from the third driver's insurance policy.

Goudeau's employer had an auto insurance policy with United States Fidelity & Guaranty Company, which included underinsured motorist. The underinsured motorist policy only applied to persons seeking recovery who actually occupied the car at the time of the incident. The insurance company denied Goudeau benefits because Goudeau was not occupying the car at the time of the accident. The trial court granted summary judgment against Goudeau on his underinsured claim. The appellate court reversed and remanded for trial, finding a fact issue as to whether Goudeau was occupying the vehicle.

HOLDING: Reversed and rendered.

REASONING: The policy defined occupying as in, upon, getting in, on, out or off. Goudeau conceded he was not in the car when the accident occurred. He asserted coverage only based on the argument that he was occupying the car by being upon it when he was injured. The court held that a driver who had exited the car, closed the door, walked around the front, and then ended up partially upon the car due to a collision could not be said to be occupying the car at the time of the accident. Texas courts are required to construe insurance policies according to their plain language using the ordinary, everyday meaning of the words to the general public. The court determined that the plain meaning of the term occupying as defined in the insurance policy could not be stretched to include Goudeau. The court reversed and rendered that Goudeau take nothing.

DEBT COLLECTION

LETTERS SIGNED BY CORPORATE OFFICERS DID NOT VIOLATE FAIR DEBT COLLECTION PRACTICES ACT

Campuzano-Burgos v. Midland Credit Mgmt., Inc., 550 F.3d 294 (3d Cir. 2008).

FACTS: Plaintiffs filed a complaint against Midland Credit Management, Inc. ("Midland Credit") and alleged Midland Credit violated the Fair Debt Collection Practices Act ("FDCPA") by sending false, misleading or deceptive collection notices. Plaintiffs claimed Midland Credit sent three dunning letters, repeated demands for repayment of debt, which contained the typed names of top company executives. Although the listed executives were real employees, they were not aware of the letters, nor were they aware that Midland Credit was attempting to collect these debts.

The court applied the least-sophisticated-debtor standard in interpreting a communication, but noted that even the least sophisticated debtor is bound to read the entire collection notice.

Both Plaintiffs and Midland Credit filed motions for summary judgment directed at the issue of liability. The district court concluded the use of top executives as signatories was likely used to impress upon the debtors the seriousness of the communication. Further, the district court found the dunning letters violated FDCPA Section 1692e as being deceptive and misleading, because the executive had no actual involvement to send the letters. Although the district court granted partial summary judgment to Plaintiffs, it submitted a certified question of law to the appellate court to determine whether a senior officer of a collection company violates the FDCPA by signing dunning letters to debtors. The Third Circuit Court of Appeals accepted the certification.

HOLDING: Reversed and remanded.

REASONING: FDCPA prohibits debt collectors from using any false, deceptive or misleading representation or means in connection with the collection of any debt. Although FDCPA lists several specific violations, the court applied the general rule that a communication is deceptive for purposes of FDCPA if it can be read to have two or more meanings, one of which is inaccurate. The court applied the least-sophisticated-debtor standard in interpreting a communication, but noted that even the least sophisticated debtor is bound to read the entire collection notice. The court held the letters were not deceptive attempts to collect debt because when read as a whole, they resemble advertisements, rather than routine business letters. The letters were technically not dunning letters because they did not demand anything. They offered an opportunity to settle at a discounted rate, and used generic form language, exclamations points, bold-faced type, a toll-free telephone number and other indicia consistent with an advertisement.

Attorney-debt collectors are held to a higher standard of care than other collectors because abusive debt collection practices have the potential to be far more egregious. A lawyer who sends a dunning letter must be directly and personally involved in supervising and mailing to meet FDCPA requirements. Midland Credits letters did not contain any reference to an attorney or legal department, and did not invoke a similar sense the high executives were involved. The letters were honest attempts to extend settlement, and could not be interpreted by even the least sophisticated debtor as coming from anyone other than a corporation. The court reversed, and ordered the lower court to enter summary judgment for Midland Credit.

