

# monthly litigation update

APRIL 2008

This update is a summary of civil decisions of significance in the consumer financial services industry from federal courts throughout the United States that were released and made available by Westlaw during the previous month. This update is a complimentary service offered by Burr & Forman LLP and is distributed during the first week of each month via email. Individuals may subscribe/unsubscribe to this monthly update by sending an email to [financialservices@burr.com](mailto:financialservices@burr.com). Each update is prepared by the following members of Burr & Forman's Financial Services Practice Group:



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With offices in Alabama, Georgia, Mississippi and Tennessee and more than twenty-five attorneys, Burr & Forman's Financial Services Practice Group has served the needs of its financial services clients in over twenty-seven states. While Burr & Forman has a strong regional presence in the southeast, the attorneys in Burr & Forman's Financial Services practice group have both regional and national experience.

## SUPREME COURT DECISIONS

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

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## 1<sup>ST</sup> CIRCUIT DECISIONS



FAIR CREDIT REPORTING ACT (REPORT OF INACCURATE INFORMATION)  
Deandrade v. Trans Union L.L.C., 2008 WL 1722237 (1st Cir. Apr. 15, 2008)

Plaintiff entered into a loan transaction with the defendant bank. The plaintiff alleged that he never received the terms of the loan and that when he requested the terms, he discovered that the loan had been forged and a lien had been improperly put on his home. After the discovery, the plaintiff stated that he stopped making loan payments to the defendant and filed suit. The defendant bank then submitted information to the three major credit reporting agencies (CRAs), indicating that the plaintiff was behind on his loan payments. The plaintiff disputed the information with the CRAs, and two CRAs refused to remove the negative information. The investigation into the accuracy of the debt consisted of only electronically verifying the plaintiff's name and social security number, and not investigating the substance of his dispute. The

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plaintiff filed suit, alleging that the defendant bank and the defendant CRAs violated several provisions of the Fair Credit Reporting Act (FCRA). The defendant CRAs argued that the information it reported was accurate and that the plaintiff's lawsuit using the FCRA was an impermissible collateral attack on the defendant bank. The district court granted summary judgment in favor of the defendants and the plaintiff appealed. The court first said that for a plaintiff to prevail on a 15 U.S.C. § 1681i claim, the plaintiff must demonstrate that his or her credit report contains an actual inaccuracy. The court stated that the information reported by the CRAs was accurate not because the plaintiff had ratified the loan, but because it did not state any factual deficiency that could have been resolved by a reasonable investigation conducted by the CRA. The court stated that determining whether the loan was valid should have only been used in a lawsuit between the plaintiff and the bank over the validity of the contract. Accordingly, the court affirmed the summary judgment order of the district court.

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## 2<sup>ND</sup> CIRCUIT DECISIONS



### FAIR CREDIT REPORTING ACT & FAIR DEBT COLLECTION PRACTICES ACT (DEFINITION OF CONSUMER REPORTING AGENCY AND STATUTE OF LIMITATIONS)

Wright v. Zabarkes, 2008 WL 872296 (S.D.N.Y. Apr. 2, 2008)

Plaintiff was two days late in paying his rent and received a collection letter from the defendant landlord and a collection letter with a validation notice from the landlord's debt collection law firm. The plaintiff filed suit against both defendants, arguing that the defendants violated various provisions of the Fair Credit Reporting Act (FCRA), the Fair Debt Collection Practice Act (FDCPA) and other state consumer protection laws by using aggressive and unnecessary efforts in demanding rent payment. The defendants sought a pre-motion conference seeking to file a motion to dismiss. After the conference, the court requested the plaintiff file a letter explaining why the complaint should not be dismissed for failure to state a cause of action. The plaintiff submitted a letter. The plaintiff first argued that the defendants

function like consumer reporting agencies (CRAs) and that their demand letters were comparable to consumer reports. The court held that neither of the defendants were similar to a CRA, therefore, they could not create consumer reports. The plaintiff then argued that defendant debt collector violated the FDCPA by sending a collection letter after a debt had been paid. The court stated that even if that were true, the one-year statute of limitations had expired and the plaintiff's claim was not timely. The plaintiff alleged the violation had occurred in April of 2006 and he did not file a claim until September of 2007. Therefore, the court dismissed both of the plaintiff's federal claims sua sponte.

