insured has been sued and served and when the insurer actually defends other insured in the same litigation, as happened in both *Weaver* and *Crocker*.

A PROVISION IN AN INSURANCE CONTRACT THAT ESTABLISHES A LIMITATIONS PERIOD SHORTER THAN TWO YEARS IS VOID

Spicewood Summit Office Condos. Ass'n Inc., v. Am. First Lloyd's Ins. Co., ____ S.W.3d ____ (Tex. App.—Austin 2009).

FACTS: Commercial property owned by Spicewood Summit Office Condominiums Association, Inc. was damaged in a hailstorm. The property was insured by America First Lloyd's Insurance Company. Spicewood reported the damage to America First. After America First's initial assessment of the loss, Spicewood obtained an independent assessment that estimated a significantly higher cost of repair. American First addressed Spicewood's concerns with additional inspections and supplemental payments. Dissatisfied with the amounts paid by America First, Spicewood filed suit against America First. The district court granted America First's motions for summary judgment, ruling that (1) Spicewood's claims for breach of contract, prompt-payment penalties, and related attorneys' fees were precluded based on the contractual limitations period provided in the insurance policy, and (2) Spicewood's extra-contractual claims were precluded because there was, at most, a *bona fide* dispute regarding the extent of damage and valuation of Plaintiff's loss. Spicewood appealed the judgment.

HOLDING: Reversed.

REASONING: The court began by looking at section 16.070(a) of the Texas Civil Practice and Remedies Code. Section 16.070(a) states, "…A stipulation, contract, or agreement that establishes a limitation period that is shorter than two years is void in this state." The court concluded under the plain language of section 16.070(a), the "time in which to bring suit" cannot be shorter than two years. The court then addressed the issue of when the "time in which to bring suit" begins. The court held that the limitation period begins to run upon the accrual of the cause of action. The court determined that a contractual limitations period, to comply with section 16.070(a), cannot end until after two years after the day the cause of action for breach of the agreement has accrued. The court then examined the insurance contract between America First and Spicewood. The court examined provision (a) and (b) of the contract. Provision (a) stated that in order to bring legal action against America First under the policy, the insured was required to comply fully with all terms. Provision (b) provided that the actions must be "brought within 2 years and one day after the date on which the direct physical loss or damaged occurred." Spicewood was required to meet the requirements of provision (a) before bringing a suit against America First. The court concluded that a trigger date for a two-year contractual limitations provision that precedes the date the cause of action accrues will result in a "time in which to bring suit" that is shorter than two years in violation of section 16.070(a) of the civil practice and remedies code. Therefore, the court held the contractual limitations provision void.

DEBT COLLECTION

BANKRUPTCY TRUSTEE CAN PURSUE CLAIMS THAT THE DEBTOR WOULD HAVE BEEN JUDICIALLY ESTOPPED FROM PURSUING HERSELF

Bailey v. Barnhart Interest, Inc., ____ S.W.3d ____ (Tex. App—Houston [14th Dist.] 2009).

FACTS: Sheryl English sued the Barnharts in state district court, alleging that she sustained personal injuries attributable to mold exposure while working in a building managed by the Barnharts. English also filed for Chapter 7 bankruptcy. She filed her bankruptcy schedules and statement of financial affairs on the same day. English failed to list her pending state court suit against the Barnharts in these filings as an asset of the bankruptcy estate. English died while her suit against the Barnharts and her bankruptcy were pending. Chapter 7 trustee Joseph M. Hill filed a no-asset report and the estate was closed. However, upon learning of English's state court suit against the Barnharts from the attorney handling that suit, Hill filed a motion to withdraw his no-asset report and to reopen the bankruptcy estate. The bankruptcy court signed an order granting Hill's motion and ordered the case reopened. The bankruptcy court then granted Hill's motion authorizing the employment of an attorney to represent him as trustee and to pursue the suit against the Barnharts; Bailey was added as a plaintiff in a supplemental state court petition. The trial court signed an amended order granting the Barnharts' summary judgment motion on judicial estoppel. Appellants filed a motion for new trial. The trial court signed an order denying the motion for new trial. Appellants timely filed their notice of appeal.

HOLDING: Reversed.

