FACTS: Magic Valley Electric Cooperative, Inc. ("Magic"), a Texas corporation, provided a self-insured health plan for its employees. Diane Merett, a Magic employee, sought treatment from Dr. Pallares for pain. Merett was diagnosed with chronic and severe pain, and undertook Pallares's recommended course of treatment, all of which was billed to Magic, totaling over half a million dollars. Magic asserted that Pallares knowingly made a false diagnosis with the intent of inducing Magic to pay for unnecessary treatment. Magic sued Pallares for fraudulent billing.

Pallares filed a motion to dismiss, asserting that the fraud claims were really health care liability claims which are subject to the rules proscribed by Chapter 74 of the Civil Practice and Remedies Code ("CPRC"), specifically the Texas Medical Liability Act. Pallares claimed Magic had failed to timely submit expert testimony reports required by Chapter 74, so the case must be dismissed. The trial court denied Pallares's motion to dismiss. Pallares filed an interlocutory appeal.

HOLDING: Affirmed.

REASONING: In determining whether a particular case presents a health care liability claim, the court looked to the underlying nature of Magic's allegations. To establish a heath care liability claim, the act or omission complained of must be an inseparable part of the rendition of medical services. Not every action taken by a health care provider or every injury sustained by a patient is a health care liability claim. The court stated that to properly categorize Magic's claim, the court must first determine whether Pallares was considered a health care provider or physician. The court found that Pallares was a health care provider, and noted that neither party disputed this characterization.

Magic's damages were merely tangential to treatment Pallares provided. Magic's claims directly related to Pallares's alleged fraudulent billing practices, not directly to an act performed or furnished during Merett's medical care, treatment or confinement. The court concluded that Magic's claim was not a health care liability claim. The court did not believe the Legislature intended to expand health care liability to peripheral claims not directly related to health care when construing the health care liability statute. The court found that the record did not contain evidence that Pallares's treatment proximately resulted in injury to or death of a claimant, Magic did not fit within the definition of a claimant as provided in CPRC, and the record did not demonstrate that any person directly sustained bodily injury or death proximately caused by the health care treatment provided by Pallares. Thus, the court agreed that Valley did not have capacity to bring suit under CPRC given that Magic was not a claimant.

DEBT COLLECTION

PENDING PERSONAL INJURY CLAIM WARRANTS RE-OPENING BANKRUPTCY

Kane v. Nat'l Union Fire Ins. Co., 535 F.3d 380 (5th Cir. 2008).

FACTS: Stuart Kane was involved in a car accident with a vehicle driven by Daniel Comstock, while Comstock allegedly was acting in the course and scope of his employment. Kane filed a lawsuit in state court seeking damages from Comstock, Comstock's employer, and employer's insurance company. While the suit was pending in state court, Kane filed for bankruptcy, but failed to list his personal injury claim. Kane's bankruptcy Trustee was never informed of the claim during the bankruptcy proceedings, which ultimately resulted in a no-asset discharge.

Kane filed a motion in bankruptcy court to reopen the proceedings, so Trustee could administer the undisclosed lawsuit, which defendants opposed. Defendants removed the case to federal court and moved for summary judgment, arguing Kane should be judicially estopped from pursuing his claims as a matter of law. Trustee moved to substitute himself for Kane as the real party with interest in the lawsuit. The district court granted defendants' motion for summary judgment, applying judicial estoppel and dismissed Trustee's motion as moot. Kane and Trustee appealed.

HOLDING: Reversed and remanded.

REASONING: Debtors have a continuing duty to disclose all pending and potential claims. Generally, if a debtor fails to schedule an asset, such as causes of action, and Trustee later discovers it, Trustee may reopen the bankruptcy case to administer the asset on the creditors' behalf. As representative of the bankruptcy estate, the Trustee is the real party in interest and the only party with standing to prosecute the estate's causes of action. Once an asset becomes part of the bankruptcy estate, all of the debtor's asset rights are extinguished, unless the Trustee abandoned the asset to the debtor. At the close of the bankruptcy case, the estate's property that was neither abandoned nor administered in the proceedings, including property never scheduled, remains the estate's property. Judicial estoppel may be applied to bar an unscheduled claim, when debtors would benefit to the creditors' detriment if the claim were permitted to proceed.

