



Consumer Finance Monthly Litigation Update April 2007

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SUPREME COURT DECISIONS

NATIONAL BANK ACT (PREEMPTION)

Watters v. Wachovia Bank, N.A., et al., 127 S.Ct. 1559, 2007 WL 1119539 (April 17, 2007)

A federal chartered bank and its subsidiary, a state-chartered mortgage company, brought suit against the Commissioner of the Michigan Office of Insurance and Financial Services seeking declaratory and injunctive relief from state registration and inspection requirements based on preemption of the National Bank Act ("NBA"). The United States District Court for the Western District of Michigan granted summary judgment for plaintiffs, and defendant appealed. The Sixth Circuit Court of Appeals affirmed. The United States Supreme Court in a 5-3 decision affirming the Sixth Circuit, held that under the NBA, a national bank's mortgage business, whether conducted by the bank itself or through the bank's operating subsidiary, is subject to superintendence of the Office of the Comptroller ("OCC"), and not to the licensing, reporting, and visitorial regimes of the several states in which the subsidiary operates. The Court held that a national bank has the power under the NBA to engage in real estate lending through an operating subsidiary, subject to the same terms and conditions that govern the national bank itself and that power cannot be significantly impaired or impeded by state law. The Court further held that OCC regulation providing that state laws apply to national banks operating subsidiaries to the same extent as those laws apply to the parent national bank did not violate the 10th Amendment.

1ST CIRCUIT DECISIONS

TRUTH IN LENDING ACT (NOTICE OF RIGHT TO CANCEL)

Santos-Rodriguez v. Doral Mortgage Corp., 2007 WL 1153052 (1st Cir. April 19, 2007)

Plaintiffs refinanced two separate home mortgage loans with defendant during August 2003 and March 2004. Before closing on both of these loans, plaintiffs were provided with a Notice of Right to Cancel modeled after the Federal Reserve Board Form H-8. In 2005, plaintiffs informed defendant of their intention to rescind their refinanced loans and argued that defendant's failure to properly disclose their rescission rights extended the rescission period from three days to three years. Defendant rejected plaintiffs' attempt to rescind the loans and plaintiffs filed suit against defendant for its alleged violation of the Truth in Lending Act ("TILA"). Specifically, plaintiffs alleged that defendant failed to comply with TILA's disclosure requirements because the Notices of Right to Cancel were patterned after Model Form H-8, which is designed for general transaction, rather than Model Form H-9, which is designed for same-lender refinancing transactions. Plaintiffs also alleged that the forms used by defendant did not adequately explain the effects of rescinding a same-lender refinanced loan, as opposed to an original loan. Defendant filed a motion to dismiss that was granted by the trial court and plaintiffs appealed. On appeal, the First Circuit held that defendant did not violate TILA because, in part, TILA only requires that the notices provided to plaintiffs be "substantially similar" to the Model Forms. The Court further held that the notices adequately informed plaintiffs of their right to rescind under TILA because (1) they were informed that they were entering into mortgage transaction that would result in a mortgage on their home; (2) they had a legal right to rescind the transactions within three days; and (3) that if they rescinded the

transaction, the mortgage that would have been created by the transaction would also be cancelled. Therefore, the First Circuit affirmed the trial court's dismissal of plaintiffs' claims.

FAIR CREDIT REPORTING ACT (FIRM OFFER OF CREDIT)

Dixon v. Shamrock Financial Corporation, 2007 WL 1170639 (D. Mass. April 20, 2007)

Defendant sent a form letter to plaintiff offering a "free consultation" and noting that defendant could restructure plaintiff's debt, improve plaintiff's credit score, and save lots of money. The letter also included language suggesting that plaintiff had been "prescreened" based upon information in his credit report. Plaintiff sought certification of a class of consumers who had received this written loan solicitation, alleging a violation of the Fair Credit Reporting Act ("FCRA"). Defendant moved to dismiss the complaint arguing that the letter was a firm offer of credit. The court granted defendant's motion to dismiss, finding that the plaintiff made no allegation that he, or anyone else, had ever responded to the solicitation and then been denied credit despite meeting creditworthiness requirements or had been diverted to some other type of business dealing. The court noted that without "an allegation that [defendant's] offer to extend credit was something other than what it purported to be, the Complaint fails to allege a critical statutory prerequisite of a cause of action under the FCRA."