### REAL ESTATE SETTLEMENT PROCEDURES ACT (RESPONSE TO INQUIRY LETTER) Mazzei v. Money Store, 2008 WL 1882703 (S.D.N.Y. Apr. 25, 2008)

Plaintiff took out a mortgage loan from the defendant. After the plaintiff paid off the balance of the loan, he sent a written request for information to the defendant. Within sixteen days, the defendant sent a letter acknowledging the receipt of the request. Several days later, the defendant responded with a full letter detailing the responses to the plaintiff's request. The plaintiff filed suit, alleging that the defendant violated the Real Estate Settlement Procedures Act (RESPA) by failing to respond to his inquiry letter timely and properly. The court held that the defendant responded to the letter timely and properly. The court stated that within twenty days of receipt of a written inquiry, the defendants responded with an acknowledgment of the plaintiff's letter. The court also stated that the defendant's second letter clearly provided reasons for which the servicer believed that the account of the borrower was correct. Therefore, the court held that the letter was adequate and granted summary judgment in favor of the defendant on the RESPA claim.

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## 3<sup>RD</sup> CIRCUIT DECISIONS



### FAIR DEBT COLLECTION PRACTICES ACT, FAIR CREDIT REPORTING ACT & REAL ESTATE SETTLEMENT PROCEDURES ACT (CREDITOR APPLICABILITY, PRIVATE RIGHT OF ACTION)

Jones v. Select Portfolio Servicing, Inc., 2008 WL 1820935 (E.D. Pa. Apr. 22, 2008)

Plaintiff entered into a mortgage loan agreement with the defendant servicing company. When the plaintiff attempted to sell her property, the defendant listed various fees that would need to be paid before the closing. When the plaintiff requested further information about the fees, the defendant failed to produce details on the fees. The plaintiff then filed suit against the defendant alleging various violations of the Fair Debt Collection Practices Act (FDCPA), the Fair Credit Reporting Act (FCRA), the Real Estate Settlement Procedures Act (RESPA) and various other state laws. The defendant filed a motion to dismiss all claims. The court first held that because the defendant servicing company only specialized in acquisition, servicing and resolution of mortgage loans, it was not a debt collector under the meaning of the FDCPA. The court then held that the plaintiff failed to produce evidence that the defendant had furnished any information to a credit reporting agency (CRA) or that if such information was furnished, that it was inaccurate. Therefore, the court dismissed the plaintiff's FCRA claims. Finally, the court held that because the plaintiff admitted that the defendant complied with its obligations under RESPA to timely respond to the plaintiff's written request for information, and because the plaintiff did not allege any specific damages suffered as a result of a RESPA violation, that the plaintiff's RESPA claims must also be denied.

### FAIR CREDIT REPORTING ACT & FAIR DEBT COLLECTION PRACTICES ACT (PRIVATE RIGHT OF ACTION & CREDITOR APPLICABILITY)

Ruff v. America's Servicing Co., 2008 WL 1830182 (W.D. Pa. Apr. 23, 2008)

