tuted producing cause of the consumer's damages. *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995). A consumer is "an individual . . . who seeks or acquires by purchase or lease, any goods or services . . . ." Tex. Bus. & Com. Code § 17.45(4). The question of whether a party is a consumer is a question of law.

A party who borrows money may not satisfy the first requirement for consumer status under the DTPA because money is not a good or service. However, when a party obtains a loan "inextricably intertwined" with the purchase or lease of a good or service, such as a mortgage loan intertwined with a contractor's agreement to build a house, then that party may qualify as a consumer.

The court agreed with Wells Fargo that Gomez was not a consumer. She was not seeking a loan to purchase any other good or service. She sought only to borrow money to avoid repossession of her house. Because Gomez was attempting to only borrow money and not purchase a good or service, she did not satisfy the requirements for consumer status under the DTPA.

DTPA CLAIM DOES NOT SURVIVE DEATH OF CONSUMER

McCoy, et al. v. Pfizer, Inc., et al., ____ F. Supp.2d ____ (E.D. Tex. 2010).

FACTS: Plaintiffs are the parents of Jon Andrea Roberts ("Andrea") who shot and killed her husband and two children. The complaint alleges that the prescription antidepressant Zoloft caused Robert's actions. The suit is partially based upon the Texas Deceptive Trade Practices Act ("DTPA"), seeking actual and punitive damages. The manufacturer of Zoloft ("Defendant") filed a motion to dismiss because DTPA claims do not survive death of consumer.
HOLDING: Granted
REASONING: The Texas Supreme Court has sidestepped any discussion on the topic of the survivability of a DTPA claim and the appellate courts in Texas are split on the issue. The court based its opinion on a federal case from the Northern District of Texas, *Launius v. Allstate Ins. Co.*, No. 3:06-cv-0579-B, (N.D.Tex. Apr.17, 2007). In *Launius*, the court held that a DTPA claim does not survive death. If DTPA claims cannot be assigned because of their personal and punitive attributes, then it would be impossible for such claims to survive the death of the consumer given the common law rule holding that actions to vindicate personal rights terminate with the death of the aggrieved party.

The court in the instant case stated that if the Texas Supreme Court were faced with this issue, it would hold that a consumer's cause of action under the DTPA does not survive the death of the consumer.

CONSUMER CREDIT

CREDIT CARD CUSTOMERS MAY MAINTAIN CLASS ACTION UNDER THE FACTA

Bateman v. American Multi-Cinema, Inc. 623 F.3d 708 (9th Cir. 2010).

FACTS: To protect against identity theft, the Fair and Accurate Credit Transactions Act ("FACTA") prohibits merchants from printing more than the last four digits of a consumer's credit or debit card number on a receipt. Michael Bateman filed a putative class action suit alleging that American Multi-Cinema, Inc. ("AMC") violated the FACTA when its box office kiosks printed more than 29,000 receipts that included the first four and last four digits of consumers' credit or debit card numbers during December 2006 and January 2007. The FACTA incorporates the Fair Credit Reporting Act's ("FCRA") statutory damages provision, which allows a consumer to recover damages between $100 and $1,000 for each willful violation of the FACTA without having to prove actual damages. On behalf of himself and other consumers who received such receipts, Bateman sought to recover statutory damages ranging from $100 to $1,000 for each willful violation of the FACTA. The United States District Court for the Central District of California denied class certification under Federal Rule of Civil Procedure 23(b)(3) ("Rule 23(b)(3)"), without prejudice. That court found that a class action was not the superior method of litigating the case because AMC had made a good faith effort to comply with FACTA after the lawsuit was filed, and the magnitude of AMC's potential liability - $29 million to $290 million – was enormous and out of proportion to any harm suffered by the class. In fact, Congress subsequently amended the FACTA to address misunderstandings about the FACTA's requirements and to provide businesses some measure of protection from lawsuits resulting from those misunderstandings. The district court requested and considered supplemental briefs, and then denied, with prejudice, Bateman's renewed motion for class certification for largely the same reasons as before, with the additional reason that he had alleged no actual harm. Bateman appealed.
HOLDING: Reversed and remanded.
REASONING: The court found that none of the district court's three grounds—the disproportionality between the potential liability and the actual harm suffered, the enormity of the potential damages, or AMC's good faith compliance—justified the denial of class certification on superiority grounds, and that the district court abused its discretion in improperly relying on them.