2ND CIRCUIT DECISIONS

FAIR DEBT COLLECTION PRACTICES ACT (BILLING NOTICES)

Dragon v. I.C. System, Inc., 2007 WL 1098686 (D. Conn. April 12, 2007)

Plaintiff filed suit against defendant, a debt collector, for alleged violations of the Fair Debt Collection Practices Act ("FDCPA"). The dispute arose after plaintiff purchased a Dell computer which plaintiff had to send back. Although Dell promised to absorb the shipping charges, Dell mistakenly billed plaintiff for that cost and ultimately retained defendant to collect the debt. Defendant sent plaintiff two billing notices trying to recover this debt, and plaintiff retained an attorney who contacted defendant who disputed the debt. The first billing notice was sent by defendant's "front-end" team (who collects debt within first 120 days) and the second billing notice was sent by the "back-end" team (who collects after 120 days). As a result of the two different teams sending separate notices, each collection notice included a different account number, thereby causing a dispute as to whether defendant knew that the first collection notice sent to plaintiff was linked to the second notice. Plaintiff moved for summary judgment on liability based on defendant's non-disclosure of the amount of debt owing, defendant's contact with her after receiving an attorney dispute letter, and defendant's attempt to collect on a disputed debt before verification of that debt was provided. The court granted plaintiff's motion for summary judgment in part, finding (1) plaintiff's collection notices listing a sum certain due was in violation of FDCPA in that it did not specifically indicate a date as of which the balance was due and was potentially misleading in that the "least sophisticated consumer" could have readily concluded that the total amount stated as due was due at any time; (2) in light of the fact that the second billing notice included a different account number and therefore possibly indicated that the second billing notice sent to plaintiff was not connected to the same account as the first billing notice, there was a genuine issue of material fact as to whether defendant actually knew that plaintiff was represented by an attorney when it sent the second billing notice; and (3) the

second billing notice was in violation of the FDCPA due to the fact that an unsophisticated consumer would have viewed that notice as being a collection effort after plaintiff had provided notice of a dispute. Lastly, defendant asserted a bona fide error defense as to plaintiff's claims, but the court rejected this defense noting that defendant failed to proffer evidence of any procedures maintained to avoid the billing errors that occurred as a result of the discrepancy between the account numbers on the first billing notice from the second.

FAIR DEBT COLLECTION PRACTICES ACT (COLLECTION LETTER)

Soffer v. Nationwide Recovery Systems, Inc., 2007 WL 1175073 (E.D.N.Y. April 19, 2007)

Defendant sent plaintiff a one-page, double-sided form letter in an attempt to collect a debt owed to a third-party. The front of the collection letter provided in pertinent part that defendant had been authorized to settle plaintiff's account for 50% of the debt owed so long as plaintiff's payment was received within 5 weeks. The collection letter also provided that the communication was an attempt to collect a debt, that any information obtained would be used for that purpose and referred plaintiff to the reverse side for additional information. The reverse side of the letter set forth plaintiff's rights under the Fair Debt Collection Practices Act ("FDCPA"), including plaintiff's right to dispute the validity of the debt. Within a month of receiving this letter, plaintiff filed suit against defendant for an alleged violation of FDCPA and defendant filed a rule 12(b)(6) motion to dismiss. In opposition to defendant's motion to dismiss, plaintiff argued that the settlement offer on the front of the letter overshadows that statutorily required language that appears on the reverse side of the letter and that the least sophisticated consumer would be confused when the Debt Validation Period began and ended because the settlement offer could have expired after the Debt Validation Period lapsed. Based on the language provided in the letter, the Court held that the settlement offer did not overshadow the statutorily required language on the reverse side and that the least sophisticate consumer would not be confused about the right to dispute the debt. Therefore, the Court granted defendant's motion to dismiss.

REMOVAL (EDGE ACT & REAL PARTY IN INTEREST)

Jana Master Fund, Ltd. v. JP Morgan Chase & Co., 2007 WL 1175694 (S.D.N.Y. April 19, 2007)

Plaintiff filed suit against JP Morgan Chase & Co., Chase Securities, Inc. and various individual defendants. Non-party JP Morgan Chase, N.A. ("Chase N.A.") removed the case to federal court under the Edge Act and argued that it was "the real party in interest" to the lawsuit. Plaintiff filed a motion to remand that was ultimately granted by the federal court. In reaching its decision, the federal court reasoned that Chase N.A. could not remove the case because the Edge Act's requirement that "a party to the action" be organized under the laws of the United States was not met since Chase N.A. was not named in plaintiff's complaint.