REASONING: The court began its analysis by describing the role of a Chapter 7 Trustee. The trustee is the real party in interest and the only party with standing to prosecute causes of action belonging to the estate. If a debtor fails to schedule an asset and the trustee later discovers the omission, the trustee may reopen the bankruptcy case to administer the asset on behalf of the creditors.

The court then addressed the issue of judicial estoppel. A party is judicially estopped when (1) its position is clearly inconsistent with a previous one; (2) the court accepted the previous position; and (3) the non-disclosure was not inadvertent. The court then proceeded to apply judicial estoppel to the Chapter 7 Bankruptcy Trustee.

The court analyzed the issue of whether English's failure to list her suit against the Barnharts in her asset report resulted in Hill being prevented from pursuing the suit on the grounds of judicial estoppel. The Barnharts, relying on *In re Superior Crewboats, Inc.*, argued that it did. The court reasoned that *In re Superior Crewboats* had been limited by the Fifth Circuit's decision

in *Kane v. Nat'l Union Fire Ins. Co*. The court noted that in *In re Superior Crewboats* the trustee in bankruptcy had abandoned his claims, had not been the real party in interest, and had not been entitled to be substituted as such. The court applying *Kane*, held that once English filed her bankruptcy petition, English's suit against the Barnharts became an asset of the bankruptcy estate. Hill, as the representative of the bankruptcy estate, became the real party in interest and was the only party with standing to prosecute English's claim. The court noted that all rights held by English in the asset were extinguished unless abandoned by Hill. As such, Hill was not estopped from pursuing the suit against the Barnharts.

COLLECTION LETTER DOESN'T VIOLATE FAIR DEBT ACT.

Hahn v. Triumph P'ships LLC., 557 F.3d 755 (7th Cir. 2009).

FACTS: Triumph Partnerships LLC ("Triumph") bought overdue credit card debts from HSBC Bank USA. 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 provided "[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, and all past-due amounts accurately may be described as "principal due".

A debt collector does not have to separate principal and interest; it is enough to tell the debtor the bottom line.

Furthermore, the court held that a debt collector does not have to separate principal and interest; it is enough to tell the debtor the bottom line. The court explained that 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. The court noted that 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 match 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 was that the letter was false based on her own definition of "interest due," and the court concluded that the statement was true.

Additionally, the court addressed Hahn's facility argument. The court stated that 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 that 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.

LAW FIRM MAY BE LIABLE UNDER FAIR DEBT COLLECTION PRACTICES ACT FOR FALSE CREDIT CARD STATEMENT

Hartman v. Great Seneca Fin. Corp., 569 F.3d 606 (6th Cir. 2009).

FACTS: Javitch, Block & Rathbone, LLP ("Javitch") filed civil complaints against Delores Hartman and Deborah Rice for defaulting on debts owed to Great Seneca Financial Corporation ("Great Seneca"). In each complaint, Great Seneca and Javitch asserted that a copy of the debtor's "account" was attached to the complaint. In each case, the document that Great Seneca and Javitch attached as an "account" resembled a credit-card statement but had been generated on Great Seneca's behalf. Hartman and Rice filed separate actions in the United States District Court for the Southern District of Ohio arguing that Great Seneca and Javitch violated the Fair Debt Collection Practices Act ("FDCPA") by representing, in their state-court complaints, that the document generated on Great Seneca's behalf was a statement of the debtor's account("Exhibit A"). The district court determined that there was no genuine issue of material fact as to whether this behavior violated the FDCPA and granted Great Seneca's and Javitch's motions for summary judgment in each case. Hartman and Rice appealed.

HOLDING: Reversed and remanded.

REASONING: In deciding if liability attached to the debt collector and its law firm, the Sixth Circuit Court of Appeals first determined whether the defendants' behavior violated the FDCPA, and subsequently analyzed whether Javitch was entitled to immunity from statements made during litigation.

The state-court complaints alleged that Hartman and Rice owed Great Seneca money on an account and that Exhibit A was a copy of the account. Exhibit A had been generated at Great Seneca's behest, and facially resembled credit-card statements but were not actually copies of the credit-card accounts on which Hartman and Rice were sued. Instead, these documents contained general information about the debt that had been transferred electronically to Great Seneca from other creditors. Although these documents showed a final balance due, they did not contain a listing of debits and credits that had been made throughout the life of the account. The court reasoned that determining whether Great Seneca's and Javitch's representations regarding Exhibit A

were false would require it to decide what "account" means under Ohio law. Instead, the court held that summary judgment was inappropriate because Hartman and rice showed that there is a genuine issue of material fact as to whether Exhibit A would mislead the least sophisticated consumer. As such, the court held that summary judgment was improper because Hartman and Rice had raised a genuine issue of fact.

