collection and Management Services, Inc. ("Preferred").[42] MAF and Preferred contacted the plaintiff to collect for treatment that the plaintiff received at FHSC's Tampa General Hospital.[43] Plaintiff contended, however, that she and her insurance company had already covered the bills upon which FHSC, MAF, and Preferred attempted to collect and that FHSC and its agents therefore attempted to collect upon a debt that FHSC knew to be illegitimate.[44]

The Court rejected FHSC's argument that "because only *individuals* in the Defendant's organization and in the collection agencies acting on its behalf were told that Plaintiff's debt had been settled, the corporation

42. Scott v. Fla. Health Sciences Ctr., Inc., No. 8:08-CV-1270-T-24EAJ, 2008 WL 4613083, at *1 (M.D. Fla. Oct. 16, 2008).

43. *Id.* at *2.

44. *Id.* at *2, *4.

itself did not have actual knowledge."[45] Instead, the Court explained that "[c]orporation and agency principles . . . imput[e] the actions of a corporation's agents and employees to the corporation itself, which is the only entity that must have knowledge of the illegitimacy of the debt."[46] And, "if a corporation is aware that a debt is illegitimate, and its employees or agents attempt to collect that debt[,] . . . the corporation has violated the FCCPA."[47] Thus, according to the Court, FHSC had "direct knowledge" that the debt had been settled because individuals "working directly for" FHSC were informed of the full payment when: (1) FHSC received full payment; (2) plaintiff informed a caller from FHSC's collection department of the payment; and, (3) plaintiff's insurer wrote a letter to FHSC explaining prior payment.[48] The Court therefore attributed actual knowledge of full payment to FHSC, and explained that it was responsible for the employees and agents (Preferred and MAF) who, acting on FHSC's behalf, attempted to collect the debt.

Several other federal decisions accept this agency theory of liability pursuant to which a corporation is responsible for the actions of collection agencies it employs.[49] Moreover, recent federal decisions interpreting and applying Florida law permit "'on behalf of' liability," finding that a corporation can be liable for "indirectly" communicating with a plaintiff by using a third party to send debt collection communications.[50] Accordingly, under the accepted theories of corporate knowledge and agency under the FCCPA, any knowledge of a healthcare provider employee will likely be imputed to the corporation itself, and if a

45. *Id.* at *3 (FHSC argued that "to be guilty under the FCCPA, the specific person calling or sending a collection letter to Plaintiff on behalf of Defendant would have to be aware that the debt was illegitimate").

46. *Id.* at *3.

47. *Id.*

48. *Id.*

49. Kaplan v. Assetcare, Inc., 88 F. Supp. 2d 1355, 1363 (S.D. Fla. 2000) (accepting plaintiff's argument that knowledge or intent under the FCCPA could be imputed to debt collectors engaged by hospital on agency theory); Bacelli v. MFP, Inc., 729 F. Supp. 2d 1328, 1338 (M.D. Fla. 2010) (denying St. Joseph's Hospital's motion for summary judgment where "[a]pparently relying on an agency theory, Plaintiff also alleges that St. Joseph's violated Sections 559.72(7), (9) & (18) by causing MFP to send its post-petition and post-discharge collection letters").

50. Mangiaracina v. Orange Lake Country Club, Inc., No. 8:14-CV-1166-T-36MAP, 2015 WL 685778 at *4 (M.D. Fla. Feb. 18, 2015) (holding that defendants' motion to dismiss, which argued that the entity sending the letter attempting to collect a debt was not an agent, was "undermined by the FCCPA's broad definition of 'communication,' [which includes] 'the conveying of information . . . directly *or indirectly* to any person through any medium'" and that "in accordance with the FCCPA's broad definition of 'communication,' this Court has interpreted the FCCPA to *permit* 'on behalf of' liability.") (citing FLA. STAT. § 559.55(2) (2014) and Kelliher v. Target Nat'l Bank, 826 F. Supp. 2d 1324, 1329–30 (M.D. Fla. 2011) (denying defendant's motion to dismiss where plaintiff alleged that defendant used a third party to send debt collection communications to the plaintiff despite knowing that the plaintiff was represented by counsel, because such actions constituted indirect communications)).

collection agency contracting with the healthcare provider either attempts to collect upon a debt that the healthcare provider employee knows to be illegitimate, contacts a represented debtor, or abuses or harasses a debtor, the healthcare provider likely faces exposure to liability under the FCCPA. Therefore, providers should review contractual relationships with collection agencies for needed revisions or underutilized provisions that may help reduce litigation expenses.

Healthcare providers should be weary of terms with collection agencies that declare an agency relationship. This could unnecessarily expose a provider to consumer collection claim liability. Providers should consider including indemnity provisions in contracts with collection agencies, or if the contract contains an indemnity provision, health care providers should consider consistently enforcing it and requiring the collection agency to face the consequences of improper contact with a consumer. Before relying on an indemnity provision, however, healthcare providers should consider how enforcing this provision could affect the ongoing business relationship.

