examine the goods when that examination would have revealed the alleged defect to him. TEX. BUS. & COM. CODE ANN. § 2.316 cmt. 8 (Vernon 1994). The court found that in classes such as this, where actual knowledge of each class member is a key issue, individual issues will always predominate, and certification is inappropriate.

Texas Rules of Civil Prodedure Section § 42(b)(4) also requires courts to determine a class action to be "superior to other available methods for the fair and efficient adjudication of the controversy." In determining the superiority of a class action, the issue of collateral estoppel or claim preclusion must be considered. The court found certification of this class could result in a scenario where a purchaser of a PWC manufactured by Polaris injures himself, and by claiming under a breach of warranty or products liability theory, is collaterally estopped from claiming the PWC to be unreasonably dangerous due to a safety defect.

Finally, the court noted that under the Federal Boat Safety Act ("FBSA") 46 U.S.C.A. §§ 4301-4508 (West Supp. 2002), the United States Coast Guard has exclusive authority in regulating the design of PWCs. The Coast Guard is presently engaged in a review of the off-throttle steering design of the PWCs, which may result in a recall of the PWCs. In considering possible prejudice to class members, and the Coast Guard investigation, the court found a class action not to be the superior method of dispute resolution in this case.

TCPA APPLIES TO INTRASTATE CALLS

Omnibus International v. AT&T, 111 S.W.3d 818 (Tex. App.—Dallas 2003).

FACTS: Between January and April of 2000, AT&T sent seven or eight unsolicited facsimiles to Omnibus without prior consent. Omnibus brought suit under the Telephone Consumer Protection Act, 47 U.S.C. §277(b)(1)(C), which prohibits sending unsolicited facsimile advertisements, and the Texas Code, which permits a private right of action for violations of the TCPA. TEX. BUS. & COMM. CODE ANN. §35.47(g). The trial court granted AT&T's motion for summary judgment, finding that the TCPA did not apply to intrastate calls.
HOLDING: Reversed and remanded.
REASONING: Federal principles of statutory construction dictate that the TCPA applies to intrastate calls because the plain language, legislative history, and Federal Communication Commission's interpretation support such a finding. The TCPA originally restricted only interstate calls, but was amended to apply to intrastate facsimiles, showing congressional intent for intrastate application in its plain language. Legislative history divined through congressional records refers to the deliberate limitation of both interstate and intrastate unsolicited calls. Furthermore, the TCPA charged the FCC with promulgating rules and administration, and in a public notice, the FCC explicitly stated the TCPA applies to intrastate calls.

Construing the invoked state legislation required not rendering any part of the statute inoperative, superfluous or without legal effect. *In re Canales*, 52 S.W.3d 698 (Tex. 2001). Section 35.47(g) of the Texas Business and Commercial Code contained an amendment granting a private right of action against violations of section 35.47 or the TCPA. AT&T contended that a TCPA claim under subsection (g) must reach only interstate calls because construing a TCPA claim to reach intrastate calls would effectively supersede existing state legislation, leaving the state legislation without legal effect. However, a private TCPA claim under section 35.47 of the Texas Code needed not apply only to interstate calls because state-law regulations apply to all intrastate facsimiles, regardless of content, extending beyond the federal prohibitions of only unsolicited facsimiles.

DEBT COLLECTION

PRIVATE COLLECTIONS AGENCIES COLLECTING STUDENT LOANS ARE SUBJECT TO FAIR DEBT COLLECTION PRACTICES ACT

Kort v. Diversified Collection Servs., Inc., 270 F.Supp.2d 1017 (N.D.Ill. 2003)

FACTS: Defendant Diversified Collection Services, Inc. ("DCS") is a collection agency that collects delinquent student loans. DCS's collection services includes telephone contact with borrowers to negotiate repayment arrangements, and to recommend clients whose accounts should be put into administrative wage garnishment. When a client, either at DCS's recommendation or on its own initiative, requests that a defaulting borrower be subjected to wage garnishment, DCS prints and mails a 30 day notice to the defaulting borrower indicating that garnishment will occur unless specified actions are taken.

On February 5, 2000, DCS printed such a letter on behalf of DCS's client, the Illinois Student Association Commission ("ISAC") and mailed the letter to Elizabeth Kort on February 7, 2000, in an attempt to collect a loan to Kort by ISAC. The letter stipulated that unless Kort complied with the requirements of the letter by March 6, 2000, payroll deductions would be ordered. Specifically, Kort was required to establish a written repayment agreement with DCS or remit the balance in full. Kort may claim an exemption to the demand by submitting written proof that she has been involuntarily separated from employment. Wage garnishment may then be stayed until Kort has been continuously employed for twelve months. The letter is identical to a form notice of administrative wage garnishment drafted in 1998 by the Department of Education ("DOE").

