its adherence to its earlier proposed settlement and, per the policy, requested an appraisal within 20 days. PSM initially refused the appraisal request and only after 8 months submitted to an appraisal, relying on documents it originally averred were insufficient. The appraisal umpire fixed the claim at $117,000, which, less the $75,000 dollar advance, PSM paid. PSM did not pay the $2000 preparations costs claim.

Willow Inn filed suit and the parties agreed to a bench trial. The district court awarded Willow Inn $2000 on the breach of contract claim, $150,000 in punitive damages, $128,075 in attorney fees and $7,372 in costs. PSM appealed, claiming *inter alia* that the punitive damages assessment was constitutionally excessive. The court vacated and remanded that award to the district court with instructions to apply the guideposts outlined in *BMW of N. American, Inc. v. Gore*, 517 U.S. 559 (1996). On remand the district court declared its $150,000 punitive damages award not to be constitutionally excessive.

HOLDING: Affirmed.

REASONING: The court found the $150,000 punitive damages to approach but not cross the constitutional line after it considered the district court's application of the three *Gore* guideposts.

The court recognized that perhaps the most important indicum of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct and explained that the critical input to the reprehensibility calculus in this case was whether the delay in settling the claim was due to legitimate differences of opinion over its value, or rather to PSM's dilatoriness and inertia. The court examined the district court's findings regarding the subfactors of the reprehensibility analysis and agreed that the plaintiff was financially vulnerable as Willow Inn was a modest family-run business. The court disagreed that the various stonewalling tactics employed by PSM in processing Willow Inn's claim satisfied the "repeated conduct" reprehensibility subfactor because "repeated conduct" in *Gore* involved not merely a pattern of contemptible conduct within one extended transaction, but rather specific instances of similar conduct by the defendant in relation to other parties. The court further held that the delay in settling the claim was due to intentional stonewalling. PSM repeatedly asked Willow Inn for documentation that had already been submitted or was unnecessary. PSM also unreasonably asserted that no dispute warranting an appraisal existed and froze the appraisal process. The court concluded that the punitive damages award was not out of proportion to the reprehensibility of PSM's conduct.

The Court next examined the ratio of the punitive damages award to the actual harm inflicted on the plaintiff. In determining the figure that comprised the second term of the ratio the court rejected the amount the district court used: "Willow Inn's claim under the policy and the payment that it belatedly received," approximately $125,000. As Willow Inn's main insurance claim had been settled before this case was brought, and because the $2000 contract claim award was only incidental to the bad faith thrust of the litigation, the court concluded that attorney fees and costs awarded was the proper term to compare to the punitive damages award for ratio purposes. These awards totaled $135,000, resulting in approximately a 1:1 ratio, which is indicative of constitutionality under *Gore*.

The court found the district court was mistaken to consider attorney fees to be a "civil penalty" when applying the third *Gore* guidepost. The court held the most applicable civil penalty to compare with the punitive damages amount was a penalty of up to $5000 contained in Pennsylvania's Unfair Insurance Practices Act. The court also noted that PSM's conduct arguably could have resulted in the revocation of one's license to issue insurance policies. The court recognized the lack of Supreme Court guidance on this issue and the difficulty in measuring civil penalties against punitive damages. While unsure as to how to apply this guidepost, the court was reluctant to overturn the punitive damages award on this basis alone. Finding the punitive damages award not constitutionally excessive, the court affirmed the judgment of the district court.

DEBT COLLECTION

DEBT COLLECTOR WAS NOT LIABLE UNDER FEDERAL LAW FOR CONTACTING THE DEBTOR DIRECTLY WHEN THE COLLECTOR WAS UNAWARE THAT THE DEBTOR WAS REPRESENTED BY COUNSEL

Schmitt v. FMA Alliance, 398 F.3d 995 (8th Cir. 2005).

FACTS: Schmitt incurred a debt to First Bank U.S.A ("First Bank"). He failed to pay the debt and he retained an attorney. The attorney informed First Bank that he represented Schmitt and that Schmitt was unable to pay the debt. After receiving the attorney's notice, First Bank transferred Schmitt's account to FMA Alliance ("FMA") to collect from Schmitt. Thereafter, FMA sent a letter directly to Schmitt seeking immediate payment, warning of accruing interest and naming First Bank as the creditor.

Schmitt filed a complaint charging that the letter from FMA violated the Fair Debt Collection Practices Act ("FDCPA"), which prohibits a debt collector from contacting a debtor where the collection agency "knows" the consumer is represented by an attorney. Schmitt's complaint premised FMA's liability on the theory that a creditor's actual knowledge of a debtor's representation is imputed to its agent (i.e., the debt collection agency). The magistrate judge construed the FDCPA to require actual knowledge by the debt collector and reasoned that although First Bank knew of Schmitt's representation, FMA did not. The district court adopted the magistrate's recommendation and dismissed the complaint. Schmitt appealed.

