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payment it did make under the policy. Farmers contended that this claim was waived when the Coatses failed to argue the point in their response to the motion for summary judgment. Using this rationale, Farmers moved for summary judgment on the 21.55 claims. The court denied Farmers' motion, stating that appellants can challenge the trial court's summary judgment based on Farmers' alleged failure to prove there was no genuine issue of material fact without having expressly asserted this argument earlier. Appellants made the original claim in April 2001 and did not receive payment until March 2002. Article 21.55 requires insurers to notify claimants in writing of the acceptance or rejection

of a claim no later than the fifteenth business day after the date the insurer receives all items necessary to secure final proof of loss. TEX. INS. CODE. art. 21.55 § 6. If an insurer, after receiving all items necessary to secure proof of loss delays payment beyond the period of time specified by applicable statutes, or for more than 60 days if the statutes do not specify a period, the insurer is required to pay an eighteen percent penalty on the amount due plus attorney's fees. TEX. INS. CODE ANN. art. 21.55 § 6. The court concluded that Farmers failed to present conclusive proof refuting the 21.55, and reversed that portion of the trial court's order granting summary judgment.

## DEBT COLLECTION

### LAWYER HIRED TO HANDLE FORECLOSURE CAN BE SUED UNDER FAIR DEBT COLLECTION PRACTICES ACT (FDCPA)

Wilson v. Draper & Goldberg, PLLC, 433 F.3d 373 (4th Cir. 2006).

**FACTS:** Plaintiff Wilson brought suit against the law firm of Draper & Goldberg, P.L.L.C., who had been retained by Chase Manhattan Mortgage Corporation "Chase" to foreclose upon Wilson's property. Defendants wrote to Wilson on Sept. 2, 2003, stating among other things that they were preparing foreclosure papers, that "federal law requires us to advise you that this letter is written pursuant to the provisions of the Fair Debt Collection Practices Act" and that "this letter is an attempt to collect a debt." Defendants also sent Wilson a Validation of Debt Notice, in accordance with FDCPA requirements. Upon receipt of the letter, Wilson wrote to Draper & Goldberg, disputing the debt. On Sept. 11, 2003, Draper & Goldberg commenced foreclosure proceedings. In mid-September, Plaintiff's attorney notified Defendants that he was representing Wilson in this matter and they should communicate with him in all future correspondence, but on two occasions in October, Draper & Goldberg corresponded only with Wilson.

Wilson settled her dispute with Chase prior to foreclosure, and brought suit, alleging that Defendants had violated the Fair Debt Collection Practices Act "FDCPA" by failing to verify the debt, continuing collection efforts after the debt had been contested, and by communicating directly with plaintiff when they knew she was represented by counsel. Defendants filed a Rule 12(b)(6) motion to dismiss, stating Wilson had failed to make a claim upon which relief could be granted, arguing that they were not "debt collectors" as defined by the Act and that they were not acting in connection with a "debt." The district court granted Defendant's motion, ruling that "trustees foreclosing on a property pursuant to a deed of trust" are not "debt collectors" under the Act, and actions taken by a trustee foreclosing on a property pursuant to a deed of trust may not be challenged as FDCPA violations.

**HOLDING:** Reversed and remanded.

**REASONING:** The Fourth Circuit Court of Appeals held that the Defendant law firm was 1) attempting to collect a debt, 2) that the firm was outside the exception to FDCPA's definition

of debt collector for activity "incidental to a bona fide fiduciary obligation," and 3) that a borrower did not have to assert a claim under a specific provision of the Act in order to succeed on that claim.

The court first reviewed Draper & Goldberg's contention that they were not acting in connection with a "debt," but rather acting as trustees foreclosing on a deed of trust. The court disagreed, holding that Wilson's "debt" remained a "debt" under the Act, even after foreclosure proceedings began, and that defendant's actions were indeed attempts to collect that debt.

Next the court reviewed defendant's argument that because they were acting as trustees, they fell under an exception from the Act's general definition of "debt collector" which covers any person collecting a debt that is "incidental to a bona fide fiduciary obligation." 15 U.S.C.A. § 1692a(6)(F)(i). The court again disagreed, holding that defendant's actions were not "incidental" but rather central to their fiduciary obligation as trustees. The court stated that it is not relevant that defendants are attorneys, as generally all lawyers are fiduciaries to their clients.