The court concluded the district court erred in relying on *Superior Crewboats, Inc. v. Primary P&I Underwriters,* 374 F.3d 330 (5th Cir. 2004). In *Superior*, debtors stood to benefit directly from pursuing their claim at the expense of their creditors, and dismissal against the debtors mooted Trustee's motion to substitute as a matter of law. Unlike *Superior*, Trustee was the real party in interest and reopened Kane's bankruptcy to pursue Kane's claim for the benefit of the estate's creditors. The court reasoned there is a statutorily explicit difference between cases in which property is not listed in the bankruptcy schedules, but were disclosed and administered. Kane's case involved property which was neither disclosed nor administered. The court stated equity favors Trustee, because the only way Kane's creditors would be harmed is if judicial estoppel were applied to bar Trustee from pursuing the claim against defendants on behalf of the estate. The court held *Superior* did not control the outcome of this case and the district court abused its discretion by concluding as a matter of law that *Superior* controlled.

FILING TIME-BARRED LAWSUIT VIOLATES FAIR DEBT COLLECTION PRACTICES ACT

Ramirez v. Palisades Collection L.L.C., ____ N.E.2d ____ (N.D. Ill. 2008).

FACTS: Rosalia Ramirez opened a Household Bank credit card account over the phone. After defaulting on her account, Ramirez's balance remained unpaid. The debt was charged-off, and Palisades Collection LLC ("Palisades") purchased Ramirez's credit card debt from the bank. Palisades sued Ramirez to collect the debt. After Ramirez retained counsel, Palisades dismissed the suit without prejudice.

Ramirez then brought a class action suit against Palisades, alleging violations of the Fair Debt Collections Practices Act ("FDCPA"). Ramirez claimed that Palisades violated the FDCPA by suing debtors on time-barred debts to attain default judgments. Palisades asserted that their credit card debt collections were under a written contract and therefore subject to a ten year statute of limitations to file suits. Both filed cross-motions for summary judgment.

HOLDING: Denied.

REASONING: The court held that Palisades and Ramirez did not have a contract, and therefore a five-year statute of limitations applied to Palisades' debt collection complaint. There was no dispute that the complaint was time-barred. The next question was whether Palisades violated FDCPA by suing Ramirez on a time-barred claim. FDCPA's central purpose is to eliminate abusive debt collection practices by debt collectors. It prohibits a debt collector from using any false, deceptive, or misleading representation or means in connection with the collection of any debt. FDCPA prohibits: the false representation of the character, amount, or legal status of any debt; the threat to take any action that cannot legally be taken or that is not intended to be taken; and the use of any false representation or deceptive means to collect, or attempt to collect any debt or to obtain information concerning a consumer. Courts view FDCPA claims through the eyes of an unsophisticated debtor. Thus, a debt collector may not file time-barred lawsuits against a debtor where the debt collector knows or reasonably should have known it was time-barred.

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The court held that summary judgment was unwarranted, however, because fact issues remained with regard to whether Palisades could establish a bona fide error defense. FDCPA does not require Ramirez to show intentional conduct by Palisades in order to recover damages. Although FDCPA imposes strict liability, Palisades may defend their actions by demonstrating by a preponderance of the evidence that the FDCPA violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such error. Palisades argued that their procedures were reasonable and bona fide because they relied on competent legal advice. The court concluded there was a genuine issue of material fact existed whether Palisades' error was bona-fide and unintentional. The court denied Ramirez's and Palisades' summary judgment motions as to whether Palisades may avoid FDCPA liability.

DEBT COLLECTOR'S SUPPORTING AFFIDAVIT INSUFFICIENT

Martinez v. Midland Credit Mgmt., 250 S.W.3d 481 (Tex. App.–El Paso 2008).

FACTS: Midland Credit Management, Inc. brought suit against Martinez to recover on Martinez's alleged debt obtained by Martinez. Midland contended that either it or its predecessor provided credit to Martinez, and Martinez accepted the credit provision by making purchases on the credit card. Midland attached an affidavit to its petition, which stated the account represented a summary total of a transaction or series of transactions kept by a systemic record. The affidavit did not contain the printed name of the affiant, but appeared to be signed "E. Mart" ("Mart Affidavit"). The exhibit attached contained what appeared to be a computer-generated, single-page document, which included Martinez's name, address, an account number, and a balance. Midland sought judgment of the debt amount, plus attorney's fees, pre-judgment interest, post-judgment interest, and court costs. Martinez objected to the mart affidavit on the grounds that it was defective for lack of personal knowledge, was based on hearsay, and was conclusory. The trial court granted Midland's motion for summary judgment and awarded damages. Martinez appealed.

