two loans from Community Bank was invalid.

The circuit court granted summary judgment against Clark and in favor of the Commission. Clark appealed.

HOLDING: Affirmed.

REASONING: The appellate court stated that Community Bank failed to establish that it was entitled to attorney's fees under the terms of the loan agreement. The loan agreement had a provision that stated Clark agreed to pay the fees incurred by Community Bank if the bank hired an attorney to collect on the notes.

The appellate court found that this case was not a collection case brought by Community Bank, but rather a declaratory judgment action created by Clark to determine the validity of the assignment of his lottery winnings and the loan agreement created therefrom. The court further determined that Community Bank's motion for attorney's fees was lacking an adequate explanation as to how the facts and circumstances of the current case entitled them to attorney's fees under the provision of the loan agreement.

DEBT COLLECTION

FILLING A PROOF OF CLAIM ON A TIME-BARRED DEBT IS NOT, STANDING ALONE, A PROHIBITED DEBT COLLECTION PRACTICE UNDER THE FEDERAL FAIR DEBT COLLECTION PRACTICES ACT

Gatewood v. CP Medical, LLC____F3d.____(8th Cir. 2015).
http://law.justia.com/cases/federal/appellate-courts/ca8/15-6008/15-6008-2015-07-10.html

FACTS: Mr. and Mrs. Gatewood ("the Gatewoods") filed a Chapter 13 bankruptcy petition. CP Medical's agent timely filed a proof of claim. The court confirmed the Chapter 13 plan, proposing monthly payments and a pro rata distribution to unsecured creditors. The Gatewoods subsequently fell behind on their plan payments and converted the case to a Chapter 7.

The bankruptcy court and court officers protect debtors from abusive collection practices.

After confirmation, but during the pendency of the Chapter 13 case, the Gatewoods filed an adversary proceeding against CP Medical for monetary damages caused by a violation of the Fair Debt Collection Practices Act ("FDCPA"). The Gatewoods asserted that by filing a claim on a debt that is time-barred, CP Medical engaged in "false, deceptive, misleading, unfair and unconscionable" debt collection practice in contravention of the FDCPA.

The bankruptcy court granted CP Medical's motion for summary judgment. The Gatewoods appealed.

HOLDING: Affirmed.

REASONING: The Eighth Circuit reasoned that filing an accurate proof of claim containing all the required information, including the timing of the debt, standing alone, is not a prohibited debt collection practice. The court reasoned there is no need to protect debtors who are already under the protection of the bankruptcy court, and there is no need to supplement the remedies afforded. The bankruptcy court and court officers protect debtors from abusive collection practices, and the Bankruptcy Code provides adequate remedies for potential creditor misconduct. The court refused to insert judicially created remedies into Congress's carefully calibrated bankruptcy scheme, thus tilting the balance of right and obligations between debtors and creditors.

DEBT COLLECTOR DOES NOT HAVE AN OBLIGATION UNDER THE FDCPA TO INFORM CONSUMER OF TAX CONSEQUENCES

Altman v. J.C. Christensen & Assocs., 786 F.3d 191 (2d Cir. N.Y. 2015).
http://law.justia.com/cases/federal/appellate-courts/ca2/14-2240/14-2240-2015-05-14.html

FACTS: Defendant, Christensen & Associates ("Christensen") was hired to collect debts owed by Plaintiff, Issac Altman, ("Altman") on his credit card bills. Christensen offered to settle Altman's debts for a lesser amount than his total balance. Altman alleged that Christensen violated the FDCPA by not warning Altman that his tax liability may increase from cancellation of debt income. The trial court ruled that Christensen did not owe a duty to Altman to inform him of possible tax consequences. Altman appealed.

HOLDING: Affirmed.

REASONING: The appellate court held that Christensen was not deceptive by his failure to disclose tax consequences, because the letter expressly stated that the savings were based on the "outstanding account balance" and not on tax liability. The appellate court reasoned that the scope of the FDCPA was to protect debtors from abusive debt collection practices, and requiring a debt collector to disclose potential tax consequences is outside the scope of the FDCPA.