3RD CIRCUIT DECISIONS

FAIR CREDIT REPORTING ACT (CLASS ACTION)

Landgraff v. GEMB, 2007 WL 1101277 (E.D. Pa. April 10, 2007)

Plaintiff filed suit against defendant alleging that defendant violated the Fair Credit Reporting Act ("FCRA") by failing to investigate inaccurate information on her credit report that plaintiff disputed and also alleging that defendant failed to provide credit reporting agencies with information that plaintiff submitted to defendant. After a 30(b)(6) deposition of defendant's representative, plaintiff felt that defendant had a set policy for how it treated plaintiff and that said policy was in violation of FCRA. As a result, plaintiff moved to amend her complaint to assert a class action. The class action consisted of all individuals who received an ACDV dispute disputing the reporting of an account with defendant discharged through bankruptcy and defendant responded to the dispute stating that the disputed account has been sold or transferred without also noting that the account was included in bankruptcy, even though defendant's records reflected that the disputed account was included in a bankruptcy. The court denied plaintiff's motion to amend, finding that the individual circumstances of the sale of accounts differ among the putative class members because the language encompassing the class includes both individuals whose accounts were discharged in bankruptcy before they were sold by defendant and individuals whose accounts were sold by defendant before they were discharged in bankruptcy.

4TH CIRCUIT DECISIONS

No civil decisions of significance in the consumer finance industry reported.

5TH CIRCUIT DECISIONS

FAIR CREDIT REPORTING ACT (EXPERT TESTIMONY)

Morris v. Equifax Information Services LLC, 2007 WL 1091005 (S.D. Tex. April 10, 2007)

Plaintiff filed suit against defendants alleging a violation of the Fair Credit Reporting Act ("FCRA") for damages caused by the appearance on his credit report of a delinquent charge account that plaintiff contends was not his liability. To support his claim, plaintiff served an expert report in which David Horn opined that defendants did not have adequate procedures for reinvestigations of disputed information. The court did not allow this expert testimony, finding that (1) nothing in Horn's background provided a foundation for admitting his testimony on what constitutes reasonable procedures under FCRA, and (2) Horn's opinions were essentially legal conclusions which are issues for the jury to decide.

6TH CIRCUIT DECISIONS

FAIR DEBT COLLECTION PRACTICES ACT (DEBT COLLECTOR)

McCall v. GMAC Mortgage Corporation, et al., 2007 WL 1201535 (E.D. Mich. April 6, 2007)

Plaintiff sued defendants alleging that defendants violated the Fair Debt Collection Practices Act ("FDCPA") by failing to verify a debt and by not ceasing collection efforts pending that

verification. In granting GMAC's and its foreclosure counsel's summary judgment motions, the district court held that neither GMAC nor its foreclosure counsel are liable under the FDCPA because they were not "debt collectors." The district court opined that although GMAC (the mortgage holder) asserted that it was owed a debt by plaintiff, it did not qualify as a "debt collector." The district court held that the term "debt collector" does not apply to "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . (ii) concerns a debt which was originated by such person . . . [or] (iii) concerns a debt which was not in default at the time it was obtained by such person." The district court also found that the "legislative history of the FDCPA conclusively indicates that a debt collector does not include a person's creditors."

FAIR CREDIT REPORTING ACT (INJUNCTIVE RELIEF)

Alarcon v. TransUnion Marketing, et al., 2007 WL 1201624 (N.D. Ohio April 20, 2007)

In a case involving claims against defendants for violations of the Fair Credit Reporting Act ("FCRA"), the district court denied Experian's partial judgment on the pleadings. Experian argued that a private litigant is not permitted to obtain injunctive relief under FCRA and, therefore, any such claims should be dismissed and any common law claim for injunctive relief would be preempted. In opposition, plaintiff argued that courts are divided on this issue and the courts in the Northern District of Ohio nor the Sixth Circuit Court of Appeals has ruled on this issue. In support of her argument, plaintiff cited a California district court case (Andrews v. Trans Union Corp., 7 F.Supp. 2d 1056, 1084 (C.D. Cal. 1998)) for the proposition that nothing in FCRA prohibits the court from granting a private litigant injunctive relief. The district court denied Experian's motion for partial judgment on the pleadings holding that while it is premature to decide this legal issue, the court is preliminarily persuaded by the reasoning of Andrews that injunctive relief for a prevailing private litigant would further the purpose of FCRA.

