a claim with respect to which its liability had become reasonably clear and refused to pay a claim without conducting a reasonable investigation.

Moreover, the jury was entitled to believe that Culbert's subsequent investigation into any preexisting injury suffered by Ruttiger was merely an attempt to justify Culbert's prior dispute of Ruttiger's claim. In fact, Culbert conceded that, according to TMI's own standards, TMI needed "extremely persuasive medical opinions" to deny coverage based on a preexisting medical condition. He further agreed that, as of the date of trial, TMI did not have any extremely persuasive medical opinions establishing this defense. Accordingly, the court held that the evidence was legally sufficient to support the jury's finding that TMI "knowingly" violated the Texas Insurance Code.

DEBT COLLECTION

DEMAND FOR USURIOUS INTEREST IN LETTER IS A CHARGE EVEN IF LETTER NEVER RECEIVED

Allen v. Am. Gen. Fin., ____ S.W.3d ____ (Tex. App.—San Antonio 2007).

FACTS: Kyle Allen was served a citation for delinquent taxes on a San Antonio property deeded to him by his father. Upon learning of the citation, Allen came to Texas from his home in Oregon and sought a home equity loan from American General Finance ("AGF") for the purpose of paying the property taxes. AGF assured Allen that it routinely paid customers' delinquent taxes, and that it would "pay the taxes and handle the suit." AGF loaned Allen the minimum loan amount of $15,000 and agreed to pay Bexar County for the delinquent taxes and the remainder to Allen. However, AGF underpaid Bexar County. As a result, Bexar County continued its tax suit and eventually foreclosed on the San Antonio property in late July. After the foreclosure sale, Allen filed a redemption action and recovered approximately $30,000, the excess proceeds of the foreclosure sale.

AGF filed suit against Allen seeking a constructive trust against Allen's redeemed proceeds for his failure to pay the home equity loan. In response to the suit, one of the issues raised by Allen was AGF's usurious interest rate. The trial court found, inter alia, that AGF's interest rate was indeed usurious, as it was in excess of the 18% allowable by law. The trial court awarded Allen the difference between the proceeds obtained from the foreclosure sale and the amount due for delinquent taxes. Allen and AGF appealed.

HOLDING: Affirmed.

REASONING: The Court of Appeals disagreed with AGF's contention that it was not liable for usury as a matter of law, because there was no evidence it "charged" a usurious rate of interest because Allen never received the letter demanding the rate.

In *George A. Fuller Co. v. Carpet Servs., Inc.*, the Supreme Court of Texas held that a claim for prejudgment interest in a pleading is not a "charge" within the meaning of the usury statute because a charge must be communicated to the debtor and a pleading was not a communication to the debtor. 823 S.W.2d 603 (Tex.1992). In *Fuller,* the supreme court explained that the required communication to the debtor need not be direct, as long as the charge is ultimately demanded from the debtor. In the present case, the usurious charge was "demanded from the debtor" by and through AGF's August 1998 letter. The letter constitutes a "communication outside the organization making the charge" and it was unnecessary for the debtor to actually receive the demand letter in order for AGF's charge to be usurious.

COMPANY THAT PURCHASED BAD CHECKS IS A "DEBT COLLECTOR"

F.T.C. v. Check Investors, Inc., 502 F.3d 159 (3rd Cir. 2007).

FACTS: Check Investors purchased $348 million worth of checks written on accounts with insufficient funds ("NSF checks"). Check Investors purchased the NSF checks from Telecheck and other businesses that guaranteed checks tendered to pay for consumer transactions. In collecting the checks, Check Investors added a fee that exceeded the legal limit for such fees under the laws of most states. Check Investors then aggressively demanded payment from defaulting payors without disclosing the original face amount and the addition of the fee.

Check Investors' collection practices included letters and phone calls accusing the payors of being criminals and threatening criminal or civil prosecution. It also mailed phony letters purporting that an attorney had been retained in pursuit of a criminal or civil action. Check Investors never notified law enforcement authorities nor took any steps towards civil actions. Check Investors also contacted payors' family members, inundated payors with phone calls, and used abusive language.

