injury. Nokia had purchased a general commercial insurance policy from Zurich American Insurance Company. In Nokia's policy, Zurich agreed to defend Nokia against suit, but reserved the right to contest the obligation to defend. As a result of the class action suit against Nokia, Zurich sued Nokia, seeking a declaration that Zurich had no duty to defend or indemnify.

The trial court granted Zurich's motion for summary judgment, declaring that Zurich had no duty to defend Nokia. Nokia appealed, and the court of appeals reversed the trial court's ruling, noting that the suits at issue involved a claim of alleged bodily injury and the business risk exclusion did not apply. On appeal to the Texas Supreme Court, Zurich argued that they had no duty to defend Nokia in the class action suit because the class action did not state claims for bodily injury or seek damages because of bodily injury.

HOLDING: Affirmed as modified.

REASONING: In determining whether a duty to defend exists, the Texas Supreme Court follows the eight-corners rule, also known as the complaint-allegation rule. An insurer's duty to defend is determined by the third-party plaintiff's pleadings, considered in light of the policy provisions, and without regard to the truth or falsity of those allegations. All doubts regarding the duty to defend are resolved in favor of the duty. Where the complaint does not state facts sufficient to clearly bring the case within coverage, the general rule is that the insurer is obligated to defend if there is potentially a case under the complaint within. The insurance policy stated that it covered bodily injury, whereas all of the complaints couched the term as biological injuries. The court was unable to state with certainty that the underlying claims did not seek damages for bodily injury because the terms could have the same meaning.

The court concluded that where a suit includes a potentially covered claim, the insurer must defend the entire suit, even if the claim is groundless or fraudulent. Additionally, the court concluded that where there are covered and non-covered claims in the same lawsuit, the insurer is obligated to provide a defense to the entire suit, at least until it can limit the suit to those claims outside of the policy coverage. The court modified the court of appeals' judgment to provide a duty to defend ended upon filing of the second amended complaint and, as modified, the court affirmed.

DEBT COLLECTION

ATTEMPY TO COLLECT AMOUNTS DUE DID NOT VIOLATE AUTOMATIC STAY

Campbell v. Countrywide Home Loans, Inc., 545 F.3d 348 (5th Cir. 2008).

FACTS: Caesar and Pamela Campbell obtained a loan from Countrywide Home Loans for the purchase of a home. Campbells' monthly mortgage payment contained two distinct elements. It included the monthly installment for principal and interest, and it collected one twelfth of the estimated property taxes and insurance due on the property at year's end. Tax and insurance payments were deposited into an escrow account. Campbells filed a Chapter13 Bankruptcy. Countrywide filed a proof of claim, listing delinquent pre-petition monthly principal and interest payments, escrow expenses from prior years, and other costs and fees. Countrywide did not include in its claim four months of unpaid escrow payments, which accrued before the bankruptcy.

In addition to its listed claims, Countrywide indicated, in its proof of claim, that it intended to increase Campbells' monthly mortgage payment post-petition to recoup the four months of escrow payments that were unpaid prior to the bankruptcy. Campbells objected to the increase in the mortgage payment, complaining that Countrywide's actions were an impermissible attempt to recover a claim against them that arose before the commencement of the bankruptcy case. The bankruptcy court agreed, granting partial summary judgment and holding that Countrywide's actions constituted a willful violation of the automatic stay. Countrywide appealed challenging the finding that it violated the automatic stay.

HOLDING: Reversed and rendered.

REASONING: The court held that a willful violation of an automatic stay means acting with knowledge of the stay. Whether the party believes in good faith that it had a right to the property is irrelevant to whether the act was willful or whether compensation must be awarded. Therefore, to establish an actionable violation of the automatic stay the Campbells must establish: (1) that Countrywide knew of the existence of the stay; (2) that Countrywide's actions were willful; and (3) that Countrywide's actions violated the automatic stay. It is undisputed that Countrywide knew of the existence of the stay and that it acted willfully and intentionally when it asserted the right to an increased mortgage payment in its proof of claim. The only issue in controversy was whether Countrywide's actions violated the stay.

Filing for a proof of claim is the logical equivalent of a request for relief from the automatic stay, and could not in itself constitute a violation of the stay.

