never knew of any falsity on the credit report. Morris objected, arguing that Equifax did know of the falsity because Morris informed them of the mistake. Morris also argued that the FCRA does not excuse the consumer reporting agency from following reinvestigation obligations because it does not own the credit file. The district court accepted the magistrate's recommendations and Morris appealed.

**HOLDING**: Reversed in part, affirmed in part, and remanded.

**REASONING**: The court held that although the state libel claim was a part of the suit, it was correctly dismissed because in order to establish malice "Morris must present 'sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.'" *St. Amant v. Thompson*, 390 U.S. 727 (1968). The court reasoned that the argument "fails under both §1681h(e) and the conditional privilege under Texas law."

The court also concluded that just because Equifax did not own Morris's file at the time they received the dispute letter, it did not excuse them from the obligations under §1681i. The court pointed to the hearings on amending the FCRA, where the Federal Trade Commission had testified that "[p]ersons who purchase consumer reports for resale (also known as 'resellers') are covered by the FCRA as consumer reporting agencies and have all the obligations of other CRAs, including the duty to reinvestigate ...." *H.R. 2622--Fair and Accurate Credit Transactions Act of 2003: Hearing Before the H. Comm. on Financial Services*, 108th Cong. (2003). The court further emphasized that §1681i did not put CSC under any statutory obligation because they did not receive a letter directly. Equifax did receive a direct dispute letter and the letter obligated them to follow the statutory rules.

The court reversed and remanded the case with instructions. The court affirmed part of the summary judgment ruling against Morris on the libel claim.

**MERE USE OF INCORRECT FORM BY LENDER DOES NOT EXTEND RIGHT TO RESCIND**

Mills v. Equicredit Corp., 172 Fed.Appx. 652 (6th Cir. 2006).

**FACTS:** Frank and Eva Mills ("the Millses") refinanced their home mortgage twice with EquiCredit Corp. in August 1999, and again in February 2000. At each closing, the Millses signed a form entitled "Notice of Right to Cancel," that explained their right to cancel the mortgage within three days from either the date of the transaction, the date they received their Truth in Lending disclosures, or the date they received that notice, whichever occurred last. The Millses defaulted on their second loan. Fairbanks Capital Corporation ("Fairbanks") subsequently purchased the loan in April 2002 from Equicredit and began foreclosure proceedings in November 2002. In that same month counsel for the Millses sent a letter to Fairbanks and EquiCredit explaining that they were rescinding the February 2000 transaction pursuant to the "Notice of Right to Cancel." Neither Fairbanks nor EquiCredit responded to that letter. The Millses filed a complaint and the foreclosure proceeding by Fairbanks was suspended. The Millses claimed that Equicredit was liable to them for rescission pursuant to various sections of the Home Ownership & Equity Protection Act ("HOEPA") or alternatively the Truth in Lending Act ("TILA"). EquiCredit moved for summary judgment on the basis of a statute of limitations violation preventing claim under TILA, that the court granted in entirety.

On appeal of the summary judgment, the Millses contended that they were entitled to rescission of the February 2000 loan transaction because EquiCredit used the incorrect form to notify them of their right to rescind.

**HOLDING:** Affirmed.

**REASONING:** There is a one-year statute of limitations to prevail on a claim for damages for violations of TILA, if proper TILA disclosures are made. However, if TILA disclosures are never made, the borrower has a continuing right to rescind for three years after the date of the transaction. The Millses never alleged that EquiCredit failed to notify them of their right to rescind, but rather concluded that EquiCredit's use of the incorrect form was misleading. Because the Millses admitted to being aware of their rights under TILA, the district court considered the use of the incorrect form by EquiCredit a harmless technicality. The appellate court affirmed that the form still properly notified the Millses of their right to cancel the loan transaction and therefore triggered the one-year statute of limitations preventing recovery in this case.

## DEBT COLLECTION

**DEBT COLLECTOR CAN BE SUED FOR THREAT OF LEGAL ACTION**

Brown v. Card Serv. Ctr., 464 F.3d 450 (3d Cir. 2006).

