court seeking rescission of the loan agreement, pursuant to the Truth in Lending Act ("TILA").

The district court granted partial summary judgment in favor of both Smith and Prime. Hartman appealed and Prime cross-appealed.

HOLDING: Affirmed in part, reversed in part.

REASONING: Hartman argued that the district court erred in granting summary judgment to Prime on their TILA rescission claim. Prime asserted that Hartman's right to rescind under TILA was barred by statute because Hartman's actions did not commence until after the house had been sold. Under TILA, in any consumer credit transaction in which a security interest is retained in property used as the principal dwelling of the person to whom the credit is extended a consumer has the right to rescind a transaction by notifying the creditor. The court accepted Prime's argument that under §1635(a), an obligor's right of rescission expires three years after the date of consummation of the transaction or upon the sale of the property. Hartman's house was sold at the sheriff's sale, which extinguished Hartman's right of rescission.

Prime argued that Hartman needed to file a lawsuit in order to exercise the TILA statutory right of rescission. The court accepted this argument as well.. The court noted there is a circuit split as to whether the borrower must file a lawsuit to exercise the right to rescind or whether the borrower need only assert that right through a written notice. This court had recently agreed with the Ninth and Tenth Circuits that the borrower must assert rescission in a legal action to fully exercise the right of rescission. The court explained that Hartman's notice of rescission was not in and of itself sufficient to exercise the right. Because Hartman did not file suit for rescission prior to the foreclosure sale, they no longer had the right to seek rescission of the transactions.

In affirming in part and reversing in part, the court ruled in favor of Prime on both issues, granting Prime's motion for summary judgment.

DEBT COLLECTION

CREDITOR FOUND LIABLE UNDER FDCPA FOR USING A NAME OTHER THAN ITS OWN WHEN COLLECTING ITS DEBTS

Vincent v. The Money Store, 736 F.3d 88 (2nd Cir. 2013).

FACTS: Plaintiff, Vincent, defaulted on his mortgage. Defendant, The Money Store, serviced Vincent's loans. The Money Store contracted with a third party law firm to send Vincent notices; Vincent received a letter from the law firm informing him of his default. The letters were printed on the law firm's letterhead and stated that the law firm had been retained in order to collect The Money Store's debts. The letters, however, functioned only as notice of Vincent's default, as the letter further stated that all communications about the default must be made through The Money Store.

The FDCPA does not generally regulate creditors collecting their own accounts.

Vincent filed suit alleging that The Money Store violated the Fair Debt Collection Practices Act ("FDCPA") by hiring the law firm to send out collection letters falsely indicating that the law firm had been retained to collect its debts when, in fact, The Money Store was still collecting its own debts. The district court granted summary judgment in favor of The Money Store.

HOLDING: Vacated in part and remanded.

REASONING: The court explained that the FDCPA does not generally regulate creditors collecting their own accounts. However, when a creditor in the process of collecting its own debts hires a third party for the express purpose of representing to its debtors that the third party is collecting the creditor's debts, and the third party engages in no bona fide effort to collect those debts, the false name exception under 15 U.S.C. §1692a(6) exposes the creditor to FDCPA liability.

The court analyzed the three elements that must be satisfied before deeming a creditor a debt collector pursuant to the false name exception: (1) the creditor is collecting its own debts; (2) the creditor uses a name other than its own; and (3) the creditor's use of that name falsely indicates that a third person is collecting or attempting to collect the debts that the creditor is collecting.

The court found that there was no dispute as to the first element; The Money Store was collecting its own debts. As to the second element, the court found that The Money Store did use a name other than its own by sending breach letters which appeared to be attorney collection letters as indicated by the use of the law firm's name and letterhead.

The court adopted the "conduit test," which distinguishes a debt collector who undertakes collection activity separately from the creditor, and a third party merely acting as a conduit for a collections process controlled by the creditor. In the first instance, the creditor would not be liable as a bona fide attempt by the debt collector to collect the debt but in the second instance, the creditor would be liable under the FDCPA.

The court held that determining the nature of the debt collection activity was a question of fact, and the district court erred in granting The Money Store's motion for summary judgment. The court concluded that if the breach letters falsely indicated that the third party law firm was collecting or attempting to collect The Money Store's debts, The Money Store could be held liable under the FDCPA according to the false name exception. The court vacated the dismissal of the claims and remanded.

SUIT FILED AFTER STATUTE OF LIMITATIONS HAS RUN VIOLATES FDCPA

Phillips v. Asset Acceptance, L.L.C., 736 F.3d 1076 (7th Cir. 2013).

FACTS: Appellee, Asset Acceptance ("Asset"), a debt collector, sued appellant Gwendolyn Phillips ("Phillips"), for a debt arising from a contract for the sale of goods. Phillips countersued, claiming that the charges against her and others similarly situated were filed after the statute of limitations on the creditor's claim had expired, violating the Fair Debt Collection Practices Act ("FDCPA").

The district court denied Phillips's motion to certify a class because the class was not similarly situated and different limitation periods applied to different defendants. Phillips appealed.

HOLDING: Reversed and remanded.