HOLDING: Reversed and remanded.

REASONING: The court of appeals disagreed with the trial court's finding that there was enough evidence to merit summary judgment. The trial court erred by admitting the Mart affidavit because the affiant did not provide any information that would indicate that he is qualified to testify as to the predecessor's record-keeping practices, did not identify the predecessor, nor provide any information concerning the acquisition of the record attached to the mart affidavit. The affiant did not indicate any way that he had any knowledge the predecessor's record-keeping policies or that the records were trustworthy. The affiant did not even provide his full name. The court held that the Mart affidavit was insufficient because it did not satisfy the requirements in to be admitted into evidence. The only summary evidence Midland offered, other than the Mart affidavit, was the affidavit of its attorney concerning attorney's fees. The court concluded that Midland offered no admissible evidence concerning it claim, and the trial court erred in granting Midland's motion for summary judgment.

SUFFICIENT EVIDENCE SUPPORTED LIABILITY AND DAMAGE FINDINGS FOR UNREASONABLE COLLECTION, DAMAGES FOR BREACH OF ESCROW AND EXEMPLARY DAMAGES

EMC Mortg. Corp. v. Jones, 252 S.W.3d 857 (Tex.App.—Dallas 2008).

FACTS: Mark and Patricia Jones brought an action against EMC

Mortgage Corporation ("EMC"), alleging common-law unreasonable collection efforts, breach of escrow, and negligent misrepresentation. Joneses bought property and placed money into an escrow account for improvements. Joneses fell behind on their payments and Washington Mutual ("WAMU") scheduled a foreclosure sale. Joneses worked with WAMU's homeowner assistance program and agreed to make extra payments, so WAMU could process a loan modification agreement and WAMU agreed. WAMU transferred the mortgage to EMC Mortgage Corporation. Joneses contacted EMC and were assured several times that EMC would honor the agreement, but never received written confirmation. A very large man, who identified himself with EMC, came to the Joneses' house and forced himself inside, informing Joneses their home was sold at a foreclosure sale, and insisted they turn over the keys and vacate. Although EMC admitted they had inadvertently sold the house at a foreclosure sale, they authorized another law firm to send an eviction letter. EMC used money from Joneses escrow fund, without their approval, to pay for a judgment brought by another company. Negotiations broke down entirely when an EMC representative angrily spoke with Mr. Jones, insisting he needed to obtain a subordination agreement for a second mortgage before a loan modification could be completed. The representative determined to proceed with foreclosure. Joneses brought suit, and were awarded actual and exemplary damages. EMC appealed.

HOLDING: Affirmed.

REASONING: EMC was required to show the exemplary damages lacked clear and convincing evidence. Under the no evidence standard, the court found that EMC's first legal sufficiency challenge as to the damages from the breach of escrow failed because there was proof, beyond a scintilla of evidence, of Joneses' loss of funds from the escrow account. The escrow agreement required Joneses' authorization before funds could be dispersed. EMC did not obtain authorization.

As for the legal sufficiency challenge regarding liability for the unreasonable collection claim, the court found sufficient evidence for a jury to infer that EMC acted intentionally unreasonable. EMC took seven months to correct the title transferred by WAMU. EMC authorized a law firm to send an eviction letter after acknowledging foreclosure was an accident. Finally, there was sufficient evidence to infer the large, intruding man acted on EMC's behalf and his conduct exceeded the bounds of reason. In Texas, exemplary damages must be proven by clear and convincing evidence that the harm suffered resulted from fraud, malice or gross negligence. The court held there was sufficient proof EMC acted with malice by the conduct of its agent who unilaterally determined the Joneses were uncooperative and sent their file for foreclosure. The court held EMC liable for exemplary damages as a corporation because it had ratified its agent's malicious actions by not investigating her deviation from EMC's policy.