The Federal Trade Commission ("FTC") filed a seven-part complaint against Check Investors alleging violations of the Federal Trade Commission Act ("FTCA"), the Fair Debt Collection Practices Act ("FDCPA"), and sought injunctive relief and restitution for injured consumers. Specifically, the FTC alleged use of abusive language, calling consumers repeatedly, falsely representing that communications came from an attorney, falsely representing that the consumers would be arrested or imprisoned, falsely threatening legal action, and adding impermissible charges to the face amounts of the debts it was collecting. The district court granted the FTC's motion for summary judgment, denied Check Investors' motion for summary judgment, permanently enjoined Check Investors and charged it with restitution damages of over $10 million. Check Investors appealed.

HOLDING: Affirmed.

REASONING: Check Investors did not dispute that it engaged in the practices listed in the FTC complaint. It instead argued that the FDCPA and the FTCA did not apply because it was not a "debt collector" as defined in the FDCPA. Check Investors argued it was a "creditor" because it bought the obligations outright and that they were neither transferred nor assigned. Additionally, it argued that payors owed it a debt and that it had not received the NSF checks "solely for the purpose of" collecting the debt from Telecheck and other similar businesses.

The court found this argument rather clever, but wrong. The court held Check Investors was a "debt collector" and not a "creditor" under the FDCPA. The court stated that an assignee is deemed a "debt collector" if the obligation was already in default when it was assigned, and conversely that an entity is a "creditor" if the debt it was attempting to collect was not in default when acquired. Thus as to a specific debt, one could not be both a "creditor" and a "debt collector." The court found that Check Investors acquired the defaulted checks only for collection purposes because, even though they owned the NSF checks outright, they had no intention of servicing the debt to preserve goodwill like a typical creditor. The court noted that Check Investors course of conduct exemplified why Congress enacted the FDCPA and created the distinction between "creditor" and "debt collector" in the first place.

COLLECTION LETTER VIOLATES FAIR DEBT COLLECTION PRACTICES ACT

Jacobson v. Healthcare Fin. Servs., 516 F.3d 85 (2nd Cir. 2008).

FACTS: Healthcare Financial Services ("HFS") sent Gershon Jacobson a collection letter, which stated Jacobson had 30 days to pay or dispute his debt. Jacobson filed a complaint alleging HFS violated the Fair Debt Collection Practices Act ("FDCPA") by divesting the consumer of his rights to dispute the debt for 30 days after receipt of the collection letter. Jacobson sought statutory damages and attorneys' fees.

HFS moved for dismissal or alternatively summary judgment. The trial court granted summary judgment and Jacobson appealed.

HOLDING: Reversed.

REASONING: The court reviewed *de novo* whether the collection letter violated the FDCPA. The court stated that it determines whether a communication complies with the FDCPA from the perspective of the "least sophisticated consumer." This perspective protects consumers against deceptive debt collection practices and creditors from unreasonable constructions of their communications. The court stated an accurate validation notice might still violate the FDCPA if other language in a collection letter overshadows or contradicts the notice according to the least sophisticated consumer standard.

The court held even the least sophisticated consumer would understand that the 30 day period began upon receipt of the letter.

Jacobson argued that HFS's collection letter might lead the least sophisticated consumer to be uncertain whether she had any right to dispute the debt at all before paying it. The court rejected this argument finding the collection letter adequately explained that the recipient had the right to seek verification of the debt. The validation notice along with the demand for immediate payment and an explanation of the notice were on the front page of the letter.

Jacobson also argued that the collection letter was confusing as to when the 30 day period for dispute began: the date printed on the letter, or the day the letter was received. FDCPA § 1692g(a)(3) requires the later. The court held even the least sophisticated consumer would understand that the 30-day period began upon receipt of the letter. In one place, the letter said that payment or notice must be submitted within 30 days; however, in the explanation of the validation notice, the letter said within 30 days of receipt. The court found the validation notice cleared up any ambiguity.