TEXAS BREACH OF CONTRACT CLAIM IS NOT PREEMPTED BY THE FEDERAL HOME OWNER'S LOAN ACT

TEXAS NEGLIGENT MISREPRESENTATION CLAIM IS PREEMPTED BY THE HOLA

TEXAS DEBT COLLECTION ACT CLAIM IS NOT PREEMPTED BY THE HOLA

Barzelis v. Flagstar Bank, F.S.B., 784 F.3d 971, 973 (5th Cir. 2015).
http://www.gpo.gov/fdsys/granule/USCOURTS-ca5-14-10782/USCOURTS-ca5-14-10782-0

FACTS: Stacy Barzelis ("Mortgagor") brought action in Texas state trial court against Flagstar Bank ("Lender") for wrongful foreclosure, breach of contract, negligent misrepresentation, violation of the Texas Debt Collections Act ("TDCA") and violation of the Real Estate Settlement and Procedures Act ("RESPA").

The trial court removed the case to federal court. The federal district court dismissed the state law claims and granted summary judgment on the RESPA claim. Mortgagor appealed the dismissal of the case claiming it was preempted by the Home Owner's Loan Act ("HOLA") of 1933.

HOLDING: Affirmed in part and reversed in part.

REASONING: The court examined the substance of the HOLA and determined that the Mortgagor's breach of contract claim was not preempted. Initially the court found that Section 51.002(d) was preempted, however, the claim was reversed because it did not address the alleged breaches of the actual security instrument.

The court determined that the Mortgagor's negligent misrepresentation claim was, however, preempted by HOLA. The court noted that the Mortgagor had asserted that in mailed notices the Lender had negligently misrepresented the status of her loan and foreclosure sale. The court held her claim was based on misstatements in disclosures contained in credit related documents and, therefore, preempted under the HOLA.

Finally, the court found the TDCA claim was not preempted by the HOLA because the essential purpose of the TDCA is to limit coercive and abusive behavior by all those seeking to collect debts. This is not something that burdens lending in the same way, as for example, a specific mandate on interest rates. Thus, the TDCA is not preempted by the HOLA.

UNDER THE FAIR DEBT COLLECTION PRACTICES ACT PLAINTIFF NEED NOT PROVE KNOWLEDGE OR INTENT TO ESTABLISH LIABILITY

FDCPA PLAINTIFF NEED NOT SHOW ACTUAL DAMAGES

Wise v. Zwicker & Assocs., 780 F.3d 710 (6th Cir. 2015).
http://www.leagle.com/decision/In%20FCO%2020150312143.xml/WISE%20v.%20ZWICKER%20&%20ASSOCS.,%20P.C.

FACTS: Plaintiff, Dawson Wise ("Wise"), defaulted on a credit card account held with American Express. American Express retained Defendant, Zwicker & Associates, P.C. (Zwicker), to collect the debt. Two attorneys for Zwicker contacted Wise and demanded payment on the debt, as well as attorney's fees for their collection activities. Wise filed suit against Zwicker, claiming the demands for attorney's fees violated the FDCPA. Zwicker filed for summary judgment, which the court granted. Wise appealed.

The risk of penalties under the FDCPA is placed solely on the debt collector engaged in an activity that is not entirely lawful.

HOLDING: Affirmed in part, reversed in part.

REASONING: The court concluded that "[u]nder the FDCPA, a plaintiff does not need to prove knowledge or intent to establish liability, nor must he show actual damages." The risk of penalties under the FDCPA is placed solely on the debt collector engaged in an activity that is not entirely lawful, thus relieving consumers from exposure to "unlawful debt collector behavior without a possibility for relief." As a result, "if a debt collector seeks fees to which it is not entitled," they have committed a FDCPA violation on its face regardless of whether or not there was a court issued statement prohibiting the collection of the fees.

The court also noted that the FDCPA authorizes an award of statutory damages or equitable relief, without a requirement the consumer prove any actual damages.