COLLECTION LETTER DOESN'T VIOLATE FDCPA.

Hahn v. Triumph P'ships L.L.C., ____ F.3d ____ (7th Cir. 2009).

FACTS: Triumph Partnerships LLC bought overdue credit card debts from HSBC Bank. One of Triumph's affiliates sent Marylou Hahn a letter stating that she owed $1,134.55; $1,051.91 of this was labeled as "amount due" and $82.64 was "interest due". Hahn did not deny owing $1,134.55. Hahn filed suit under the Fair Debt Collections Practices Act ("FDCPA") relying on § 1692e that provides "[a] debt collector may not use any false, deceptive or misleading representation or means in connection

with the collection of any debt." Under § 1692e(2)(A) a debt collector may not falsely represent "the character, amount, or legal status of any debt."

Hahn's complaint alleged that Triumph misrepresented the "character" of her debt when it said that the interest due was $82.64 because it represented interest accrued on the debt after it purchased the debt from HSBC. The district court granted summary judgment in Triumph's favor, ruling that the letter's statement was true.

HOLDING: Affirmed.

REASONING: The court held an "amount" that is due can include principal, interest, penalties, attorneys' fees, and other components. Interest can be added to that total. The court explained that when interest is compounded, today's interest becomes tomorrow's principal, thus all past-due amounts accurately may be described as "principal due".

Furthermore, a debt collector need not break out principal and interest; it is enough to tell the debtor the bottom line. Thus, the court explained that the Triumph could have sent a letter to the Hahn demanding full payment in the amount of $1,134.55 without an explanation of the amount due. According to the court, if Triumph had lumped the interest charged while Hahn's creditor owned the account, plus interest after the account was sold to Triumph, then the letter would have produced an amount and interest that did not matched any records Hahn would have recognized. By reporting post-transfer interest separately, Triumph may have helped Hahn to check whether Triumph had applied the correct interest rate to the balance it acquired from Hahn's creditor. Hahn's only argument is that the letter is false based on her own definition of "interest due" and the court concluded the statement is true.

The court also addressed Hahn's falsity argument. The court stated the FDCPA was designed to provide information that helps consumers choose intelligently, and by definition immaterial information neither contributes to that objective if the statement is correct, nor undermines it if the statement is incorrect. Thus if a statement would not mislead an unsophisticated consumer, it does not violate the FDCPA even if it is "false" in some technical sense. The court concluded a statement cannot mislead unless it is material, so a false but non-material statement, like in this case, is not actionable. The court affirmed the district court's judgment.

A PROVISION IN THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT THAT FORBIDS ATTORNEYS TO ADVISE CLIENTS TO INCUR DEBT PRIOR TO FILING FOR BANKRUPTCY IS CONSTITUTIONAL

Hersh v. U.S., 553 F.3d 743 (5th Cir. 2008).

FACTS: Susan Hersh, an attorney who represented debtors in bankruptcy proceedings, sued the United States, seeking declaratory and injunctive relief to prohibit the government from enforcing a recently enacted provision in the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). BAPCPA applies to debt relief agencies, which includes attorneys that counsel consumer debtors. BAPCPA prohibits an attorney from counseling a client to incur debt in contemplation of bankruptcy. Hersh argued BAPCPA's provision prohibiting debt relief agencies, including bankruptcy counsel, from advising their clients to incur debt in contemplation of bankruptcy or to incur debt to pay attorney or bankruptcy petition preparer fees, was facially unconstitutional in violation of the first amendment because it impaired her right to provide legal advice to her clients, and chilled and punished speech that is fundamental to the attorney-client relationship. She asserted that she intended to engage in speech that violated BAPCPA by advising her clients to incur debt in contemplation of bankruptcy when doing so would be in good faith and not abusive of the bankruptcy system.

