NO DAMAGES ARE RECOVERABLE WHEN DEFENDANT'S TENDER PRIOR TO SUIT EXCEED THE AMOUNT OF DAMAGES

A CONSUMER MUST RECOVER DAMAGES TO RECEIVE ATTORNEY'S FEES

Fire Ins. Exch. v. Sullivan, ____ S.W.3d ____(Tex.App.-Hous.[14th Dist.] 2006).

FACTS: In 2001, a pipe in the attic of Clifton and Diane Sullivan's home burst. Mr. Sullivan replaced the pipe and cleaned up the water and Mrs. Sullivan reported the leak to their insurance agent, Dwight Moody of Fire Insurance Exchange ("FIE"). FIE insured the Sullivan's home under a standard Texas Homeowner's Policy. After inspecting the Sullivan's home the FIE insurance adjuster estimated the cost of repairs at less than $3,000. Concerned that the actual cost of repair would be greater than the estimate, the Sullivans obtained a second opinion. The second estimate of the cost of repairs was over $7,000.

Because the Sullivans believed that they could not afford to pay the amount the insurance would not cover, they contacted a lawyer. Despite the attorney's efforts, the Sullivans did not receive satisfactory actions from FIE. After waiting four months for FIE to take action, the Sullivans moved into a hotel due to the extent of mold growth in their home from the original and later discovered water leaks. FIE then sent another insurance adjuster out to the house, who authorized additional living expenses for the Sullivans and ordered additional testing on the mold growth in the house. As a result of the testing, two additional checks were issued to the Sullivans totaling approximately $85,000. Unsatisfied with the amount of money FIE awarded them, the Sullivans sued FIE, alleging breach of contract, bad faith, violations of the Insurance Code, and violation of Deceptive Trade Practices Act. After a jury found for the Sullivans and the trial court awarded them approximately $98,000 in damages, FIE appealed.

HOLDING: Reversed.

REASONING: After examining the jury's arrival at the appropriate amount of damages and determining that the trial court erred in calculating the damages, the court held that because the amount of money that FIE gave to the Sullivans before they went to trial exceeded the amount to which they were entitled under the jury's verdict, the Sullivans were not entitled to damages. The court reasoned that because the jury's findings that the total amount of the Sullivan's potential recovery and the amount of coverage owed under the policy was less than $62,000, recovery was not allowed because FIE had given the Sullivans almost $85,000 before they filed suit.

The court also held that the Sullivans were not entitled to attorney's fees under the DTPA or Chapter 38 of the Civil Practice and Remedies Code. FIE argued the Sullivans could not recover attorney's fees because they were not prevailing parties. The court reasoned that because the law required an entitlement to damages before attorney's fees could be recovered, and the Sullivans should have recovered no damages, they could not collect attorney's fees. Thus, because FIE had paid the Sullivans more than they were entitled to recover on their breach-of-contract and DTPA claims, the Sullivans could not recover attorney's fees under the DTPA or the Civil Practice and Remedies Code.

DEBT COLLECTION AND BANKRUPTCY

A BANKRUPTCY TRUSTEE'S PROCEEDING TO SET ASIDE THE DEBTOR'S PREFERENTIAL TRANSFERS TO STATE AGENCIES IS NOT BARRED BY SOVEREIGN IMMUNITY

Central Virginia Cmty. Coll. v. Katz, 126 S. Ct. 990 (2006).

FACTS: Petitioners are higher education institutions considered to be "arm[s] of the state" and thus entitled to sovereign immunity. Wallace Bookstores, Inc. ("Debtor"), conducted business with the petitioners before it filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code in the U.S. District Court in Eastern Kentucky. Respondent Katz, the court-appointed liquidating supervisor of the estate, initiated proceedings in the bankruptcy court to recover preferential transfers made from the Debtor to the petitioners when the Debtor was insolvent. The court denied the petitioners' claims to dismiss the action based on sovereign immunity. The denial was affirmed by the district court and the Sixth Circuit based on its' prior decision that Congress had decided to abrogate states' sovereign immunity in bankruptcy proceedings. The Supreme Court granted certiorari to determine whether Congress' attempt to abrogate sovereign immunity in 11 U.S.C. § 106(a) was valid.

HOLDING: Affirmed.

REASONING: The Court noted that bankruptcy proceedings are *in rem* proceedings which, by their nature, do not implicate states' sovereignty as great as other proceedings because jurisdiction is premised on the debtor and the estate, not the creditor. *Tennessee Students' Assistance Corp. v. Hood,* 541 U.S. 440 (2004). However, Congress was given the authority through Article I, §8, cl. 4, of the Constitution to establish uniform bankruptcy laws.