The court reasoned that "[t]o qualify for the bona fide error defense, a debt collector must prove by a preponderance of the evidence that: (1) the violation was unintentional; (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." Taking the facts in the light most favorable to Hartman and Rice, the court held that Great Seneca and Javitch had not shown that the violation was unintentional. Hartman and Rice asserted that Great Seneca and Javitch made Exhibit A look like a credit-card statement in order to avoid Ohio law.

The court noted that Great Seneca and Javitch had not shown by a preponderance of the evidence that they maintained procedures intended to avoid the type of error that occurred. The error made by Great Seneca and Javitch was a mistake of law; they represented that Exhibit A was an account in a manner that could be found to be misleading or deceptive. The court stated that Great Seneca's and Javitch's arguments fail to address the procedures that they had in place to avoid this type of error. Before the district court, Great Seneca and Javitch extensively detailed the process of the electronic transfer of debts to show that the amount they alleged was actually the amount owed. The court held that procedures meant to ensure that the amount of a debt is properly verified are not at issue. The court noted that one of Javitch's managing partners stated that he believed that Ohio law permitted the use of a document like Exhibit A in a creditor's claim. The court noted that this statement suggests that the violation was unintentional, but it does not detail any procedures that Great Seneca or Javitch used to ensure that mistakes of law did not occur. Great Seneca and Javitch presented no evidence that they perform ongoing FDCPA training, procure the most recent case law, or have an individual responsible for continuing compliance with the FDCPA. The court held that Javitch and Great Seneca were not entitled to the bona fide error defense.

FDCPA IS CONSTITUTIONAL EVEN WHEN APPLIED TO DOCUMENT IN JUDICIAL PLEADING

Hartman v. Great Seneca Fin. Corp., 569 F.3d 606 (6th Cir. 2009).

FACTS: Debtors filed separate suits against the defendant debt collector and its attorney, alleging violations of the Fair Debt Collection Practices Act ("FDCPA") for representing in their state-court complaints that the documents generated by the collector were statements of the debtors' accounts. In response to unpaid credit card accounts of the two debtors, the debt collector Great Seneca Financial Corporation and its attorney Javitch filed civil complaints, and attached "Exhibit A" to each. The debt collector's law firm prepared each "Exhibit A," which "resembles a typical credit-card statement", and asserted in Great Seneca's state-court complaint that the document was a copy of each debtor's delinquent account. Great Seneca then dismissed the cases against the two debtors, Delores Hartman and Deborah Rice, who then each filed suit in the United States District Court for the Southern District of Ohio, and the court granted summary judgment to the defendants Great Seneca and Javitch. Hartman and Rice appealed the decision, and the two cases were grouped for decision. In defending the suit against the alleged FDCPA violations, the defendants argued in part that statements and documents produced in litigation are shielded from liability under the Petition Clause of the First Amendment.

HOLDING: Reversed and remanded.

REASONING: On appeal, the Sixth Circuit Court of Appeals first determined if there was a "genuine issue of material fact" as to whether the defendants' representations of Exhibit A as statements of each debtor's account was misleading or deceptive from the perspective of the least sophisticated consumer. After holding there was an issue of material fact concerning whether the document would mislead the least sophisticated consumer and remanding the case to the district court for that determination, the court addressed the issue of whether applying the FDCPA to documents produced during judicial proceedings was constitutional. The court focused on the protection of the Petition Clause of the First Amendment, which provides a qualified right to petition to a court with the expectation that conduct and statements made by parties to the litigation will be immunized from liability. While the court recognized that the First Amendment provides some protection with respect to conduct and statements made during litigation, it reasoned that this protection did not extend to the defendants' alleged behavior in this case. Because the court held there was a genuine issue of material fact concerning whether the defendants' representations in their state-court complaints were misleading or deceptive, the court ruled that the protection of the Petition Clause was inapplicable. As the court explained, the Petition Clause does not provide an "absolute" right to petition, but only "protects legitimate petitioning." Thus, "baseless litigation, or petitions containing 'intentional falsehoods," would not be entitled to the protection of the Petition Clause. The court then reasoned that the alleged misrepresentations by the defendants fall within the category of statements that do not receive the protection of the Petition Clause, as the First Amendment does not immunize false or deceptive statements. Based on this reasoning then, application of the FDCPA to the documents produced by the defendants was constitutional in this case because the behavior alleged, if true, would not entitle the defendants to protection under the First Amendment. The general rule articulated by the court, then, is that the FDCPA is constitutional even when applied to documents or statements produced in a judicial proceeding, as long as those documents do not receive the protection of the First Amendment. Documents that are false or misleading do not receive such protection and are subject to FDCPA liability.

