PLAYING IT SAFE:
USING YOUR POKER FACE TO SCARE OFF THE FAIR DEBT COLLECTION ACT
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Due to the recent poker craze, it seems Texas Hold’em Tournaments are being held everywhere. Although I am not a poker fan, after being promised a chance to win a big screen television, I decided to go to one of these tournaments to see what I had been missing. As you can imagine, due to my lack of poker lingo, I felt really out of place at the tournament. However, I decided to sit down at the table and “try my hand.”

As I sat down, I was surrounded by a unique cast of characters. Each person had a different approach to the game or a difficult “tell” sign as they call it. Initially my luck was not so good, however, a nice gentlemen next to me gave me some great advice. He told me “play it safe and always cover all your bases.”

This advice reminded me of an issue I had been dealing with concerning the Fair Debt Collection Practices Act (FDCPA) and health plans covered by the Employee Retirement Income Security Act (ERISA). In this article you are going to learn how to “play it safe” and, hence, increase your subrogation settlements while avoiding any conflict with the FDCPA. Hopefully this article will help you become the Phil Helmuth or Johnny Chan of collections.

RULES OF THE GAME
In order to perform well at any game you must first know the rules. The main rule in the collection industry is the Fair Debt Collection Practices Act. In 1977 the federal government enacted the FDCPA to eliminate abusive debt collection practices. While this law is needed to regulate the debt collection industry, it has made collections more of a “nosebleed.” Many creditors feel when they provide a service on credit they are going all in on a blind draw. To intelligently evaluate your hand, it is important to know if your claim falls under this Act and how that will affect the odds of collecting and winning big at the subrogation poker table.


This is a tricky one because many courts have not addressed this issue and the case law varies depending on the facts of the case and the court’s interpretation of what defines a “debt” and “debt collector” under the FDCPA. If you want to “play it safe,” the best bet is to follow the Act.

While the FDCPA and ERISA are both federal acts, initially the intention of Congress was for the two acts to complement one another. However, in the few instances where conflicts arise you must review the savings provisions of each act. Both of these provisions suggest that “any conflicts should be resolved in favor of the FDCPA.”

The FDCPA defines “debt” as:

“All 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 the personal, family, or household purposes, whether or not such obligation has been reduced to judgment.”

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Additionally the term “debt collector” is defined under the Act as:

“Any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of debts; or who regularly collects or attempts to collect, directly, debts owed or due or asserted to be owed or due another.”

While disputes may be resolved in favor of the FDCPA, you must make sure that the Act applies to the health plan at issue. The following are a few exceptions that can be helpful when evaluating your hand.

EXCEPTION TO THE RULE
Although this definition of “debt collector” is rather broad, there are some exceptions. One exception from the definition of debt collector is one who is collecting a debt not in default or obtained the right to collect the debt before it goes into default. In Hamilton v. United Healthcare of Louisiana, Inc. and Healthcare Recoveries Inc. the Fifth Circuit Court of Appeals held that a subrogation claim was a debt under the FDCPA and remanded the case to the District Court. The District Court granted Healthcare Recoveries (HRI) motion for summary judgment and dismissed the FDCPA claim on the basis that HRI was exempted from the definition of debt collector.

In Hamilton, the insurance company was seeking reimbursement from the member. Hamilton was injured in an accident and United Healthcare paid for his medical expenses and sought subrogation through its contract with HRI. While the Fifth Circuit considered these facts to be a “debt” under the FDCPA, ultimately the FDCPA did not apply due to the “debt collector” exemption.

Additionally, the Eleventh Circuit has addressed the issue of whether a subrogation claim constitutes a “debt” under the FDCPA in the case of Hawthorne v. Mac Adjustment, Inc. In Hawthorne, the insurance company was collecting from the tortfeasor directly and the court held that a subrogation claim was not a debt because there was no consensual obligation and that a tort does not involve the purchase or use of goods and services. Although it appears these two Circuits are split in their decisions, there is a factual distinction between these cases. The debt in Hawthorne arose from a tort which is not considered a “consumer transaction.” The Court in Hamilton held that the debt did not arise from the tort, but from the debtor’s actual purchase of insurance which is a “consumer transaction.”