Certain categories of actions are statutorily identified as prohibited by the automatic stay. None of these provisions bar a creditor from filing a proof of claim pursuant to bankruptcy code §501. The court found no precedents in which a court has held that asserting a right to payment in a proof of claim constituted a violation of the automatic stay. In fact, the court pointed to a similar case where a bankruptcy court held that filing for a proof of claim is the logical equivalent of a request for relief from the automatic stay, and could not in itself constitute a violation of the stay. The court viewed the analysis persuasive that the Bankruptcy Code allowed creditors to assert any claim even if that claim is contingent, un-matured or disputed. In this case, Countrywide filed a claim asserting a right to increased mortgage payments under the loan documents. Campbells objected, and the bankruptcy court sustained the objection. These actions were permitted by the Bankruptcy Code and did not violate the automatic stay.

DEBT COLLECTOR FAILED TO ESTABLISH THE BONA FIDE ERROR DEFENSE UNDER THE FDCPA

DEBT COLLECTOR ACTED KNOWINGLY UNDER TEXAS DTPA

CA Partners v. Spears, ____ S.W.3d ____ (Tex. App.—Houston [14th Dist.] 2008).

FACTS: Debt collector CA Partners ("CAP") filed suit against Marshall Spears, seeking reformation and judicial foreclosure on the deed of trust CAP held on Spears' home. Spears counterclaimed, alleging CAP violated the Fair Debt Collection Practices Act ("FDCPA"). The trial court denied CAP relief, but held that CAP violated the FDCPA, which prohibits debt collectors from threatening debtors with the seizure and sale of their personal property when they have no legal right to do so. CAP illegally represented in the Trustee's Deed that seizure of Spears' property might occur if he did not pay off the debt. CAP conceded to making a false assertion in the trustee's deed, and then sought refuge in FDCPA's bona fide error defense on appeal. The trial court held that CAP's violations of FDCPA were not the result of Bona Fide Error. The court also found a knowing violation of the DTPA.
HOLDING: Affirmed.
REASONING: The FDCPA provides that a debt-collector is not liable if it can prove the violation was unintentional and resulted from a bona fide error notwithstanding preventative procedures implemented to avoid such violations. The court of appeals found no evidence on the record showing CAP instituted reasonable procedures to prevent the error causing that FDCPA violation. Without proof that CAP instituted preventative procedures, the court held that CAP was not entitled to the protection of the bona fide error defense. In so doing, the lower court's decision was affirmed.

The court also affirmed the trial court's finding that CAP acted knowingly. The DTPA provides an award of additional damages for "knowingly" committed statutory violations. The DTPA defines "knowingly" as actual awareness of the falsity, deception, or unfairness of the act complained of at the time the act was committed. The trial court heard evidence that CAP was largely in the business of buying, selling and collecting bad debt, and had been for thirteen years. There was evidence CAP created a lien on any and all of Spears's personal property located at the premises, including those exempt under the Tex. Prop. Code. Additionally, the court noted CAP sent Spears a demand letter that misrepresented the character, legal status and amount of the debt.

Based upon the foregoing pieces of evidence, the court held the record contained sufficient evidence to support the trial court's finding that CAP knowingly engaged in conduct violating DTPA. In light of the evidence, the court affirmed the trial court's decision.

JUDGMENT AGAINST ATTORNEY AS DEBT COLLECTOR UPHELD BY FIFTH CIRCUIT

Hester v. Graham, Bright & Smith, P.C., 289 Fed. App'x 35 (5th Cir. 2008).

FACTS: Carla Hester owed a debt to Aqua Finance, Inc. for the installation of siding on her home. Spencer Shytles, of Graham, Bright & Smith, P.C. ("GBS"), filed suit on behalf of Aqua against Hester to collect the debt. The court granted summary judgment against Hester for damages, attorney's fees, interest, and court costs. Hester then filed suit against Shytles, GBS, and Aqua alleging that Shytles engaged in "distant forum abuse" in violation of the Fair Debt Collection Practices Act ("FDCPA") because GBS filed suit in Dallas County, but the contract was executed in Tarrant County, and Hester lived in Smith County. In their answer, Shytles and GBS denied violating the FDCPA and further claimed that they were not governed by the FDCPA because they were attorneys, not debt collectors. On Hester's motion for partial summary judgment, the court found Shytles and GBS were debt collectors under the FDCPA and were liable to Hester for violating the FDCPA because they filed suit against her in an improper judicial district. Shytles and GBS filed a motion for rehearing or for new trial, challenging, among other things, the definition of "debt collector" under the FDCPA. Their motion was denied and final judgment was entered in favor of Hester. Shytles and GBS appealed, and argued that they were not "debt collectors" under the FDCPA.

