their debt collection subject to the Fair Debt Collection Practices Act ("FDCPA"). Rutgers had two locations in New Jersey, the central headquarters in one county and the law school Fogel attended in a different county. Fogel's permanent address was in New York, and included in the promissory notes, enabling a debt collector to serve him there. After Fogel graduated, he failed to repay the notes, and eventually, Rutgers sought to collect the debt.

Rutgers brought an action against Fogel to collect funds from the unpaid student loans. Fogel then brought a third-party action against the law firm that representing Rutgers, alleging violation of the FDCPA because filed suit in an improper venue. The trial court granted the firm's summary judgment. Fogel appealed.

HOLDING: Reversed and remanded.

REASONING: The FDCPA requires debt collection actions be filed either in the judicial district where the debtor lives or in the judicial district where the debtor signed the contract underlying the debt. The FDCPA's purpose is to prevent forum abuse, and to promote consistent state action to protect consumers against debt collection abuses. The court looked at other jurisdictions and concluded that judicial district, generally, has been construed as referring to the geographic units into which a state divides its judiciary. The court first determined judicial district referred to state, rather than federal districts, as has been indicated by the FDCPA's history as constructed by the Federal Trade Commission, which is responsible for enforcing the FDCPA.

The FDCPA's purpose is to prevent forum abuse, and to promote consistent state action to protect consumers against debt collection abuses.

The county should be considered the basic judicial district for purposes of the FDCPA's venue provision. The court determined that the firm should have filed the collection action in the county where the contract was signed or where the student lived, rather than in the county where Rutgers's central headquarters were located. The court reversed the order granting the firm's summary judgment, and remanded to the trial court for further proceedings consistent with this opinion.

CONSUMER CREDIT

LENDER NOT LIABLE FOR FAILING TO REFUND "UNEARNED" FINANCE CHARGE

Davis v. Pac. Capital Bank, 550 F.3d 915 (9th Cir. 2008).

FACTS: Felicia Davis brought an action against Pacific Capital Bank under the Truth in Lending Act ("TILA"). Davis obtained a Refund Anticipation Loan ("RAL"), secured by her anticipated federal income tax refund, which Davis authorized the IRS to deposit into an account established by Pacific. RAL included a finance charge to be paid by Davis even if RAL was paid off early. Davis's refund was deposited ten days earlier than anticipated as in the loan agreement. Davis complained that Pacific's failure to refund the finance charges violated TILA's provision requiring lenders to refund unearned interest. The district court dismissed Davis's complaint with prejudice, holding the finance charge was not interest. Davis appealed.

The drafters intentionally excluded finance charges and limited the provision to require only unearned interest refunds.

HOLDING: Affirmed.

REASONING: TILA does not define the term interest, so the court looked at TILA's legislative history. The court noted the original bill required creditors to refund unearned portions not only of an interest charge, but also of any finance charge. The finance charge language was left out of the final bill. This specific change in terminology suggested the drafters intentionally excluded finance charges and limited the provision to require only unearned interest refunds. The court found no violation of federal law to form the basis of Davis's claim, and affirmed the district court's decision to dismiss.

TILA CLASS ACTION CERTIFICATION DENIED

Andrews v. Chevy Chase Bank, 545 F.3d 570 (7th Cir. 2008).

FACTS: Susan and Bryan Andrews obtained a loan from Chevy Chase Bank ("CCB") to refinance their home. The loan provided a "cash flow payment option" permitting the Andrews to vary their monthly payments based on their personal cash flow for that month. At closing, CCB provided the Andrews with an adjustable-rate note, a Truth in Lending Act ("TILA") disclosure, and an adjustable rate rider. Based upon the Andrews' understanding of these documents, their minimum monthly payment and initial interest rate were to remain fixed for the first five years of the loan. In fact, the initial interest rate was only a teaser rate that applied just to the first monthly payment. Thereafter, the minimum required payment remained fixed, as the Andrews had expected, while the interest rate climbed each month. As a result, an ever-increasing share of each monthly installment paid interest instead of principal. Eventually, the minimum payments were insufficient to cover even the interest due. The Andrews filed suit against the bank alleging violation of the TILA and sought statutory damages, rescission, and attorney's fees. The trial court authorized the award of attorney's fees and rescission. The trial court also granted the Andrew's motion to certify a class, declaring all class members had the right to rescind their mortgages. CCB appealed.