Hence, the case law at this time seems to favor the subrogation specialist by granting an exception to get around the FDCPA. However, because the Act is so broad and situations vary, there are many grey areas under the Act yet to be decided. Thus, you may want to go ahead and “play it safe” by following the Act to “cover all your bases.” This philosophy will ensure your case will be a toothpick.

STRATEGY
How to play it safe and cover all your bases.

The law, like poker, is sometimes just a betting game. It is very important to make sure you play your cards right and know when you need to make a “judgment fold.” If you are unsure whether the Act applies to your subrogation claim “play it safe” and follow the Act. The following are some simple procedures that should put you in good shape if you are contacting a member or tortfeasor.
1. The initial demand letter should include the name of the original creditor, name of entity that is currently seeking the money and the amount owed. The letter should also include language stating that the claim will be assumed valid unless the validity is disputed within thirty (30) days.

2. If the claim is disputed, it should be further validated in writing. The mini-miranda should also be placed on any correspondence in a clear and concise manner so as not to promote any confusion or mislead the debtor.\textsuperscript{18}

3. Any material mailed to the debtor must not be identifiable by a third party. The agency/firm must also not communicate with any third party regarding said obligations, unless you have express permission from the debtor.\textsuperscript{19} Phone calls should also not be made to the debtor before 8:00 am or after 9:00 pm or any other time which the debtor has stated is inconvenient.\textsuperscript{20}

4. Do not engage in any conduct of which the purpose is to harass or abuse the debtor. \textsuperscript{21}

5. Do not make a false, misleading or deceptive representation.

6. Do not threaten to take any legal action that cannot legally be taken or is not intended to be taken. \textsuperscript{22}

The next time you are collecting a debt or handling a subrogation matter think twice before you place your bet. While the federal case law at this time may not require you to comply with the FDCPA, you may want to follow some of the procedures in the Act to answer any changes in the future. The Act is easy to follow and, once in place, it can ensure you will protect your company as well as your stack of chips. If you have a question that is not addressed within the laws, remember to “play it safe and cover all your bases.” If you keep this simple phrase in mind you should never end up in the “bubble”\textsuperscript{23} when dealing with the federal collection laws.

\textsuperscript{1} See 15 USCS 1692 (e).

\textsuperscript{2} Phil Hellmuth, Jr., \textit{Play Poker Like the Pros} (New York: HarperCollins, 2003) 375. (“Metaphor used to describe highstakes poker in which players can lose large amounts of money very quickly.”)

\textsuperscript{3} Phil Hellmuth Jr., \textit{Play Poker Like the Pros} (New York: HarperCollins, 2003) 369. (“Situation in which a player needs one card to complete a poker hand.”)

\textsuperscript{4} Id @ 384. (“Playing hands in unorthodox ways to confuse your opponents.”)

\textsuperscript{5} See \textit{United States of America v. Ali H. Sawaf and Elena V. Sawaf}, 74 F. 3d 121 (6th Cir. 1996); 28 U.S.C. §3003 (c).

\textsuperscript{6} 15 USCS 1692 (a) (5).

\textsuperscript{7} Id. @ 1692 (a) (6).

\textsuperscript{8} Id. @ 1692 (a) (6) (F) (iii).

\textsuperscript{9} 310 F.3d at 391-392.

11 Id.

12 140 F. 3d 1367 (11th Cir. 1998).

13 Id.

14 Id. @389.

15 Phil Hellmuth, Jr., Play Poker Like the Pros (New York: HarperCollins, 2003) 384. (“Idea that you can start with a tiny amount of money in a poker game and end up with a small fortune.”)

16 Phil Hellmuth Jr., Play Poker Like the Pros (New York: HarperCollins, 2003) 374. (“Folding a hand on the basis of your read of all the factors.”)

17 Phil Hellmuth Jr., Play Poker Like the Pros (New York: HarperCollins, 2003) 372. (“Used to describe a situation in which a player has a high probability of winning the pot.”)

18 15 USCS 1692 (g) This section discusses the “least sophisticated consumer standard” adopted by the Act. The mini-miranda is used to describe the phrase, “This is an attempt to collect a debt and any information obtained shall be used for that purpose.” 15 USCS 1692 (e) 807 (11).

19 15 USCS §1692 (c ) 805 (b).

20 Contacting a third party includes leaving a message on an answering machine. Id. @ 805 (a) (1).

21 15 USCS § 1692 (d) 806.

22 15 USCS § 1692(e) 807 (5).