DEBT COLLECTOR STRICTLY LIABLE FOR MISTAKE UNDER FAIR DEBT ACT

Reichert v. Nat'l Credit Sys, Inc., 531 F.3d 1002 (9th Cir. 2008).

FACTS: Mr. and Mrs. Reichert entered into a residential lease agreement with La Privada Apartments, L.L.C. ("La Privada"). The agreement contained a provision stating that in the event of legal action to enforce compliance with the lease agreement, the prevailing party may be awarded court costs and reasonable attorney's fees. Reichert terminated the lease before it expired. La Privada notified him that he owed money under the lease agreement. La Privada assigned the debt to National Credit Systems, Inc. ("NCS") for collection. NCS sent Reichert an initial demand letter stating the debt amount. Reichert disputed the debt and requested verification. NCS sent Reichert written verification of the debt and stated the amount owed was $225 more because, at La Privada's direction, NCS added attorney's fees incurred when an attorney wrote the notification letter.

Reichert filed suit against NCS, alleging violation of the Fair Debt Collection Practices Act ("FDCPA") by seeking to collect an amount, the attorney's fees, not expressly authorized by the lease. Reichert and NCS both moved for summary judgment. NCS argued that it had properly relied on La Privada's representation of the debt or alternatively, that it had made a bona fide mistake. NCS further argued that FDCPA did not impose strict liability and its violation was unintentional. Reichert and NCS filed motions for summary judgment. The district court granted Reichert's motion for summary judgment, finding NCS attempted to collect an amount not expressly authorized by the agreement or permitted by law, regardless of NCS's intent. NCS appealed.

HOLDING: Affirmed.

REASONING: Under FDCPA, a debt collector cannot collect any amount unless such amount is expressly authorized by the agreement creating the debt or permitted by law. 15 U.S.C. § 1692f(1). The court previously held that FDCPA makes debt collectors liable for violations that are not knowingly or intentional with a narrow exception for bona fide errors notwithstanding the maintenance of procedures reasonably adapted to avoid such errors.

The court clarified the reasonable reliance defense to mean reliance on the basis of procedures maintained to avoid mistakes and is an affirmative defense requiring the debt collector to prove beyond a preponderance of evidence. Although NCS claimed that it had never received incorrect information from La Privada in the past, the court held that mere assertion of that fact was insufficient to show procedures existed to avoid debt reporting errors. Thus, insufficient to establish a bona fide error defense. The court further asserted that a debt collector must maintain debt error-discovering procedures instead of waiting until a creditor makes a mistake to institute procedures to prevent a recurrence. Since NCS failed to prove its burden that it had an existing error-discovering procedure beyond mere reliance on the creditor's past conduct, the trial court properly granted Reichert's motion for summary judgment.

The court clarified the reasonable reliance defense to mean reliance on the basis of procedures maintained to avoid mistakes and is an affirmative defense requiring the debt collector to prove beyond a preponderance of evidence.

SEEKING FILING FEE FROM DEBTOR MAY VIOLATE FAIR DEBT COLLECTION PRACTICES ACT

Eads v. Wolpoff & Abramson, L.L.P., 538 F. Supp. 2d 981 (W.D. Tex. 2008).

FACTS: Wolpoff & Abramson, L.L.P., a law firm, practiced in the field of consumer debt collection. Wolpoff filed suit against John Eads on behalf of its client, MBNA America Bank, to enforce an arbitration award arising out of a debt Eads allegedly owed to MBNA pursuant to a credit agreement. Eads filed a complaint, alleging Wolpoff violated the Fair Debt Collections Act ("FDCPA") by misrepresenting the character, status and amount of the debt owed, and threatening to take and actually taking debt not legally authorized, namely additional fees not agreed to in the arbitration award. Wolpoff filed a motion to dismiss.
HOLDING: Denied.
REASONING: Under FDCPA, a debt collector is prohibited from collecting or attempting to collect any amount, including interest, fees, charges or expenses incidental to the principal obligation, unless such amount is expressly authorized by the agreement creating the debt. The court held that Wolpoff could be liable for violating the FDCPA §1692f(1). Wolpoff asserted no authority to collect any costs associated with pursuing the arbitration award, including filing fees. Because Wolpoff could not show the violation was unintentional or the result of a bona fide error, Wolpoff could not assert a statutory defense of good faith.