Of the factors Rule 23 provides regarding the superiority of a class action, none authorizes a court to consider whether certifying a class would result in damages that are disproportionate to any harm suffered by a plaintiff. Rather, the plain text of the statute and congressional silence on the issue of class relief strongly suggest that Congress intended class relief to be available, and that a court cannot deny class certification, to plaintiffs who have otherwise met the requirements of Rule 23. In fashioning the FACTA, Congress aimed to restrict the amount of information available to identity thieves. That FACTA allows consumers to recover statutory damages furthers this purpose by deterring businesses from willfully making consumer financial data available – even when no actual harm results. Despite Congress' awareness of the availability of class actions, it set no cap on the total amount of aggregate damages, no limit on the size of a class, and no limit on the number of individual suits that could be brought against a merchant in the statute. Congress also provided for punitive damages in addition to any actual or statutory damages. The court found that Congress demonstrated its intent to allow class action lawsuits in accordance with the FACTA's deterrent and compensatory purposes when it did nothing to limit the availability of class relief or the amount of aggregate damages in amending the FACTA in the more recent Clarification Act. Therefore, it held that proportionality of the damages in a class action is an irrelevant consideration in effectuating the FACTA's compensatory and deterrence purposes.

The fact that class treatment would render AMC's potential liability enormous was not an appropriate reason to deny class certification.

The court also noted that the fact that class treatment would render AMC's potential liability enormous was not an appropriate reason to deny class certification. To do so would undermine FACTA's compensatory and deterrent purposes. Defendants facing huge costs may find it more economically feasible to settle. There are appropriate safeguards in place, such as the court's discretion to reduce damages awards, if the award is unconstitutionally excessive. In the absence of affirmative steps such as placing caps on aggregate liability, the court held that Congress intended FACTA's remedial scheme to operate as it was written.

The district court's third justification for denying class certification under Rule 23(b)(3), that AMC had engaged in good-faith compliance with FACTA within a few weeks of the action being brought, was also not an appropriate reason to deny class certification. Such a justification undermined FACTA's compensatory and deterrent purposes.

ATTORNEY IS "CREDIT REPAIR ORGANIZATION" UNDER CREDIT REPAIR ORANIZATION ACT

Rannis v. Recchia, 380 Fed.Appx. 646 (9th Cir. 2010).

FACTS: Debtor Phillip Rannis brought a putative class action against attorney Peter Recchia, alleging that Recchia engaged in credit repair services that violated the requirements of the Credit Repair Organizations Act, 15 U.S.C. §§ 1679-1679j. Recchia represented clients on a variety of issues relating to consumer protection and unfair debt collection under the firm name Fair Credit Lawyers, Inc. He offered a non-litigation "credit resolution program," in which he charged clients a set amount of money for his services purportedly achieving a "maximally accurate" and "positive" credit report. After viewing an ad in the local PennySaver, Rannis contacted and retained Recchia. Rannis paid almost the entire amount of the program before Recchia completed services on his behalf. Rannis then sued Recchia on behalf of himself and other individuals who had entered into contracts with Recchia for credit repair services. Rannis alleged that Recchia had violated the CROA by accepting payment in advance of services and by failing to provide required disclosures. The United States District Court for the Central District of California granted Rannis' summary judgment motion, holding, inter alia, that Recchia had violated the CROA. Attorney appealed.

HOLDING: Affirmed.