DEBT COLLECTOR HAS BURDEN TO PROVE A THIRD PARTY COMMUNICATION FITS WITHIN AN EXCEPTION PROVIDED BY THE FDCPA

Evankavitch v. Green Tree Servicing, LLC, ____ F.3d____(3rd Cir. 2015).
http://www2.ca3.uscourts.gov/opinarch/141114p.pdf

FACTS: Evankavitch, defaulted on a mortgage that was later assigned to Green Tree Servicing LLC, ("Green Tree"). After failing to reach Evankavitch personally, Green Tree made numerous unsuccessful phone calls to Evankavitch's daughter and neighbors asking them to tell Evankavitch to contact Green Tree regarding the mortgage.

The Third Circuit court noted that as a general rule, the FDCPA forbids a "debt collector from contacting third parties in its attempts to collect a consumer's debt."

Once Evankavitch learned of Green Tree's communications with her daughter and neighbors, she filed suit against Green Tree, claiming that Green Tree violated the FDCPA by impermissibly contacting third parties in its debt collection efforts. The district court entered judgment in Evankavitch's favor for $1,000. Green Tree appealed.

HOLDING: Affirmed.

REASONING: The Third Circuit court noted that as a general rule, the FDCPA forbids a "debt collector from contacting third parties in its attempts to collect a consumer's debt." An exception to this rule exists when the communications are made "for the purpose of acquiring location information about the consumer." However, a debt collector may not contact a third party regarding location information more than once "unless the debt collector reasonably believes that the earlier response of such [third party] is erroneous or incomplete and that such [third party] now has correct or complete location information."

The court indicated five factors in determining whether the consumer or the debt collector has the burden of proving/disproving the applicability of the third party exception to the general FDCPA rule. Those factors include: (1) whether a defense is a statutory exception, (2) whether the statutory scheme indicates which party has the burden, (3) whether a plaintiff will be unduly prejudiced by the assertion of a defense, (4) which party has control of the information necessary for proving/disproving the defense, and (5) policy considerations. After reviewing these factors, the court concluded that the debt collector exception to third party communication is an affirmative defense that must be proved by the debt collector for the exception to the general FDCPA rule to apply.

ANY PERSON, NOT JUST A DEBTOR, WHO HAS SUSTAINED ACTUAL DAMAGES FROM A TEXAS DEBT COLLECTION ACT VIOLATION HAS STANDING TO SUE

ACTUAL DAMAGES INCLUDE MENTAL ANGUISH

ECONOMIC LOSS RULE DOES NOT BAR TDCA VIOLATIONS

McCaig v. Wells Fargo Bank (Texas), 788 F.3d 463 (5th Cir. 2015).
http://www.ca5.uscourts.gov/opinions%5Cpub%5C14/14-40114-CV0.pdf

FACTS: Plaintiffs, David and Marilyn McCaig ("the McCaigs") took over Allie McCaig's mortgage payments after her death. The loan soon fell into default and the McCaigs entered into settlement and forbearance agreements with the mortgage holder, Defendant, Wells Fargo Bank ("Wells Fargo"). The agreements provided that Wells Fargo would not foreclose on the property so long as the McCaigs followed the payment plan set forth in the agreement. The McCaigs adhered to the plan, but Wells Fargo initiated the foreclosure process and the dispatch of multiple erroneous notices of default. The McCaigs filed suit.

The court held that a violator of the TCDA should not be shielded from liability under the economic loss rule simply because there are existing contracts between the parties.

The district court found that Wells Fargo breached its agreements with the McCaigs violating the TDCA. The McCaigs were awarded $75,000 each for mental anguish damages and $156,775 in attorney's fees, in addition to other forms of monetary relief. Wells Fargo appealed.
HOLDING: Affirmed in part, vacated and remanded in part.
REASONING: In determining whether the McCaigs had standing to sue, the circuit court first looked to the statutory scheme of Texas Financial Code § 392.403. The Fifth Circuit concluded that the statute "provides for remedies for 'any person' adversely affected by prohibited conduct, not just parties to the consumer transaction." *Monroe v. Frank,* 936 S.W.2d 654, 660 (Tex. App. 1996). The McCaigs lack of an interest in the property and the fact that they were not parties or obligors to the mortgage did not matter to the court's standing analysis.