As the Court explained, the Petition Clause does not provide an "absolute" right to petition, but only "protects legitimate petitioning."

BANKRUPTCY COURTS MAY CONSIDER FUTURE EVENTS WHEN DETERMINING DISPOSABLE INCOME

In re Nowlin, ____ F.3d ____ (5th Cir. 2009).

FACTS: Pamela Nowlin filed for Chapter 13 bankruptcy. As an "above-median debtor," she was required to file a plan with a minimum applicable commitment period of five years under 11 U.S.C. § 1325(b)(4). At a hearing, Nowlin testified that a loan from her 401(k) would be paid off after two years, freeing up $1,134.79 a month. The Trustee argued that the extra money should be used to pay her creditors. Nowlin argued that the additional money in her budget after the loan is repaid should not be considered for confirmation purposes because the calculation of "projected disposable income" under § 1325(b)(1) should be mechanical, involving nothing more than (1) determining her current disposable income under § 1325(b)(2), and (2) multiplying that amount by the plan's term. The bankruptcy court denied confirmation of Nowlin's plan. Nowlin appealed.
HOLDING: Affirmed.
REASONING: The court discussed the meaning of the phrase "projected disposable income." The court noted that the competing interpretations are (1) a mechanical approach, favored by Nowlin, in which "projected" is simply a mathematical task of multiplying the "disposable income" calculated under § 1325(b)(2) by the term of the applicable commitment period; and (2) a forward-looking approach, favored by the Trustee, in which projection allows the bankruptcy court to consider evidence of substantial changes to the debtor's income or expenses that have occurred before confirmation or will occur within the plan's period.

The court analyzed the statute in light of changes made by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Congress changed the definition of "disposable income" in § 1325(b)(2), but left unchanged the phrase "projected disposable income" in § 1325(b)(1)(B). The court reasoned that the independent definition of "projected" adds to the phrase's overall meaning. The court found that the term "projected," not defined in the statute, means "[t]o calculate, estimate, or predict (something in the future), based on present data or trends." *In re Jass*, 340 B.R. at 415 (quoting the Am. Heritage College Dictionary 1115 (4th ed.2002)). In view of this definition, the court interpreted the phrase "projected disposable income" to embrace a forward-looking view grounded in the present via the statutory definition of "disposable income" premised on historical data.

The court reasoned that the statutorily defined "disposable income" is the starting point from which the bankruptcy court projects that income over the course of the plan. The court reasoned that any party may rebut this presumption by presenting evidence of present or reasonably certain future events that substantially change the debtor's financial situation. The court noted that some future events may be too speculative, such as the fluctuation of an investment market during the plan's term and its impact on the debtor's budget. The court reasoned that other events are much more certain, as in Nowlin's case where she will pay off a debt on a date certain. The court held that while an above-median-income Chapter 13 debtor's "projected disposable income" presumptively consists of the debtor's statutorily defined "disposable income" mechanically projected into the future for the duration of the plan, any party may rebut this presumption by presenting evidence of present or reasonably certain future events that substantially change the debtor's financial situation.

DEBT COLLECTOR LIABLE TO VICTIM OF MISTAKEN IDENTITY

Komarova v. Nat'l Credit Acceptance, ____ Cal. Rptr. 3d ____ (Cal. Ct. App. 2009).