FAIR CREDIT REPORTING ACT (BUSINESS TRANSACTIONS)

Breed v. Nationwide Insurance Company, 2007 WL 1231588 (W.D. Ky. April 24, 2007)

Plaintiff is a real estate investor that purchases homes, reconditions them and then tries to sell them for a profit. Credit Collection Services ("CCS") reported to Trans Union, LLC ("Trans Union") an allegedly erroneous negative item that plaintiff contends prevented him from being able to procure credit. Plaintiff filed suit against multiple defendants, including CCS and Trans Union, and asserted a claim against these two defendants for violations of the Fair Credit Reporting Act ("FCRA"). The Court dismissed plaintiff's FCRA claim for actual damages because the alleged damages arose from commercial transactions and plaintiff filed a motion to reconsider. The Court then withdrew its dismissal of plaintiff's FCRA claim to "avoid injustice" due to the split in the Circuits regarding whether reports generated for a consumer's business transactions are considered consumer reports under FCRA.

FAIR DEBT COLLECTION PRACTICES ACT (CLASS ACTION)

Richard v. Oak Tree Group, Inc., 2007 WL 1238899 (W.D. Mich. April 27, 2007)

Plaintiff filed a complaint, and subsequently an amended complaint, setting forth allegations that defendant mailed them a collection letter demanding payment of an alleged debt owed to a

creditor in the amount of \$6,506.58; however, the stated balance due on the letter falsely inflated the balance by \$1,355.98 to include collection fees, and the letter failed to inform plaintiff of this fact. The parties stipulated to the filing of the amended complaint, alleging a class action for violations of the Fair Debt Collection Practices Act ("FDCPA") based upon this conduct, and the proposed class included consumers who defendant mailed collection letters to, but did not include any requirement that prospective class members actually received the collection letters in question or suffered any injury. The court denied plaintiffs' motion for class certification, finding that they failed to demonstrate the typicality requirement because plaintiff's receipt of the letter and demand for damages premised upon that receipt sets them apart from the members of the proposed class, since receipt of the letter is not required for membership in the class. Moreover, the court stated that "[m]embers of the proposed class as presently defined have suffered no violation of the FDCPA."

FAIR DEBT COLLECTION PRACTICES ACT (COMMERCIAL DEBT)

Schram v. Federated Fin. Corp. of America, 2007 WL 1238863 (E.D. Mich. April 27, 2007)

In this Fair Debt Collection Practices Act ("FDCPA") case, plaintiff worked for ICR Services, Inc., which gave him signing authority on an MBNA business credit card. Plaintiff did not have to apply for the card and was not obligated to make payments on it; rather, he used the card as part of his employment. The card was personally guaranteed by one of ICR's officers. Defendant purchased the account as part of a business credit card portfolio from MBNA. Defendant mistakenly believed that plaintiff was personally liable for the debt and reported the delinquent account on plaintiff's credit reports. Plaintiff sought summary judgment on his FDCPA claim. The district court denied plaintiff's motion for summary judgment and entered judgment in favor of defendant holding that because it is undisputed that the debt defendant was attempting to collect was a business debt and not a consume debt, FDCPA did not apply.

7TH CIRCUIT DECISIONS

FAIR CREDIT REPORTING ACT (FIRM OFFER OF CREDIT)

Murray v. GMAC Mortgage Corporation, 2007 WL 1100608 (N.D. Ill. April 10, 2007)

Defendant, a residential mortgage lender, send a direct mailing to plaintiff, and numerous others, trying to attract her to obtain a loan through them by using the equity in her home. The letter states that plaintiff has been "PRE-APPROVED", includes language lauding the terms and competitiveness of defendant's mortgage services, includes an explanation of the rates and amounts used to calculate the hypothetical loan amounts, notes a few exclusions to the offer, and also includes some additional information required under the Fair Credit Reporting Act ("FCRA"). Once receiving the mailer, a recipient could contact the number on the mailer and an agent would then ask a series of questions to determine where the consumer fell on a "rate sheet" that was updated daily. After receiving the mailer, plaintiff did not respond to the mailer, but instead filed a complaint alleging that defendant violated FCRA. Both plaintiff and defendant each filed a motion for summary judgment. The court granted each motion in part and denied each motion in part, finding that (1) the mailer was more of a "solicitation" rather than a "firm offer" in that it included highly conditional terms and did not provide enough information for consumers to evaluate whether the offer is worth pursuing, but (2) plaintiff failed to produce

evidence on which a jury could find that defendant willfully violated FCRA because, at the time the mailing was produced, the factfinder could find that defendant actually tried its best to comply with FCRA's demands.