HOLDING: Reversed and remanded.

REASONING: The court held the Andrews' class could not be certified, because TILA rescission is a personal remedy, not applicable to class actions. The court recognized TILA was designed to assure a meaningful disclosure of credit terms to consumers. The court ruled TILA rescission is a purely personal remedy designed to only operate privately with the creditor and debtor working out the logistics of a given rescission. The rescission of a loan transaction requires unwinding the transaction in its entirety to return borrowers to the position they occupied before the loan agreement. Therefore, the court concluded the rescission remedy of TILA appeared to only contemplate individual proceedings and the personal character of the remedy made deployment unsuitable in a class action context.

The court also found the rescission remedy prescribed by the TILA is procedurally and substantively incompatible with the class-action device. Each class member would have the right to rescind, but not all class members would want to exercise their right because the loan principal would have to be returned in exchange for the release of the lien and any interest payments. This would likely lead to a host of individual proceedings because the equitable nature of the rescission remedy requires judicial consideration of the individual circumstances of each particular transaction. Therefore, the court concluded class certification would give rise to thousands of individually tailored proceedings requiring individual remedies making the class action mechanism neither economical nor efficient compared to individual lawsuits. Accordingly, the lower court's judgment was reversed, and the case remanded with instructions to vacate the class-certification order.

HOME BORROWERS CAN SUE OVER TITLE FEES UNDER RESPA WITHOUT ALLEGATIONS OF OVERCHARGING

Carter v. Welles-Brown Realty, Inc., 553 F.3d 979 (6th Cir. 2009).

FACTS: Erick and Whitney Carter purchased a home and were represented by Welles-Bowen Realty, Inc. ("Realty"). Realty was co-owned by Welles-Bowen Investors, LLC ("Investors") and Chicago Title Insurance Co. ("Chicago Title"). Investors and Chicago Title also co-owned Welles-Bowen Title Agency, LLC ("Title"). Based on Realty's referral, Carters utilized Title to perform real estate settlement services at the close of their purchase agreement. Each of Title's charges was detailed in an affiliated business arrangement disclosure statement, which Carters reviewed prior to closing.

Carters filed a complaint, alleging Title violated the Real Estate Settlement Procedures Act ("RESPA") anti-kickback and anti-fee-splitting provisions. Carters alleged Title was a sham company that did not and could not provide settlement services, but still received unearned revenues. The settlement work was actually performed by Chicago Title. Carters did not allege they were overcharged for the title insurance or settlement services, but filed a motion for class certification, seeking to certify a class of individuals who paid Title for real estate settlement services after being referred by Realty. Appellees filed a motion to dismiss, alleging a lack of subject matter jurisdiction, because Carters did not suffer an injury-in-fact. The district court found in appellees' favor. Carters appealed.

HOLDING: Reversed and remanded.
REASONING: The RESPA's purpose is to prevent harmful practices to consumers by ensuring consumers have a right to both public and private remedies. Carters argued the arrangement allowed Chicago Title to provide illegal kickbacks to Realty in exchange for the referral of settlement work through the form of Title's partial ownership. Appellees argued that since there was no overcharge, Carters did not have standing. In order to have standing under the RESPA, the injuries need not be economic in nature or collective. The court examined the brief of the agency responsible for the RESPA's administration and interpretation. The brief indicated its preference that there be no overcharge requirement on potential plaintiffs in order to have standing. The court found the Carters' allegation that appellees violated the RESPA was an injury-in-fact under RESPA, and was sufficient to survive a motion to dismiss.