**FACTS:** In early 2004, Elizabeth Brown received a collection letter from Card Service Center ("CSC"), a debt-collection firm, attempting to recover a delinquent credit card balance. The letter requested that Brown contact CSC within five days to make payment arrangements. The letter also stated that should Brown fail to make payment arrangements, her account "could" be forwarded to CSC's attorney and that "refusal to cooperate could result in a legal suit." Brown did not contact CSC and she continued to receive collection letters. CSC did not refer the account to their attorney, nor did they take legal action against Brown. In early 2005, Brown filed suit in the United States District Court for the Eastern District of Pennsylvania. Brown claimed that because CSC never intended to take legal action against her, the CSC letter contained false and misleading statements that amounted to a threat meant to intimidate and coerce her in violation of §1692e of the Fair Debt Collection Practices Act ("FDCPA"). Brown also claimed that the 5-day deadline was "illusory" because CSC never intended to take legal action against her.

CSC filed a 12(b)(6) motion to dismiss the complaint for failure to state a claim under the FDCPA. The district court granted the motion and dismissed the complaint without prejudice.

The court gave Brown the opportunity to amend her complaint. She chose not to, and the dismissal became final. Brown appealed the dismissal to the United States Court of Appeals for the Third Circuit.

**HOLDING:** Vacated and remanded.

**REASONING:** The district court drew a distinction between debt collection efforts that threaten debtors with actions that "would" be taken, and those that threaten debtors with actions that "could" be taken. In her complaint, Brown alleged that CSC does not take legal action against class members, but rather refers alleged debts to other collection agencies. The court found that the district court had erred in dismissing Brown's complaint, and that the threat of legal action could be false or misleading under the FDCPA.

The court analyzed the CSC letter by applying the "least sophisticated debtor" standard. The "least sophisticated debtor" standard serves the purpose of protecting "all consumers, the gullible as well as the shrewd." *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993). The court observed that from the perspective of the least sophisticated debtor, CSC's letter might suggest that legal action or the involvement of a lawyer would be "imminent" if he or she failed to respond within five days. If Brown were able to prove that CSC rarely or never took legal action or referred debts to an attorney, a jury could find the letter to be misleading. The court also found support for its judgment in the Federal Trade Commission's commentary on the FDCPA. The commentary suggests that where an action by a debt collector is unlikely, implying that such action is possible could be misleading. The court vacated the judgment and remanded the case for further proceedings consistent with their opinion.

### ATTORNEY WHO FILED FORECLOSURE SUIT CAN BE SUED UNDER FAIR DEBT COLLECTION PRACTICES ACT

Kaltenbach v. Richards, 464 F.3d 524 (5th Cir. 2006).

**FACTS:** Robert Kaltenbach purchased a mobile home and used it as a security interest on a loan from Vanderbilt Mortgage & Finance, Inc. ("Vanderbilt"). Kaltenbach stopped making payments on the loan and Vanderbilt informed him that he was in default. Vanderbilt accelerated the loan and warned Kaltenbach that they might exercise their option to repossess the home. Kaltenbach continued to miss payments and Vanderbilt retained Keith Richards, a licensed Louisiana attorney, to initiate the foreclosure process on the mobile home. Richards filed a foreclosure action, and eventually the mobile home was seized and sold.

Kaltenbach filed suit against Richards alleging that he violated §1692g of the Fair Debt Collection Practices Act ("FDCPA") by not sending a "dunning letter" before filing the foreclosure action. Richards filed a motion to dismiss for failure to state a cause of action and the district court granted the motion. They held that Richards was not subject to §1692g because he did not meet the general definition of debt collector under the FDCPA except for purposes of §1692f(6). Kaltenbach appealed the dismissal and the Court of Appeals granted review.