Kort claims that the letter is in violation of sections 1692e and 1692e(5) of the Fair Debt Collections Practices Act ("FDCPA") by threatening garnishment sooner than Kort is legally entitled to do so and by requiring Kort to document or provide written proof of her eligibility for an exemption by

a specific deadline although she is not required to do so.

Kort brought a class action against DCS alleging violation of the FDCPA. In Count I, DCS asserts that the provisions of the Higher Education Act ("HEA") and the FDCPA are in conflict and cannot be harmonized. DCS claims that the more specific statute, HEA controls and, therefore, loan servicers under the HEA are not statutory debt collectors under section 1692a of the FDCPA.

Plaintiff and Defendant cross-moved for summary judgment. The District Court granted and denied the motions in part, holding that DCS was a "debt collector" subject to the FDCPA

HOLDING: Reversed in part, affirmed in part, remanded for further proceedings.

REASONING: When two federal statutes appear to conflict, absent a clearly expressed Congressional intention to the contrary, it is the duty of the courts to harmonize them where possible. *Morton v. Mancari,* 417 U.S. 535, 551 (1974). In the instant case, however, none of the allegedly conflicting provisions of the HEA and the FDCPA were at issue. Where the HEA is silent, this court must assume the FDCPA has full effect because "the HEA does not trump or preempt the FDCPA." *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1267 (9th Cir.1996). The *Brannon* court reasoned that while GSL regulations preempt inconsistent State laws regarding pre-litigation collection activity, significant Federal protection for GSL debtors remains under the FDCPA. The court in the instant case applied that same reasoning to hold that private guaranteed student loan debt collectors are subject to the FDCPA. The court found DSC was a debt collector under the FDCPA because it collected money from debtors, included its name in it letters, was paid on a contingency basis, and had a direct relationship with creditor clients.

FDCPA REQUIRES OBLIGATION BE IN "DEFAULT"

Alibrandi v. Financial Outsourcing Services, Inc., ____ F.3d ____ (2nd Cir. 2003).

FACTS: In October 1999 at the conclusion of an automobile lease, First Union National Bank ("Bank"), the lessor, concluded that Alibrandi owed a final payment for excess mileage, wear and tear on the vehicle. In November 1999, the Bank retained North Shore ("NS") to help collect the debt. NS immediately sent Alibrandi a letter stating that it was a debt collector and would be collecting his debt. This letter included all the required warnings under the Fair Debt Collection Practices Act ("FDCPA"). In January 2000, the Bank retained the services of Financial Outsourcing ("FO") to "service the debt." Alibrandi sued FO, for alleged violations of the FDCPA and sought damages on behalf of himself and a purported class. Specifically, Alibrandi alleged that he had defaulted on his obligation to the Bank as of October 1999 and that FO's January 27, 2000 letter did not contain the warnings the FDCPA requires of debt collectors' correspondence. 15 U.S.C. § 1692e(11). In response FO maintained debts such as Alibrandi's would not be considered "delinquent," much less in default. In granting summary judgment, the United States District Court of Eastern New York rejected Alibrandi's argument that a debt goes into default immediately after it becomes due.

HOLDING: Vacated and remanded.

REASONING: This court decided that this case turned on the definition of "default" for the purposes of the FDCPA, because if Alibrandi's debt was not in default when FO wrote to him then no statutory warnings were needed.

Alibrandi argued that his debt was in default immediately after it became due. For support Alibrandi used Black's Law Dictionary, which defines default as "an omission or failure to perform a legal or contractual duty, or to observe a promise or discharge an obligation." The court responded by stating that although classifying a debt as in default immediately after it first becomes due may have a certain facile appeal, this approach was at odds with how the term is generally understood. The court went on to say that in applying the FDCPA, courts have repeatedly distinguished between a debt that was in default and a debt that was merely outstanding, emphasizing that only after some period of time did an outstanding debt go into default. The court used the example of cases involving student loan collections under the FDCPA, under which a debt that was repayable in monthly installments went into default after 180 days of delinquency. Likewise, various other federal regulations have defined default as commencing anywhere between thirty and 270 days after a debt became due. Although these judicial decisions and regulations reflect inconsistent periods of time preceding default, they all agree that default did not occur until well after a debt became outstanding. The court concluded that the FDCPA's broad, pro-debtor objectives would not be served if the court adopted Alibrandi's argument.

In applying the FDCPA, courts have repeatedly distinguished between a debt that was in default and a debt that was merely outstanding.