In exploring the history of the Bankruptcy Clause, the Court concluded that ancillary orders, such as orders directing turnover of preferential transfers, implicated states' sovereign immunity. However, the states had agreed at the Constitutional Convention not to assert this immunity. Thus, the Framers plainly intended to give Congress power to redress injustice resulting from states' refusal to respect one another's discharge orders.

The Court stated it believed Congress' enactment of §106(a) was unnecessary to give the Bankruptcy Court jurisdiction over adversarial preferential hearings such as the present one. The Court simplified the dispute by asking whether Congress was given the authority to subject states to bankruptcy proceedings within the scope of the "Laws on the subject of Bankruptcies." Because history clearly indicated Congress was given the authority over bankruptcy laws at the Convention, the "abrogation" was a plan effectuated by the Convention, not the statute. Thus, the Court responded in the affirmative

RECENT DEVELOPMENTS

A SPOUSE IS NOT PERSONALLY LIABLE FOR THE DEBTS OF HIS FORMER SPOUSE

Providian Nat'l Bank v. Ebarb, 180 S.W.3d 898 (Tex.App.—Beaumont 2005).

FACTS: In 1999, Providian National Bank ("the Bank") brought an action against George Ebarb and his wife Kerri to recover the balance due on a credit card. The Ebarbs divorced one month after the suit commenced, and the bank moved for a nonsuit. In 2001, the Bank again brought suit against both former spouses for the same debt. The Bank obtained a default judgment against Kerri. George Ebarb, however, counterclaimed for malicious prosecution. The court denied the Bank's claim against Ebarb, found in favor of Ebarb on the malicious prosecution claim, and awarded Ebarb twenty four thousand dollars in damages. The Bank appealed. Among the issues raised, the Bank challenged the trial court's denial of its claim based on legal sufficiency and misapplication of Tex. Fam. Code Ann. §3.201.
HOLDING: Affirmed.
REASONING: First, the court reviewed whether the evidence introduced at trial was legally sufficient to establish the bank's claim as a matter of law. The court found insufficient evidence to show that Ebarb agreed to be responsible for the debt. Although both Ebarb and his former wife's names were on the credit card, Ebarb's signature was not on the actual credit application. The court also found insufficient evidence that Ebarb had ratified the debt by approving with full knowledge to assume the debt. There was evidence that Ebarb had subsequently become aware of the debt and made some payments on it. However, at trial, he testified that he did not know the debt amounted to almost $4,500 and he did not personally benefit from, or use, the card himself.

Whether there is a presumption of "community debts" does not answer the question of personal liability.

Next, the court reviewed the Bank's arguments that the trial court misapplied §3.201 of the Texas Family Code. Under §3.201, one is personally liable for the acts of one's spouse only if one acted as the spouse's agent. The Bank argued that, according to *Cockerham v. Cockerham*, 527 S.W. 2d 162 (Tex. 1975), debts incurred during marriage are presumed to be "community debts" unless the creditor agreed to look solely to separate property for satisfaction of the debt. The Bank also argued that, pursuant to §3.202, community property can be used to satisfy the debt in this case.

The court rejected the Bank's arguments. First, whether there is a presumption of "community debts" does not answer the question of personal liability. Morever, post *Cokerham*, the Legislature modified the Texas Family Code and added §3.201. Second, §3.202 governs marital property liability, not personal liability. For these reasons, §3.201 controlled in this case and the trial court correctly applied §3.201. Both of these issues were affirmed against the Bank.

A DEBTOR COULD NOT DISCHARGE HER STUDENT LOANS BECAUSE SHE FAILED TO PROVE UNDUE HARDSHIP

Educ. Credit Mgmt. Corp. v. Frushour, 433 F. 3d 393 (2005).

FACTS: Debtor, Sandra Frushour, filed for a Chapter 7 bankruptcy. Debt holder, Educational Credit Management Corporation ("ECMC"), is a non-profit corporation that administers government-guaranteed student loans. Frushour filed an adversary complaint against ECMC to discharge her student-loan debt as an undue hardship under 11 U.S.C. §523(a)(8). Both parties agreed that §523(a)(8) was the relevant provision for Frushour's student loans. The bankruptcy court discharged Frushour's student-loan debt, holding that she proved "undue hardship" under the applicable three-part test.

At the time of the proceedings, Frushour was in her forties and had a seven-year old son for whom she received no child support. Frushour maximized her income and minimized her expenses, but her expenses still exceeded her income. At all times, ECMC provided assurances that Frushour remained eligible to participate in the William Ford Income Contingent Repayment Plan. The plan would have allowed her to pay between zero and five dollars per month unless her income increased. After twenty-five years, any remaining debt would be discharged.
HOLDING: Reversed.
REASONING: The court reviewed *de novo* the determination of whether the debtor had met the undue hardship standard, and reviewed the factual underpinnings of that legal conclusion for clear error. Whether a debtor has met the "undue hardship" standard is a legal conclusion that is based on the debtor's individual factual circumstances.

