definitions as well as Appleman's Insurance Law and Practice treatise in deciding that the term was unambiguous in light of its generally accepted meaning and in the context of the facts of the case. The court here adopted the same view.

Further, it was noted that a levee is a flood-control structure and its very purpose is to prevent flooding. The plaintiffs' argument that the only reasonable interpretation of the term refers to an inundation of water with natural causes was rejected by the court. Further, the court rejected the plaintiffs attempt to use the reasoning from a line of broken water main cases. First, the water main cases differ because, unlike a canal, a water main is not a body of water or watercourse. Many dictionaries define "flood" as an overthrow or inundation of a body of water or watercourse. Second, the amount of water generally released from a broken water main is not comparable to the inundation of water caused by the broken New Orleans levees. Last, a levee is a flood-control structure and its very purpose is to prevent flooding. Even a properly designed and constructed levee could result in flooding somewhere downstream which would be considered an unnatural cause. Floodwaters do not cease being floodwaters because an unnatural component, such as a levee, is injected into its path. The court failed to recognize a distinction between natural and unnatural causes of flooding because such a distinction would lead to absurd results in this context.

The amount of water generally released from a broken water main is not comparable to the inundation of water caused by the broken New Orleans levees.

Efficient proximate cause doctrine is applied where a loss is caused by a combination of a covered risk and an excluded risk. The loss is covered if the risk was the efficient proximate cause of the loss. Anti-concurrent causation clauses are the insurers attempt to contract around the operation of the efficient proximate cause rule. The Fifth Circuit agreed with the district court's determination that it did not need to address efficient proximate cause because there were not two separate causes of the plaintiffs' damage, as required by the rule.

The plaintiffs finally argued that the expectations of the reasonable homeowner would be that damage resulting from man-made floods would be covered. As the court found the policies to be unambiguous, that argument also failed. The court concluded that even if the they determined that there was negligence in designing the levees, a flood provision would still cover against damages caused by the water.

DEBT COLLECTION

LETTER DOES NOT VIOLATE FAIR DEBT COLLECTION PRACTICES ACT

Barnes v. Advanced Call Center Techs., LLC, 493 F.3d 838 (7th Cir. 2007).

FACTS: Plaintiffs filed suit against Advanced Call Center Technologies ("ACCT"), a debt collection agency that was collecting past due credit card payments from plaintiffs on behalf of a bank. Plaintiffs argued that the dunning letters ACCT sent to the plaintiffs violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §1601 *et seq*. The dunning letters listed the past-due amount as the "Current Amount Due" and did not include the total amount due on the account. Plaintiffs argued that these letters violated the FDCPA, in part because they did not list "the amount of the debt," which the Plaintiffs interpreted to be the total amount due on the account, as required by the FDCPA. A federal magistrate judge granted ACCT's motion for summary judgment. Plaintiffs appealed.

HOLDING: Affirmed.

REASONING: Reviewing the grant of summary judgment *de novo*, the court found that the dunning letter did not violate the FDCPA. The court found that the plaintiffs had misinterpreted the holding of a previous decision to mean that the entire credit card balance is the "amount of the debt" under §809 and, therefore, *necessary* for compliance. The court found that requiring letters to include the total amount due on the account but not the past-due amount would be contrary to the purpose of the FDCPA. The court rejected the argument that a consumer might be confused by the current amount due posted on the bill and believe that it is the total amount of debt owed. The court stated that it was unreasonable to believe that even an unsophisticated consumer would believe that they could relieve all their debt by paying the current balance due.

ATTORNEYS' FEES IN "WASTEFUL" DEBT COLLECTION SUIT MAY BE REDUCED

French v. Corp. Receivables, Inc., 489 F.3d 402 (1st Cir. 2007).

FACTS: David and Tammy French sued Corporate Receivables, Inc. and its employee for violation of the Fair Debt Collection Practices Act ("FDCPA") and Mass. Gen. Laws ch. 93A. Both the FDCPA and ch. 93A entitle plaintiffs who successfully recover statutory or actual damages to an award of reasonable attorney fees and expenses. Corporate Receivables made two offers of judgment, one for $2,500 and another for $3,900, which the plaintiffs rejected.