TILA APPLIES TO INTEREST RATE INCREASES

McCoy v. Chase Manhattan Bank, USA, ___ F.3d ___ (C.A.9 (Cal.) 2009).

FACTS: James McCoy, a credit card holder, filed a class action suit against Chase Manhattan Bank, USA, N.A. ("Chase"), and alleged that Chase increased his interest rates retroactively to the beginning of his payment cycle after his account was closed as a result of a late payment to the bank or another creditor. McCoy claimed that the retroactive interest rate increase violated federal law, namely the Truth in Lending Act ("TILA"), because Chase gave no notice of the increase until the following periodic statement, *after* the rate increase had already taken effect. The district court dismissed McCoy's complaint with prejudice, holding that because Chase had already disclosed the highest rates in the event of default in its cardmember agreement, no further notice was required. McCoy appealed.

Written notice must be given at least 15 days prior the effective date of change for "any term required to be disclosed under § 226.6."

HOLDINGS: Reversed and Remanded (as to the TILA claim).
REASONING: The underlying policy behind the TILA was to "assure a meaningful disclosure of credit terms" so consumers can compare various credit offers and also to protect consumers from "inaccurate and unfair credit billing" practices. 15 U.S.C. § 1601(a). Under Regulation Z, adopted by the Federal Reserve Board to implement the TILA, a written notice must be given at least 15 days prior the effective date of change for "any term required to be disclosed under § 226.6." 12 C.F.R. § 226.9(c)(1). Section 226.6 requires that a creditor disclose each periodic rate that may be used to compute the finance charge. McCoy argued that the phrase "any term required to be disclosed under § 226.6" applies to the list of specific items under § 226.6(a)(2), including the interest rates to be used, while Chase argued that the phrase only applies to the contractual terms of the cardmember agreement.

Citing the longstanding rule of deferring to an agency

interpretation of an ambiguous regulation, the court examined the official staff comments to § 226.9(c)(1) to determine whether changes to interest rates require notice. Under Official Staff Commentary 3, notice must be given if there is an "increased periodic rate… attributable to the consumer's delinquency or default", although the notice may be delivered as late as the date of the effective change. Under the plain language of comment 3, McCoy has stated a claim because Chase's notice occurred after the rate increase became effective.

Further, the court examined Official Staff Commentary 1, and noted that while Comment 1 requires no notice of change in terms if the specific change is set forth initially, it specifically requires notice to be given "if the contract allows the creditor to increase the rate at its discretion but does not include specific terms for an increase". The court pointed out that three examples given in Comment 1 for interest rate changes that require no notice involved an element of control by the consumer, such as when the interest rate is tied to the prime rate, when the interest rate is tied to employment, and when the interest rate is tied to the consumer maintaining a certain balance in a savings account. In contrast, McCoy's rate increase occurred at Chase's discretion because the Chase cardmember agreement stated that Chase "may" change the interest rate and imposes a non-preferred rate "up to" the maximum rate. Further, the agreement provides that McCoy's rate "may" lose its preferred rate if he defaults. The court held that because Chase's retroactive rate increases are within Chase's discretion, it is required to give notice under Comment 1.

Finally, the court briefly examined and rejected Chase's argument interpreting Regulation Z based on language contained in the now-superceded Advance Notice of Proposed Rulemaking ("ANPR") in 2007. While the court found that some language in the 2007 ANPR supported Chase's interpretation, the court held that the ANPR did not clearly weigh in favor of either McCoy's or Chase's interpretation because the primary purpose of the ANPR is to solicit comments to proposed changes and not to offer additional staff commentary on current regulations.

The court held that McCoy stated a TILA claim, under Regulation Z, if Chase failed to give him notice of an interest rate increase "because of the consumer's delinquency or default" required under Comment 3 or if his contract with Chase "allows the creditor to increase the rate at its discretion but does not include the specific terms for an increase" under Comment 1. 12 C.F.R. § 226.9(c)(1). Having concluded that McCoy stated a claim under either standard, the court of appeals reversed and remanded McCoy's TILA claim back to the district court.