Finally, the court reviewed defendant's argument that Wilson had alleged violations of the portions of the Act that did not apply to them. According to defendants, because they are engaged in a business the principal purpose of which is the enforcement of security interests, they could only be a "debt collector" under one section expressly provided, 15 U.S.C.A. § 1692f(6), and because Wilson had alleged no violation of § 1692f(6), they could not be liable. Again the court disagreed, interpreting this provision in the Act as applying to those whose only role in the debt collection process is that of enforcement of a security interest. The court stated that 15 U.S.C.A. § 1692f(6) is not an *exception* to the definition of the term debt collector, but rather an *inclusion*, and that defendants could still be "debt collectors" even if they were also enforcing a security interest.

### CHECK GUARANTEE COMPANY IS DEBT COLLECTOR UNDER FDCPA

Volden v. Innovative Fin. Sys., Inc., 440 F.3d 947 (8th Cir. 2006).

**FACTS:** Innovative Financial Systems, Inc. ("IFS") is primarily a check guarantee company that contracts with merchants who accept checks from customers. In June 2002, Travis Volden

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(“Volden”) wrote two dishonored checks to McDonald’s restaurants and to an establishment called the Crow Bar. McDonald’s and the Crow Bar contracted with IFS for their check guarantee services. After the checks were returned by the merchants’ banks, IFS electronically submitted them to EFT Network Inc. (“EFT”) for re-presentment through the automated clearing house (“ACH”) to Volden’s credit union. IFS also separately submitted a \$30.00 collection fee plus \$1.80 sales tax for each check.

Debtor brought action against the check guarantee company, IFS, asserting claims under the Fair Debt Collection Practices Act (FDCPA) and state-law causes of action for fraud and deceit. Parties consented to final disposition by the magistrate judge. The United States District Court of South Dakota granted summary judgment for IFS.

**HOLDING:** Affirmed.

**REASONING:** The court ruled that IFS, a check guarantee company, was a debt collector. Under the Fair Debt Collection Practice Act (“FDCPA”) a debt collector is “any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.” 15 U.S.C. § 1692a(6).

The court reasoned that IFS was a debt collector because the debt IFS collected from Volden was for a transaction for personal, family, or household purposes and it was undisputed that the checks at issue were written to McDonald’s and the Crow Bar for personal uses. The court also found that the debt IFS collected was also a debt in default at the time of attempted collection and the only reason the checks were referred to IFS was that they were dishonored by Volden’s credit union. Had the checks been honored, IFS would have never obtained them. Therefore, the court reasoned that IFS is a debt collector because Volden’s debt was not a first-party obligation making IFS a creditor of Volden.

The court affirmed its earlier decision in *Duffy v. Landberg* stating, “[t]hird party attempts to collect payment on a dishonored check can be debt collection practices within the meaning of the FDCPA and be subject to its consumer protections. 133 F.3d 1120, 1124 (8th Cir. 1998). In light of, (1) the FDCPA’s definition of “debt collector,” (2) that IFS’s principal business—some eighty percent—is processing dishonored checks, and (3) its decision in *Duffy*, the court concluded IFS was a debt collector under the FDCPA.

## PLAINTIFF MUST PREVAIL TO RECOVER ATTORNEY’S FEES UNDER FDCPA

Edward P. Dechert v. Cadle Co., 441 F.3d 474 (7th Cir. 2006).

**FACTS:** This cases involved a claim brought by Chapter 7 bankruptcy trustee against debt collection corporation for an alleged violation of the Fair Debt Collection Practices Act (FDCPA), seeking statutory damages of \$1,000.00. The trustee received summary judgment on liability and \$1,000.00 award for defendant’s failure to comply with a discovery order. Although trustee waived trial on the issue of statutory additional damages, he moved for an award of attorneys fees, as did the defendant. The United States District Court for the Southern District of Indiana awarded trustee nearly \$60,000.00 in fees and costs and

denied defendant’s motion. Defendant appealed.