REASONING: Recchia challenged the district court's determination of liability under the CROA, arguing that he did not qualify as a "credit repair organization." The court held otherwise, finding that Recchia precisely met the requirements of the CROA. The CROA defines a "credit repair organization" as "any person who uses any instrumentality of interstate commerce or the mails to sell, provide, or perform (or represent that such person can or will sell, provide or perform) any service, in return for the payment of money or other valuable consideration, for the express or implied purpose of … improving any consumer's credit record, credit history, or credit rating." 15 U.S.C. § 1679a(3)(A). Recchia admitted to using interstate commerce and the mail in providing credit resolution services and he provided those services in exchange for valuable consideration. In addition to other evidence, his PennySaver advertisement explicitly advertised "Improve Your Credit Score Now!", and his retainer agreements expressly stated that his goal was to "achiev[e] a maximally accurate and positive credit report on Client's behalf.

Recchia also argued that he was not acting as credit repair organization because the CROA exempts attorneys acting in the course and scope of the practice of law. The court, relying on *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001), rejected this argument. Although *Gill* was distinguishable from Recchia in that the defendants in *Gill* acted fraudulently, *Gill's* application of the CROA was still applicable. Recchia qualified as a "credit repair organization" so long as he acted for the purpose of "improving any consumer's credit record, credit history, or credit rating." Because Recchia met the definition of a credit repair organization, he was required to comply with the CROA, including its provisions prohibiting charging clients before fully performing services, 15 U.S.C. § 1679b(b), and mandating certain disclosures prior to contracting with clients for the credit resolution services he offered, 15 U.S.C. §§ 1679c-1679e. Recchia violated both of these provisions.

BANKRUPTCY ATTORNEY SANCTIONED FOR CHARGING FEE TO CLIENT'S CREDIT CARD

In re Seidel, ____ B.R. ____ (Bankr. S.D. Ohio 2010).

FACTS: Linda Seidel consulted with attorney Michael Warren about filing for bankruptcy due to her credit card and mortgage debts. Seidel informed Warren that her house was an important asset that she did not want to lose. After being advised of the lawyer's $3,000 fee for Chapter 13 services, Seidel reluctantly agreed to make the payment for his services on her Discover card, a method of payment suggested by Warren. After Seidel's credit card was charged the fee of $3,000 plus the court filing fee of $274, Warren presented and Seidel signed two documents: the first document was titled “Basic Bankruptcy Flat Fee Agreement”, which described the services Warren would provide. The second document was titled “Be Careful How You Use Credit Cards,” which warned debtors of the consequences of credit card use immediately prior to filing a bankruptcy case. At Warren’s request, Seidel obtained an appraisal of her home and contacted National City, the entity holding the first mortgage on her residence. The balance owed on her first mortgage exceeded the property value of her home, which qualified Seidel to obtain relief under Chapter 13.

Prior to the meeting with the creditors, National City filed a Proof of Claim, which, on its face, indicated an outstanding mortgage balance that was materially less than the amount that was given to Seidel in the previous month.

Seidel expressed concern regarding the conflicting amounts shown in the paperwork but was assured by Warren that her case was “fine” and she had nothing to worry about. However, because of these conflicting amounts, which showed that Seidel owed less than what her home was appraised for; Seidel failed to meet the requirements to eradicate the second mortgage on her home, thus not qualifying her for relief provided under Chapter 13. After unsuccessful attempts to reach Warren after filing the bankruptcy proceeding, Seidel wrote a letter to the bankruptcy judge objecting to the claim provided by National City as being mistaken, which caused the court to hold a hearing on the claim. Seidel appeared at the hearing without being represented by Warren and cleared the way to confirmation of her Chapter 13 plan. These events led the court to schedule a hearing into the Warren’s conduct.

HOLDING: Sanctions imposed.