The FDCPA claim was tried before a jury and the plaintiffs received a verdict for $1,000 in statutory damages. The trial court awarded David French $1,000 and Tammy French $25 for the defendants violation of ch. 93A. The plaintiffs moved for an award of attorney's fees and expenses totaling $22,719.33. The defendants opposed this motion, as the second offer of judgment was more than the plaintiffs had been awarded. The trial court ordered a substantial reduction in the fee request to $ 2,500 because the Frenches obtained only "de minimis" success at trial. The plaintiffs appealed this order arguing that because David French obtained statutory damages for the FDCPA and ch. 93A claims, reduction was inappropriate.

HOLDING: Affirmed.
REASONING: The court began by stating that a trial court has broad discretion in determining fee awards and those awards will not be disturbed unless they constitute a manifest abuse of discretion. While FDCPA expressly states that successful plaintiffs are entitled to reasonable attorneys' fees, they are not necessarily entitled to what they request. In reviewing the testimony of the plaintiffs, the court found little evidence that they incurred actual damages. As such, "pursuing this case through trial was wasteful, especially where there was an offer of judgment that would have essentially compensated the Frenches for the amount of damages they were likely to (and did in fact) obtain." The court held the trial court's basis for reduction appropriate where the plaintiffs had limited success.

SEVERANCE PAYMENTS ARE EXEMPT AS CURRENT WAGES

General Electric Capital Corp. v. ICO, Inc., ___ S.W.3d ____ (Tex. App.—Houston [14th Dist.] 2007).

FACTS: Timothy Gollin worked for ICO as its Chief Executive Officer. Gollin's employment contract contained a severance package which was equal to his base salary immediately prior to the non-renewal of his contract. However, the contract did not state any further details regarding the severance package such as how it would be paid or over what period of time. At the end of the contract, Gollin was unable to renegotiate his employment contract. ICO wanted to pay Gollin's severance over the period of a year; however, Gollin requested a lump sum. The two parties compromised on a six-month payment period.

In the meantime, General Electric ("GE") obtained a judgment against Gollin for a total of $389,102. GE pursued a garnishment action against ICO, who owed Gollin one-year salary of $247,000. The trial court issued a writ of garnishment. Gollin filed a motion to dissolve the writ. The trial court granted Gollin's motion and dissolved the writ. GE appealed.
HOLDING: Affirmed.
REASONING: Texas Rule of Civil Procedure 664(a) allows for a defendant whose property or account has been garnished to seek to vacate, dissolve, or modify the writ of garnishment for any grounds or cause, extrinsic or intrinsic. Under Texas law, one such ground is the exemption from garnishment for "current wages for personal service." Tex. Const. art XVI, §28; 28. The garnishment exception applies for current wages without regard to whether the compensation is "wages" or "salary." This exception should be liberally construed in favor of the wage earner. The issue was whether the employment contract and severance package was an agreement for "personal services." The severance package itself stated only that severance was owed but not why it was owed. Where no contradictory contract language exists, the court holds that a severance payment should be liberally construed as a bonus for satisfactory service, because such payments might be considered additional compensation for services previously rendered. Based on the liberal application of the garnishment exception, the trial court acted within its discretion when it found that the severance payment was in the nature of current wages for personal service.

DEBTOR CANNOT KEEP PERSONAL INJURY SETTLEMENT

In re Ford, 492 F.3d 1148 (10th Cir. 2007).

FACTS: Tonda Ford was seriously injured in a car accident in December 2003. As a result, Ford was treated for extensive injuries. These injuries caused her to miss work as a paralegal to attend follow-up therapy sessions. Shortly after the accident, Ford retained a law firm to represent her in bringing a claim against the driver of the other vehicle. The firm filed a complaint on Ford's behalf in February 2004 seeking general damages for pain and suffering, past and future medical expenses, lost earnings, loss of earning capacity, and loss of property.