The court found Eads had an additional FDCPA claim when a debt collector threatened to take action prohibited by law. The court found that Wolpoff threatened to perform the illegal action of trying to collect the unauthorized filing fee by adding the fee to the underlying debt. The court concluded that Eads could state cognizable FDCPA claims and denied Wolpoff's motion to dismiss.

ATTORNEY WHO WAS A DEBT COLLECTOR MAY BE INDIVIDUALLY LIABLE FOR LETTERS SENT BY A LIMITED LIABILITY COMPANY

Kistner v. Law Offices of Michael P. Margelefsky, L.L.C., 518 F.3d 433 (6th Cir. 2008).

FACTS: After receiving a collection letter from The Law Offices of Michael P. Margelefsky ("Law Offices"), Amanda Kistner filed a class action lawsuit against Law Offices and Margelefsky individually, alleging violations of the Fair Debt Collection Practices Act ("FDCPA"). Margelefsky was the sole member of Law Offices and operated both, a law practice and a debt collection agency. Margelefsky drafted the form letter Kistner received, stating the letter contained all the notices required by FDCPA. Margelefsky acknowledged he did not review the specific letter sent to Kistner before mailing it. In district court, both sides moved for summary judgment. The district court granted Law Offices' and Margelefsky's motions for summary judgment, and denied Kistner's motion. Kistner appealed.
HOLDING: Reversed and remanded.
REASONING: The court stated that whether an individual member of a limited liability corporation ("LLC") could be held liable under FDCPA without piercing the corporate veil was an issue of first impression. The court found that an individual could be held personally liable based on his participation in the LLC's debt collection activities. Margelefsky argued that he could not be personally liable because he did not participate in sending the specific letter to Kistner. There was no doubt that, in a generic sense, a person who authors collection letters, supervises collection activities, and is the sole attorney in a debt collection firm is a debt collector as defined by FDCPA. The court found that subjecting the LLC's sole member to individual liability for FDCPA violations would require proof that the individual was a debt collector, but did not require piercing the corporate veil. Margelefsky drafted the form letter, was one of only two attorneys at the Law Firm, the only LLC member, and negotiated terms with the mailing service provider used in the debt-collection practice. The court held that Margelefsky was a debt collector as a matter of law, and thus subject to individual liability.

DEBTOR'S FAILURE TO LIST CREDIT CARD DEBTS ON SCHEDULES WARRANTED A DENIAL OF HER DISCHARGE

In re Harris, 385 B.R. 802 (1st Cir. BAP 2008).

FACTS: Janice Harris filed a bankruptcy petition. Ronald Chase, a creditor, filed a complaint objecting to the discharge, alleging Harris had knowingly and fraudulently made a false oath when she failed to list five credit card debts. The bankruptcy court docket reflected that at no point in the proceedings did Harris move to amend her schedules. Although Harris claimed ignorance of the requirement to list the credit card debts because the bankruptcy involved larger, non-credit card related debt, she previously testified she didn't list the credit cards because she didn't want to totally destroy her credit. The bankruptcy judge found in favor of Chase, and denied the discharge. Harris appealed.
HOLDING: Affirmed.
REASONING: Under the Bankruptcy Code, a debtor can be denied a discharge only if she knowingly and fraudulently made a false oath, relating to a material fact in her bankruptcy case. § 727(a)(4)(A). The court noted that Harris admitted to making a false oath relating to a material fact, and conceded that Chase had made his prima facie case. Therefore, the only issue on appeal was whether the trial court was clearly erroneous in finding Harris acted with fraudulent intent. The court previously held that a reckless indifference to the truth constitutes a fraudulent intent for § 727(a)(4)(A) purposes. Harris first stated at trial she omitted the credit card debts because she did not realize she had to disclose them. When reminded of her prior testimony, Harris admitted she had not listed the debts because she didn't want to totally destroy her credit. She made no effort to correct the error. There was no question Harris acted with a reckless indifference to the truth, and in fact she omitted the credit card debts with the intent to deceive. The court held that the bankruptcy court's findings were amply supported by the record. Therefore, the bankruptcy court did not abuse its discretion in finding fraudulent intent.