Finally, Jacobson argued that the collection letter inaccurately explained the end date for disputing the payment of the debt. The letter said payments or disputes must be received by HFS within 30 days rather than sent within 30 days. The court examined the statutory language of § 1692g and found that the statute requires the mailing of the dispute or payment within 30 days, not that the dispute or payment be received within 30 days. Because HFS's collection letter required receipt within 30 days, the court held it violated FDCPA § 1692g.

ATTORNEY LIABLE AS "DEBT COLLECTOR" UNDER FAIR DEBT COLLECTION PRACTICES ACT

Kistner v. Law Offices of Michael P. Margelefsky, LLC, 518 F.3d 433 (6th Cir. 2008).

FACTS: Attorney Michael P. Margelefsky was the sole member of the Law Offices of Michael P. Margelefsky, LLC and under that name Margelefsky operated both a law practice and a debt collection agency. Margelefsky admitted in his deposition that he drafted the form letter that was sent to Amanda Kistner in relation to her Cincinnati Bell account, was one of only two attorneys at the law firm, was the only member of the LLC, and was the one who negotiated terms with the mailing service provider used in the debt-collection practice. He also admitted in his brief that he was involved in the debt collection practice "to oversee compliance with applicable collection laws and when the intervention by a lawyer became necessary." Margelefsky's signature did not appear on the collection notice that was sent to Kistner, but the remittance voucher attached to the letter directed Kistner to make her check or money order payable to Margelefsky individually.

Kistner filed a complaint alleging that Margelefsky violated six provisions of the Fair Debt Collection Practices Act ("FDCPA"). Following discovery, both sides moved for summary judgment. The district court denied Kistner's motion and granted the joint motion of the Law Offices and Margelefsky.

HOLDING: Reversed.

REASONING: At issue before the court was whether an individual member of an LLC that engaged in debt collection may be held liable under FDCPA without piercing the corporate veil. The court stated that liability under the FDCPA attaches only to a "debt collector," a term defined as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debt, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."

The court stated that Ohio law precludes personal liability for members of an LLC on the basis of the LLC's liability.

The court adopted the analysis in *Brumbelow* and held that subjecting the sole member of an LLC to individual liability for violations of the FDCPA required proof that the individual was a "debt collector," but did not require piercing the corporate veil. 372 F. Supp. 2d 615 (D. Utah 2005). The court stated that Margelefsky's alleged liability was not premised solely on the fact that he worked for, and was the sole member of, the Law Offices, but because he was "regularly engaged, directly and indirectly, in the collection of debts." The court concluded that given the facts as stated above, Margelefsky was a "debt collector" as a matter of law and thus subject to individual liability.

HOME EQUITY LOAN PENALTIES DO NOT APPLY TO VALID LIENS THAT WERE REFINANCED

LaSalle Bank Nat'l Ass'n v. White, 246 S.W.3d 616 (Tex. 2007).

FACTS: Lorae White obtained a home-equity loan on a homestead designated for agricultural use. The loan was later assigned to LaSalle Bank. The original lender used a portion of the loan to pay off White's purchase-money mortgage, another portion to pay off state property taxes and disbursed the rest to White. White failed to make timely payments on the loan and LaSalle filed a homestead equity loan foreclosure. White sued seeking declaratory judgment that LaSalle had forfeited the principal and interest.

The trial court held that the Texas Constitution prohibited home-equity loans from being secured by homestead property designated for agricultural use. The court of appeals affirmed and held that the Texas Constitution prohibited equitable subrogation for the portions of the loan used to refinance White's pre-existing homestead debts. LaSalle appealed.
HOLDING: Affirmed in part, reversed in part and remanded.
REASONING: The court affirmed that the portion of the loan directly disbursed to White was in violation of the Texas Constitution. LaSalle did not challenge its forfeiture of principal and interest as to the portion of the loan disbursed to White. However, it argued that it was entitled to the common law right of equitable subrogation for the portion of the loan used to pay off the pre-existing mortgage and property taxes.

"[o]nce valid, the lien does not become invalid against the homestead simply because the original debt has been refinanced."