Encountering financial difficulties after the accident, Ford and her husband filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code in May 2004. Along with her petition for bankruptcy, Ford and her husband completed schedules listing their assets and debts. On the schedule requiring the Fords to disclose all of their assets, including legal claims they might have against others, Ford did not disclose her damages claim in the pending accident case. While her bankruptcy case was pending, Ford never informed her bankruptcy counsel of the accident litigation. The bankruptcy case was closed in August 2004, when the Trustee filed a no-asset report. The personal injury suit was still pending at this time.

The court concluded that Ford intentionally concealed the personal injury claim in order to benefit herself and prejudice her creditors.

Ford said she did not become aware of her obligation to disclose the personal injury suit until shortly after her bankruptcy case closed. In September 2004, Ford's personal injury suit settled for $50,000. After considering the admitted evidence, hearing Ford's testimony, and assessing her credibility, the court concluded that Ford intentionally concealed the personal injury claim in order to benefit herself and prejudice her creditors. Ford explained that based on her paralegal training she intentionally failed to disclose the claims because she believed personal injury claims were exempt from creditors under state law. The bankruptcy court concluded that Ford sought the exemption in bad faith and denied the exemption. The 10th Circuit Bankruptcy Appellate Panel reversed, concluding the bankruptcy court's findings of bad faith were clearly erroneous and that its denial of the exemption was an abuse of discretion.
HOLDING: Affirmed.
REASONING: The bankruptcy court found, under both state and federal rules, Ford was required to disclose the settlement as an asset of her estate, contingent or otherwise, and then seek an exemption. These rules allow the trustee to investigate whether the claimed exemption is valid and ensure the debtor's estate is complete. The bankruptcy court ruled that (1) Ford had knowledge of the undisclosed claim, and had a motive for its concealment; (2) because of her paralegal training, Ford knew that the claim was exempt and therefore made a conscious decision not to disclose it; (3) Ford falsely failed to disclose the claim on her schedule; and (4) Ford's failure to disclose the claim was a

blatant dishonesty resulting in her intent to hinder the Trustee's administration of the estate which would prejudice.

The 10th Circuit Court of Appeals, under a clearly erroneous standard of review, found that the bankruptcy court's findings were "not completely devoid of minimum evidentiary support" and bore a "rational relationship to the supportive evidentiary data." *Gillman v. Scientific Research Prods.*, 55 F.3d 552, 555 (10th Cir. 1995).

THE MERE PAYMENT OF PART OF A DEBT WHICH IS UNDISPUTED IS NOT SUFFICIENT CONSIDERATION TO SUPPORT A PROMISE OF FULL PAYMENT OF THE DEBT

Petty v. Citibank (South Dakota) N.A., 218 S.W.3d 242 (Tex. App.—Eastland 2007).

FACTS: Leon Petty obtained from Citibank (South Dakota) N.A. an "AT&T Universal Platinum MasterCard" credit account in 2001. As of February 2005, Petty owed Citibank an excess of $11,000. On February 14, Petty paid $5,900 and asserted that Citibank accepted the payment in full settlement of his debt, based on conversations with an account representative and on restrictive endorsements placed on the check. Citibank cashed the check, which contained the restrictive endorsement "Do not deposit unless for full settlement amount" on the back and a written note stating "paid in full" on the front.

Citibank filed suit in April 2005 to recover the remainder of the debt. In response to Citibank's motion for summary judgment, Petty asserted the affirmative defense of accord and satisfaction. The trial court granted Citibank's motion for summary judgment and awarded a judgment in the amount of $5,441.17 as well as attorney's fees and post-judgment interest. Petty appealed and argued, among other issues, that summary judgment was improper given that he had raised a fact issue to support his defense of accord and satisfaction.

The court held that Petty did not establish a common law or statutory defense of accord and satisfaction.

HOLDING: Affirmed.

REASONING: The court held that Petty did not establish a common law or statutory defense of accord and satisfaction. The defense of accord and satisfaction required proof of a new contract in which the parties agreed to discharge an existing obligation for a lesser payment. The evidence must show that the parties agreed that the lesser amount paid constituted full satisfaction and that an unmistakable communication was made to the creditor that acceptance of the lower amount constituted satisfaction. Petty's defense was based on an oral agreement made with a Citibank representative, and his check carried restrictive endorsements that his payment was to constitute full satisfaction.