FAIR CREDIT REPORTING ACT (FIRM OFFER OF CREDIT)

Zawacki v. Goal Financial, LLC, 2007 WL 1099480 (N. D. Ill. April 10, 2007)

Plaintiff filed suit against defendant alleging that defendant's student loan consolidation mailer violated the Fair Credit Reporting Act ("FCRA"). Defendants filed a motion to dismiss arguing that the mailer constituted a "firm offer of credit" within FCRA. The court granted defendant's motion to dismiss, finding (1) the mailer explicitly stated that the offer would be honored in that the mailer stated that as long as the recipient is not, among other things, in default on their loans, they he/she will meet eligibility requirements; (2) the mailer's disclosure of the \$15,000 minimum of credit was not so minimal or subject to so many limitations that it was of little value; and (3) although the mailer itself did not disclose the material terms of the offer, the mailer did reference the Higher Education Act ("HEA") which sets forth the specific requirements and terms of the loan consolidation.

FAIR DEBT COLLECTION PRACTICES ACT (COLLECTION LETTER)

Kreisler v. Latino Union, Inc., 2007 WL 1118408 (N.D. Ill. April 12, 2007)

Plaintiff Kreisler brought a putative class against defendants Latino Union and Antonio Dempsey alleging a violation of the Fair Debt Collection Practices Act ("FDCPA"). Defendant Latino Union is a nonprofit community organization that works to combat labor abuses in the construction industry, partly by collecting debts owed to day laborers. Defendant Dempsey works for Latino Union as a wage theft advocate. The dispute began when plaintiff Kreisler entered into a written contract with Grgic to perform work on his house, and Grgic in turn hired Sandoval through Latino Union. Sandoval worked on the project, and plaintiff paid Grgic in full for the services. However, both Dempsey and Sandoval went to Kreisler's home on several occasions and talked to Kreisler's girlfriend, arguing that Sandoval had not been paid and that, if he wasn't paid by either Kreisler or Grgic, they would file a mechanic's lien against the property. Moreover, Dempsey wrote Kreisler a letter stating the amount owed to Sandoval, requesting a meeting to negotiate, informing him that if an agreement was not met he would file a mechanic's lien, and attaching a document which falsely stated that Sandoval started work on May 22. The plaintiff alleged that (1) the communication by defendants with Kreisler's girlfriend violated Section 1692c(b) of the FDCPA, (2) defendants failed to send written notice to him as required by Section 1692g(a), and (3) defendants made false or misleading representations violating Section 1692e. Both defendants countered by each filing a motion to dismiss, arguing they are not "debt collectors" as defined under the FDCPA, that they never attempt to collect a "debt", and that they did not make any false or misleading statements regarding a third party's lien rights. The court granted Dempsey's motion to dismiss, finding that individuals do not become "debt collectors" simply by working for or owning stock in debt collection companies. However, the court denied Latino Union's motion to dismiss, finding (1) plaintiff may be able to prove that Latino Union is a debt collector due to the fact that it appears they regularly collect or attempt to collect debts, and the "affiliate exception" did not apply because Sandoval and Latino Union did not have the kind of relationship intended to be covered by this statutory exception, (2) it

appeared that the obligation to pay between Kreisler and Sandoval and/or Grgic did constitute a "debt" as there was an obligation to pay money arising out of a consensual transaction and the subject of the transaction was primarily for personal, family, or household purposes, and (3) the discrepancy of the start date listed on the letter constituted a false or misleading statement in that it significantly affected Sandoval's right to pursue a lien.