Alibrandi's second contention was that NS's letter had already declared his debt defaulted by virtue of NS's self identification as a "debt-collector." The court agreed, if the Bank hired NS to pursue Alibrandi's debt, NS's self-identification constituted a declaration by the Bank that Alibrandi's debt was in default. If Alibrandi's debt was in default when FO obtained it, FO had no ability to change that status through an agreement with the Bank. FO may sincerely have believed it was servicing a debt that was not in default, but the court held that was irrelevant. Therefore, the prior judgment was vacated and the case was remanded for further proceedings consistent with this opinion.

STUDENT LOAN CAN BE DISCHARGED IN BANKRUPTCY

Oyler v. Educ. Credit Mgmt. Corp., 300 B.R. 255 (B.A.P. 6th Cir. 2003)

FACTS: Michael Oyler obtained four separate student loans to fund his education at Fuller Theological Seminary. Educational Credit Management Corporation ("ECMC")

assumed these loans. In June of 1998, Oyler began a Messianic Jewish congregation and was to receive a monthly salary of $1200 as a licensed pastor. Oyler's salary, however, depended on the contributions received by the congregation, and the family's annual income had been less than $10,000. He lived with his wife and three children in an apartment, which was paid for by the congregation. The family of five budgeted only $400-$450 per month for food, did not have any health insurance, wore donated clothing and drove used, high mileage, vehicles.

Oyler filed a chapter 13 bankruptcy petition on September 9, 1999, and on June 13, 2002, he commenced an adversary proceeding seeking to discharge his student loans pursuant to 11 U.S.C. section 523(a)(8). The only debts scheduled in the chapter 13 plan were the student loans to ECMC. At the time of trial Oyler was current in his monthly payments of $50 into the chapter 13 plan.

The bankruptcy court noted Oyler's income was well below the poverty level and he and his family maintained a very frugal lifestyle. Oyler testified that he was completely committed to his calling as a minister in his congregation and that his circumstances would be likely to continue for the foreseeable future. After a review of the totality of the circumstances, the bankruptcy judge concluded Oyler had established that repayment of the student loans would create an undue hardship and entered a judgment discharging the debt pursuant to 11 U.S.C. section 523(a)(8). ECMC appealed, arguing the evidence did not support the bankruptcy court's determination.

HOLDING: Affirmed.

REASONING: Under section 523(a)(8) of the Bankruptcy Code, "a discharge under section 727, 1141, 1228(a), or 1328(b) of this title does not discharge an individual debtor from any debt…for an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in party by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship, or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. §523(a)(8).

To determine whether an undue hardship exists, the United States Court of Appeals for the Sixth Circuit has adopted a multifactor approach starting with, and then expanding on, the three prong analysis announced by the Second Circuit in *Brunner v. New York State Higher Education Services*, 831 F.2d 395 (2nd Cir. 1987) In *Cheesman v. Tenn. Student Assistance Corp.*, 25 F.3d 356, 359 (6th Cir. 1994), the court stated the debtor must demonstrate "1) the debtor cannot maintain, based on current income and expenses, a minimal standard of living for herself and her dependents if forced to repay the loans; 2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period…; and 3) the debtor has made good faith efforts to repay the loans." Other factors that may be considered, including the amount of the debt, the rate at which interest is accruing, the debtor's claimed expenses and current standard of living.

ECMC argued Oyler's circumstances did not satisfy the *Cheesman* test and that the court incorrectly applied the test by placing a great deal of weight on the fact that the loans were for an education in the ministry. In particular, ECMC took issue with the court's determination that Oyler's circumstances were likely to continue. Because the court refused to consider Oyler could have obtained a higher paying job with a different congregation or in another field, ECMC claimed Oyler did not establish that his circumstances would continue to persist for the foreseeable future.

Contrary to ECMC's assertion, *Cheesman* did not simply adopt the three prong *Brunner* analysis, but rather indicated the *Brunner* test was one of several that could be used to determine if an undue hardship existed. *Cheesman* made it clear that a debtor's choice to work in a low paying field was not by itself an indication of bad faith, nor would it be used against a debtor in an evaluation of undue hardship.

Although the bankruptcy court considered Oyler's profession in reaching its decision, the appellate court concluded the fact that the low paying profession involved in the appeal was the ministry had no bearing on the decision. The court focused instead on whether Oyler had attempted to maximize his income by seeking or obtaining stable employment commensurate with his education, background, and abilities. In the totality of the circumstances, the appellate court agreed Oyler carried his burden of proving he was entitled to a discharge of his student loans. Accordingly, the bankruptcy court's discharge of Oyler's student loans was affirmed.

DEBTOR'S STATEMENT TO DEBT COLLECTOR "SHE COULD NOT TALK TO HIM AT WORK" IS SUFFICIENT TO PUT COLLECTOR ON NOTICE EMPLOYER PROHIBITS SUCH CALLS

Horkey v. J.V.D.B. & Assocs., Inc., 333 F3d 769 (7th Cir. 2003).