Plaintiff refinanced her loan. The loan was serviced by the defendant. After the plaintiff fell into default and the bank attempted to foreclose upon her property, the plaintiff filed suit alleging that the defendant violated various

provisions of the Fair Credit Reporting Act (FCRA), Fair Debt Collection Practices Act (FDCPA) and other state laws. Both parties filed motions for summary judgment. The plaintiff first alleged that the defendant servicing company violated the FCRA by furnishing false information to a consumer reporting agency (CRA). The court held that the only section of the FCRA that allows a private right of action against a furnisher of information is 15 U.S.C. § 1681s-2(b). The court stated that § 1681s-2(b) required the plaintiff to have first sent a notice of dispute to a CRA so that it could notify the furnisher of information of a reported inaccuracy. The court held that there was no evidence that the plaintiff notified any CRA of a dispute, and therefore, the plaintiff had failed to state a claim under the FCRA. The plaintiff then alleged that the defendant violated the FDCPA by falsely representing the status of her loan. The court rejected this argument, holding that the FDCPA only applies to debt collectors and noted that the defendant was only a mortgage-servicer collecting on its own loan. Therefore, the court held that the defendant was not a debt collector under the meaning of the FDCPA and granted the defendant's motion for summary judgment on the FDCPA claim.

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## 4<sup>TH</sup> CIRCUIT DECISIONS



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

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## 5<sup>TH</sup> CIRCUIT DECISIONS



### FAIR CREDIT BILLING ACT (APPLICABILITY TO FINANCE CHARGES)

Esquibel v. Chase Manhattan Bank U.S.A., N.A., 2008 WL 1881494 (5th Cir. Apr. 29, 2008)

Plaintiff maintained an open line of credit with the defendant credit card company. Several times the defendant charged late fees and other penalties to the plaintiff's account and recorded them as "finance charges." Every time this occurred, the plaintiff sent the defendant a Notice of Billing Errors. After the defendant responded to two of these letters, it informed the plaintiff that it would not respond to further letters. The plaintiff filed suit alleging that the defendant violated the Fair Credit Billing Act (FCBA) by not responding to several of her notice of billing error letters. Both parties filed motions for summary judgment. The district court found that the plaintiff's letters failed to trigger the defendant's duty under the FCBA because the letters complained only of finance charges and failed to state a billing error. The plaintiff appealed to the Fifth Circuit Court of Appeals. The court stated that a billing error is a reflection on a statement of an extension of credit for which the obligor requests additional clarification including documentary evidence thereof. The court noted that the pertinent question in the case was whether a finance charge reflects "an extension of credit." The court held that a finance charge does not reflect an extension of credit, but rather, is incident to the extension of credit. Accordingly, finance charges cannot constitute billing errors, and therefore, the court affirmed the district court's ruling granting summary judgment in favor of the defendant.

### FEDERAL ARBITRATION ACT (ARBITRATION AFTER COUNTER-CLAIM)

Johnson v. 21<sup>st</sup> Mortg. Corp., 2008 WL 906817 (S.D. Miss. Apr. 3, 2008)

Plaintiffs entered into a mortgage loan transaction with the defendant bank. Upon executing the agreement, the plaintiffs signed an arbitration agreement, which provided that all claims arising out of the contract would be arbitrated. After the defendant repossessed the mobile home, the plaintiffs filed suit, alleging conversion and breach of contract. The defendant filed a counterclaim and a motion to dismiss and to compel arbitration, pursuant to the Federal Arbitration Act (FAA). While the plaintiffs admitted that there was a valid arbitration agreement, they argued that arbitration was inappropriate because the defendant filed a counterclaim against the plaintiffs and asked to bifurcate the punitive damages issue. The plaintiff argued that one who availed itself of the court's jurisdiction waived the right to invoke arbitration. The court disagreed with the plaintiff, holding that by filing a counter-claim the defendant had not actively participated in or substantially invoked the litigation process. The court stated that the defendant had raised the arbitration issue at the earliest possible point in the case. Finally, the court held that the plaintiffs had not produced any evidence to demonstrate that the defendant had delayed the proceedings to the detriment or prejudice of the plaintiffs. Accordingly, the court granted the defendant's motion to dismiss and to compel arbitration.