Generally, a discharge under Chapter 7 does not discharge government-backed student loan debt because Congress expressly excluded this debt from the regular bankruptcy procedures. Student loans are discharged only if they create an undue hardship. Congress neither defined "undue hardship" nor provided standards for what it entails. "Undue" generally means "unwarranted" or "excessive." Therefore, the required hardship must be more than the usual hardship that accompanies bankruptcy.

To determine undue hardship, the court used the test announced in *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987). This test requires a debtor show that (1) she cannot maintain a minimal standard of living and repay the loans, (2) additional circumstances exist that illustrate she will not be able to repay the loans for a substantial part of the repayment period, and (3) she attempted to repay the loans in good faith. The debtor has the burden of proving all three factors by a preponderance of the evidence.

The court did not address *Brunner's* factor one, because it was not at issue. In examining the second, the court stated that only a debtor with rare circumstances will satisfy the second factor. Although not exhaustive, a debtor might meet this test if she can show "illness, disability, a lack of useable job skills, or the existence of a large number of dependents." Further, the second factor is prospective in nature and looks for exceptional circumstances beyond the debtor's current situation. Having a low-paying job does not in itself provide undue hardship, especially where the debtor is satisfied with the job, has not actively

sought higher-paying employment, and has earned a larger income in previous jobs. Frushour's circumstances were not ideal but her college education, real estate license, and restaurant management experience created the likelihood that her present circumstances will not extend for the rest of her repayment period or that she will not be able to pay off her loans at some future date.

The court also looked at the debtor's "efforts to obtain employment, maximize income, and minimize expenses." The debtor's hardship must be a result of factors over which she had no control. Frushour refused to enter into the William Ford Income Contingent Repayment plan, and her reasons for such refusal were that it did not suit her and that she wanted a fresh start.

Permitting loan beneficiaries a routine discharge of these obligations through bankruptcy would create the very inequities among loan recipients that Congress sought to avoid with its use of the word "undue." Thus, the bankruptcy court decision was reversed.

DEBT COLLECTOR'S NOTICE STATING THAT CON - SUMER'S DISPUTE MUST BE IN WRITING VIOLATED FDCPA

Camacho v. Bridgeport Fin., Inc., 430 F.3d 1078 (2005).

FACTS: Rita Camacho sued Bridgeport Financial for violations of the Fair Debt Collection Practices Act ("FDCPA"). Camacho's debt of $42.57 was assigned to Bridgeport Financial by Into Video. Bridgeport's initial communication to Camacho stated, "[U]nless you notify this office in writing within 30 days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid." Camacho sued under §1692g and §1692e of the FDCPA alleging this statement misrepresented the rights of consumers because it required Camacho to dispute the debt in writing. Under §1692g(a), a debt collector must send a consumer debtor a written notice within five days of its initial attempt to collect any debt. Under 1692g(a)(3), the notice must contain a statement that, unless the consumer disputes the validity of the debt, or any portion thereof, within thirty-days after receipt of the notice, the debt will be assumed to be valid by the debt collector.

Bridgeport argued that its collection notice met this requirement because the subsection must be interpreted as requiring written notice in order for the procedure in §1692g(a)(3) to be consistent with the debt validation mechanisms provided later. Camacho argued that §1692g(a)(3) does not explicitly include a writing requirement and Bridgeport subsequently misrepresented the debtor's rights. The district court denied Bridgeport's motion to dismiss and concluded that Camacho had stated a viable claim under the plain meaning of the statute. The district court certified the issue for interlocutory appeal.

HOLDING: Affirmed and remanded.

REASONING: In *Lamie v. United States Trustee*, 540 U.S. 526 (2004), the Supreme Court reasoned that, absent sufficient indications to the contrary, it should refrain from inserting language into a statute, even if it suspected that Congress inadvertently omitted such language. If Congress had intended to impose a writing requirement in §1692g(a)(3), it could have done so in the subsection itself, as it did in the later subsections of §1692g(a). Further, the plain meaning of subsection (a)(3) would not lead to absurd results because an oral dispute triggers multiple statutory protections. The district court rejected Bridgeport's arguments and held that the plain meaning of §1692g(a)(3) does not require that disputes be in writing and that this interpretation did not undermine the purpose or destroy the coherence of the statute. The court of appeals affirmed this ruling by holding the collector's collection notice violated the FDCPA insofar as it stated that disputes of validity of debts had to be in writing.

TO PROVE MUTUAL MISTAKE NULLIFIES THE NOTE, THE EVIDENCE MUST SHOW THAT BOTH PARTIES WERE ACTING UNDER THE SAME MISUNDERSTANDING OF THE SAME MATERIAL FACT

McGoodwin v. McGoodwin, 181 S.W.3d 870 (Tex.App.- Dallas 2006).