CLAIM AGAINST CREDIT CARD COMPANY MUST GO TO ARBITRATION

Pleasants v. Am. Express Co., 541 F.3d 853 (8th Cir. 2008).

FACTS: American Express Incentive Services ("AEIS") sent Chrystin Pleasants three pre-paid cards in exchange for her participation in online surveys. The cards could be used to make purchases at establishments that accepted American Express credit cards. Attached to each card was a document entitled card terms and conditions. The document stated that any claim must be resolved by arbitration, and there was no right or authority for any claim to be arbitrated on a class action basis. Pleasants used the cards to pay at a restaurant, but the restaurant processed the cards for more than their stored value. AEIS requested Pleasants pay the difference within ten days. A month later, AEIS sent Pleasants another letter requesting she pay the difference, a late fee, and a transaction fee. Pleasants disputed the charges, but AEIS continued its collection efforts. Pleasants brought this lawsuit on behalf of herself and others similarly situated, claiming AEIS violated the Truth in Lending Act ("TILA") by issuing prepaid cards without making the required disclosures. Pleasants sought injunctive relief, actual and statutory damages, attorney's fees, and other costs. AEIS moved to compel arbitration on an individual basis as provided in the terms and conditions of the card agreement and the Federal Arbitration Act. The district court granted AEIS's motion and compelled Pleasants to submit her claim to arbitration on an individual basis. Pleasants appealed, arguing that the contract's class-action waiver is unconscionable.

The court provided examples of procedural unconscionability, including fine print font, misrepresentation or unequal bargaining power between contracting parties.

HOLDING: Affirmed.

REASONING: Pleasants argued that under Missouri law, the class-action waiver contained in the arbitration clause was unconscionable and unenforceable. Missouri law requires that for a contract to be voided as unconsionable, it must be both procedurally and substantively unconscionable, but not necessarily in equal amounts. The court provided examples of procedural unconscionability, including fine print font, misrepresentation or unequal bargaining power between contracting parties. The court found the arbitration clause did not exhibit procedural unconscionability, and noted the class-action waiver's font was in all-caps and conspicuous. Substantive unconscionability is defined as an undue harshness in the contract terms themselves. The court found the arbitration clause did not limit Pleasants's remedies. Under the TILA, a prevailing plaintiff may recover attorney's fees, costs, and statutorily-capped and actual damages. Pleasants would not be practically prohibited from seeking redress for an alleged violation, because her total recovery would likely exceed her claim's arbitration costs. The court determined that enforcing the agreement, under the circumstances, did not lead to an unconscionable result.

ONLINE PAYMENT CONFIRMATIONS NOT BOUND BY FACTA'S RECEIPT RESTRICTIONS

Smith v. Zazzle.com, Inc., 589 F. Supp. 2d 1345 (S.D. Fla. 2008).

FACTS: Allison Smith brought action against Zazzle.com, Inc., after she engaged in an internet purchase with Zazzle. Zazzle provided an internet receipt that contained the expiration date of Smith's credit/debit card. This receipt was automatically displayed on Smith's computer screen after the transaction had occurred, rather than being submitted to her through an email. Smith

alleged the Fair and Accurate Credit Transaction Act ("FACTA") requirements were disseminated to Zazzle by various companies and councils affiliated with the credit-card industry. Due to this notice, Zazzle's failure to comply with FACTA requirements allegedly constituted a willful violation. Smith alleged that she was actually harmed by being exposed to an increased risk of identity theft, but she did not seek actual damages because they would have been too difficult to quantify. She sought to collect statutory damages, punitive damages, and reasonable attorneys' fees and costs. Smith alleged that similar willful violations by Zazzle had affected other similarly-situated individuals. Zazzle moved to dismiss, arguing that FACTA's truncation requirement did not apply to internet receipts.

HOLDING: Motion granted.