After Hersh filed suit, the government responded to Hersh's complaints by filing a motion to dismiss all of Hersh's claims. The district court issued a memorandum opinion and order in response to government's motion to dismiss, holding BAPCPA was facially unconstitutional in violation of the first amendment's right to free speech because the provision imposed limitations on speech beyond what is narrow and necessary. The court granted government's motion on all of Hersh's other claims. The court invited Hersh to move for summary judgment once she amended her compliant to assert the claim explicitly. Hersh filed a motion for summary judgment claim, which the district court granted, ordered that Hersh have declaratory judgment, and ordered the government, its agents, and all people acting in active concert with it were permanently enjoined from enforcement. The government appealed.

The court found the provision only affects unprotected speech.

HOLDING: Reversed.

REASONING: The court noted if BAPCPA's provision was interpreted literally and broadly, then it would raise serious constitutional problems because it would restrict some speech protected by the first amendment. Based on the doctrine of constitutional avoidance, the court interpreted the provision so that it does not violate the constitution. The court found the provision only affects unprotected speech. The court held that BAPCPA's language can and should be interpreted only to prohibit attorneys from advising clients to incur debt in contemplation of bankruptcy when doing so would be an abuse and improper manipulation of the bankruptcy system. Under the court's construction, the potential for BAPCPA to prohibit protected speech is not substantial in relation to its legitimate reach. Thus, the provision was not facially unconstitutional, and the court reversed the lower court's ruling.

ONE WHO ACQUIRES A "DEBT IN DEFAULT" IS CATEGORICALLY NOT A CREDITOR; ONE WHO ACQUIRES A "DEBT NOT IN DEFAULT" IS CATEGORICALLY NOT A DEBT COLLECTIOR

VALIDATION NOTICE DOES NOT VIOLATE FDCPA

McKinney v. Cadleway Props., Inc., 548 F.3d 496 (7th Cir. 2008).

FACTS: Versia McKinney's home was damaged when a sewer backed up into her basement due to flooding. Unable to afford the repairs, McKinney applied for and received a disaster loan

from the small business administration. Several years later, McKinney defaulted on the loan. The loan was then sold to Cadleway Properties, Inc. Cadleway sent a letter to McKinney, along with a validation of debt notice. The validation notice detailed the amount of principal and interest that remained due, and requested McKinney to either confirm or dispute the amount owed. McKinney sued Cadleway, claiming that the validation notice was confusing and violated the Fair Debt Collection Practices Act ("FDCPA"). Both parties moved for summary judgment. The district court granted McKinney's summary judgment, concluding that Cadleway was a debt collector and that its collection letter was confusing to the unsophisticated consumer and, therefore, violated the FDCPA.

HOLDING: Affirmed, reversed and remanded.

REASONING: The court looked to the exclusionary language of FDCPA's definitions of creditor and debt collector. The definition of creditor excludes those who acquire and attempt to collect a debt in default, while the definition of debt collector excludes those who acquire and attempt to collect a debt which was not in default at the time it was obtained. So one who acquires a debt in default is categorically not a creditor; one who acquires a debt not in default is categorically not a debt collector. FDCPA did not define default, but it was undisputed that McKinney's debt had been delinquent for at least two years when Cadleway purchased it. The court, therefore, ruled this sufficed to establish the loan was a debt in default when Cadleway acquired it, and affirmed the district court's ruling that Cadleway was a debt collector, not a creditor.

There was nothing on the face of Cadleway's letter that could be considered confusing to the unsophisticated debtor.

The court then discussed whether a debt collector's letter complies with the requirements of FDCPA's provisions governing notice of debt is determined objectively. The court found there was nothing on the face of Cadleway's letter that could be considered confusing to the unsophisticated debtor. The validation of debt notice appeared on the reverse side of the letter in clear, easy-to-read type and contained all of the required statutory disclosures. McKinney, herself, presented no extrinsic evidence to prove Cadleway's validation of debt notice was confusing to an unsophisticated debtor, rather, McKinney simply testified she did not understand how to calculate the correct debt amount, which the court found her testimony to be insufficient to show the letter was objectively confusing. The appellate court reversed the district court's decision, and remanded the case with instructions to enter judgment in Cadleway's favor.