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## 6TH CIRCUIT DECISIONS



### REAL ESTATE SETTLEMENT PROCEDURES ACT (CREATION OF ESCROWED LOAN)

In re Johnson, 2008 WL 963436 (Bkrcty. E.D. Mich. Apr. 9, 2008)

The debtor filed bankruptcy and had a schedule D that listed a mortgage held by a bank. The mortgage showed over \$111,000 that was still owed, which included \$20,000 in arrearage. The debtor objected to the arrearage, arguing that the bank was not allowed to recover the money because it failed to send the debtor notifications required by the Real Estate Settlement Procedures Act (RESPA) § 2609(b) for the amounts advanced by the defendant for taxes and insurance. The bank argued that the debtor's mortgage was a non-escrowed loan, to which the RESPA requirements for notification do not apply. The bank also argued that even if the court considered that the mortgage was an escrowed account, the bank was exempt from sending annual escrow statements to the debtor because the borrower was in bankruptcy proceedings. The court disagreed with the bank's arguments holding that while the bank was likely exempt from sending an annual escrow account statement, the bank still had an obligation under § 2609(b) to provide notice to the debtor regarding any escrow account shortage or deficiency irrespective of other exemptions. The court held that under Michigan law, because the bank did not notify the debtor of the arrearage for several years, it waived the right to recover the disputed amount of the arrearage in its proof of claim.

### FEDERAL ARBITRATION ACT (CARDHOLDER INSURANCE CONTRACT)

Eaves-Leanos v. Assurant, Inc., 2008 WL 1805431 (W.D. Ky. Apr. 21, 2008)

Plaintiff was the Administratrix of the estate of the decedent. Upon his death, the decedent had several credit card balances, the balances of which passed to his estate.

The plaintiff alleged that the balances should have been paid by insurance that the decedent had obtained through his credit card company. The plaintiff then filed suit attempting to force the defendant to pay for the balances. The defendant filed a motion to compel arbitration, arguing that the decedent's cardholder agreement determined that any dispute arising out of the agreement would be arbitrated pursuant to an arbitration agreement mailed to the decedent. The plaintiff argued that the insurance contract was subject to the McCarran-Ferguson Act, which operated to save state statutes enacted for the purpose of regulating the business of insurance from federal preemption, thereby allowing state law to determine the arbitration dispute. The defendant disagreed, arguing that the dispute was not an insurance dispute, but rather one arising out of the cardholder agreement, and therefore, was subject to the laws of the Federal Arbitration Act (FAA). The court held that the cardholder agreement was not an insurance contract because it was nothing more than an agreement for an extension of credit. Accordingly, the court granted the defendant's motion to compel arbitration.

### FAIR DEBT COLLECTION PRACTICES ACT (ATTORNEY'S FEES)

Mabbitt v. Midwestern Audit Service, Inc., 2008 WL 1840620 (E.D. Mich. Apr. 23, 2008)

Plaintiff filed suit against the defendant alleging various violations of the Fair Debt Collection Practices Act (FDCPA). After the court granted summary judgment in favor of the defendant, the defendant brought a motion to recover attorney's fees from the plaintiff. The defendant argued that it was entitled to attorney's fees because the plaintiff did not respond to requests for discovery and deposition dates in a timely fashion. Additionally, the defendant stated that the plaintiff failed to produce certain individuals for deposition. The court held that the defendant was entitled to Rule 11 sanctions because the plaintiff's counsel knew or reasonably should have known that the claims asserted by the plaintiff were frivolous. The court held that while the plaintiff brought FDCPA claims, the defendant never attempted to even collect a debt. The court determined that because the claims were obviously frivolous from the outset, the plaintiff was responsible for all of the defendant's attorney's fees throughout the entire course of the litigation. The court determined that the defense counsel's requested rate of \$200/hour was reasonable as well as the 51 hours that were billed on the case. Accordingly, the court awarded the defendant \$10,223.65 in attorney's fees and \$537.35 in costs.