The court noted that attorneys qualify as debt collectors for purpose of liability under the FDCPA when they regularly engage in consumer debt collections, such as litigation on behalf of a creditor client.

HOLDING: Affirmed.
REASONING: Under the FDCPA, debt collectors are defined as any person who uses any instrumentality of interstate commerce or the mails in any business the principle purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due to asserted to be owed or due another. The court recognized that the FDCPA's definition contained two categories of debt collectors, those who collect debts as their principal purpose, and those who do so regularly. The court noted that attorneys qualify as debt collectors for purpose of liability under the FDCPA when they regularly engage in consumer debt collections, such as litigation on behalf of a creditor client. Because there is no bright-line rule identifying when an attorney or law firm "regularly" collects or attempts to collect debts, the court must make the determination on a case-by-case basis, determined by the volume or frequency of the attorney's debt-collection activity.

The court held that Shytles and GBS qualified as debt collectors under the FDCPA. The court noted that in the two years prior to this lawsuit, GBS and Shytles had attempted to collect debts on 450 occasions for four clients. They also filed nearly 200 debt collection lawsuits and sent nearly 300 demand letters. These facts clearly indicated to the court that both GBS and Shytles participated in enough debt-collection activities to be considered regular debt collectors under FDCPA.

FAIR DEBT COLLECTION PRACTICES ACT APPLIES TO MISTAKE OF LAW

Jerman v. Carlisle, 538 F.3d 469 (6th Cir. 2008).

FACTS: Countrywide Home Loans filed a complaint through its hired law firm ("Carlisle") and sought to foreclose on Karen Jerman's home for outstanding mortgage debt. The complaint contained a notice under the Fair Debt Collections Practices Act ("FDCPA"), stating that debts would be assumed valid unless debtor disputed in writing within thirty days. Jerman's attorney disputed the debt in writing. In response, Carlisle requested verification of the debt from Countrywide and Countrywide confirmed the debt was paid in full. Carlisle then dismissed the complaint and sent a copy to Jerman's attorney.

Jerman filed a complaint challenging Carlisle's debt collection practices. Jerman claimed that Carlisle violated the FDCPA when they represented that Jerman's debt would be assumed valid unless she disputed the debt in writing. The FDCPA does not require a written dispute. The district court agreed that Carlisle violated the FDCPA by instructing Jerman that she had to dispute the debt in writing. However, the court granted Carlisle's motion for summary judgment and concluded that the FDCPA's bona fide error defense applied to mistakes of law. Jerman appealed arguing that the district court erred in concluding that the FDCPA's bona fide error defense applied to mistakes of law.

HOLDING: Affirmed.

REASONING: The court first examined whether the FDCPA's bona fide error defense applied to mistakes of law. Jerman argued that the bona fide error defense only applied to clerical errors and made a comparison to the Truth in Lending Act ("TILA"). However, the court distinguished the TILA from the FDCPA, finding that the language in the TILA expressly prohibited the use of the bona fide error defense to mistakes of law. The court found that the plain language of the FDCPA does not prohibit the bona fide error defense to mistakes of law. The court then looked to the legislative history of the FDCPA. Although the FDCPA has been revised several times, Congress has never changed the language to exclude mistakes of law. Therefore, the court held that the FDCPA's bona fide error defense applies to mistake of law.

To qualify for the bona fide error defense, a debt collector must prove by a preponderance of evidence that: (1) the violation was unintentional (not the communication itself); (2) the violation was a result of a bona fide error; and (3) the debt collector maintained procedures reasonably adapted to avoid any such error. Jerman disputed that Carlisle failed to comply with the third prong of the defense. The court found that Carlisle maintained procedures to avoid mistakes of law. Specifically, Carlisle designated a senior principal responsible for compliance with the FDCPA. He attended conferences and seminars in addition to having routinely distributed copies of relevant cases to all attorneys at the firm. Additionally, employees were encouraged to seek his advice with questions regarding the FDCPA and were required to conduct mandatory meetings at least twice a year. The court found that the bona fide error defense applied and affirmed the judgment.