FACTS: As part of their divorce settlement, David and Deborah executed several agreements. David and his company DLM Enterprises, Inc. ("DLM"), executed a promissory note to Deborah in the amount of $150,000, which called for David to make $1,500 monthly interest payments through October 1997 and monthly principal payments of $4,166.67 thereafter. As collateral for the note, the couple executed a security agreement for Deborah to hold 4,000 DLM shares. The couple also executed their Agreement Incident to Divorce ("AID"). Under the AID, Deborah received 4,000 DLM shares and $150,000 cash in the event of David's death.

David made monthly interest payments until December 1991, when DLM ceased operations. In October 2001, Deborah sued for payment on the note. The trial court granted summary judgment in favor of Deborah and awarded her $335,733.76. David filed an appeal, and the court of appeals held that Deborah's award should be limited to the six-year period prior to the filing of the suit. On remand, the trial court awarded Deborah $449,669.86 plus post-judgment interest. David subsequently filed another appeal, arguing, *inter alia,* that mutual mistake nullified the note.

HOLDING: Affirmed.

REASONING: On appeal, David presented several arguments, including that the note failed due to mutual mistake. To establish mutual mistake nullified the note, the evidence must show that both parties were acting under the same misunderstanding of the same material fact. In this case, the court concluded that David provided no summary judgment evidence that pointed to common misunderstandings held by both David and Deborah regarding the note. Because David failed to raise an issue of material fact on the issue of mutual mistake, the court affirmed the trial court ruling.

ACTUAL DAMAGES ARE NOT REQUIRED FOR STANDING UNDER THE FDCPA

Robey v Shapiro, Marianos, & Cejda, L.L.C., 434 F.3d 1208 (10th Cir. 2006).

FACTS: Richard Robey sued Mortgage Electronic Registration Systems, Inc. ("MERS") and its law firm, Shapiro, Marianos, & Cejda, L.L.C. (the "Lawyer Defendants") for violation of Fair

Debt Collection Practices Act ("FDCPA"). The case arose out of a foreclosure action by MERS against Robey, in which MERS was represented by the Lawyer Defendants. In the foreclosure petition, the Lawyer Defendants requested that MERS be awarded both a money judgment, and a judgment of foreclosure. The Lawyer Defendants also requested that MERS be awarded "a reasonable attorney's fee." MERS ultimately dismissed the foreclosure action without prejudice, however, and was not awarded attorney's fees. Prior to the dismissal of the foreclosure action, Robey filed an action against MERS and the Lawyer Defendants alleging they violated the FDCPA when they sought to recover "a reasonable attorney's fee" in the foreclosure action.

According to Robey, the request for "a reasonable attorney's fee" was an unfair debt collection practice under 15 U.S.C. §1692f(1) because MERS and the Lawyer Defendants had agreed that the Lawyer Defendants would handle the foreclosure action for a flat-fee and the flat-fee agreement was never disclosed to the state court. The defendants filed motions to dismiss Robey's complaint, arguing that (1) Robey lacked standing to assert his claims because he had not suffered an injury in fact in the foreclosure action and (2) Robey failed to state a claim upon which relief could be granted. The trial court dismissed the complaint for failing to state a claim under the FDCPA and did not address the standing issue. Robey appealed.

HOLDING: Robey granted standing.

REASONING: Because standing implicated the district court's subject matter jurisdiction, the court of appeals was required to address this issue before addressing the merits of the appeal. The court examined the criteria for standing and focused its opinion on the "injury in fact" prong. MERS had claimed that because Robey was not actually ordered to pay any attorney's fees in the state court foreclosure that he had not suffered any injury and lacked standing to pursue his claims under the FDCPA. The FDCPA provides for liability for *attempting* to collect an unlawful debt, however, and permits the recovery of statutory damages up to $1,000 in the absence of actual damages. Therefore, it did not matter that the attorney's fees had not been ordered in the prior action—what mattered was the fact that the fees had been requested. The court concluded that actual damages were not required to have standing under the FDCPA. Because Robey's claim was that MERS and the Lawyer Defendants violated the FDCPA by attempting to collect attorney's fees that were not permitted under Oklahoma law, the court found that Robey had been injured under the terms of the FDCPA and had standing to seek legal redress of his claims under the act.

The FDCPA provides for liability for *attempting* to collect an unlawful debt.

COURT ENFORCES "ABSURD" PROVISION OF BANKRUPTCY CODE REQUIRING CREDIT COUNSELING

In re Sosa, 336 B.R. 113 (Bankr. W.D. Tex. 2005).

FACTS: Debtors Mr. and Mrs. Sosa ("Debtors") were involved in discussions with the mortgage company on the exact amount of their debt. At the last moment, the creditor refused to accept payment and, in response, the Debtors submitted an emergency bankruptcy filing. Due to the emergency nature of the filing, the Debtors failed to request credit counseling prior to the filing. After the filing, Mr. Sosa, but not Mrs. Sosa, underwent credit counseling and filed a Certificate of Credit Counseling with the Bankruptcy Court. This decision arose from the Show Cause hearing in which the Bankruptcy Court determines whether the Debtors' case should be dismissed for failure to file a Certificate of Credit Counseling.