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## 7<sup>TH</sup> CIRCUIT DECISIONS



### FAIR CREDIT REPORTING ACT (FIRM OFFER OF CREDIT)

Murray v. New Cingular Wireless Services, Inc., 2008 WL 1701839 (7th Cir. Apr. 16, 2008)

The Seventh Circuit Court of Appeals took three different lawsuits and combined their facts into one decision. The decision focused upon pertinent questions raised by the Fair Credit Reporting Act (FCRA) and was organized according to individual issues. In each case, a lender had accessed the plaintiff's credit report in order to send a solicitation. The plaintiffs argued that these solicitations violated the FCRA because they were not "firm offers of credit." In each case, the defendants argued that they were firm offers. The court answered these questions: (1) Must an offer of credit be valuable to all or most recipients? The court first acknowledged confusion about whether a firm offer of credit needed to have "value" since its decision in *Cole v. U.S. Capital, Inc.*, 389 F.3d 719 (7th Cir. 2004). The court stated that 15 U.S.C. § 1681b(c)(1)(B)(i) calls for a firm offer of credit, but not a valuable firm offer of credit. The court stated that a firm offer was sufficient when dealing with an actual offer of credit, but not an offer of merchandise. In *Cole*, the court attempted to separate bona fide offers of credit from advertisements for products and services when a small offer of credit was made that would not have covered the purchase price of a similar offer of merchandise. The court stated that when credit histories are used to offer credit (or insurance) and nothing but, the correct question is whether the offer is "firm," rather than whether it is "valuable." (2) Does a promise of "free" merchandise mean that an offer is not one "of credit?" The court stated that in a situation where a phone company offers a free phone in return for phone service, the offer is one for credit because the service is provided before payment is rendered, therefore constituting a credit transaction. The court stated that it was immaterial that the credit could not

be used to purchase another item, because "credit" does not have to be portable to fall within the statutory definition. (3) Must the initial flyer contain all material terms? The court stated that the appropriate question is whether the offer of credit will be honored, and not whether all of the terms appear in the initial mailing. The court stated that there was no requirement in the FCRA that initial communications to a consumer must contain all of the important terms that must be agreed on before credit is extended. (4) Does a power to vary the deal's terms make the offer not "firm?" The court held that the court can vary the terms, but cannot use that excuse as a guise for walking away from the transaction just because it has the ability to charge more after the consumer is approved for credit. (5) Is six-point type conspicuous? The court held that six-point type in black ink is not conspicuous and cannot constitute a valid disclosure under the FCRA. (6) Is the use of 6-point type a "willful" violation of the FCRA? The court held that it did not think it was reckless for a defendant to have printed a notice in 6-point type before this decision, because courts and the U.C.C. did not clearly define a conspicuous disclosure.

### FAIR CREDIT REPORTING ACT (FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003)

Troy v. Home Run Inn, Inc., 2008 WL 1766526 (N.D. Ill. Apr. 14, 2008)

After the plaintiff paid his bill with a credit card at the defendant's restaurant, the defendant printed an electronic receipt that contained the plaintiff's credit card expiration date. The plaintiff filed suit on behalf of himself, and others similarly situated, alleging that the defendant, by printing the expiration date of his credit card on the receipt, violated the Fair and Accurate Credit Transactions Act of 2003 (FACTA), a subset of the Fair Credit Reporting Act (FCRA). The defendant filed a motion to dismiss. The defendant first argued that the FACTA does not authorize a private right of action. The court dismissed this argument, stating that 15 U.S.C. § 1681c(g) of the FACTA creates a private right of action when a defendant willfully fails to comply with the Act. The defendant then argued that the plaintiff had failed to plead sufficient facts to state a claim for a willful violation of § 1681c(g), which is a prerequisite to recovering damages. The court also rejected this argument, stating that reckless and knowing violations of the FCRA suffice to establish willfulness. The court stated that the defendant had three years to comply with the Act but ignored publications and warnings informing it to come into compliance. Finally, the defendant argued that its actions did not cause the plaintiff to suffer any actual harm, and therefore, an award of statutory damages would violate due process. The court

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rejected this argument, stating that even if it were true, the correct time to discuss the issue would be after class certification and not during the dismissal stage. Accordingly, the court denied the defendant's motion to dismiss.