The court then asserted that the *Bentley* case stands for the proposition that "mental anguish is a form of 'actual damages'," thus, qualifying the McCaigs as an appropriate party to bring suit against Wells Fargo. *Bentley v. Bunton*, 94 S.W.3d 561, 604 (Tex. 2002).

The court continued to evaluate whether the economic loss rule barred the McCaig's claims. The economic loss rule generally prevents recovery for mistakes that solely involve a breach of contract. The first step in the economic loss analysis is to look to see if there is an independent duty based in tort for the McCaigs claims. That duty may be based on a breach of contract so long as the duty is "independent of the contractual undertaking and the harm suffered is not merely the economic loss of a contractual benefit." In that type of situation, the economic loss rule will not bar recovery.

The court held that a violator of the TCDA should not be shielded from liability under the economic loss rule simply because there are existing contracts between the parties. Even though Wells Fargo's mistakes constituted a contractual breach of its agreements with the McCaigs, Wells Fargo was still liable for violating the TDCA because it breached the TDCA's independent statutory duty.

DEMANDING FEES IN FORECLOSURE COMPLAINT IN A WAY CONTRARY TO THE UNDERLYING AGREEMENT IS ACTIONABLE UNDER THE FDCPA

Kaymark v. Bank of Am., N.A., 783 F.3d 168 (3d Cir. 2015).
http://law.justia.com/cases/federal/appellate-courts/ca3/14-1816/14-1816-2015-04-07.html

FACTS: Appellant, Kaymark, defaulted on a mortgage held by, Appellee, Bank of America, N.A. ("BOA"). On behalf of BOA, Appellee, Udren Law Offices, P.C. ("Udren") initiated foreclosure proceedings against Kaymark in state court. The terms of the mortgage allowed the lender to charge the borrower fees for services preformed and expenses incurred in connection with the borrowers default. The foreclosure complaint filed in the foreclosure proceedings listed not-yet-incurred fees as due and owing.

Kaymark filed suit, alleging BOA violated the FDCPA by attempting to collect fees for legal services not-yet-preformed. The district court granted BOA's motion to dismiss, concluding neither the mortgage contract nor state or federal law prohibit the inclusion of not-yet-incurred fees. Kaymark appealed.
HOLDING: Affirmed in part, reversed in part.
REASONING: The Fifth Circuit first determined whether BOA used a false, deceptive, or misleading representation to collect a debt. The court found that the most natural reading of the mortgage contract was that BOA was not authorized to collect fees for not-yet-performed legal services and expenses. Because Kaymark agreed to pay attorneys' fees and other expenses that were actually incurred with the default, not fees that might occur, the foreclosure complaint form, which included these not-yet-incurred fees was actionable under the FDCPA.

The court also refused to find that a communication could be uniquely exempted from the FDCPA because it is a formal pleading or, in particular, a complaint. In the instant case, the foreclosure action met the broad definition of debt collection under the FDCPA because the complaint was directed at Kaymark in an attempt to collect on his debt, thereby actionable under the FDCPA.

TO BE A DEBT COLLECTOR UNDER THE FAIR DEBT COLLECTION PRACTICES ACT, ENTITY MUST MEET STATUTORY TEST

Davidson v. Capital One Bank, ____F.3d____ (11th Cir. 2015).

FACTS: HSBC Bank Nevada, N.A. ("HSBC") filed suit against Keith Davidson ("Davidson") to collect on a credit card account. The parties entered into a settlement agreement, whereby Davidson agreed to pay $500 to HSBC Bank Nevada, N.A. ("HSBC") to dismiss its collection action. Davidson defaulted on the payments and the loan was later acquired by Capital One Bank (USA), N.A. ("Capital One"). Capital One filed suit against Davidson to collect on the same credit card account alleging the account was delinquent $1,149.96. Davidson responded by filing a class action suit claiming that Capital One's activities violated the FDCPA.