A distinction between creditors and debt collectors is fundamental to the FDCPA.

HOLDING: Affirmed.
REASONING: The Court noted that the issue was one of apparent first impression in the 8th Circuit, and recognized that some courts have construed the term "knows" to require actual knowledge while others have held that the term refers to actual or implied knowledge. The Court reasoned the theory of implied knowledge contradicts established agency law, which dictates that while the knowledge of the agent is imputed to the principal, the converse is not true.

The court declined to follow authority urged by Schmitt in support of his claim that the FDCPA created a specific exception to the rule. First, the Court found no textual basis within the statute to suggest that an exception to such a well-settled rule was intended. Second, a distinction between creditors and debt collectors is fundamental to the FDCPA, which does not regulate creditor's activities. Third, even if the FDCPA created an exception allowing a principal's knowledge to be imputed to the agent under narrow circumstances, it was not clear on the record whether the relationship between the creditor and debtor was one of principal-agent or whether the debt collector was an independent contractor.

The Court affirmed the judgment, holding that a creditor's knowledge would not be imputed to a debt collector.

THE FILING OF A COMPLAINT IN A STATE COURT COLLECTION SUIT TRIGGERED THE PROTECTIONS OF THE FAIR DEBT COLLECTION PRACTICES ACT

Thomas v. Law Firm of Simpson & Cybak, 392 F.3d 914 (7th Cir. 2004).

FACTS: Frank Thomas purchased a Chevrolet Blazer under an installment contract. Upon default, the creditor sent a letter to Thomas and informed him that payment was past due. The creditor later, through its attorneys, sued Thomas in Illinois state court to recover the vehicle. The law firm's complaint stated it was a debt collector attempting to collect under the Fair Debt Collection Practices Act ("FDCPA"). Thomas then filed suit against the debtor and the law firm under the FDCPA, claiming that he did not receive notice of his rights as a debtor from either party.

The district court dismissed Thomas' claim, holding the creditor's letter and the debt collector's initiation of the lawsuit in state court did not constitute "initial communications" as required by the FDCPA. The district court granted both defendants' motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Thomas appealed.
HOLDING: Reversed and remanded.
REASONING: The FDCPA requires that within five days after the initial communication with a consumer, in connection with the collection of any debt, the debt collector must send the debtor a written validation notice. The notice must contain the amount of the debt, the name of the creditor, and state that the debt will be assumed valid if the debtor does not dispute the debt within 30 days of receipt of the notice. The court held that the default letter from the creditor did not constitute an "initial communication" under the FDCPA. In *Schlosser v. Fairbanks Capital*, 323 F.3d 534, 536 (7th Cir. 2003), the Court found that while the FDCPA defines "communication" broadly, it regulates debt collectors rather than creditors. The Court found that Congress did not intend for a creditor's unilateral actions to obligate debt collectors to inform debtors of their rights.

The Court found that the service of summons and complaint by the law firm, as a debt collector, did constitute an "initial communication" which triggered its obligation to notify Thomas of his validation rights. Although courts are divided on the issue of whether pleadings are communications, the Court found the FDCPA's broad definition of communication encompassed the service of a summons and complaint, and that such a finding was consistent with the legislature's intent. The Court reasoned that to allow an exception of pleadings from the definition of communication would erode the requirement of debt collectors to inform debtors of their validation rights, because debt collectors could avoid their obligation to advise debtors of their rights by initiating litigation.

ARBITRATION

A CHECK-CASHING COMPANY COULD NOT REQUIRE ARBITRATION OF A CLASS ACTION THAT ALLEGED IT CHARGED CUSTOMERS USURIOUS RATES

Cardegna et. al v. Buckeye Check Cashing, Inc., 894 So.2d 860 (Fla. 2005).

FACTS: Borrowers brought a class action lawsuit against Buckeye Check Cashing Inc. ("Lender"), alleging that it made illegal usurious loans disguised as check cashing transactions in violation of Florida statutes. Lender filed a motion to compel arbitration pursuant to provisions for arbitration contained in the deferred deposit and disclosure agreement signed by the borrowers. The circuit court denied the motion. Lender appealed and the appeals court reversed and remanded. The borrowers petitioned for review based on a direct conflict with another decision.
HOLDING: Quashed and remanded.
REASONING: The petitioners claimed that the court's holding conflicted with the decision in *FastFunding v. Betts*, 758 So.2d 1143 (Fla. 5th DCA 2000), which held that arbitration cannot be compelled under a contract that is void under Florida law, and that the issue of the contract's legality must be determined in Florida's courts. The court concluded that a party who alleges and offers evidence that a contract is illegal cannot be compelled to arbitrate the issue of the existence of the agreement to arbitrate. Only the court can make that determination. The Lender argued that the U.S. Supreme Court's decision in *Prima Paint* supported the court's