**FAIR DEBT COLLECTION PRACTICES ACT  
(BANKRUPTCY PETITION & FALSE  
REPRESENTATION)**

Keisler v. Encore Receivable Management, Inc., 2008 WL 1774173 (S.D. Ind. Apr. 17, 2008)

Plaintiff defaulted on a debt with her credit card company. The company then transferred the debt to a debt collector for collection. After the plaintiff filed for bankruptcy, she listed the debt collector as an unsecured creditor and subsequently informed the debt collector of her petition. Before the credit card company was informed of the petition, it again transferred collection rights to another debt collector, the defendant, who used an automated system to send a collection letter to the plaintiff just before it was informed of the bankruptcy petition. The plaintiff filed suit against the defendant, alleging that it violated the Fair Debt Collection Practices Act (FDCPA) by attempting to collect a debt that was subject to a bankruptcy petition. The plaintiff also alleged that the defendant violated 15 U.S.C. § 1692c(a)(2) of the FDCPA by contacting her directly, even though it knew that she was represented by an attorney. Finally, the plaintiff argued that § 1692e of the FDCPA was violated because the defendant stated in its letter that previous collection attempts were "ignored." The plaintiff had previously had conversations with the credit card company about the debt and, therefore, alleged that it was not "ignored." Both parties filed motions for summary judgment. The defendant argued that it was not liable under the FDCPA because when the plaintiff received the letter, she knew that she no longer owed the debt because of her bankruptcy petition. Additionally, the defendant argued that it did not have actual knowledge of the bankruptcy before the letter was sent. The court first stated that knowledge in the hands of one creditor or debt collector is not knowledge in the hands of another. Therefore, the defendant did not violate the FDCPA by contacting the plaintiff when it did not have reason to believe that she was represented by an attorney. The plaintiff also failed to produce evidence that the defendant had any reason to know that she had filed for bankruptcy. The court did state, however, that the wording in the letter sent to the plaintiff could be considered a violation of the FDCPA. The court stated that a fact finder could conclude that a reasonable consumer would be confused by the defendant's assertion that the plaintiff had "ignored" previous collection attempts. There was evidence that the plaintiff had attempted to reach an agreement with respect to the debt. The court then stated that it could not

conclude, as a matter of law, that the defendant had made only a bona fide error. The court stated that a fact finder could conclude that the defendant did not have reasonable procedures in place to avoid such a mistake. Therefore, the court granted the defendant's motion for summary judgment in respect to the § 15 U.S.C. § 1692c(a)(2) claim, but denied the motion with respect to the § 1692e claim.

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**8<sup>TH</sup> CIRCUIT  
DECISIONS**



**FAIR CREDIT REPORTING ACT (FIRM OFFER  
OF CREDIT)**

McDonald v. NextStudent, Inc., 2008 WL 906814 (E.D. Mo. Apr. 1, 2008)

Plaintiff filed suit on behalf of herself, and others similarly situated, alleging that the defendant lending institution obtained her credit information without a permissible purpose, in violation of the Fair Credit Reporting Act (FCRA). The defendant sent the plaintiff a student loan solicitation, in the form of a "PreScreen & Opt Out Notice." The letter did not give specific details on interest rates or the maximum amount of loan that the plaintiff was approved for. The letter also stated that if she no longer met the initial criteria that the offer would be revoked. The plaintiff argued that the solicitation was not a firm offer of credit as is defined by 15 U.S.C. § 1681a(1) of the FCRA. The defendant filed a motion for summary judgment. The defendant argued that the letter was just the beginning of a "multi-step" firm offer of credit. The defendant stated that the offer itself would be made by the defendant over the phone after the recipient of the letter called and was determined eligible. The court stated that while Congress did not require specific terms to be included in a firm offer of credit, the letter mailed to the plaintiff simply could not be recognized by a reasonable

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consumer as an offer of credit. The court stated that the letter barely uses the term “offer” and that the word “credit” only appears in the fine print notifications. The court also rejected the defendant’s argument that the FCRA allowed for a “multi-step” firm offer of credit. The court stated that FCRA did not allow lenders to access the plaintiff’s information just to send an invitation to begin the credit process. Accordingly, the court denied the defendant’s motion for summary judgment.