TRUTH IN LENDING ACT (RIGHT OF RESCISSION)

Doss v. Clearwater Title Co., 2007 WL 1141599 (N.D. Ill. April 17, 2007)

Plaintiff Doss allegedly sought to refinance the mortgage on his house and contacted defendant Arranger who procured a mortgage loan for Doss with defendant First Franklin Financial. Franklin allegedly required Doss to obtain title insurance as a condition to the loan and Arranger chose Clearwater, who was unlicensed. Plaintiff alleges that Clearwater and Arranger were affiliated and that Arranger knew Clearwater was unlicensed but failed to inform plaintiff of this fact and also failed to give plaintiff any other choice of title insurers. Moreover, plaintiff alleged that at the time of the closing, the Itemization of Amount Financed statement noted that he was to be charged \$500.00 for title insurance, but the HUD-1 revealed that plaintiff was actually charged \$1,470.00. Based upon this conduct, plaintiff filed suit alleging numerous claims, including a claim seeking a right to a rescission of the mortgage under the Truth in Lending Act ("TILA"). In response, defendants filed a partial motion to dismiss as it pertained to the TILA claim, arguing that plaintiff lost the right to rescind when he sold the property. Plaintiff countered alleging that the deed selling the property was a forgery and that, in fact, he had brought a separate action in state court to quiet title to the property. The court determined that plaintiff failed to present any evidence that the deed had been found invalid by the state court, and therefore took judicial notice of the deed and granted defendants' partial motion for summary judgment.

TRUTH IN LENDING ACT, EQUAL CREDIT OPPORTUNITY ACT AND FAIR CREDIT REPORTING ACT (RESCISSION - CLASS ACTION; NOTICE OF "ADVERSE ACTIONS")

In re Ameriquest Mortgage Co. Mortgage Lending Practices Litigation, 2007 WL 1202544 (N.D. Ill. April 23, 2007)

Plaintiffs filed a Consolidate Class Action Complaint against defendants seeking relief for, among other things, violations of the Truth in Lending Act ("TILA"), Equal Credit Opportunity Act ("ECOA") and Fair Credit Reporting Act ("FCRA"). Defendants moved to dismiss plaintiffs' complaint in its entirety arguing that TILA rescission is not susceptible to class relief and that neither ECOA nor FCRA require notices of "adverse actions" in this case. While recognizing that TILA rescission is a personal right and that other courts have held that class-wide declaratory relief stating a right to rescission is not permissible under TILA, the district court found that neither Fed. R. Civ. P. 23 nor TILA prohibits the relief sought by plaintiffs (declaratory relief authorizing class members to individually request rescission where they are legally entitled to do so). The district court also held that although plaintiffs would not be entitled to adverse notices under ECOA and FCRA if they accepted counteroffers of credit, the complaint does not expressly allege that defendants extended or that plaintiffs accepted counteroffers. Rather, plaintiffs state that defendants originally offered plaintiffs credit packages

including one set of terms and rates, then -- after reviewing plaintiffs' credit reports -- surreptitiously changed plaintiffs' credit agreements at their respective closings. Accordingly, the district court denied defendants' motion to dismiss.

8TH CIRCUIT DECISIONS

No civil decisions of significance in the consumer finance industry reported.

9TH CIRCUIT DECISIONS

BANKRUPTCY (AUTOMATIC STAY)

In re Connor, 2007 WL 974342 (Bankr. D. Haw. Apr. 2, 2007)

Conner filed a Chapter 13 bankruptcy petition, invoking the automatic stay, and proposed a plan which was ultimately rejected by Countrywide Home Loans (the owner of a mortgage on Conner's home) and others. Soon thereafter, Conner then filed a Chapter 7 Individual Debtor's Statement of Intention in which he listed his home as "secured property" and Countrywide as the secured creditor, and indicated his intention to surrender the property. Then, the Chapter 7 trustee reported that there were no assets to administer to the benefit of creditors, and Conner received a discharge. However, during the time between Conner's Chapter 13 filing and when he received a discharge under Chapter 7, Countrywide sent him a demand letter requesting overdue payments and also continued to send him monthly statements. As a result, Conner filed an adversary proceeding against Countrywide alleging that the demand letter and monthly statements sent by Countrywide were a violation of the automatic stay. Countrywide filed a motion to dismiss, and the bankruptcy judge granted the motion to dismiss as to the monthly statements (finding these were not in violation of the automatic stay) but denied the motion as to the demand letter. Conner moved for reconsideration. First, the judge determined that the denial of the motion to dismiss as to the demand letter was proper in that the automatic stay generally prohibits creditors from making formal or informal demands for payment. Second, the judge determined that the granting of the motion to dismiss as to the monthly statements that were sent when the case was in Chapter 13 was proper because said statements were not threatening or coercive and Conner actually needed to know the information in those statements in order to formulate his plan. However, the judge determined that a motion to dismiss was not proper as to the statements sent while the case was in Chapter 7 because Conner no longer needed to know the information in the statements because he had already stated his intention to surrender the mortgaged property.