LENDER DID NOT WAIVE TILA "ACCURACY" DEFENSE

In re Sterten, 546 F.3d 278 (3rd Cir. 2008).

FACTS: Gayle Sterten secured a loan from Option One Mortgage Corp. The purpose of the loan was to refinance the second mortgage on her home and to consolidate her medial and credit card bills. Sterten obtained the loan through a mortgage broker who helped her execute an adjustable rate note in favor of Option One and a mortgage granting Option One a lien on her home to secure the loan. She also signed a truth in lending disclosure statement. Shortly thereafter, Sterten sent a letter to Option One requesting a rescission of the loan, contending the closing had not been conducted in accordance with the Truth in Lending Act ("TILA"). Option One disputed Sterten's right to rescind.

Sterten filed a bankruptcy petition and Option One filed a proof of claim. Sterten responded by filing an adversary proceeding, seeking rescission of the loan and statutory penalties. She alleged the finance charges of the loan were not accurately disclosed. The bankruptcy court applied the tolerances for accuracy provision and concluded that because the nondisclosure finance charges were within the tolerance range, the disclosure was accurate as a matter of law. It entered judgment in favor of Option One on both claims. Sterten filed a motion to alter or amend the order, arguing the court should not have applied the provision because Option One failed to raise it as an affirmative defense in its pleadings, at trial and at any other point in the proceedings, waiving the defense. Option One appealed to the district court, which reversed the amended judgment, and held that because the tolerances for accuracy provision is not an affirmative defense, the bankruptcy court's original verdict in favor of Option One was correct and should not have been disturbed. The court ordered the bankruptcy court's initial judgment restored. Sterten appealed.

HOLDING: Affirmed.

REASONING: Affirmative defenses are generally waived if not specifically raised by responsive pleading or by appropriate motion. When a particular defense is an affirmative defense, the court must determine whether the defense was adequately asserted merely by denying the allegations made in the complaint, or whether more is required. The court noted that many courts in different jurisdictions have focused on the relationship between the defense in question and plaintiff's primary case. In practice, however, focusing solely on the relationship is of limited use where the issue is precisely the nature of the relationship. The purpose of requiring a defendant to plead available affirmative defenses in his answer is to avoid surprise and undue prejudice by providing plaintiff with notice and the opportunity to demonstrate why the affirmative defense should not succeed. The court concluded that the tolerance provision was not an affirmative defense, and Option One's failure to invoke the provision did not disadvantage Sterten. Therefore, the tolerance for accuracies defense was put into play by Option One's general denial, and Option One did not waive the accuracy defense when it failed to specifically raise it. The court affirmed the district court's order directing the bankruptcy court to restore its initial judgment in favor of Option One.

DEBT COLLECTOR LIABLE FOR FILING IN IMPROPER VENUE

Rutgers-The State Univ. v. Fogel, 403 N.J. Super. 389; 958 A.2d 1014 (App. Div. 2008).

FACTS: Alter Fogel, a student at Rutgers-State University law school, signed promissory notes for repayment of student loans extended under a loan program. The promissory notes concerned debts for personal, family, or household purposes, which made

their debt collection subject to the Fair Debt Collection Practices Act ("FDCPA"). Rutgers had two locations in New Jersey, the central headquarters in one county and the law school Fogel attended in a different county. Fogel's permanent address was in New York, and included in the promissory notes, enabling a debt collector to serve him there. After Fogel graduated, he failed to repay the notes, and eventually, Rutgers sought to collect the debt.

Rutgers brought an action against Fogel to collect funds from the unpaid student loans. Fogel then brought a third-party action against the law firm that representing Rutgers, alleging violation of the FDCPA because filed suit in an improper venue. The trial court granted the firm's summary judgment. Fogel appealed.