HOLDING: Dismissed.

REASONING: Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Act"), the debtor must receive credit counseling from an approved agency prior to the date of filing. If no counseling is received the debtor is ineligible for relief under the Bankruptcy Code, unless an exemption was granted. To receive an exemption, the debtor must provide "exigent circumstances that merit a waiver" and show that the debtor requested but was unable to receive credit counseling services. If the debtor failed to request credit counseling prior to the date for filing, the debtor is ineligible for relief and ineligible to receive an exemption.

The bankruptcy court characterized the credit counseling requirement as "absurd" and criticized the harsh results of these provisions. Further, the court stated that, even if the debtor re-filed within the next year, the creditors could argue that the new case would not be filed in good faith, as required under 11 U.S.C. § 362. However, because the Act created by Congress for the purpose of protecting consumers was clear and unambiguous, the court dismissed the case finding the Debtors violated the provision in question.

DEBT-COLLECTION LAWYERS' AFFIDAVITS MAY FORM BASIS FOR LIABILITY UNDER FAIR DEBT COLLECTION PRACTICES ACT

Todd v. Weltman, Weinberg, & Reis, Co., 434 F.3d 432 (6th Cir. 2006).

FACTS: Robert Todd purchased furniture and financed the purchase with a loan. Todd then defaulted on the loan, and Weltman, Weinberg, & Reis Co., L.P.A. ("Debt Collector") brought suit on behalf of the creditor and obtained a judgment. Debt Collector then initiated proceedings to garnish Todd's bank account. The Debt Collector, under Ohio law, was required to file an affidavit which states that "the affiant has reasonable basis to believe that the person named in the affidavit as the garnishee may have property, other than personal earnings, of the judgment debtor that is not exempt under the law of this state or the United States." Todd requested a hearing to contend that the funds in his bank account were exempt because they derived from his Social Security benefits and his wife's short-term disability benefits. The court held that the funds were exempt. Todd contended that prior to submission of the affidavit, Debt Collector did not conduct a debtor's exam, did not undertake discovery as to whether Todd possessed non-exempt assets, and otherwise had no factual basis for believing that his bank account contained non-exempt assets.

In August 2003, Todd filed a complaint against Debt Collector, alleging violations of Fair Debt Collection Practice Act ("FDCPA"). In February 2004, Debt Collector filed a motion for

judgment on the pleadings, one ground being that Debt Collector was absolutely immune for its actions. The district court denied Debt Collector's motion on all grounds. Debt Collector then appealed the district court order with respect to the issue of witness immunity.
HOLDING: Affirmed.
REASONING: Todd contended that Debt Collector should not receive absolute immunity for its affidavit because there were no procedural safeguards ensuring the veracity of the affidavit at the time it was submitted, due to the ex parte, non-adversarial nature of the initiation of garnishment proceedings under Ohio law. The court did not agree that the non-adversarial nature of a proceeding automatically precluded applicability of absolute immunity to witness testimony given in such a proceeding. The inquiry should be based on the twin rationales in *Briscoe v. LaHue*: ensuring that a witness is unafraid of providing testimony, and, when the witness testifies, ensuring that the witness is not impermissibly pressured to alter her testimony. 460 U.S. 325, 333-34 (1983). Neither of these rationales applied to this case. A defendant, therefore, is not entitled to absolute immunity to counter a claim of improper garnishment; instead, he has the defenses of probable cause and lack of malice.

The court also found that Debt Collector's affidavit statements constituted testimony as a complaining witness. In *Wyatt v. Cole*, the Supreme Court ruled that "although public prosecutors and judges were accorded absolute immunity at common law, such protection did not extend to complaining witnesses who, like respondents, set the wheels of government in motion by instigating a legal action." 504 U.S. 158, 164-65 (1992). Debt Collector's garnishment action was the result of Debt Collector's "complaint" that Todd had non-exempt property, and that Todd thus owed this non-exempt property to Debt Collector. As a complaining witness, Debt Collector had no immunity for its testimony.

SATELLITE TV COMPANY CANNOT BE SUED UNDER RICO FOR SENDING DEMAND LETTERS

Sosa v. DIRECTV, Inc., 437 F.3d 923 (9th Cir. 2006).