FACTS: Plaintiff Anastasiya Komarova filed suit against the defendant debt collector alleging violations of the Robbins-Rosenthal Fair Debt Collection Practices Act ("Act") and intentional infliction of emotional distress. Defendant National Credit Acceptance, Inc., attempted to collect a debt from the plaintiff that she did not owe, due to the similarity in the spelling of the plaintiff's name and the actual debtor. Employees of the defendant called the plaintiff at her place of employment repeatedly in an attempt to collect the debt, refused to identify themselves when requested to do so in phone conversations, and made otherwise harassing calls in communication with the plaintiff, behavior which constituted several violations of the Act. Pursuant to the original credit card agreement with the true debtor, the defendant debt collector filed a claim against the plaintiff for the unpaid debt, and an arbitrator awarded $11,214.33 to the defendant. The plaintiff never received notice of the arbitration, and was later served with a petition to confirm the award. The plaintiff then notified the defendant's counsel immediately of the mistaken identification, and after hiring an attorney to represent her in the petition to confirm the arbitration award, the defendant terminated the collection efforts and released the plaintiff from the alleged debt. The plaintiff then filed this suit for the debt collection violations and intentional infliction of emotional distress. The jury found the defendant liable for multiple debt collection violations under the Act and awarded the plaintiff $197,905. The jury also awarded the plaintiff $67,905 on the intentional infliction of emotional distress claim, as well as an additional $75,000 in punitive damages.

The privilege shields involved parties in a suit from liability for any communications made in a judicial or quasi-judicial proceeding that are related to the action.

HOLDING: Affirmed as modified.
REASONING: On appeal, the defendant argued that the litigation privilege provided immunity and therefore barred the plaintiff's claims under the Act. The court explained that the privilege shields involved parties in a suit from liability for any communications made in a judicial or quasi-judicial proceeding that are related to the action. The defendant contended that the alleged violations were committed in connection with the arbitration claim filed on the debt, and therefore those acts were entitled to immunity under the litigation privilege. While the privilege is absolute, the court recognized two exceptions to its applicability. The court explained that it does not apply when statutes in conflict with it are more specific than the privilege and would be significantly or wholly inoperable if the privilege applied.

In holding that the first exception applied, the court reasoned that that the Act was more specific than the privilege because the latter applied to all judicial and quasi-judicial hearings concerning debt collection, whereas the Act was only applicable in a small percentage of debt collection proceedings. The court reasoned that if the litigation privilege applied to cases concerning debt collection violations the requirements of the Act could be regularly circumvented by debt collectors. A consequence of applying the privilege in such cases is that debt collectors could commit egregious violations of the Act yet avoid liability simply by filing suit on the debt. Thus, the second exception to the privilege applied, as its application would afford debt collectors relative ease in avoiding liability for violations, and thereby render the Act inoperable. Because both exceptions to the privilege applied, the defendant was liable for violations of the Act.

LAW FIRM DIDN'T VIOLATE FAIR DEBT COLLECTION PROTECTION ACT

Miller v. Javitch, 561 F.3d 588 (6th Cir. 2009).

FACTS: Peggy Miller stopped making payments on a credit card issued by Providian National Bank. Providian sold the debt to Palisades Collection LLC, who hired the law firm Javitch, Block, and Rathbone ("JBR") to collect the debt. JBR then filed suit in state court against Miller, using their standard collection suit form. When Miller responded requesting more detail, JBR dropped the suit, as is customary for large volume collection firms when met with resistance. Miller filed a putative class action in the Eastern District of Michigan, claiming violations of the Fair Debt Collection Practices Act ("FDCPA"). She alleged that language in the state court complaint was false, deceptive, and misleading, specifically language: 1) identifying the debt as "money loaned," 2) representing the credit card as a charge card, and 3) identifying Palisades as an innocent purchaser of the debt. The district court entered summary judgment in favor of JBR.
HOLDING: Affirmed.
REASONING: The court analyzed each of the contested statements in terms of the FDCPA's goal in protecting the "least-sophisticated-consumer." *Kistner v. Law Office of Michael P. Margelefsky LLC*, 518 F.3d 433 (6th Cir. 2008). The court determined that characterizing credit-card debt as a loan is not false under the FDCPA. In Harris Trust and Savings Bank v. McCray, 316 N.E.2d 206, 209 (1974), the court held that "money advanced to a merchant in payment for merchandise received by the defendant constitutes a loan." The court found further support in the credit-card agreement referring to repaying funds "borrowed" and to Miller's having used the credit-card at automated-teller machines to receive cash advances. The court determined that the least sophisticated consumer would be able to determine that the complaint referenced the credit-card debt, despite its characterization of the debt as a loan, because the complaint mentioned the account by its specific account number and referenced the balance due on the account, information which the consumer would recognize as pertaining to his personal debt.