**FAIR CREDIT REPORTING ACT (FIRM OFFER OF CREDIT)**

Klutho v. Oxford Lending Group, L.L.C., 2008 WL 1701171 (E.D. Mo. Apr. 9, 2008)

Defendant sent the plaintiff a “Pre-Qualification Selection Notification,” which did not contain specific credit terms but stated that the plaintiff could refinance her home with the defendant if the plaintiff met certain criteria. The plaintiff filed suit against the defendant, alleging that the defendant violated the Fair Credit Reporting Act (FCRA) when it accessed the plaintiff’s credit report without a permissible purpose. The defendant responded that the letter was a firm offer of credit and, therefore, was sent for a permissible purpose, pursuant to 15 U.S.C. § 1681b of the FCRA. The defendant filed a motion to dismiss. The court, looking to First Circuit precedent in *Sullivan v. Greenwood*, 2008 WL 726135 (1st Cir. Mar. 19, 2008), held that the mailer was a firm offer of credit even though it did not contain specific terms. The judge noted that in light of the *Sullivan* decision, he was interpreting the firm offer of credit rule differently than he had in the past. The court stated that the plaintiff did not allege that she would have been denied credit even if she had met the criteria and also did not allege that the letter was sent only for the purposes of identifying potential buyers of any other product. Accordingly, the court granted the defendant’s motion to dismiss.

**FAIR DEBT COLLECTION PRACTICES ACT (ATTORNEY’S FEES)**

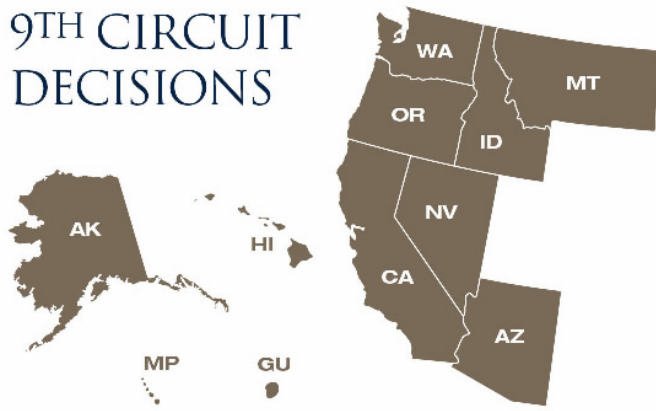
Olson v. Messerli & Kramer, P.A., 2008 WL 1699605 (D. Minn. Apr. 9, 2008)

Plaintiff brought suit against the defendant alleging various violations of the Fair Debt Collection Practices Act (FDCPA). After the plaintiff accepted the defendant’s offer of judgment in the amount of \$1,001.00, plus reasonable attorney’s fees and costs, the parties were unable to agree on an appropriate resolution and the plaintiff brought this motion for attorney’s fees and costs. Two of the plaintiff’s attorneys requested fees to be charged in the amount of \$400/hour. The court examined a previous case in the same court where the same attorneys requested fees of \$400/hour but were actually awarded fees of \$250/hour. The plaintiff’s third attorney then