DEBT COLLECTOR CAN ENFORCE ARBITRATION PROVISION IN CREDIT CARD AGREEMENT

Koch v. Compucredit Corp., 543 F.3d 460 (8th Cir. 2008).

FACTS: Mary Koch entered into a credit card agreement with First North American National Bank ("FNANB"). Koch incurred debt on her credit card account, but claimed she settled the debt in full, thus terminating her obligations to FNANB under the credit agreement. FNANB assigned all rights, title and interest in Koch's account to Jefferson Capital. When Jefferson took over the account, FNANB's records still showed Koch was past due on the account, so Jefferson hired the J.A. Cambece Law Firm to collect the debt. Cambece sent Koch a collection notice, claiming she owed Jefferson as an assignee of FNANB. Koch tried to resolve the matter with the law firm, but the law firm continued their collection efforts.

Koch filed suit against Cambece, Jefferson, and its corporate parent Compucredit, alleging violations of the Fair Debt Collection Practice Act and the Arkansas Deceptive Trade Practices Act. The defendants moved to stay the proceedings and compel arbitration by invoking the arbitration clause in the credit agreement between Koch and FNANB. The district court denied defendants' motion to compel, concluding that there was no valid arbitration agreement between Jefferson and Koch, because FNANB's assignment to Jefferson was invalid. The district court reasoned that because there was no existing debt on Koch's account, FNANB had no present interest in the account and thus had no valid interest to assign to Jefferson. Therefore, because there was no valid arbitration agreement between Jefferson and Koch, arbitration cannot be compelled. The defendants filed an interlocutory appeal.

Under the Federal Arbitration Act, the validity of an assignment is a matter of state law.

HOLDING: Reversed and remanded.

REASONING: Under the Federal Arbitration Act, the validity of an assignment is a matter of state law. As a matter of Arkansas law, an assignor must have a present interest in an account in order to have a valid assignment. The elements of a valid assignment are delivery with the intent to make a complete transfer of the rights, title, and interest, and the assignor must have a present interest in the matter. A present interest may include any ongoing obligations.

The appellate court held that even if the underlying credit agreement was terminated by settlement of the debt with FNANB, such a termination does not necessarily release the parties from their obligations under the agreement, including the obligation to arbitrate. To the contrary, there is a presumption in favor of post-expiration arbitration of matters. Because the obligation to arbitrate continues even after the expiration of the agreement, the court found Koch's claim that she was released from all of her obligations when she settled her debt erroneous.

The court further held the continuing obligation to arbitrate gave FNANB a present interest in the contract even after Koch settled her debt. Thus, FNANB did have something to assign to Jefferson, and the assignment was valid. Through the assignment, Jefferson assumed all of FNANB's remaining rights and obligations under the contract including the right to arbitrate. The court held the arbitration provision applied to the dispute between Koch and Jefferson. Accordingly, the court reversed the lower court's decision, and remanded with directions to grant the defendants' motion to compel arbitration.

NEW BANKRUPTCY LAW VIOLATES ATTORNEYS' FREE-SPEECH RIGHTS

Milavetz, Gallop & Milavetz, P.A. v. U.S, 541 F.3d 785 (8th Cir. 2008).

FACTS: The Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), amended the bankruptcy code. BAPCPA introduced the term "debt relief agency," which seemed to extend to bankruptcy attorneys. This section barred debt relief agencies, and consequently bankruptcy attorneys, from advising clients to incur any debt in contemplation of bankruptcy or any similar statements.

A group of Minnesota bankruptcy attorneys filed suit against the government seeking declaratory judgment that bankruptcy attorneys should not be classified as debt relief agencies. In the alternative, Milavetz argued that if the court finds that a bankruptcy attorney is a debt relief agency, then the restrictions of BAPCA violated the attorneys' constitutional right to free speech under the First Amendment.