REASONING: The court first addressed the policy concerns behind prohibiting debt collection suits filed after limitations ran. After a long period of time, the consumer is subject to unfair circumstances, such as the loss of relevant records, dulled memory, attorneys' fees, and unfamiliarity of the applicable statute of limitations. Debt collectors often filed these suits after limitations ran to pressure the consumer into paying the debt, which is what the FDCPA prohibits.

The court held that if the debt collection suits were filed after the statute of limitations had run, they were time-barred and violated the FDCPA. Asset's cause of action could have been saved by showing that the violation was not intentional and resulted from a bona fide error, under 15 U.S.C. §1692k(c), or through an equitable tolling or equitable estoppel defense, to bar the statute of limitations. The court found one limitation period applied to all proposed class members, and reversed the district court's ruling on Phillips's motion.

FOURTH CIRCUIT HOLDS FDCPA PERMITS ORAL DISPUTES OF DEBT

Clark v. Absolute Collection Serv., Inc., 741 F.3d 487 (4th Cir. 2014).

FACTS: Appellants, Dana and David Clark ("Clark"), incurred two debts at a health care facility. When Clark was unable to pay, the health care facility referred the debts to a third-party collector, Appellee, Absolute Collection Service ("ACS"). ACS sent Clark collection notices, which contained disclosures stating, "[a]ll portions of this claim shall be assumed valid unless disputed in writing within thirty (30) days."

Clark sued ACS in a putative class action suit for failing to comply with the Fair Debt Collection Practices Act ("FDCPA"), claiming that ACS violated their right to challenge their debt orally under §1692g(a)(3) of the FDCPA. ACS moved to dismiss arguing that §1692g(a)(3) contained an inherent writing requirement and that Clark had failed to state a claim. The district court granted ACS's motion, and Clark appealed.

HOLDING: Vacated and remanded.

REASONING: The Fourth Circuit reviewed §1692 of the FDCPA and determined that written communication from consumers is not required in all instances. Sections 1692g(a)(4), 1692g(a)(5), and 1692g(b) required consumers to contact debt collectors in writing, but 1692g(a)(3) did not. The court refused to find an implied requirement of written communication into §1692g(a)(3) because it is generally presumed that Congress acts intentionally and purposefully when including particular language in one section of a statute, but omitting it in another.

Additionally, the court looked to well-established principles of statutory construction, and felt bound to give effect to every clause and word of a statute whenever possible. The court explained that relying on the writing requirements in §§1692g(a)(4), 1692g(a)(5), and 1692g(b) to give effect to §1692g(a)(3) would violate that principle and render §1692g(a)(3) meaningless on its own. Thus, §1692g(a)(3) provided consumers statutory protections that were independent of those provided by §§1692g(a)(4), 1692g(a)(5) and 1692g(b). In making this determination, the court created a bifurcated scheme of consumer rights and agreed with the Second and Ninth Circuits that the text of §1692g(a)(3) permitted oral disputes of debt.

UNDER FAIR DEBT COLLECTION PRACTICES ACT ACTIONS OF DEBT COLLECTOR ARE EVALUATED BY "UNSOPHISTICATED CONSUMER" STANDARD

Royal Fin. Group, L.L.C. v. Perkins, 414 S.W.3d 501 (Mo. Ct. App. 2013).

FACTS: Appellee, Royal Financial Group ("Royal"), brought action against Appellant, Perkins, for breach of contract and attorneys' fees. Perkins counterclaimed, alleging Royal's debt collection practices violated the Fair Debt Collection Practices Act ("FDCPA"). The trial court dismissed Royal's petition for failure to comply with discovery. In regard to Perkins's counterclaim, the trial court concluded that Perkins's evidence insufficiently supported the FDCPA claims and ruled in favor of Royal. Perkins appealed.

HOLDING: Reversed and remanded.

REASONING: The court first determined whether Royal used false, deceptive, or misleading representations or means to collect debt. A debt collector's actions are evaluated through the lens of an unsophisticated consumer, meaning one who has below average sophistication or intelligence. Statements contained in pleadings and other court filings are actionable under the FDCPA. Perkins alleged that Royal made false claims in its pleading because Royal asserted that it was an assignee of Chase Manhattan Bank in its petition, but later admitted that it possessed no documentation linking the chain of ownership to Chase. The court held that the record could support no other finding but that Royal's assertion was false, or in the very least, misleading from the perspective of an unsophisticated consumer.

A debt collector's actions are evaluated through the lens of an unsophisticated consumer, meaning one who has below average sophistication or intelligence.

The court next determined whether Royal falsely represented that it was entitled to collect attorneys' fees. A collector violates the FDCPA by requesting fees to which it is not entitled under the law. A collector's unfounded claim for attorneys' fees can constitute deceptive means to collect debt under the FDCPA because the consumer might feel pressured to immediately settle the debt, regardless of its validity. The court determined that Royal insufficiently produced evidence of its alleged entitlement to attorneys' fees beyond an unauthenticated boilerplate cardholder agreement, which prior holdings deemed inadequate as a basis to support a collector's claim. The court held that Royal's petition itself, viewed from the perspective of an unsophisticated consumer, was a deceptive attempt to collect a debt that Royal could not legally collect.