FACTS: J.V.D.B. & Associates, Inc. ("J.V.D.B."), a debt collection agency, was trying to collect an outstanding debt from Amanda Horkey ("Horkey") in the amount of $817.00. Chris Romero ("Romero"), an employee of J.V.D.B., called Horkey at least twice at her work on January 9, 2001. The first time he spoke with her he demanded that she pay the $817.00. Horkey told Romero that she could not talk to him at work and asked for his telephone number so that she could call him back from her home to set up a payment schedule. Romero refused to let Horkey off the phone, so Horkey hung up on him. Shortly thereafter, Romero called Horkey's work for the second time and spoke with her co-worker, Jimmie Scholes. When Scholes asked to take a message, Romero said, "tell Amanda to stop being such a bitch."

Horkey sued J.V.D.B. and claimed that J.V.D.B. violated section 1692c(a)(3) of the Fair Debt Collection Practices Act (FDCPA) which prohibits contacting debtors at work, where the debt collector does not have the debtor's consent or the court's express permission to make such calls or knows or has reason to know that the employer does not allow such calls. The District Court granted Hockey's motion for summary judgment and J.V.D.B. appealed

HOLDING: Affirmed.

REASONING: FDCPA section 1692c(a)(3) states without the consent of the debtor or the express permission of the Court, the debt collector is prohibited from contacting the debtor at the debtor's place of employment if the debt collector knows or has reason to know that the debtor's employer prohibits such communication. J.V.D.B. did not have Horkey's consent or the Court's express permission to contact Horkey at work.

J.V.D.B. knew or should have known that Horkey's employer prohibited her from communicating with J.V.D.B. while she was at work. During Romero's first call, Horkey told him, that she could not talk to him at work and asked for a telephone number so that she could return is call and set up a payment schedule. While this phrase could be interpreted as meaning something other than "my employer won't let me talk to you while I'm at work," the Court of Appeals held summary judgment in favor of Horkey was still appropriate. The Court reasoned the FDCPA was enacted to help protect unsophisticated consumer debtors who are not well versed in legal terminology. To satisfy section 1692c(a)(3) and put the debt collector on notice, the debtor need only tell the debt collector in plain English she cannot speak to the debt collector while she is at work.

THE LEAST-SOPHISTICATED-CONSUMER STANDARD IS MORE RIGOROUS THAN DETERMING WHETHER A "REASONABLE CONSUMER" WOULD FIND A DEBT COLLECTOR'S COMMUNICATIONS FALSE, DECEPTIVE, OR MISLEADING

TO DEMONSTRATE A SECTION 1692e(4) VIOLATION, CONSUMER MUST SHOW DEBT COLLECTOR REQUESTED OR IMPLIED NONPAYMENT WOULD RESULT IN ACTION DEBT COLLECTOR COULD NOT LAWFULLY TAKE OR DID NOT INTEND TO DO SO

Weiss v. Collection Center, Inc., ____ N.W.2d ____ (2003).

FACTS: Shawtee Weiss ("Weiss") received medical treatment at Medcenter and incurred a $255 balance. Medcenter assigned Weiss' past-due account to Collection Center, Inc ("CCI") for collection. As part of their collection efforts, CCI sent Weiss a letter informing her that CCI made an inquiry regarding her vehicles with the North Dakota Department of Motor Vehicles ("DMV"). DMV did not receive such an inquiry.

Weiss alleged that CCI's letter violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692e, ("the Act") and sought certification of the case as a class action. CCI moved for summary judgment. The trial court granted CCI's motion for summary judgment. Weiss appealed.

HOLDING: Reversed and remanded.

REASONING: The test to determine whether a collection letter violates the Act is the "least-sophisticated-consumer standard." This standard is more rigorous than determining whether a "reasonable consumer" would find a debt collector's communication false, deceptive, or misleading. The purpose of the least-sophisticated-consumer standard is to protect those consumers at a level lower than the average consumer.

The purpose of the least-sophisticated-consumer standard is to protect those consumers at a level lower than the average consumer.

To prevail, Weiss must show CCI represented or implied that nonpayment of their debt would result in arrest or imprisonment, seizure, garnishment, attachment or sale of any property or wages, unless such action is lawful and CCI intended to take such action. Weiss argued CCI had no legal basis to seize their vehicle or had no intention to do so. The court ruled there was no legal prohibition against taking action to collect even the smallest debt but found there was a material question of fact regarding CCI's intent to take such action. CCI argued the DMV letter was an informational letter that even the least sophisticated consumer would not regard as an implied threat that nonpayment would result in action. The court was unwilling to conclude as a matter of law that a hypothetical least sophisticated consumer could not interpret CCI's letter as an implied threat to seize Weiss' vehicle if the debt remained unpaid.