Capital One moved to dismiss Davidson's action for failure to allege that Capital One was a "debt collector" for the purposes of the FDCPA. The district court dismissed the action, stating that whether the account was in default at the time it was acquired had no bearing on whether Capital One satisfied the statutory definition of a "debt collector," but they did not meet the definition of debt collector under the FDCPA. Davidson appealed.

HOLDING: Affirmed.

REASONING: The court began with the definition of "debt collector" under § 1692a(6) of the FDCPA. The Act defines "debt collector" to mean: (1) "any person who uses any instrumentality of interstate commerce or the mail in any business the principal purpose of which is the collection of any debts," or (2) any person "who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." The court defined a "creditor" as "any person to the extent that he receives an assignment or transfer of debt in default solely for the purpose of facilitating collection of such debt for another." Davidson argued based on the exclusion under the FDCPA, that if the debt was in default at the time it was acquired, the entity is a "debt collector", but if the debt was not in default at the time it was acquired, the entity is a "creditor."

The court rejected Davidson's argument stating where a person does not fall within any of the six statutory exclusions under the FDCPA, he is not deemed a "debt collector," and the statutory definition of "debt collector" applies without regard to the default status of the underlying debt. Davidson failed to plausibly allege that Capital One was a "debt collector" under the FDCPA and the "principal purpose" of Capital One's business was debt collection. Therefore, Captial One was not subject to liability under the FDCPA.

ARBITRATION

IS ARBITRATION A "DARLING OF FEDERAL POLICY?"

Andermann v. Sprint Spectrum L.P, 785 F.3d 1157 (7th Cir. 2015).
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2015/D05-11/C:14-3478:J:Posner:aut:T:fnOp:N:1549408:S:0

FACTS: Plaintiffs, ("the Andermanns"), obtained mobile phone service from U.S. Cellular in 2000 under a renewable two-year contract that was last renewed in 2012. The contract contained a arbitration clause providing that all disputes arising out of the contract would be resolved by binding arbitration and that the arbitration agreement would survive termination of the agreement. The contract also provided that U.S. Cellular could assign the agreement without notifying the Andermanns. In May 2013, U.S. Cellular assigned the contract to Defendant, ("Sprint") without notice to the Andermanns. Sprint sent the Andermanns a letter informing them of the sale and that their mobile phone service agreement would be terminated on January 31, 2014 due to the incompatibility of Sprint's network with the Andermanns' phones. Sprint followed the letter with six calls.

The Andermanns brought suit in federal district court alleging that these calls contained unsolicited advertisements in violation of the Telephone Consumer Protection Act ("TCPA"). Sprint responded by asking the court for an order to arbitrate based on the contract and the presumption in favor of arbitration. The district court denied Sprint's motion to compel arbitration. Sprint appealed.

HOLDING: Reversed and Remanded.

REASONING: The district court ruled for the Andermanns on the grounds that the dispute arose after the contract was terminated, thus, the dispute regarding the legality of the calls could not have arisen out of the contract. The Seventh Circuit, ruled that Sprint was entitled to arbitrate, finding that the service agreement allowed the assignment leading to the incompatibility of the Andermann's phones and the ultimate reason for the disputed calls. The court reasoned that the calls were necessary in Sprint's efforts to retain the Andermanns as customers, thus the Andermanns were required to arbitrate because the dispute clearly arose from the assignment clause within the agreement.

It's not clear that arbitration, which can be expensive because of the high fees charged by some arbitrators and which fails to create precedents to guide the resolution of future disputes, should be preferred to litigation.

In his discussion of arbitration, Judge Posner discussed the presumption that arbitration is the favored method of dispute resolution. He stated:

> Sprint gilds the lily, however, in telling us that arbitration is a darling of federal policy, that there is a presump-