The court stated that the pre-existing purchase-money mortgage and the property tax liens were valid liens against White's homestead. The court cited *Benchmark Bank v. Crowder*, in which the court held that "[o]nce valid, the lien does not become invalid against the homestead simply because the original debt has been refinanced." 919 S.W.2d 657, 661 (Tex.1996). Equitable subrogation allows the refinancing lender to step into the shoes of the original lien holder. The court found that equitable subrogation protects homesteads from foreclosure by allowing the owner the opportunity to refinance loans. Finally, the court held that invalidation of LaSalle's lien does not preclude it from equitable subrogation.

DEMAND LETTERS SENT BY COMPANY DID NOT CONSTITUTE EVIDENCE THAT THE COMPANY WAS DOING BUSINESS

State v. Life Partners, Inc., 243 S.W.3d 236 (Tex. App.—Waco 2007).

FACTS: Life Partners ("LP") is a viatical settlement company that facilitates the sale of life insurance policies to investors. When LP mailed "demand letters" notifying Travis County investors that their escrow accounts were depleted and that an additional fee must be paid to prevent the policy from lapsing, the State of Texas filed suit on behalf of the public interest. The trial court transferred venue from Travis County to McLennon County and granted LP's motion for summary judgment. On appeal, the State of Texas argued that the trial court erred by transferring venue because the demand letters mailed to investors constituted evidence that LP did business in Travis County.
HOLDING: Affirmed.
REASONING: The court looked at LP's transactions within Travis County to determine if LP was doing business within that venue. Multiple transactions, even if unrelated to the facts of the case, are sufficient to establish venue. Likewise, a single transaction is sufficient to establish venue if it forms the basis of the lawsuit, but is insufficient if it "does not relate to the facts upon which the plaintiffs cause of action is based." *FDI Inv. Corp. v. S.S.G Invs.,* 663 S.W.2d 135, 138 (Tex. Civ. App.—Fort Worth 1983). The State of Texas alleged that LP engaged in multiple transactions with insureds, investors, and insurance companies located in Travis County and mailed demand letters to Travis County investors.

LP admitted contracting with these parties, but maintained that: (1) these individuals initiated communication by contacting LP in McLennon County; (2) LP executed all contracts there; and (3) all discussions and negotiations occurred there. LP does not dispute mailing letters to the investors, but contends that the letters were "merely reminders of obligations on contracts already culminated and executed in McLennon County." The court agreed with LP that the actionable representation was not in the letters, but in the original contract. The court held the letters did not constitute "doing business" in Travis County.

CONGRESS DID NOT WAIVE THE SOVEREIGN IMMUNITY OF THE UNITED STATES BY ENACTING THE FAIR DEBT COLLECTION PRACTICES ACT

Wagstaff v. U.S. Dep't of Educ., 509 F.3d 661 (5th Cir. 2007).

FACTS: Audrey Wagstaff took out student loans to attend Our Lady of the Lake University in San Antonio, Texas. She signed six promissory notes payable to various lenders. After graduating, she was gainfully employed. Nonetheless, she never made a single voluntary payment on her student loan debt.

The Texas Guaranteed Student Loan Corporation ("TGSLC") guaranteed the student loans, which the Department of Education ("DOE") reinsured using federal funds. Upon default, TGSLC paid the underlying claims to the various lenders, was reimbursed by the DOE, and assigned its rights and title to the DOE for collection purposes. In 1999, the DOE filed suit in federal court seeking judgment on the unpaid student loans. Wagstaff raised the issue of whether all six notes were valid. After the DOE determined that all six notes were valid it resumed efforts to collect the debt administratively by offsetting Wagstaff's tax refunds in 2005 and 2006 and it approved the garnishment of her wages in 2005.

In 2005, Wagstaff filed suit in federal court alleging a claim under the Fair Debt Collection Practices Act ("FDCPA"). The DOE filed a motion to dismiss, or in the alternative, for summary judgment. In granting the motion, the district court held that it lacked subject matter jurisdiction and that Wagstaff failed to raise a genuine issue of material fact as to any of her claims and that the DOE was entitled to judgment as a matter of law.