**HOLDING:** Reversed.

**REASONING:** To be entitled to an award of fees and costs, the plaintiff’s suit must be characterized as a “successful action to enforce the foregoing liability...” 15 U.S.C.A. § 1692k(a)(3). Generally, to be a “prevailing party” and entitled to an award of fees and costs, one must either obtain a judgment that provides him with a formal relief, such as damages, an injunction, or a declaration that he can use if necessary to obtain an injunction or damages, or he must obtain a settlement that gives him similar relief. *Buchhannon Board & Care Home, Inc. v. West Virginia Dep’t of Health & Human Resources*, 532 U.S. 598 (2001). The trustee obtained neither. He received the award because the defendant violated a discovery order and thus did not enforce any liability under the FDCPA.

## FILING COMPLAINT IN STATE COURT COLLECTION SUIT TRIGGERS THE PROVISIONS OF THE FAIR DEBT COLLECTION PRACTICES ACT

Goldman v. Cohen, 445 F.3d 152 (2nd Cir. 2006).

**FACTS:** Defendant Cohen, an attorney, was retained by a landlord to initiate nonpayment proceeding against Plaintiff/tenant Goldman. The petition filed by Cohen sought recovery of \$13,030.52 in back rent and \$3000.00 in attorneys’ fees. Goldman filed suit, alleging Cohen had violated the Fair Debt Collection Practices Act “FDCPA” by failing to include in his initial communications any of the litany of warnings and notices required by the FDCPA’s validation notice requirements. 15 U.S.C. § 1692g(a). The District Court for the Southern District of New York held that Cohen’s petition was a communication within the meaning of the FDCPA and therefore must comply with FDCPA provisions, and because Cohen failed to provide Goldman with the required validation notice in the petition or alternatively within five days, Cohen had violated the FDCPA.

**HOLDING:** Affirmed.

**REASONING:** The Second Circuit Court of Appeals held that the initiation of a lawsuit in state court seeking recovery of unpaid consumer debts is an “initial communication” within the meaning of the FDCPA, triggering the debt collector’s obligation to provide validation notices to the consumer at the time of the initiation of the lawsuit, or within five days thereafter. In reaching that conclusion, the court looked to the plain language of the FDCPA, which broadly defines the term “communication” as the “conveying of information regarding a debt directly or indirectly to any person through any medium.” The court also noted that its decision is consistent with a decision of the seventh circuit, holding that a debt collector’s initiation of a lawsuit constitutes an initial communication for purposes of the FDCPA. *Thomas v. Law Firm of Simpson & Cybank*, 392 F.3d 914 (7th Cir. 2004).

**The initiation of a lawsuit in state court seeking recovery of unpaid consumer debts is an “initial communication” within the meaning of the FDCPA.**

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## FILING LAWSUIT WITHOUT IMMEDIATE MEANS OF PROVING DEBT DOES NOT VIOLATE FDCPA

Harvey v. Great Seneca Fin. Corp., 453 F.3d 324 (6th Cir. 2006).

**FACTS:** In January of 2004, Javitch filed a “Complaint for Money” to collect a debt that Wendelyn Harvey (“Harvey”) allegedly owed Seneca. The complaint alleged that Harvey owed Seneca a total of \$12,765.72 on two separate accounts. Seneca claimed that “[a]lthough due demand has been made, [Harvey] has failed to liquidate the balance due and owing.”

Harvey filed suit in January of 2005, alleging violations of both the FDCPA and the OCSA. She claimed that Seneca and Javitch filed “a lawsuit to collect a purported debt without the means of proving the existence of the debt, the amount of the debt, or that Seneca owned the debt.” Harvey contended in her complaint that Seneca’s filing of a state-court collection action knowing that it “had no documentation” to prove the debt constituted a deceptive, unfair, and unconscionable debt-collection practice. She specifically cited violations of 15 U.S.C. § 1692d, that prohibits conduct that has the consequence of harassing, oppressing, and abusing a debtor, and 15 U.S.C. § 1692e(10), which forbids using deceptive means to collect a debt. The district court held that Harvey’s allegations failed to state a claim under the FDCPA. It then declined to exercise

supplemental jurisdiction over Harvey’s OCSA claim once her federal claim had been dismissed.