REASONING: FACTA's truncation requirement provides that those who accept payment by credit or debit cards for business transactions are not permitted to print more than the card's last five digits or expiration date on any receipt. The term print is not defined, so the court looked to the term's common usage. Courts are guided by the principle directing courts to construe a general term in light of the more-specific terms within such statute. Based upon the other FACTA language, the court concluded congress intended the term print meant the imprinting of something on paper or another tangible surface. If congress intended the term to extend to email transmissions, then congress would have reflected such intent in clear, plain language. The court held that a merchant's receipt displayed on a computer screen is not subject to FACTA's truncation requirement. Smith did not have a cause of action under FACTA. The court granted Zazzle's motion to dismiss.

The term print is not defined, so the court looked to the term's common usage.

ARBITRATION

ARBITRATION CLAUSE GRANTING UNEQUAL POWER AND WAIVING LEGAL RIGHTS DEEMED UNCONSCIONABLE

Bencharsky v. Cottman Transmission Sys., L.L.C., ____ F. Supp. 2d ____ (N.D. Cal. 2008).

FACTS: Plaintiff, Joseph Bencharsky, entered into a franchise agreement with defendant, Cottman Transmission Systems, LLC, a franchisor of automotive repair businesses. After Cottman acquired a competitor, AAMCO, it stopped promoting the Cottman brand. Cottman refused to renew Bencharsky's franchises except under AAMCO's name. Cottman and Bencharsky's relationship was governed by a franchise agreement, which included a provision requiring arbitration. The franchise agreement represented Cottman had a proven system, Cottman recognized trademarks it would continuously promote, and each franchisee would have a renewable protected territory. Bencharsky asserted Cottman did not uphold these representations after acquiring the AAMCO brand. Bencharsky filed suit against Cottman for breach of contract, fraud, negligent misrepresentation, interference with contractual rights, and violation of the California Franchise Investment Law ("CFIL"). Cottman filed a motion to compel arbitration.

HOLDING: Granted.

REASONING: Bencharsky argued the arbitration agreement was invalid, because it unconscionable, and thus, unenforceable. In order for a court to invalidate a contract provision on unconscionability grounds, both procedural and substantive unconscionability must be present, but they need not be present in the same degree. Procedural unconscionability concerns the manner in which the contract was negotiated and the circumstances of the parties at that time. The focus is on inequality of bargaining power and whether the arbitration agreement is adhesive. As a national franchisor, Cottman was in a stronger financial position and there was no evidence Bencharsky could have opted out of the arbitration provision, making it evident this was a contract of adhesion. The court noted there were few other aspects of procedural unconscionability present, and held that there was minimal procedural unconscionability.

Substantive unconscionability focuses on contract terms and whether those terms are so one-sided as to shock the conscience. Cottman had the right to proceed directly to court in order to obtain temporary restraining orders and preliminary or permanent injunctions against conduct that may cause Cottman irreparable harm, while Bencharsky's only option was arbitration. The court found the lack of mutuality in the arbitration provision to be substantively unconscionable. The arbitration provision also limited rights that would otherwise have been available to Bencharsky. One clause barred recovery of punitive and exemplary damages, and another imposed a one year statute of limitations. The CFIL made punitive damages available and had a statute of limitations of four years. The court noted that the CFIL also may not be waived. The arbitration provision would bar relief otherwise available to Bencharsky by an unwaivable statute, and thus, substantively unconscionable. The court recognized a duty under the Federal Arbitration Act to enforce arbitration agreements. The court granted Cottman's motion to compel arbitration while severing the unconscionable clauses from the agreement.

MANIFEST DISREGARD OF THE LAW IS NOT A VALID, NONSTATUTORY BASIS FOR VACATING AN ARBITRATION AWARD SUBJECT TO THE FEDERAL ARBITRATION ACT

Citigroup Global Mkts, Inc. v. Bacon, 562 F.3d 349 (5th Cir 2009).

FACTS: Debra Bacon notified Citigroup that her husband had made five withdrawals from her Citigroup IRA without her permission. Bacon submitted a claim in arbitration against Citigroup seeking reimbursement for the unauthorized withdrawals. The arbitration panel found in favor of Bacon