FACTS: DIRECTV sent tens of thousands of demand letters alleging that the recipients had accessed DIRECTV's satellite television signal illegally and would be sued if they did not quickly settle claims against them under the Federal Communications Act ("FCA"). A number of recipients contacted DIRECTV by telephone to protest their innocence of the alleged conduct. DIRECTV repeated its accusations and threats to sue. Rather than incur the expense of engaging an attorney to respond, some allegedly innocent recipients, including the named plaintiff, paid thousandS of dollars to settle the claims. Sosa filed this class action lawsuit on behalf of himself and a putative class of recipients of the letters ("Plaintiffs") who reached settlements with DIRECTV, claiming DIRECTV violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), by mailing the pre-suit demand letters. DIRECTV filed a motion to dismiss, asserting Plaintiffs had failed to state a claim under RICO and that their claims were barred by various abstention doctrines and the *Noerr-Pennington* doctrine. The district court dismissed Plaintiffs' suit on the basis that DIRECTV's action mailing the demand letters was conduct immunized from RICO liability under the *Noerr-Pennington* doctrine. Plaintiffs appealed this decision.
HOLDING: Affirmed.
REASONING: Under the *Noerr-Pennington* doctrine, those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct. *Empress LLC v. City & County of S.F.,* 419 F.3d 1052, 1056 (9th Cir. 2005)(citing *Manistee Town Ctr. v. City of Glendale,* 227 F.3d 1090, 1092 (9th Cir. 2000)). The doctrine initially reflected the Supreme Court's effort to reconcile the Sherman Act with the First Amendment Petition Clause. The court held railroad companies were not liable under the Sherman Act for their efforts in influencing legislation regulating trucking. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961). The court viewed the *Noerr-Pennington* doctrine as a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause. Thus, the doctrine dictates that the court must construe federal statutes so as to avoid burdening conduct that implicates the protections of the Petition Clause.

The court then followed the three step analysis announced in *BE&K Construction Co. v. NLRB,* 536 U.S. 516, 525 (2002), by (1) identifying the burden that the threat of an adverse judgment imposes on employer's petitioning rights, (2) examining the precise petitioning activity at issue to determine whether the burden on that activity implicated the protection of the Petition Clause, and (3) analyzing the statute to see whether it could be construed so as to preclude a burden on the protected petitioning activity. After identifying the burden by a successful RICO as one that would hinder DIRECTV's ability to settle legal claims, the court concluded that the burden imposed by a successful RICO claim "at the least present[ed] a difficult constitutional question." Finally, the court analyzed the RICO statute, rejected various arguments by Plaintiffs, and determined that the demand letters asserted claims that were weak, but did not rise to the level of shams. Because this conduct was not unambiguously within the scope of the conduct enjoined by RICO, the court declined to give the act such a broad construction. The court affirmed granting immunity to DIRECTV and the dismissal of the district court.

LAW FIRM HANDLING EVICTIONS MAY BE LIABLE UNDER FDCPA

Hodges v. Feinstein, Raiss, Kalin, Booker, L.L.C., 893 A.2d 21 (N.J. Super. Ct. App. Div. 2006).

FACTS: Sasil Corporation operated the Sotnas Garden Apartments ("SGA"). Feinstein, Raiss, Kalin, Booker, L.L.C. ("Feinstein") was the defendant law firm that regularly represented Sasil Corporation in landlord/tenant disputes, including regularly prosecuting summary dispossesses actions. Plaintiffs, sisters Renita and Rochelle Hodges, maintained separate apartments at SGA, but their cases were joined because of the similar circumstances surrounding their claims. The sisters received HUD housing subsidies, which statutorily regulated plaintiff's legal rent obligation to thirty percent of their adjusted monthly household income. Renita's monthly rent obligation was $55.00, while Rochelle's was $119.00.

A clause within plaintiff's respective lease agreements stated that if plaintiffs fell behind on their rent obligations they would have to pay at least three forms of "additional rent": late fees, court costs and attorneys' fees incurred by Sasil. Each sister received several Summary Dispossession Complaints indicating past due amounts that were substantially more than the amount of "rent" actually due. The complaints did not state that under federal law, no landlord may evict for non-payment of non-rent items. Also, nothing in the complaints advised tenants that they were only required to pay the actual past due rent to avoid eviction. Each sister ultimately paid a substantial portion of the past due amounts, including fees and court costs, to avoid eviction. This series of events was repeated over and over again with varying degrees of court intervention until plaintiffs filed suit against Feinstein, claiming defendants had violated several federal laws and regulations, including the Fair Debt Collection Practices Act ("FDCPA"). 15 U.S.C.A § 1692d.

The trial court dismissed plaintiffs' claim, holding that because defendants were not collecting a debt, but instead seeking possession of the premises, they could not be labeled "debt collectors" under the FDCPA. The trial court concluded their actions were not in violation of the statute.