FAIR DEBT COLLECTION PRACTICES ACT (ATTORNEY'S FEES AND COSTS)

Lea v. Cypress Collection, 2007 WL 988184 (N.D. Cal. Apr. 2, 2007)

Plaintiffs filed, among other things, a Fair Debt Collection Practices Act ("FDCPA") claim against defendant Cypress and others. Prior to the filing of any dispositive motions, plaintiffs accepted Cypress' offer of judgment for a total of \$4,000.00; however, the judgment provided that Cypress would pay attorney's fees and costs in an amount to be determined by the Court. Plaintiffs moved for attorney's fees of \$10,000, submitting a calculation showing that three attorneys worked on the case (with hourly rates anywhere between \$250 and \$465) a total of

45.1 hours. However, the court reduced the total for fees and costs to \$7,978.00. In light of the simplicity of the case and the fact that only a few non-dispositive motions had been filed, the court determined that the appropriate attorney's fees were thirty hours at a billable rate of \$250.00. Further, the court determined that plaintiffs were entitled to \$478.00 in costs (filing fee and costs of service), but were not entitled to the \$210.00 fee for an attorney's *pro hac vice* application because the court felt that the attorney's work was duplicative.

FAIR DEBT COLLECTION PRACTICES ACT (DEBT COLLECTOR)

Pacheco v. Citibank (South Dakota), N.A., 2007 WL 1241934 (N.D. Cal. April 27, 2007)

Plaintiff obtained a consumer loan from defendant that she ultimately was unable to repay. Plaintiff filed suit against defendant for, among other things, its alleged violation of the Fair Debt Collection Practices Act ("FDCPA") in trying to collect the debt. Defendant moved to dismiss plaintiff's FDCPA claim on the grounds that defendant was not a debt collector under FDCPA. In granting defendant's motion to dismiss, the Court held that as a matter of law, creditors generally are not subject to FDCPA.

10TH CIRCUIT DECISIONS

CLASS ACTION REMOVAL (JURISDICTIONAL AMOUNT)

Barnes v. First Franklin Corp., 2007 WL 1072171 (W.D. Okla. April 4, 2007)

Plaintiff filed a putative class action in state court on behalf of all persons who, within five years prior to the filing of the complaint, entered into a home mortgage loan with defendants that included a prepayment penalty addendum. Specifically, plaintiff sought a declaration of rights under the provisions of the promissory notes and an injunction enjoining defendants from claiming prepayment penalties and/or recasting fees. Defendant Countrywide removed the case on the basis of diversity jurisdiction under 28 U.S.C. § 1332(a) and (d). However, plaintiff filed a motion to remand arguing that defendant Countrywide failed to meet its burden of establishing by a preponderance of the evidence that the amount in controversy exceeds the \$5,000,000 jurisdictional amount of § 1332(d) or the \$75,000 jurisdictional amount of § 1332(a). The court held that defendant Countrywide did establish that the \$5,000,000 jurisdictional requirement was met because (1) in its removal, Countrywide stated that it presently services in excess of 5,000 mortgage loans that fall within the class action, and the average prepayment charges per loan were easily over \$1,000, and (2) Countrywide's Vice President submitted an affidavit stating that it serviced at least 5,139 loans with the average prepayment penalty of at least \$1,000 and further charged a recasting fee of approximately \$225 per loan.

11TH CIRCUIT DECISIONS

FAIR DEBT COLLECTION PRACTICES ACT (HELLO LETTER)

Kuehn v. Cadle Company, Inc., 2007 WL 1064306 (M.D. Fla. April 6, 2007)

Defendant sent a Hello Letter to plaintiff informing her that her credit card debt had been purchased and instructed her where all future payments could be made. In the Hello Letter, defendant included an IRS-generated W-9 and further included a sentence stating: "you are subject to a \$50 penalty imposed by the IRS . . . if you fail to furnish a TIN." Plaintiff filed suit

against defendant alleging, among other things, that defendant violated § 1692(e) by falsely implying that if she does not provide her social security number to defendant as soon as possible, the IRS will immediately levy a \$50 penalty against her. On summary judgment, the court held that defendant was in violation of § 1692(e) because the letter and attached W-9 were misleading in the fact that they did not make it clear that the request for a taxpayer identification number is premature, and that IRS penalties will not be levied, if ever, until several other steps take place.