HOLDING: Affirmed.

REASONING: The issue of whether Congress waived the sovereign immunity of the United States by enacting the FDCPA was one of first impression for the Fifth Circuit. "In order to hale the federal government into a court proceeding, a plaintiff must show that there has been a valid waiver of sovereign immunity." "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text . . . and will not be implied." "Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text. "Absent a waiver of sovereign immunity, the federal government is immune from suit." Finally, "[t]he absence of such a waiver is a jurisdictional defect."

The court found Wagstaff failed to cite a single provision in the FDCPA that unequivocally and expressly waives the sovereign immunity of the United States. Instead, she argued that the DOE waived its own sovereign immunity by acting through a third party to collect on her student loan debt, filing suit in 1999 to enforce judgment on her debt, and informing her that she had a right to bring suit in federal court to seek review of the decision to garnish her wages. The court rejected these arguments based on the longstanding principle that only Congress can waive an executive agency's sovereign immunity. The court held that because the FDCPA does not contain an unequivocal and express waiver of sovereign immunity, the district court correctly held that it lacked subject matter jurisdiction in this case.

CONSUMER CREDIT

FAIR CREDIT REPORTING ACT AMENDMENT IS NOT RETROACTIVE

Killingsworth v. HSBC Bank Nevada, N.A., 507 F.3d 614 (7th Cir. 2007).

FACTS: The court consolidated two cases that required them to determine whether an amendment to the Fair Credit Reporting Act ("FCRA") eliminating private rights of action, had an impermissible retroactive effect when applied to FCRA claims that accrued prior to the amendment's effective date.

Killingsworth received a prescreened credit card offer from Household Bank prior to August 2004. She claimed the offer contained FCRA disclosures that were not clear and conspicuous. Sawyer applied for auto insurance with Ensurance Insurance Services, Inc. ("Ensurance") in October 2004. Ensurance obtained his credit report in connection with that application. Sawyer alleged Ensurance violated the FCRA by charging him a higher rate based on negative information in his credit report without giving him notice of that adverse action, and by using his initial credit information for subsequent renewals of his policy when corrected credit information would have qualified him for a lower rate.

Both plaintiffs filed class action lawsuits. The district court dismissed both complaints based on section 311 of the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), which amended the FCRA to eliminate enforcement of certain FCRA provisions by private civil suit. *See* 15 U.S.C. § 1681m(h)(8). Sawyer and Killingsworth argued that the amendment, effective December 1, 2004, impaired rights they possessed prior to the new statute's effective date and therefore had an impermissible retroactive effect if applied to them.

HOLDING: Reversed and remanded.

REASONING: Section 1681(m) presented a threshold issue in both appeals of whether FACTA eliminated private causes of action for the particular violations of the section. If applied retroactively, § 1681m(h) would eliminate both of their claims. Unless Congress expressly calls for retroactivity, courts presume an enactment has prospective effect. The defendants argued that Congress did specify FACTA's reach, but through negative implication. The court found that § 312(f) of FACTA preserved private causes of action for liability that accrued prior to FACTA's date of enactment, but the court found defendant's argument did not hold because FACTA had different enactment and effective dates. Drawing a negative inference from § 312(f) fails to distinguish between FACTA's enactment and effective dates, or account for claims arising between the two dates. Were the court to apply it here, the negative implication argument would simply conflate FACTA's enactment and effective dates. The court found the latter date would have no meaning if all claims accruing after the date of enactment were extinguished without regard to the effective date.

The court found Congress had not clearly spoken to the question of whether § 1681m(h)(8) applied to FCRA claims that arose between FACTA's enactment and effective dates. The court sought to determine whether the application of § 1681m(h)(8) would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would have any of these effects, the "traditional presumption" of prospectivity would apply.

Prior to FACTA's effective date, Killingsworth had a right of private civil action for damages, a right that would have been impaired had § 1681m(h)(8) been applied retrospectively. The