Providers should also consider re-negotiating with collection agencies to revise existing contracts to clarify that collection agencies will comply with the FCCPA, FDCPA, and TCPA, and to ensure that the collection agency's practices and internal processes and procedures comply with these statutes. Providers should consider requesting an explanation of the collection agency's policies and procedures that it has in place. Requiring compliance as part of its agreement with a collection agency will help a provider present a *bona fide* error defense should the collection agency incur any liability on your behalf.[51]

Moreover, requiring a collection agency to provide a healthcare provider with the collection agency's books and records would demonstrate a commitment to compliance and encourage compliance through monitoring. Through these measures, healthcare providers can demonstrate to plaintiffs, their counsel, and potential fact-finders that they have ensured debt collection on their behalf and completed by their agents is subject to procedures designed to avoid violations. To the extent that the provider documents that it requires its agents to comply with the consumer collection laws, the provider increases its ability to respond to demand letters and litigate if necessary. The provider will also enhance its reputation for compliance through these measures.

Document Results and, if Applicable, Shift the Onus of Defense to Collection Agencies

In addition to requiring each collection agency to demonstrate the precautions and measures each takes to prevent violations of Florida's

51. *See, e.g.*, *Bacelli*, 729 F. Supp. 2d at 1334–36.

consumer collection laws, providers should document its efforts to spur the collection agencies' compliance and the results obtained from these efforts. To the extent the provider creates a paper trail, the provider reduces its eventual liability under the Acts as it possesses a reservoir of evidence to draw upon to encourage repeat players to dismiss their claims or settle, and to present a *bona fide* error defense in any litigation.[52] Similarly, a track record of errors prevented—e.g., individuals not contacted because the provider or the collection agency investigated and found out about attorney representation, bankruptcy, or insurance coverage—will be helpful to demonstrate compliance before a court.[53]

When a provider possesses evidence that a collection agency made the contact allegedly giving rise to liability—despite the provider's procedures implemented to deter such conduct—the provider can request that plaintiff's counsel pursue the collection agency for its responsibility in initiating the communication at issue. Although the provider could be subject to liability under an agency or "on behalf of" theory of liability pursuant to the language in the contract, some plaintiff's counsel elect to pursue the collection agency and have the provider and collection agency determine indemnity claims separately. This can be an attractive option to providers as the onus would be on a collection company to seek indemnity from the provider should the collection company believe it is not liable for the contact. Rather than haggling with a collection agency to recover for damages that they caused, a provider is kept out of the fray. Again, this involves a business calculation regarding whether the provider is concerned about potentially damaging its relationship with the collection company.

Consider Selling Accounts Receivable to Collection Companies.

As explained above, a provider can be deemed ultimately liable for the actions of collection agencies under several theories of liability. Instead of revising the provider's contracts with collection agencies to improve their compliance efforts and/or revising and relying upon indemnity provisions to require that collection agencies absorb the liability for their actions, a provider could identify and negotiate with companies that will purchase accounts receivable. Once a separate entity owns the accounts and attempts to collect upon the outstanding balances for its own behalf, the provider should no longer be liable for any violations of the consumer collection laws incidental to the collection efforts.

Monitor and Immediately Disseminate Changes to a Patient's

52. *See, e.g.*, *id.* at 1332–36.
53. *See id.*

Collection Information

Providers should consistently record and disseminate any of the following information regarding a patient any time such information is related to any of its employees from any source:

- revocation of consent to being contacted (*e.g.*, being told to stop calling);
- representation by an attorney;
- bankruptcy or refusal or inability to pay;
- insurance coverage;
- workers' compensation coverage;
- prior payment of an amount included in an account statement or otherwise listed as outstanding; and,
- changes to contact information (*e.g.*, phone number, address, email, or employer).

A change in any of these areas can expose the provider to liability if not accounted for, and when any employee learns of such information, it is imputed to the corporation as a whole. Thus, the provider should provide a mechanism through which an employee can immediately report any relevant information related by a patient or other source regarding these issues, and require each employee to utilize this system to report any such information learned and to check this system before communicating with a patient. Through this process, the provider can prevent further contact or other action that could support a claim under Florida's consumer collection laws.

Not only can effective monitoring and internal reporting of this information reduce instances in which a provider's employee violates the consumer collection laws, the provider may be required to provide such information to collection agencies pursuant to agreements with the collection agencies. To the extent the provider can establish and use such an internal control to promptly record and report this information, it can reduce its exposure to agency or "on behalf of" liability for the actions of collection agencies as well as avoid unintentionally breaching any agreements. Additionally, a provider's efforts to monitor these areas further demonstrates evidence of its commitment to compliance, which will discourage plaintiffs' counsel to incur costs litigating against it and enhance its ability to assert a *bona fide* error defense in the event of inadvertent contact.