The court addressed the statutory defense of accord and satisfaction under the Texas Business & Commercial Code ("Code"). Although Code section 3.311 provides a method to discharge debts by accord and satisfaction, it only applies to claims that are unliquidated or subject to a bona fide dispute under section 3.311(a)(2). Comment 4 of section 3.311 explicitly states that the rule does not apply to liquidated damages or amounts that are not subject to a bona fide dispute. Petty's outstanding debt to Citibank was not in dispute, thus he cannot rely on section 3.311.

The court reasoned that Petty's claim also failed in common law because the accord and satisfaction was not supported by consideration. The court cited the rule that mere payment of part of a debt is not sufficient consideration to support a promise to accept the same in full payment of the debt and does not bar the creditor's suit to recover the balance. Further, the court noted that an unliquidated claim or good faith dispute as to liability on a liquidated claim furnishes sufficient consideration to support accord and satisfaction. Because there was no dispute as to the amount Petty originally owed to Citibank, there was no consideration to support the agreement with the Citibank representative as a matter of law.

OUTRAGEOUS CONDUCT BY CREDITOR MAY CONSTITUTE ASSAULT

Pierce v. State, 218 S.W.3d 211 (Tex. App.—Texarkana 2007).

FACTS: Clarence Pierce accompanied Mike Simpson as "muscle" in order to collect a debt owed to Simpson from Greg Gideon. When Gideon saw Pierce and Simpson arrive at his home, he armed himself with a metal baseball bat. At some point after Simpson demanded money from Gideon, Gideon was disarmed and severely beaten by Pierce using the metal bat. Although he claimed that the debt was already paid, Gideon gave the men money in order to end the beating.

Pierce was charged and convicted of aggravated robbery. Appealing his conviction, Pierce argued, among other things, that he could not commit theft since Simpson was a creditor who cannot commit theft in the process of collecting a debt.

HOLDING: Affirmed.

REASONING: Under an unusual interpretation of the law of parties, the court limited its analysis to consider if Simpson could commit theft (an element of aggravated robbery) as a creditor and, thus, whether Pierce could assert Simpson's creditor status as a defense. The court found little evidence that Simpson was a creditor at the time of the beating, as there was testimony from Gideon and his family indicating that the debt was fulfilled prior to the assault.

Even under the assumption that Simpson was still a creditor, the court adopted the position that a creditor who uses force to collect a debt can commit aggravated robbery. Echoing the public policy considerations in *Crawford v. State*, 509 S.W.2d 582 (Tex. Crim. App. 1974), the court found that to excuse a creditor's assault during collection of a debt would encourage parties to decide their own damages and then enforce collection thereof by violence.

LAW FIRM CAN BE SUED FOR VIOLATING FAIR DEBT ACT

Sayyed v. Wolpoff & Abramson, 485 F.3d 226 (4th Cir. 2007).

FACTS: Discover Card retained Wolpoff & Abramson ("W&A"), a law firm in the field of consumer debt collection,

to pursue an action against Farid Sayyed for a default on credit card debt. W&A sued Sayyed in Maryland state court to collect the balance due. W&A moved for summary judgment in the suit. Sayyed sued W&A in federal court alleging W&A violated the Fair Debt Collection Practices Act ("FDCPA"). The alleged violations stemmed from W&A's interrogatories to Sayyed and its summary judgment motion. W&A filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(6). W&A argued that attorneys enjoy absolute common law immunity from claims based on statements made in the course of judicial proceedings. Alternatively, even if W&A was not entitled to immunity, they argued that the interrogatories and summary judgment motion were served upon Sayyed's counsel rather than Sayyed himself, and thus could not give rise to violations of the FDCPA. Lastly, W&A argued that any allegedly false statements were based upon information furnished to W&A by Discover, and therefore, W&A had the right to rely upon that information. The district court concluded that W&A enjoyed absolute immunity from the FDCPA for its interrogatories and summary judgment motion, and thus dismissed the case.

HOLDING: Reversed and remanded.