Similarly, the court found that representing the credit card as a charge card was not misleading within the terms of FDCPA. Failure to use the term "credit card" anywhere in the complaint did not impermissibly mislead. Given, again, the reference to the account number and amount owed, the least sophisticated consumer would understand why he was being sued. Miller herself admitted to initially "pretty much" understanding the complaint. Miller alleged that a charge card differs grossly from a credit card. The court found that although this distinction is fundamentally accurate, the least sophisticated consumer would not appreciate such a distinction.

The court held that the language that Palisades "acquired, for valuable consideration, all right, title and interest in and to the claim" was not misleading. Miller alleged that it implied an innocent purchaser who would enjoy holder-in-due-course protection. The court held that the complaint did not use holder in due course language, that the least sophisticated consumer would not have thought of the term in reading the complaint, and would have no knowledge of even the concept of holder in due course.

The court expressed that a lawyer is not required by the FDCPA to write litigation documentation in plain English understandable by the unsophisticated consumer and that some leeway must be granted for legal terms of art. Accordingly, the court affirmed the district court's summary judgment.

BORROWERS HAVE EXTENDED RIGHT TO RESCIND MORTGAGE

Rand Corp. v. Moua, 559 F.3d 842 (8th Cir. 2009).

FACTS: The Moua family refinanced their existing home loan through Rand Corporation. During closing, Rand provided a Notice of Right to Cancel that advised the Mouas that they had until midnight three business days after the closing date to cancel the transaction. Two versions of the Notice were given and signed by the Mouas during the closing. One version contained a "receipt" section, where the Mouas' signatures acknowledged receipt of the Notice. The other version contained a section acknowledging receipt and a "confirmation" section stating, "More than 3 business days have elapsed since the date of the new transaction and I/We received this Notice and Truth-In-Lending disclosures with regard to the new transaction. I/We certify that the new transaction has not been rescinded." The conflicting sections were both signed on the closing date.

After closing, the Mouas discovered that the new payments were much higher than their prior payments, they had waived their right to three-day advance HOEPA disclosure, and they had forfeited their right to cancel by signing the Notice. After the Mouas failed to make a monthly payment, Rand commenced foreclosure. The Mouas tried to rescind the transaction in writing, but were denied by Rand. The Mouas' home was sold at sheriff's sale to Rand.

The Mouas filed a motion for a temporary restraining order to postpone their eviction. The Mouas argued that the Notice was an ineffective waiver of the TILA required three day notice, which triggered a statutory right to an extended rescission period. The district court granted summary judgment in favor of Rand, to which the Mouas appealed.
HOLDINGS: Reversed and remanded.
REASONING: Under the TILA § 226.23(b)(1), if a loan is secured by a debtor's primary residence, the creditor must "clearly and conspicuously" disclose the debtor's rights, including their right to rescind the transaction within three days. Failure to

comply with that section extends the debtor's right to rescission to three years following the transaction.

The court agreed with the Mouas that the Notice was confusing to the average borrower because the Mouas were required to certify that three business days had elapsed since closing and they had not rescinded the contract, when in fact the document was signed on the same day as closing. The court stated that "requiring borrowers to sign statements that are contradictory and demonstrably false is a paradigm for confusion". The court held that Rand violated the TILA by failing to clearly and conspicuously disclose the Mouas' three-day right to rescind the transaction, thereby giving rise to a three-year period of rescission.

COLLECTION LETTER VIOLATES FAIR DEBT ACT

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

FACTS: Alice A. Ruth and Mary Hahn brought a class action suit on behalf of consumers (collectively "Ruth") against debt collector Triumph Partnerships for alleged violations of the Fair Debt Collection Practices Act ("FDCPA"). The suit arose from Triumph's collection letters that claimed that Triumph would share the consumer's non-public information with third-parties unless the consumer opted-out. The opt-out form provided, "You have the option of directing us NOT to disclose your information with outside companies (other than those disclosures permitted by law). If you prefer that we do not disclose nonpublic personal information about you to nonaffiliated third parties, please fill out the Opt-Out Response Form on the reverse side…" Ruth claimed that this letter violated the FDCPA. The district court granted Triumph's motion for summary judgment. Ruth appealed.
HOLDING: Reversed and remanded.
REASONING: The court began by reviewing actions prevented by the FDCPA. The court noted that the FDCPA prohibits "[t]he threat to take any action that cannot legally be taken or that is not intended to be taken," and "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." 15 U.S.C. §§ 1692(e)(5), (10).

