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## Fair Debt Collection Practices Act and Consumer Protection Act Inapplicable to Consumer Cash on Delivery Transactions

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ciation. The Association, however, did not approve the course until the summer of 1990. Although the 1985-1987 academic catalogue correctly stated that the "University will apply for full accreditation with the NSRA, which is expected in 1986," the next catalogue, issued for 1987-1989, contained a false statement of accreditation.

The catalogue also included a section on the University's School of Applied and Continuing Education, which offered the court reporting program. Although this section listed the accrediting agencies that had approved other programs within this school, it did not contain any accreditation statement relating to the court reporting program.

Within one week after Washburn noticed the false claim of accreditation, it began placing white tape over the statement in all undistributed catalogues. In addition, the Washburn administration conducted announcements to classes regarding the error and stating that the University was presently seeking accreditation. All other brochures available to students correctly stated that Washburn sought accreditation for the course.

Several court reporting students filed a lawsuit against Washburn alleging that the false statement of accreditation in the catalogue was a violation of the Kansas Consumer Protection Act ("Act"), KAN. STAT. ANN. 50-623 to 50-644 (1973). The students also claimed the University committed "educational malpractice" in its conduct and supervision of the court reporting program.

The trial court granted judgment for Washburn, noting that it was necessary for the students to show that Washburn's violation of the Act had caused them some injury. The students appealed this decision to the Kansas Supreme Court.

### *Students' Claims*

The students, who did not claim that they relied on the false statement of

accreditation when they enrolled at Washburn, argued that the Act did not require proof of reliance on the false statement. The students contended that the Act merely required them to show that they were consumers engaged in a consumer transaction with Washburn and further, that Washburn committed an act defined as "deceptive" under the Act. Moreover, since the Kansas Attorney General was allowed to bring a suit under the Act without bringing it on behalf of an "aggrieved consumer," the students asserted that they too should be allowed to sue, even if they were not aggrieved.

### *Causal Connection Required Under the Act*

The Supreme Court of Kansas upheld the trial court's grant of judgment in favor of Washburn. Although the false statement of accreditation was a *per se* violation of the Act under this amendment, the court indicated that this actual violation was not sufficient to allow the students to recover. Accordingly, the court held that a consumer could not recover under the Act without a showing that the consumer was aggrieved by the violation.

In its decision, the court relied upon the definition of "aggrieved" included in an earlier Kansas Supreme Court case, *Fairfax Drainage Dist. v. City of Kansas City*, 374 P.2d 35 (Kan. 1962). In *Fairfax*, the court said an aggrieved party was someone who had a substantial grievance, who had been denied a personal or property right, or upon whom a burden or obligation had been imposed. The court found that the students had not met this standard because they had not relied on the false statement of accreditation. In fact, many were unaware of the statement. The court also noted that the students had not suffered any loss or injury because of the false statement. Accordingly, although the students were consumers under the Act, they were not aggrieved by Washburn's violation of that act.

### *Educational Malpractice Not a Recognized Claim*

The Kansas Supreme Court also upheld the trial court's judgment on the claim of educational malpractice, noting that no American court has recognized this as a legal claim. The students based their argument on the low pass rates of Washburn students taking the statewide certification examination. While the court acknowledged these statistics, it noted that there was no proof that the instruction in the court reporting course caused the low pass rates.

According to the court, several public policy concerns weighed against recognizing a new cause of action for educational malpractice. The court identified the lack of a measurable standard of care and the potential for a flood of lawsuits as compelling policy reasons against recognizing a tort claim for educational malpractice. In addition, the court was reluctant to involve the state's courts in monitoring the daily operations of schools. Finally, the court noted that the difficulties in establishing a causal connection between the educational process and an individual student's success also weighed against recognizing this new type of tort claim. ❖

— JoAnne Juliano Giger

## Fair Debt Collection Practices Act and Consumer Protection Act Inapplicable to Consumer Cash on Delivery Transactions

In *Sterling Mirror of Maryland, Inc. v. Gordon*, 619 A.2d 64, (D.C. App. 1993), the District of Columbia Court of Appeals held that neither the Fair Debt Collection Practices Act nor

the Consumer Credit Protection Act covered cash on delivery consumer transactions. Consequently, a claim for damages arising from consumer transactions in which the contract balance was paid upon delivery or installation could not be maintained under either act.