REASONING: Bankruptcy Code Section 526(a)(4) explicitly prohibits an attorney from advising a debtor to incur more debt for the purpose of obtaining bankruptcy related legal services. The court did not take into account that Seidel consented to and was informed of the consequences of using her credit card prior to a bankruptcy proceeding. Section 526(a)(4) unambiguously states that its prohibition may not be waived even if a client is advised of the consequences of charging a credit card immediately prior to pursuing bankruptcy relief.

Section 523(a)(2)(A) of the Bankruptcy Code excepts from a debtors discharge “any debt for money, ... services or an extension, renewal, or refinancing of credit, to the extent obtained by ... false pretenses, a false representation, or actual fraud ....” In determining false representation encompassed by § 523(a)(2)(A) and the use of credit cards, courts look to the subjective intent of the debtor at the time of the credit card use. See *In re Manning*, 280 B.R.171, 185 (Bankr. S. D. Ohio 2002) (citing *Rembert v. AT&T Universal Card Servs., Inc.*, (*In re Rembert*), 141 F.3d 277, 281 (6th Cir. 1998)). The court determined in the present case, Seidel did not intend to pay the debt incurred (i.e., the charge on the credit card) for the lawyer’s fee; rather she intended to seek bankruptcy protection and to pay only a yet to be determined percentage of the debt through her bankruptcy. Thus, use of her credit card to pay the Warren’s fee is a false representation within the meaning of § 523(a)(2)(A) of the Bankruptcy Code. The court noted that Warren has been a bankruptcy practitioner for approximately eighteen years, and therefore knew that Seidel, who was preparing to file bankruptcy, had no intention of repaying the credit card debt incurred to pay his fee. By accepting payment via credit card, Warren not only allowed Seidel to incur additional debt, but assisted his client in conduct that he knew to be fraudulent.

In addition to the cease and desist order, Warren was ordered to refund the $3,264 to Seidel’s credit card. Warren was also required to file a list with the court of every case he filed since October 11, 2005, in which all or part of the fees were charged to a bankruptcy client’s credit card, and was subject to further investigation by the U.S. Trustee of his transactions with his bankruptcy clients to determine whether further action should be taken.

DEBT COLLECTION

FDCPA FEE-SHIFTING APPLIES TO APPELLATE PROCEEDINGS

Anchondo v. Anderson, Crenshaw & Associates, L.L.C, 616 F. 3d 1098 (10th Cir. 2010).

FACTS: Elsa Anchondo was the lead plaintiff in a class action lawsuit against Anderson, Crenshaw and Associates for claims under the Fair Debt Collection Protection Act (FDCPA). After the parties agreed to a settlement in favor of Anchondo, the district court awarded Anchondo $63,333.52 in fees and costs. Anderson then appealed the award of fees.

HOLDING: Affirmed.

REASONING: The Tenth Circuit held that, like the Truth in Lending Act (TILA), the FDCPA‘s fee-shifting provision includes appellate actions. The court held that the district court properly applied the lodestar method and conducted an appropriate review of Anchondo’s attorney’s billing records. The Court relied on *Gallegos v. Stokes*, 593 F.2d 372, 376 (10th Cir. 1979), which held the plaintiff “was entitled to attorney’s fees for the successful defense of this appeal.” Although *Gallegos* recognized a right to appellate fees under the Truth in Lending Act (TILA) rather than the FDCPA, the fee-shifting provisions of the two statutes are identical. The court noted “in the case of any successful action to enforce the foregoing liability [for violation of the TILA or FDCPA]” the plaintiff may recover “costs of the action, together with a reasonable attorney’s fee as determined by the court.” 15 U.S.C. § 1640(a) (3) (TLA) and § 1692k (a) (3) (FDCPA).

Following the reasoning applied in *Gallegos*, the Tenth Circuit granted Ms. Anchondo’s request for fees incurred in defending the appeal. In its opinion the Court held that because “the operative fee-shifting provisions of the [TILA and FDCPA] are identical…plaintiff is statutorily entitled to fees and costs for this appeal.”