The court held that upon receiving and reading the collection letter and the notice, the only reasonable conclusion that an unsophisticated consumer or, indeed, any consumer-could reach is that the defendants were claiming a legal right to disclose the nonpublic information about the debtor that they had obtained as a consequence of attempting to collect the debt, and were threatening to do so unless the debtor affirmatively "opted out." The court noted that Triumph did not deny that sharing the nonpublic information it had about the plaintiffs, without their express prior consent, would have violated the FDCPA. Thus, on its face, the only reasonable interpretation of the notice was as a threat to take illegal action.

Triumph argued that the notice does not falsely claim a right to share the plaintiffs' nonpublic information because it states that it will do so only "to the extent permitted by law." However, the court reasoned that to threaten to take some action "to the extent permitted by law," is to imply that, under some set of circumstances and to some extent, the law actually permits that action to be taken. The court noted that Triumph suggested no set of circumstances under which the FDCPA would have permitted disclosure of the plaintiffs' nonpublic information without their consent. If anything, the court explained, the notice's implication to the contrary makes the statement more misleading, not less.

Thus, the court concluded that the only reasonable conclusion an unsophisticated consumer could reach, upon receiving the collection letter and the notice, was that Triumph intended to share without permission the nonpublic information it had received by virtue of acquiring and collecting on the debts. The court ruled that as a matter of law, the notice constitutes "a threat to take ... action that cannot legally be taken," § 1692e(5), and a "false representation or deceptive means to collect or attempt to collect a [ ] debt," § 1692e(10).

LENDER MUST RETURN DEBTORS VEHICLE AFTER DEBTOR FILES BANKRUPTCY

Thompson v. Gen. Motors Acceptance Corp., LLC, 566 F.3d 699 (7th Cir. 2009).

FACTS: Appellant Theodore Thompson entered into an installment contract with Appellee General Motors Acceptance Corporation, LLC ("GMAC") for the purchase of a 2003 Chevrolet Impala. Thompson defaulted on his payments, and GMAC repossessed the vehicle in January 2008. In February 2008, Thompson filed for Chapter 13 bankruptcy protection and requested that GMAC return the vehicle. GMAC refused to return the vehicle absent what it deemed "adequate protection" of its interests. Thompson moved for sanctions pursuant to 11 U.S.C. § 362(k), claiming that GMAC willfully violated the automatic stay provision in 11 U.S.C. § 362(a)(3). The bankruptcy court denied the motion because it held that a creditor need not return seized property to a debtor's estate absent adequate protection of its interests. Thompson brought direct appeal.
HOLDING: Reversed and remanded.
REASONING: The court reasoned that Thompson had an equitable interest in the Chevrolet Impala, and as such, it was property of his bankruptcy estate. The court also reasoned that withholding possession of property from a bankruptcy estate was essentially exercising control over possession for purposes of the automatic stay provision because it prevented the debtor from achieving the beneficial use of the estate's property. The court decided that 11 U.S.C. § 542(a) indicated that a turnover of seized property to the bankruptcy estate was compulsory. The court held that the purpose of the stay was to allow the debtor free use of his assets while the court established a repayment plan. If the debtor's car remained with the creditor, it could hamper the debtor from finding or maintaining employment. If the court were to allow the creditor to maintain possession of the asset, the bar would be unfairly tipped in the creditor's favor, vastly reducing the powers of the bankruptcy court to collect the estate for the benefit of the other creditors. The other creditors would be harmed, because the value of the estate would decrease. However, if the debtor failed to show that he could adequately protect the creditor's interest, the bankruptcy court would be empowered to condition the right of the estate to keep possession of the asset on the provision of certain adequate protections to the creditor. The court did not decide whether GMAC willfully violated the automatic stay, but noted that the creditor must either tender the goods or face sanctions for violation of the stay.