**HOLDING:** Affirmed.

**REASONING:** The court reasoned that Harvey’s allegation that the debt collector and law firm had violated Fair Debt Collection Practices Act (FDCPA) by filing a debt-collection suit “without the means of proving the existence,” amount, or ownership of the debt, stated only the claim that, at time of filing, collector and law firm lacked means of proving their debt-collection claim. The court reasoned that Harvey’s inference that collector and law firm had no means of ever proving their claim was not warranted by the complaint. Fair Debt Collection Practices Act, § 802 et seq., 15 U.S.C.A. § 1692 et seq. The court further stated that Seneca and Javitch did not implicitly represent by filing the Complaint for Money that they had in hand the means to prove Seneca’s claims. Rule 11 of the Federal Rules of Civil Procedure does not require attorneys to ensure that their client can prove its case before filing. Instead, the Rule mandates only that “the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.” Fed. R. Civ. Proc. 11(B)(3). Harvey did not allege in her complaint that Seneca and Javitch failed to undertake a reasonable investigation into whether or not Harvey’s debt existed; rather, she essentially focused on the contention that Seneca and Javitch did not presently possess the means of proving that debt.

## TEXAS BUSINESS AND COMMERCE CODE

### TEXAS BUSINESS AND COMMERCE CODE SECTION 3.420 PREEMPTS ANY COMMON LAW THEORY OF RECOVERY THAT ALLOWS A PLAINTIFF TO EXCEED THE STATED AMOUNT OF LIABILITY

AMX Enterprises, Inc. v. Bank One, N.A., 196 S.W.3d 202 (Tex. App.—Houston [1st Dist.] 2006).

**FACTS:** Homeowners Raymond and Tobey Willie, on behalf of themselves and their mortgage company, CIT Group, contracted with AMX Enterprises (“AMX”) for mold remediation services in the amount of \$60,978, less \$1,500 in deductions. After AMX fully performed, the Willies’ insurer, Safeco Lloyds Insurance Company (“Safeco”), issued three checks on September 30, 2002, each payable to “Raymond Willie & Tobey Willie & Citi Group & AMX Enterprise.” All three checks were endorsed by the Willies and sent to CIT Group with instructions for CIT to endorse them and forward on to AMX. CIT Group instead presented the checks for deposit at Bank One, who presented the checks to the drawee bank and ultimately deposited the funds into CIT Group’s interest bearing account.

In December 2002, Safeco issued an additional four settlement checks to the Willies, to be used to rebuild the Willies’ home. The Willies forwarded these checks to CIT Group, who again deposited them into their Bank One account. Following this, CIT Group issued checks payable to “Raymond Willie III & Breckenridge Luxury Homes.” AMX made a written claim for \$59,478.00 against Bank One in May, 2003, and when that proved

unsuccessful, filed suit in June against the Willies, Bank One and CIT Group, claiming among other things, breach of contract as per the Willies, and statutory conversion as per Bank One. While the lawsuit was pending, the Willies paid AMX \$60,978.00. Bank One then filed a motion for summary judgment, contending that AMX had been paid in full, and, therefore, the listed causes of action were preempted by the Texas Business and Commerce Code. In June 2004, the trial court granted Bank One’s motion for summary judgment. AMX appealed the decision.

**HOLDING:** Affirmed.

**REASONING:** The appellate court found that Business and Commerce Code Section 3.420 did indeed preempt AMX from collecting from Bank One. Section 3.420 specifically provides the measure of damages that can be recovered in a statutory conversion claim; the measure of liability is presumed to be the amount payable on the instrument, but recovery may not exceed the amount of the plaintiff’s interest in the instrument. While principles of common law and equity may supplement provisions of the Code, they may not supplant its provisions, or the purposes or policies those provisions reflect, unless a specific Code provision provides otherwise, and further, the Code preempts principals at common law and equity that are

**Section 3.420 specifically provides the measure of damages that can be recovered in a statutory conversion claim.**