HOLDNG: Reversed and remanded**.**

REASONING: The FDCPA defines a debt collector as a person who regularly collects or attempts to collect, directly or indirectly, debts owed or due another. Under the FDCPA a "debt collector" is prohibited from engaging in any conduct which will result in the harassment, oppression, or abuse of any person in connection with the collection of a debt. Because the U.S. Supreme Court has ruled that the FDCPA applies to attorneys who regularly engage in litigation seeking payment of consumer debt, the court then examined whether Feinstein was a debt collector. *Heintz v. Jenkins*, 514 U.S. 291, 299 (1995).

The superior court found that at least one attorney at Feinstein's firm appeared to be regularly engaged in the practice of debt collection, because a summary dispossession action constituted a debt collection activity. The attorney was a "debt collector" subject to the FDCPA if that attorney "regularly" engaged in the practice of filing summary dispossession actions. The court reversed the dismissal by the trial court and remanded the case for a determination of whether the extent of the firm's debt collection activity was sufficient to conclude it qualified as a "debt collector."

THE BANKRUPTCY CODE DOES NOT PERMIT DEBTORS TO RECOVER EMOTIONAL DISTRESS DAMAGES AGAINST THE GOVERNMENT

In re Torres, 432 F.3d 20 (1st Cir. 2005).

FACTS: In 1992, Sofia Villata Sella and Antonio Rivera Torres ("Debtors") filed for Chapter 7 bankruptcy. In response, the IRS submitted $14,486.62 in unsecured general claims and $7,100.49 in unsecured priority claims. All dischargeable debts, including the $14,486.62 in unsecured general claims, were discharged. However, the IRS suspended collection activities on both its claims. In 1995, Debtors' tax return showed a refund. Due to a coding error by an IRS technician, the refund was incorrectly applied against the Debtors' discharged debt. The IRS then began collection activities on both the discharged and non-discharged debts.

Debtors tried unsuccessfully to resolve the issue directly with the IRS. In March 1997, Debtors filed a motion in their ongoing bankruptcy proceedings alleging that the IRS violated 11 U.S.C. §524 by trying to collect on a discharged debt. Debtors also sought various damages, including damages for emotional distress. The next month, the IRS halted collections and corrected the misapplication of the refund. Later, the IRS moved for summary judgment and requested the court dismiss Debtors' show cause motion. The IRS argued that even though it had violated the discharged injunction and may be liable for compensatory damages, §524 does not authorize emotional distress and punitive damages or attorney's fees and costs.

The bankruptcy court found that sovereign immunity was waived under 11 U.S.C. §106(a) and the court had the authority under 11 U.S.C. §105(a) to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Based on an evidentiary hearing, the bankruptcy court awarded Debtors $10,000 for emotional distress damages. The Bankruptcy Appellate Panel ("BAP") affirmed and noted that the IRS had waived the issue of sovereign immunity by failing to present the particular argument in bankruptcy court. The only issue on the ensuing appeal was whether the bankruptcy court correctly awarded emotional distress damages.

HOLDING: Reversed and remanded.

REASONING: The primary question for the court was whether 11 U.S.C.S. §106 provides an explicit waiver of sovereign immunity against emotional distress damages. The court found the question one of first impression. The court stated that BAP's rationale that the IRS had waived sovereign immunity was incorrect; sovereign immunity is a defense that cannot be waived in litigation. It then stated the correct standard: a waiver must be "unequivocally expressed" and "strictly construed in favor of the sovereign." Moreover, such waivers may be limited to specific categories of damages.

In examining 11 U.S.C.S. §106, the court found that it provided an express waiver against "money recovery." Next, the court examined whether "money recovery" encompassed emotional distress damages. The court applied the narrower temporal approach, which examines whether emotional distress damages were encompassed at the time of the amendment. Case law indicated that, at the time of the amendment in 1994, the enumerated sections in §106 did not apply to emotional distress damages. The legislative history indicated that "monetary recovery" connotates a different type of damages than emotional distress. Therefore, the court held that sovereign immunity barred emotional distress damages and that the IRS did not waive its sovereign immunity.

THE PROVISION IN THE BANKRUPTCY CODE THAT GIVES PRIORITY TO CONSUMER DISPUTE CLAIMS APPLIES EVEN IF THE CONSUMER PAID THE WHOLE CONTRACT PRICE

In re Salazar, 430 F.3d 992 (9th Cir. 2005).

FACTS: The Salazars owned a swimming pool contracting business. The Floreses contracted to have a pool built at their residence by the Salazars. The Floreses agreed to and paid the full amount of the purchase price, $30,829, when the two parties entered the contract. The Salazars commenced work, but never completed the project.

When the Salazars filed for bankruptcy, approximately 17 months later, the project was only 50 to 70 percent complete.

The Floreses filed a timely answer to the petition for bankruptcy and later filed their formal proof of claim. The Floreses wanted their claim to be treated as secured. The Salazars objected to the claim and the bankruptcy court determined that the claim was not secured, but rather was a priority claim to the extent of $2,100. The Salazars appealed the determination and the Bankruptcy Appellate Panel ("BAP") affirmed.