CLAIMS UNDER THE FAIR DEBT COLLECTION PRACTICES ACT ARE EVALUATED UNDER THE OBJECTIVE "UNSOPHISTICATED CONSUMER" STANDARD

Gruber v. Creditors' Prot. Serv., Inc., 742 F.3d 271 (7th Cir. 2014).

FACTS: Appellant, John Gruber ("Gruber"), received a debt collection notice from Appellee, Creditors' Protection Service ("CPS"). The Fair Debt Collection Practices Act ("FDCPA") required CPS to include a statement in the letter that if the consumer notified the debt collector within thirty days, disputing all or part of the debt in writing, the debt collector would obtain verification of the debt or a copy of a judgment against the consumer. The debt collector would then mail a copy of such verification or judgment to the consumer. CPS included a similar statement but omitted the phrase "that the debt, or any portion thereof, is disputed."

The district court dismissed the suit for failure to state a claim. Gruber appealed.
HOLDING: Affirmed.
REASONING: Gruber argued that the notice from CPS was misleading in that it directed consumers to request verification from the collector instead of dispute the debt. The court rejected this argument by explaining that claims under the FDCPA are evaluated from the "unsophisticated consumer" standard, not the least sophisticated consumer standard. The unsophisticated consumer has some basic knowledge of the financial world, is able to read financial notices with added care, is reasonably intelligent, and is capable of making logical conclusions and inferences. The court added that unless a significant portion of the population would have been misled, the action should be dismissed. The court held that letters of notice sent by CPS were not misleading and complied with the FDCPA.

DEBT COLLECTOR DOES NOT HAVE TO PARROT LANGUAGE TO COMPLY WITH FDCPA

Wallace v. Diversified Consultants, Inc., ____ F.3d ____(6th Cir. 2014).

FACTS: Appellant, Carl Wallace ("Wallace"), a debtor, sued Appellee, Diversified Consultants, Inc. ("Diversified"), a creditor, for violating the Fair Debt Collection Practices Act ("FDCPA"). Diversified notified Wallace that it would assume the validity of Wallace's debt unless he disputed it "within 30 days of receiving the notice." Wallace found issue with this phrasing, as it did not use the verbatim language of the FDCPA, which states "within 30 days after receiving the notice."

The district court disagreed with Wallace and granted a judgment on the pleadings in favor of Diversified. Wallace appealed.
HOLDING: Affirmed.
REASONING: The court held that a debt collector does not have to parrot the language of the FDCPA to comply with the notice requirement. The court stated that a notice complies with the FDCPA if it speaks with enough clarity to convey the required information to a reasonable but unsophisticated consumer. The court decided that Diversified's letter adequately informed Wallace of the 30-day period to dispute the debt before the validity of the debt would be assumed. The court stated that using "of" or "after" did not matter and referred to other literary works that use the two words interchangeably.

Wallace also argued that "of" and "after" were ambiguous as to when to start counting the days. The court agreed, but said that it did not matter because the results would be the same either way. The FDCPA did not say whether the day the letter had been received by the debtor counts, so this argument did not make a difference as to the notice.

DEBT COLLECTOR CANNOT USE BONA FIDE ERROR DEFENSE

Engelen v. Erin Capital Mgmt., L.L.C., 544 F. App'x. 707 (9th Cir. 2013).

FACTS: Appellee, Rosen & Loeb, was hired to collect a debt of Appellant, Arthur Engelen ("Engelen"). Rosen & Loeb's bookkeeper entered payments into their collection software for calculation. Rosen & Loeb's office manager periodically spot-checked the payment to make sure that the payments were accurately credited. Rosen & Loeb unjustly garnished Engelen's wages even though Engelen had already satisfied the debt because its bookkeeper failed to record Engelen's payment.

The bona fide error defense is a narrow exception to strict liability under the FDCPA.

Engelen filed suit against Rosen & Loeb under the Fair Debt Collection Practices Act ("FDCPA"). The district court granted summary judgment in favor of Rosen & Loeb, and Engelen appealed.
HOLDING: Reversed.
REASONING: The court sought to determine whether the bona fide error defense shielded Rosen & Loeb from liability under the FDCPA. The bona fide error defense is a narrow exception to strict liability under the FDCPA. Defendants bear the burden of proof at summary judgment. In order for the bona fide error defense to apply, defendants must prove the error was: (1) unintentional; (2) bona fide, meaning made in good faith; and (3) resulted notwithstanding reasonably adapted procedures to avoid it.

According to the court, Rosen & Loeb's procedures, which consisted of legal compliance training, a written policy describing how payment notifications were to be handled, and periodic spot-checking of the bookkeeper's work, were not reasonably adapted to avoid error. Rosen & Loeb neither presented evidence of any regular redundancies designed to catch human recording errors nor contacted the debtor or the court before filing a Writ of Execution and garnishing Engelen's wages. Because Rosen & Loeb failed to meet its burden of proof as to its entire set of procedures under the bona fide error defense, the court concluded that Rosen & Loeb was not entitled to summary judgment.