The district court granted summary judgment for Milavetz and held that the definition of a debt relief agency did not include attorneys because it would be unconstitutional to place such restrictions on those who have a duty to advise their clients. The government appealed on the grounds that bankruptcy attorneys are debt relief agencies and as such, should be governed by the BAPCPA, which places stringent restrictions on what attorneys may advise clients to do.

HOLDING: Affirmed in part and reversed in part.

REASONING: In order to determine if BAPCPA violated Milavetz's free speech rights under the First Amendment, the court first had to decide if the section applied to attorneys at all. The court held that the plain language definition of debt relief agency does extend to bankruptcy attorneys and thus, reversed that part of the district court's decision. The court next addressed whether the code could constitutionally restrict the advice bankruptcy attorneys give to their clients. The court held that the government's restriction on speech was not supported by a compelling interest which was narrowly tailored, nor are they limited only to that speech the government claims a legitimate interest in restricting. Instead, it was an over-broad restriction that covered any advice given to a client to incur debt, no matter the circumstances.

The court further reasoned that the statute was overbroad because it may prevent the attorneys from fulfilling duties to their clients. As advocates for their clients, attorneys may sometimes need to guide clients to incur debt, even those clients on the verge of filing for bankruptcy. The court reasoned that an example of this is if a client is contemplating bankruptcy, an attorney may advise that client to refinance their mortgage in order to lower their monthly payment and perhaps prevent the client from filing for bankruptcy at all. The statute prohibits attorneys from advising their clients to incur *any* debt in contemplation of bankruptcy. An attorney would either have to violate the statute or fail in their obligation to appropriately and ethically advise their clients. The court affirmed the district court ruling and held that the restriction on Milavetz's ability to advise clients violated constitutional free speech.

DEBT COLLECTOR'S PHONE CALLS VIOLATE DEBT COLLECTION LAW

Ramirez v. Apex Fin. Mgmt., L.L.C., 567 F. Supp. 2d 1035 (N.D. Ill. 2008).

FACTS: Jeremy Ramirez, opened an MBNA credit card on which he later defaulted. After the default, Hilco Receivables, LLC, a debt buyer, purchased the account from MBNA. Hilco then outsourced Ramirez's account to its subsidiary, Apex Financial Management, LLC, to collect any amounts that Ramirez still owed. Ramirez sent Apex a "cease and desist" letter at one of their listed addresses and requested that Apex cease all communications concerning his outstanding debt. The cease and desist letter was received at Apex's payment processing office and was transferred to their main office for processing. During the seven-day period between when Apex received Ramirez's letter and when they processed and entered it into their system, Apex placed twenty-one calls to Ramirez at his home and place of work.

Ramirez moved for summary judgment, alleging violations of the Fair Debt Collection Practices Act ("FDCPA") based on Apex's repeated contact with Ramirez after they received his "cease and desist" letter. Apex, in their cross-motion for summary judgment, claimed that they were not in violation of the FDCPA because: (1) their phone calls to Ramirez were not "regarding the debt" as defined under the statute; and (2) even if it communicated with Ramirez after having received the "cease and desist" letter, they did so only because of a "bona fide error."

HOLDING: Ramirez's motion granted, Apex's motion denied.

REASONING: In response to Apex's first defense claim, the court recognized that the FDCPA defined communication as "the conveying of information regarding the debt directly or indirectly to any person through any medium." The court held that Apex's twenty-one phone calls to Ramirez, some of which resulted in voice messages requesting that Ramirez return their phone calls as soon as possible, were, at the very least, indirect communications regarding Ramirez's debt. In response to Apex's second defense claim, the court recognized that to establish a bona fide error, a debt collector must show that (1) it violated the FDCPA unintentionally, and (2) it has in place procedures reasonably adapted to avoid the violation committed.

The court found the evidence showed that Apex had a procedure for handling "cease and desist" letters once they arrived at their main office, but not at their payment-processing center. They held that Apex's procedure of transferring mail between the two offices only "a couple times a week" was a loose procedure that resulted in the seven-day delay in processing and twenty-one collection calls to Ramirez. Accordingly, the court found that Apex's unpredictable procedure was not reasonably adapted to avoid violating the FDCPA, and, therefore, the bona fide error defense did not apply. Therefore, the court granted Ramirez's motion for summary judgment, and denied Apex's motion for summary judgment.