HOLDING: Affirmed.

REASONING: After reviewing the case *de novo*, the court agreed that the consumer deposit priority provision of the bankruptcy code could apply where the consumer has paid the whole contract price, rather than only a portion of that price. Congress has provided that level 6 priority is accorded to allowed unsecured claims of individuals, to the extent of $2,100, arising from deposit before commencement of the case, of money in connection with the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided. The court considered what was paid over by the Floreses to the Salazars was for the purchase of property and services for personal, family, and household use. According to the court, the dispute arose over whether the full payment of $30,829 should be considered a deposit.

Because the plain and ordinary meaning of the statute was unclear, the court considered other sources. A deposit, as defined by Black's law dictionary, is "money placed with a person as earnest money or security for the performance of a contract." Thus, while a part payment is what one often thinks of when one hears the word "deposit," nothing in that word precludes incorporation of more than a mere portion of the whole price. Other courts who had examined the deposit issue agreed had similarly concluded that full payment by a consumer for goods or services to be rendered over time is a deposit within the meaning of the law. *In re Terra Distrib., Inc.,* 148 B.R. 498, 600-01 (Bankr. D. Idaho 1992). The court was certain that Congress was concerned about consumers who were induced to make deposits, but because the statute in question was a precise response to merchants' violations of consumers' expectations and trust, this concern did not end when a consumer made deposit of the full payment. Therefore, the court held that the term "deposit" as used in 11 USC 507(a)(6) may include the advance handing over of full payment for consumer goods or services, and included the Floreses' payment to the Salazars.

BANKRUPTCY DEBTOR CANNOT GET WAIVER OF CREDIT COUNSELING REQUIREMENT

In re Dixon, 338 B.R. 383 (B.A.P. 8th Cir. 2006.)

FACTS: On November 10, 2005, Keith Dixon filed a Chapter 13 bankruptcy petition. With his petition, he filed a Certification Requesting Waiver of Debt Counseling by Individual Debtor. The contents of the certification stated that his residence was scheduled for foreclosure at 12:00 p.m., November 10, 2005 at the St. Louis County Courthouse in Clayton, Missouri. He did not contact an attorney to determine how to stop the foreclosure until 6:30 p.m., November 9, 2005. His attorney advised him to file a Chapter 13 petition prior to midnight of November 10 in order to stop the foreclosure. The attorney also advised that he had to complete credit counseling prior to filing for bankruptcy and he was referred to a debt counseling center.

The counseling center informed Dixon that it would be two weeks before they could provide him counseling via phone or twenty-four hours before they could provide him internet counseling. Dixon asserted in the certification that he did not own a computer and did not have access to the internet. Citing these reasons, he stated that it was impossible for him to complete credit counseling prior to filing his Chapter 13 petition and requested a waiver of the credit counseling requirement based on exigent circumstances. The bankruptcy court reviewed the certificate and determined that the circumstances did not describe exigent circumstances meriting a waiver. As a result, the bankruptcy court dismissed Dixon's case. Dixon filed a Notice of Appeal.

HOLDING: Affirmed.

REASONING: The debtor's case was governed by the Bankruptcy Code as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). One of the primary amendments enacted by the BAPCPA was a new eligibility requirement for individual debtors. Section 109(h)(1) of the BAPCPA states that as a general rule, debtors must receive an appropriate briefing during the 180 days preceding the date of filing. It also indicates which agencies are eligible to provide such briefings and what the briefings should entail. The requirements of §109(h)(1) are subject to two exceptions. The first, stated in §109(h)(2), provides that if the United States Trustee certifies that there are no approved agencies available to provide the briefing services in a given district, then debtors in that district are excused from complying with the requirement. Because this exception was unavailable in the present case, the second exception under §109(h)(3), based on exigent circumstances, was at issue.

The bankruptcy court determined that Dixon's exigent circumstances did not merit a waiver of the counseling requirements.

Dixon did not obtain the mandated briefing prior to filing his petition. He attempted to establish eligibility under §109(h)(3), which provides that the briefing requirement do not apply to debtors who submit to the court a certification providing: (1) a description of exigent circumstances meriting a waiver of the requirements of §109(h)(1), (2) a statement that the debtor requested credit counseling from an approved agency, but was unable to obtain the services during the five day period after he made such a request, and (3) all of which was satisfactory to the court. Mo. Rev. Stat §443.310 requires twenty days notice of foreclosure under Missouri law. In the face of that much notice, the court determined that Dixon's exigent circumstances did not merit a waiver of the pre-bankruptcy briefing requirement. A review of reported decisions on cases with similar facts disclosed that most courts reached the same conclusion, while a minority decided that such circumstances did merit a waiver. Because the Bankruptcy Appellate Panel found no abuse of discretion, it did not disturb the bankruptcy court's decision.