HOLDING: Reversed and remanded.

REASONING: The FDCPA requires debt collection actions be filed either in the judicial district where the debtor lives or in the judicial district where the debtor signed the contract underlying the debt. The FDCPA's purpose is to prevent forum abuse, and to promote consistent state action to protect consumers against debt collection abuses. The court looked at other jurisdictions and concluded that judicial district, generally, has been construed as referring to the geographic units into which a state divides its judiciary. The court first determined judicial district referred to state, rather than federal districts, as has been indicated by the FDCPA's history as constructed by the Federal Trade Commission, which is responsible for enforcing the FDCPA.

The FDCPA's purpose is to prevent forum abuse, and to promote consistent state action to protect consumers against debt collection abuses.

The county should be considered the basic judicial district for purposes of the FDCPA's venue provision. The court determined that the firm should have filed the collection action in the county where the contract was signed or where the student lived, rather than in the county where Rutgers's central headquarters were located. The court reversed the order granting the firm's summary judgment, and remanded to the trial court for further proceedings consistent with this opinion.

CONSUMER CREDIT

LENDER NOT LIABLE FOR FAILING TO REFUND "UNEARNED" FINANCE CHARGE

Davis v. Pac. Capital Bank, 550 F.3d 915 (9th Cir. 2008).

FACTS: Felicia Davis brought an action against Pacific Capital Bank under the Truth in Lending Act ("TILA"). Davis obtained a Refund Anticipation Loan ("RAL"), secured by her anticipated federal income tax refund, which Davis authorized the IRS to deposit into an account established by Pacific. RAL included a finance charge to be paid by Davis even if RAL was paid off early. Davis's refund was deposited ten days earlier than anticipated as in the loan agreement. Davis complained that Pacific's failure to refund the finance charges violated TILA's provision requiring lenders to refund unearned interest. The district court dismissed Davis's complaint with prejudice, holding the finance charge was not interest. Davis appealed.

The drafters intentionally excluded finance charges and limited the provision to require only unearned interest refunds.

HOLDING: Affirmed.

REASONING: TILA does not define the term interest, so the court looked at TILA's legislative history. The court noted the original bill required creditors to refund unearned portions not only of an interest charge, but also of any finance charge. The finance charge language was left out of the final bill. This specific change in terminology suggested the drafters intentionally excluded finance charges and limited the provision to require only unearned interest refunds. The court found no violation of federal law to form the basis of Davis's claim, and affirmed the district court's decision to dismiss.

TILA CLASS ACTION CERTIFICATION DENIED

Andrews v. Chevy Chase Bank, 545 F.3d 570 (7th Cir. 2008).

FACTS: Susan and Bryan Andrews obtained a loan from Chevy Chase Bank ("CCB") to refinance their home. The loan provided a "cash flow payment option" permitting the Andrews to vary their monthly payments based on their personal cash flow for that month. At closing, CCB provided the Andrews with an adjustable-rate note, a Truth in Lending Act ("TILA") disclosure, and an adjustable rate rider. Based upon the Andrews' understanding of these documents, their minimum monthly payment and initial interest rate were to remain fixed for the first five years of the loan. In fact, the initial interest rate was only a teaser rate that applied just to the first monthly payment. Thereafter, the minimum required payment remained fixed, as the Andrews had expected, while the interest rate climbed each month. As a result, an ever-increasing share of each monthly installment paid interest instead of principal. Eventually, the minimum payments were insufficient to cover even the interest due. The Andrews filed suit against the bank alleging violation of the TILA and sought statutory damages, rescission, and attorney's fees. The trial court authorized the award of attorney's fees and rescission. The trial court also granted the Andrew's motion to certify a class, declaring all class members had the right to rescind their mortgages. CCB appealed.

HOLDING: Reversed and remanded.