**HOLDING:** Reversed and remanded.

**REASONING:** The Fifth Circuit Court of Appeals disagreed with the district court's dismissal for failure to state a cause of action because a party who satisfies §1692a(6)'s general definition of a "debt collector" is a debt collector for the purposes of the entire FDCPA even when enforcing security interests. The court found the statute ambiguous as to whether a person that satisfies the §1692f(6) part of the definition and the general definition of debt collector is subject to the entire FDCPA. The court concluded that the entire FDCPA applies to a party whose principal business is enforcing security interests but who nevertheless fits § 1692a(6)'s general definition of a debt collector.

**A party who satisfies the statute's general definition of a debt collector is subject to the entire FDCPA even when enforcing a security interest.**

The court noted that if it were to hold that an actor who was enforcing a security interest was only subject to §1692f(6), it would leave §1692i(a)(1) without effect. The principles that govern statutory construction generally hold that nothing in the statute should be superfluous or void. Under §1692a(6), a party's general debt collection activities are determinative of whether they meet the statutory definition of debt collector, not the particular instance that gave rise to the dispute. The court concluded that a party who satisfies the statute's general definition of a debt collector is subject to the entire FDCPA even when enforcing a security interest. The court reversed the district court's dismissal and remanded the case for proceedings to determine whether Richards met the general statutory definition of a debt collector under §1692a(6).

### ATTORNEY CAN'T RECOVER FEES INCURRED IN COLLECTING FEES

Ween v. Dow, 822 N.Y.S.2d 257 (2006).

**FACTS:** Defendant Patricia Dow originally retained plaintiff Jeffrey Ween, pursuant to a retainer agreement, to represent her in litigation concerning her apartment business. The agreement required Dow to pay for services rendered within 30 days of receiving a billing statement. If she failed to comply, the agreement authorized the law firm to cease representation and collect a 1% monthly interest on the unpaid charges. In addition, if failure to pay resulted in a successful lawsuit, the agreement sanctioned the law firm to collect costs, expenses and attorneys' fees attributable to the collection proceedings. Dow did not pay the full balance, but she continuously rendered partial payment. Ween brought suit to collect the remaining charges. Dow cross-moved to dismiss the claim. She maintained that the provision in the agreement providing for such fees was void as against public policy. Dow claimed she was charged for "shoddy work and mistakes," and she only continued making payments because the plaintiff convinced her that she could not retain another attorney until his entire fee had been paid. Dow expressed her dissatisfaction both orally and in writing. In one letter, she complained that the "bills [were] not at all honest" because she received poor results from plaintiff's services and there was lack of progress in the litigation.

The Supreme Court of New York denied both the plaintiff's motion of summary judgment and the defendant's cross

motion for partial summary judgment.
**HOLDING:** Affirmed with modifications.
**REASONING:** The court agreed with the lower court that issues of fact did exist as to whether Dow's oral and written objections were sufficient to defeat Ween's fee claim. Additionally, Ween failed to make a prima facie case for non-payment because the invoices submitted did not show his hourly rate, the billable hours expended, or the particular services rendered. The Court also agreed that Dow's partial payments did not necessarily mean she believed the fees were correct. By raising an issue of misrepresentation (not rebutted by Ween), she created an issue of material fact to be determined by a jury.

Turning to the defendant's cross motion for dismissal of fees, the court analyzed how attorney-client fiduciary duties affected Dow's claim. Citing Judge Bellacosa, the court stated "[t]his unique fiduciary reliance, stemming from people hiring attorneys to exercise professional judgment on a client's behalf-giving counsel' - is imbued with ultimate trust and confidence." *Matter of Cooperman*, 83 N.Y.2d 465, 472 (1994). Moreover, when dealing with attorney fee arrangements, courts, as a matter of public policy, should give particular scrutiny to the reasonableness of the arrangement. *King v. Fox*, 7 N.Y.3d 181, 191 (2006); *Matter of First Nat'l. Bank of E. Islip v. Brower*, 42 N.Y.2d 471, 474 (1977). The attorney has the burden of showing that "a fee contract is fair, reasonable, and fully known and understood by the client." *Jacobson v. Sassower*, 66 N.Y.2d 991, 993 (1985); *Koral v. Koral*, 185 A.D.2d 298, 299-300, 586 N.Y.S.2d 288 (2d Dep't 1992). The court found the provision permitting recovery of attorneys' fees by the attorney should he prevail in a collection action, without a reciprocal allowance for attorneys' fees should the client prevail, fundamentally unfair, unreasonable and unenforceable. The court also noted that interest on the fees may be charged but such interest must be fair and reasonable.