### ***Smoke and Mirrors***

Mr. and Mrs. John Gordon (the "Gordons") contracted with Sterling Mirror of Maryland, Inc. ("Sterling") for the installation of mirrors in their home. The contract required a deposit before delivery of the mirrors and payment of the balance upon delivery and installation.

After Sterling delivered and installed the mirrors at the Gordons' house, a dispute arose about a chip in one of the mirrors. The Gordons and Sterling failed to reach an agreement concerning the chipped mirror. Consequently, the Gordons refused to pay the balance of the contract, which totaled \$4,207.50.

In an effort to collect the amount due on the contract, a Sterling employee telephoned Mrs. Gordon numerous times at her workplace. When these attempts proved unsuccessful, Sterling sued the Gordons for the balance of the contract. The Gordons, however, counterclaimed against Sterling, seeking damages for the harassment Mrs. Gordon allegedly suffered from Sterling's telephone calls.

The trial court concluded that the Gordons owed Sterling a portion of the outstanding balance, amounting to \$695, under the contract. However, the court also awarded Mrs. Gordon one-thousand dollars for damages arising from the telephone calls to her workplace. Sterling objected to the award of damages to Mrs. Gordon and consequently appealed this decision.

### ***No Legally Recognized Claim***

On appeal, Sterling contended that Mrs. Gordon failed to state a legally recognized claim from which damages

could be awarded. Sterling argued that neither the Fair Debt Collection Practices Act ("FDCPA") nor the Consumer Credit Protection Act ("CCPA"), statutes upon which the lower court based its decision, applied. Furthermore, Sterling stated that no non-statutory provisions provided any basis for Mrs. Gordon's claim.

The appellate court agreed with Sterling's argument. First, the court held that the Debt Act only applied to parties collecting debts on behalf of others. The court stated that the Debt Act, by its own terms, applied only to professional debt collectors, which the Act defined as people who regularly collect or attempt to collect debts owed to another. Furthermore, the plain language of the Debt Act specifically excluded from coverage "any officer or employee of a creditor, while in the name of the creditor, collecting debts from such creditor." Therefore, court reasoned that Mrs. Gordon could not base her claim on the Debt Act, because it did not apply to actions of a creditor attempting to collect its own debts directly from the debtor.

The court next addressed Mrs. Gordon's claim under the Protection Act and concluded that the Act provided no basis upon which Mrs. Gordon could state a claim. In its determination, the court first stated that the Protection Act only applied to "actions to enforce rights arising from a consumer credit sale or a direct installment loan." The court noted that the Protection Act defined a consumer credit sale as a sale of goods or services in which credit was extended by the seller to the buyer for amounts less than \$25,000, and the debt was payable in installments or subject to a finance charge. Additionally, a direct installment loan primarily accesses a line of credit for the borrower that is repaid in equal installments. The court concluded that the contract between the Gordons and Sterling was neither a consumer credit sale nor a direct installment loan but rather a cash on delivery transaction. Therefore, it held that Mrs. Gordon

was unable to state any action under the Protection Act.

Furthermore, the appellate court concluded that Mrs. Gordon failed to state any non-statutory basis for her claim. The court reasoned that the only non-statutory basis on which Mrs. Gordon could have relied was the intentional infliction of emotional distress. However, the court found that Sterling's conduct was not sufficiently outrageous nor extreme to support an action under this theory. Consequently, the court dismissed Mrs. Gordon's claim under this basis of recovery.

### ***Basis of Decision at Issue***

The court noted that it based all of its determinations upon a partial transcript supplied by Sterling. It also stated that the court did not have a copy of Mrs. Gordon's counterclaim. However, the court concluded that it adequately considered all possible statutory and non-statutory theories that might have been alleged in Mrs. Gordon's claim.

In support of its decision, the court noted that Sterling maintained the burden of presenting a record sufficient to demonstrate that the Gordons failed to prove a legally recognized claim. The court found that Sterling sustained this burden. Furthermore, the court noted the Mrs. Gordon had a duty to supply the court with any relevant information which had been omitted by Sterling. Because Mrs. Gordon failed to produce more information or to contend that Sterling failed to supply all relevant portions of the record, the court justified its reliance on the record presented by Sterling.

Thus, the court held that the record sufficiently demonstrated the Mrs. Gordon failed to prove a legally recognized claim that entitled her to damages from Sterling's telephone calls. Consequently, the appellate court reversed the judgment of the lower court.