Providers should monitor their fax machines and immediately note any attorney representation letters faxed to it or any other changes to a

patient's collection information. If a fax number or email address is not monitored or otherwise utilized, providers should consider disconnecting or discontinuing it so that they can defend against claims that they acquired knowledge via fax or email of a patient's bankruptcy, that a patient retained counsel, or similar changes that prohibit communications to collect amounts owed by a patient.

Additionally, providers must ensure that patient information is immediately updated as soon as any payments are received to cover a patient's treatment or as soon as any information relating to insurance or other coverage is received. Concomitantly, enhancing a provider's ability to prevent account statements from going out once payments are made or coverage information is acquired will prevent claims under the consumer collection laws. Immediate dissemination and the ability to prevent bill generation and mailing can deter claims.

Review Patient Agreements for Consent and Arbitration Provisions

Providers should not only monitor the means by which a patient or his attorney may contact it, but they should attempt to contract with the patient to define these means. Additionally, providers should expressly obtain patient consent to communications via cell phone or any other method by which the provider might contact a patient.

Providers should clarify acceptable methods for a patient to withdraw his or her consent by requiring the patient to reach out to a regularly monitored email address and/or mailing address. Although such a defense might not ultimately prevail if asserted alone as any knowledge acquired by an employee is imputed to the entire company, such a contractual provision may reduce unintended improper contact by notifying a patient how he or she can put a stop to contact, which in turn may prevent some cases from ever arising.

Providers should also consider whether to include in their agreement a provision requiring patients to consent to arbitration, rather than litigation in state or federal court, for disputes arising out of treatment, billing, or otherwise as a result of the provider's relationship with the patient. Arbitration is designed to be an expedited process with less attendant costs should a matter not be promptly settled.

Require Employees to Note the Substance of Oral Communications with Patients.

Providers should consider incorporating into their policies and procedures a requirement that any employee who communicates via telephone or face-to-face with a patient records notes of the substance of their conversation. Such notes do not have to be overly detailed. Even brief notations can demonstrate that later contact with a patient was not prohibited under Florida's consumer collection laws if there is no

indication that the provider should refrain from further contact (*e.g.*, attorney representation, bankruptcy, "do not call again," etc.). To the extent the provider establishes a consistent practice of recording certain relevant details of patient contact, the provider ensures that it has evidence to rebut a plaintiff's allegations that he or she revoked consent to contact or otherwise triggered potential liability for further communication. Even when a communication is for a routine reason that is unrelated to consumer collection, recording that fact, and noting that none of these topics came up in the communications with a patient will ensure that further contact will not expose the provider to liability and it will help the provider to ward off unsupported claims. To ease the potential burden on employees, providers should consider developing a short checklist of areas that should be noted if discussed and requiring an employee to merely indicate whether they were mentioned or not, and if so, the substance of such communication. Providers can present these checklists—which would be completed by employees during and after communications with patients and maintained as business records—to a court or other fact-finder to demonstrate that a patient did not request that the provider cease further contacting the patient, but instead the patient and provider discussed some other aspect related to treatment or services rendered. A provider thus creates a "paper trail" that evidences that the provider did not have the requisite knowledge of a patient's desire not to be further contacted, which triggers liability under the collection laws. The provider should make sure that all employees involved in patient contact and all debt collectors employed are apprised of these notes once recorded so that the provider refrains from further communications that would expose the provider to liability.

Create Brief Informational Chart Regarding Prohibited Contact

In addition to enhancing one's policies and procedures and providing training on compliance, providers should consider displaying important requirements and prohibitions of these ever-more-frequent claims in visible areas where employees with frequent patient contact work. For instance, identifying the acceptable times to call, the acceptable way to leave a message, and reminding employees to consult the "do not contact" list before reaching out to a patient will reduce potential violations. It will also add to the evidence of compliance that one can present to opposing counsel or a judge.

Maintain Rapport with Plaintiffs' Counsel, Investigate Facts Promptly, and Resolve Claims Involving Close Legal Questions Expeditiously

Defense counsel and providers should be ready to present underlying facts in an upfront, non-confrontational manner. It is beneficial to promptly investigate the facts of each claim or demand, as such

information is often discoverable and will inevitably need to be produced. Armed with such corporate records, a provider can engage in settlement communications early on, reducing or eliminating liability when there is evidence that appropriate policies and procedures were employed and improper contact did not occur. If improper conduct did occur, providers effectively stem their losses by opening up lines of communication to resolve the claim before significant attorneys' fees are incurred.

By consistently demonstrating candor and professionalism to opposing counsel, as well as demonstrating a commitment to compliance, providers and their defense counsel can ensure that plaintiffs do not push forward in litigation and incur costs and fees that plaintiffs might not recover as a result of a *bona fide* error defense or a plaintiff's inaccurate recollection. Over time, repeat players that take Florida's consumer collection laws seriously should reap rewards as plaintiffs become aware of the risk in litigating against compliant providers.