REASONING: The court stated that no absolute common law immunity attaches to law firms that constitute debt collectors because the FDCPA clearly defined the parties and activities it regulated. The court looked at section 1692a(6) of the FDCPA and noted that the plain meaning of the Act's definition of "debt collector" encompasses attorneys. Further, the court found that the FDCPA states six specific exceptions to the definition of "debt collector," none of which W&A met. Therefore, according to the plain text of the statute, W&A was a debt collector subject to the provisions of the FDCPA.

In *Heintz v. Jenkins*, 514 U.S. 291, 293 (1995), the Supreme Court expressly confirmed this reading of the FDCPA. The Supreme Court recognized that an earlier version of section 1692a(6) had provided an express exception for lawyers, but that this exemption was repealed by Congress in 1986. Thus the Supreme Court confirmed that there is no implied exemption to the statute's definition of debt collector. As is clear from its face, the FDCPA "applies to the litigating activities of lawyers."

The court found that Congress expressly addressed the issue of immunity and extended it only as far as provided by section 1692k(c): bona fide errors and non-intentional violations. Under the plain meaning of the FDCPA, a litigating attorney fell under the statute's definition of "debt collector." Therefore, the court recognized that even if conducting litigation, lawyers may be engaged in the collection of debts.

In *Heintz*, the Supreme Court held that there was a cause of action under the FDCPA on the basis of statements contained within a letter to counsel. Therefore in the current case, the court reasoned that FDCPA liability could attach to communications made by a debt collection attorney to a debtor's counsel, because the statute defines "communication" broadly as "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. §1692a(2).

CONSUMER CREDIT

CREDIT REPORT ERROR WAS NOT UNREASONABLE

Dennis v. BEH-1, LLC, 485 F.3d 443 (9th Cir. 2007).

FACTS: Jason Dennis was served with an unlawful detainer complaint by his landlord, BEH-1, LLC. BEH-1 agreed to drop the suit in exchange for $1,959 to be paid in installments. Dennis and BEH-1 agreed that no judgment would be entered. Despite their agreement, the court's register reflected that a judgment was, in fact, entered.

Dennis received a credit report from Experian Information Solutions, Inc. which indicated that a civil claim judgment had been entered against him. Dennis called Experian to inform them of the error. Experian in turn contacted Hogan Information Services, a third-party public records vendor to verify the disputed information. Hogan informed Experian that the information was accurate. Experian informed Dennis that it would not amend the report.

Dennis sued Experian alleging violations of the California Consumer Credit Reporting Agencies Act. The district court granted summary judgment to defendants on all claims. Dennis appealed, challenging the summary judgment ruling arising from Experian's duty to maintain "reasonable procedures" to ensure the accuracy of credit reports under section 1681(b).

HOLDING: Affirmed.

REASONING: To maintain a claim under section 1681(b), a plaintiff must show that the credit reporting agency failed to maintain "reasonable procedures" to insure the accuracy of its reports. Once a plaintiff establishes that his credit report is inaccurate, "[t]he reasonableness of the procedures and whether the agency followed them will be jury questions in the overwhelming majority of cases." *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995). Credit agencies are obligated to follow "reasonable procedures" to ensure that reports accurately reflect creditworthiness. The only alleged defect in Experian's initial investigation was that it relied on secondary documents without obtaining a copy of the actual judgment. The documents were official records issued by the Superior Court. Thus, it was reasonable, as a matter of law, for Experian to base its initial report on the secondary documents without doing any additional investigation.

SUPREME COURT SETBACK NO BAR TO ATTORNEY FEES UNDER TILA

Nigh v. Koons Buick Pontiac GMC, Inc., 478 F.3d 183 (4th Cir. 2007).

FACTS: Nigh filed suit against Koons alleging conversion, breach of contract, fraud, and violations of the Federal Odometer Act, Truth In Lending Act ("TILA"), and Virginia Consumer Protection Act ("VCPA"). A jury returned a verdict for Nigh under TILA and VCPA. Koons appealed its liability and the amount in damages, costs, and attorneys' fees awarded to Nigh. The Fourth Circuit affirmed the district court's judgment in all respects and awarded an additional $11,840 in attorneys' fees