### ***Dissent Argues that the Record is Inadequate***

A strong dissent argued that the record before the court was insufficient

to overturn the trial court's decision. The dissenting judge stated that the party seeking reversal bears the burden of presenting a record sufficient to demonstrate that error occurred. Consequently, when that party fails to sustain its burden, the court lacks discretion to reverse the lower court. The dissent claimed that Sterling failed to meet its burden and therefore, the trial court's opinion should be affirmed. ♦

— *Thomas Melody*

### Health Care Contracts May Not Unfairly Limit Uninsured Motorist Compensation

In *Brown v. Snohomish County Physicians Corp.*, 845 F.2d 334 (Wash. 1993), the Supreme Court of Washington invalidated provisions in health care service contracts that excluded medical coverage to the extent benefits were available through uninsured or underinsured motorist coverage. The court found that the provisions violated public policy favoring full compensation for innocent automobile accident victims. Accordingly, the restrictive contract provisions were held to be enforceable only after accident victims were compensated for general and non-duplicative special damages.

#### *Contract Provisions Unjustly Restricted Medical Coverage*

In two related cases, a health care service contractor denied automobile accident victims complete reimbursement for medical expenses. In refusing coverage, the contractor relied on contract provisions that provided compensation only to the extent that the claims

surpassed the benefits from uninsured or underinsured motorists ("UIM") policies. In each case, the victims, who both maintained UIM coverage, received significantly less compensation for injuries than otherwise available absent the contract provision.

In the first case, Ray Brown ("Brown") suffered serious injuries after an automobile struck him. Medical expenses for his injuries, as well as damages for lost wages and pain and suffering, totaled in excess of \$160,000. Public Employees Mutual Insurance Company ("PEMCO"), the insurer of both the driver and victim, paid the limits of their respective policies: the driver's liability insurance of \$25,000, no-fault medical coverage of \$10,000, and Brown's UIM coverage of \$50,000 and personal injury protection of \$10,000.

Through his employer, Brown also maintained a health care service contract with Snohomish County Physicians' Corporation ("SCPC"). SCPC, however, limited Brown's recovery to medical expenses above \$70,000, stating that the contract contained a provision which limited recovery if the patient had access to UIM coverage, automobile "no-fault," or other similar medical coverage. According to SCPC, the provision applied to Brown's \$50,000 of UIM coverage, his \$10,000 of personal injury protection coverage, and the driver's \$10,000 of no-fault medical coverage, totaling the \$70,000 for which SCPC maintained no responsibility.

Absent such provisions, Brown could retain his \$50,000 of UIM coverage. Theoretically, the UIM coverage would have compensated Brown for general and special damages beyond ordinary medical expenses. However, the provision effectively precluded the UIM coverage as an avenue of recovery for lost wages or pain and suffering damages.

Brown sought a judgment invalidating the policy provision. The trial court, however, rejected Brown's argument that the provision was unen-

forceable as against public policy. Brown appealed this decision.

In the companion case, Ross Hogsett ("Hogsett") died from injuries sustained in an automobile accident with an uninsured driver. Hogsett's personal injury protection coverage paid the first \$10,000 of medical expenses. However, a dispute arose as to whether SCPC or UIM coverage would compensate Hogsett for the remaining \$24,277.13 in medical bills. SCPC claimed that a health care service contract provision, similar to the one in Brown's case, precluded compensation from SCPC because Hogsett had adequate UIM protection.

Hogsett's widow sought judgment against SCPC declaring the restrictive provision invalid, as well as injunctive relief and damages under the Consumer Protection Act. The trial court, however, denied Hogsett's motion. Hogsett filed a timely appeal of this decision.

The appellate courts affirmed the judgments in both of the cases. The Supreme Court of Washington, however, granted discretionary review of both cases.

#### *Principles of Insurance Law Apply*

The Supreme Court of Washington first noted that in resolving the public policy issue, the general rules governing insurance policies applied to the health care service contracts. The court stated that insurance companies may limit liability if the restrictions are consistent with public policy. However, the court also warned that violations of public policy may warrant judicial intervention to invalidate the unacceptable provision.

In evaluating the validity of the provisions, the court relied on prior Washington Supreme Court precedent and extended the rule that an insurer may recover only the excess that remains after the insured is fully compensated for a loss caused by another's negligence. The court advocated the rule as illustrative of a socially desirable policy that promotes the adequate