## LANDLORD–TENANT

### LANDLORD FAILED TO GIVE PROPER NOTICES UNDER TEXAS PROPERTY CODE TO TENANT IN AN EVICTION ACTION

Kennedy v. Andover Place Apartments, 203 S.W.3d 495 (Tex. App.—Houston [14th Dist.] 2006).

**FACTS:** Kennedy signed a one year written lease with Andover Place Apartments requiring that Andover give Kennedy ten days to respond to an eviction notice. After sending Kennedy several notices of lease violations, Andover sent Kennedy an eviction notice. The eviction notice indicated that Kennedy had ten days to respond and thirty days to vacate. Kennedy did not respond within ten days, and Kennedy did not vacate the apartment. Andover filed an action for forcible detainer. Texas Property Code §24.002 states that "a tenant commits a forcible detainer by refusing to surrender possession of real property after the landlord has lawfully terminated the tenant's right to possession."

Kennedy argued that Andover was not entitled to prevail in its forcible detainer action because Andover did not lawfully terminate her possession. Kennedy believed that the termination of her lease was not lawful because it violated Texas Property Code § 24.005 providing that if the lease gives a tenant the chance to respond to a proposed eviction, "a notice to vacate may not be given until the period provided for the tenant to respond to the eviction notice has expired." Andover argued the contrary, that § 24.005 required only a single notice. The trial court found that Kennedy violated her lease, that Andover lawfully terminated her lease, and that Andover was entitled to possession of Kennedy's apartment.
**HOLDING:** Reversed.
**REASONING:** The court agreed with Kennedy that Andover did not lawfully terminate her lease under § 24.005. Kennedy's lease required that she have ten days to respond to the eviction notice. Andover complied with the lease requirements by giving Kennedy ten days to respond. However, the Court recognized that Andover violated §24.005 by failing to provide Kennedy with a separate notice to vacate after the ten day notice period had expired. The court held that Andover was not entitled to prevail in its forcible detainer action, reversed the trial court's judgment, and rendered judgment for Kennedy.

### LANDLORD DID NOT ACT IN BAD FAITH IN RETAINING SECURITY DEPOSIT

### LANDLORD ENTITLED TO RECOVER FOR DAMAGE TO RENTAL PROPERTY

Pulley v. Milberger, 198 S.W.3d 418 (Tex. App.—Dallas 2006).

**FACTS:** Milberger had a rental property that he leased to Pulley. The initial one year lease agreement was a form contract which included a security deposit, from which he could deduct his costs for property damage caused either by Pulley or resulting from negligent or improper use of the property.

After the initial one year lease agreement ended, Pulley renewed on a monthly basis. After six years of renting, Pulley gave one month notice of his intent to vacate the house. Milberger then tried to re-lease the house but was unable to due to the poor condition of the property. It took three months to repair the damage before the house could be shown to prospective tenants. Within days of Pulley vacating, Milberger sent Pulley a letter describing the damage to the house and that he would be keeping the security deposit since cost to repair this damage exceeded the deposit. Milberger also tried multiple times to contact Pulley directly but did not get a response.

Thirty days after vacating, Pulley sent Milberger a letter demanding the security deposit within 15 days, stating he would otherwise initiate collection. The day after receiving the letter, Milberger responded by inviting Pulley to review the documented damages and costs incurred in repairing the damages. One year later, Pulley sued Milberger for the security deposit. Milberger asserted an affirmative defense that he sent Pulley an itemized notice and counterclaimed for damages in excess of the original