FAIR DEBT COLLECTION PRACTICES ACT (ARBITRATION)

Athon v. Direct Merchants Bank, 2007 WL 1100477 (M.D. Ga. April 11, 2007)

Plaintiff filed a Fair Debt Collection Practices Act (FDCPA) claim against defendant, and defendant moved to compel arbitration pursuant to the Federal Arbitration Act (FAA). The primary dispute surrounding the arbitration agreement was that plaintiff obtained and had been using the credit card prior to defendant's addition of an arbitration provision. The arbitration addendum was sent to plaintiff at the address on the original credit card agreement and where the monthly statements for the account were sent. The court held that a written agreement to arbitrate existed, finding (1) that the agreement was sent to plaintiff and "the law recognizes a rebuttable presumption that an item properly mailed was received by the addressee"; (2) the fact that plaintiff did not sign the agreement is of no consequence because the FAA only requires that the agreement be in writing; (3) they assented to the arbitration agreement through ratification after accepting the benefits of the account and making payments on the account; and (4) the arbitration agreement covered plaintiff's claims in that all the claims alleged by plaintiff related to the credit card.

TRUTH IN LENDING ACT (ARBITRATION)

In re Dawsey, 2007 WL 1140358 (M.D. Ala. April 16, 2007)

Plaintiffs filed an adversary proceeding against defendant CitiFinancial, as a counterclaim to CitiFinancial's proof of claim, alleging a violation of the Truth in Lending Act ("TILA") arising from a consumer credit transaction with Mitchell Nissan which was assigned to CitiFinancial. Plaintiffs filed a motion for leave to amend the complaint, which was subsequently granted, and CitiFinancial filed a motion to compel arbitration under the Federal Arbitration Act ("FAA") pursuant to an arbitration agreement executed by plaintiff in connection with the consumer credit transaction. The arbitration agreement specifically excluded any matter where all parties collectively seek monetary relief in the aggregate of \$15,000 or less in total relief. Plaintiffs opposed the motion to compel arbitration arguing that the amount of the claim excludes it from the scope of the arbitration agreement and that the matter was a core proceeding which the court has discretion to retain. The court granted CitiFinancial's motion to compel, finding (1) since plaintiffs couched the amended complaint as a counterclaim, it was appropriate to include the claim of defendant as part of the proceeding, and therefore defendant's \$16,821.88 proof of claim exceeded the \$15,000 threshold; and (2) it was unnecessary to resolve the issue of whether the matter was a core proceeding because arbitration of the proceeding would not inherently conflict with the underlying purposes of the Bankruptcy Code, largely due to the fact that there is no bankruptcy purpose to be served by resolving both the claim and alleged counterclaim in the bankruptcy court and resolution of the action through arbitration would not interfere with the plaintiff's attempted rehabilitation through their chapter 13 case.

FAIR DEBT COLLECTION PRACTICES ACT (STATE REGISTRATION)

Pescatrice v. Elite Recovery Service, Inc., 2007 WL 1192441 (S.D. Fla. April 23, 2007)

Defendant Elite Recovery Service, Inc. sent a collection letter to plaintiff on or about November 11, 2005, and the letter requested payment to a Buffalo, New York post office box address, and in the upper left corner of the document, the same address was listed in that spot, but the company name listed was "ERS". The plaintiff alleged that defendant violated the Fair Debt Collection Practices Act ("FDCPA") because defendant did not disclose the post office box address and the name "ERS" in its state of Florida registration, and therefore any attempt to collect debts under the FDCPA is a deceptive means of collecting a debt. Both plaintiff and defendant filed motions for summary judgment. The court denied plaintiff's motion for summary judgment and granted defendant's, finding that all of the information in defendant's registration was valid and current, and simply using a P.O. Box for the mailing of payment and using the direct abbreviation of the registered name as a return address is not a violation of the FDCPA's requirement of keeping a collection agency's name "current."

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