requested a fee of \$350/hour. The plaintiff’s attorneys submitted various pieces of evidence which indicated that attorney’s fees were rising and that the court should raise the amount able to be collected as an attorney in a FDCPA case. The court rejected the plaintiff’s submission of the “Laffey Matrix,” a calculation of attorney’s fees in Washington D.C., as being too high. The court acknowledged that the attorneys should receive a higher rate than in their previous case, but stated that there was insufficient evidence to award them a rate of \$400/hour. Therefore, the court awarded two of the plaintiff’s attorneys a rate of \$325/hour, and awarded the third attorney a rate of \$300/hour. The court then found that the hours claimed by the plaintiff’s attorneys were reasonable, with only two exceptions. The court stated that the case presented many non-frivolous issues and the fact that the plaintiff only succeeded on one claim did not mean his attorneys could only be compensated for that claim. The court did cut the 70.56 hours of time spent on preparing the motion for attorney’s fees. The court stated that it was an unreasonable amount of time for a motion for fees, especially in light of the fact that the plaintiff’s counsel had filed a similar petition to the court before. The court held that no time should be allowed to be billed for the motion for attorney’s fees. Also, the court stated that the plaintiff’s attorneys spent an unreasonable amount of time on discovery. The court reduced the 48.67 hours on discovery to 30 hours. Accordingly, the court found that the plaintiff could recover \$36,795.79 in attorney’s fees and costs.

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## 9TH CIRCUIT DECISIONS



### FAIR CREDIT REPORTING ACT & TRUTH-IN-LENDING ACT (DISCLOSURES, RESCISSION, STATUTE OF LIMITATIONS & FURNISHER OF INFORMATION)

Henderson v. GMAC Mortgage Corp., 2008 WL 1733265 (W.D. Wash. Apr. 10, 2008)

Plaintiffs refinanced their home mortgage loan with the defendant lender. After the plaintiffs fell three months behind on their loan, the defendant initiated foreclosure proceedings. The plaintiffs then filed suit against the defendant, claiming various violations of the Fair Credit Reporting Act (FCRA), the Truth-in-Lending Act (TILA) and other state laws. The defendant filed a motion for summary judgment. The plaintiffs first argued that the defendant violated the TILA by only giving the plaintiffs one, undated notice of their right to cancel the transaction. However, the plaintiffs had signed a copy of a Notice of Right to Cancel which acknowledged that they received two adequate copies. The court held that written acknowledgment of receipt of a Notice of Right to Cancel was conclusive proof of the delivery of the Notice. The plaintiffs also alleged that their APR was overstated, their amount financed was understated and they did not receive copies of the Home Ownership Equity Protection Act (HOEPA) disclosures. The court held that because the TILA statute of limitations begins to run from the date on which the parties closed on the loan, that the plaintiffs' three year delay in filing a lawsuit made their claims time-barred. The plaintiffs then argued that they were entitled to rescind their transaction under the TILA. The court disagreed for two reasons. First, in order to have a three-year right of rescission under the TILA, the plaintiff needs to show that there were inadequate disclosures. The court held that there were no inadequate disclosures. Additionally, in order to exercise the right of rescission, the plaintiffs are required to tender the total amount of the mortgage principal and interest, which they did not do. The plaintiffs then attempted to argue that the defendant reported inaccurate negative information to credit reporting agencies (CRAs), a violation of the FCRA. The

court rejected this argument, however, because the plaintiffs did not prove that the defendant furnished inaccurate information. The court stated that the only information furnished by the defendant was that the plaintiffs were three months behind in their mortgage payments, something the plaintiffs admitted. Accordingly, the court granted the defendant's motion for summary judgment.

### TRUTH-IN-LENDING ACT & REAL ESTATE SETTLEMENT PROCEDURES ACT (STATUTE OF LIMITATIONS)

Marcelos v. Dominguez, 2008 WL 1820683 (N.D. Cal. Apr. 21, 2008)

Plaintiff, a Spanish speaker, negotiated in Spanish for a home loan with the defendant. Upon completion of the negotiations, the defendant presented documents printed in English for the plaintiff to sign. The signing was witnessed by the defendant notary. After the payments became too much for the plaintiff to pay, he brought action alleging that the defendants violated several provisions of the Truth-in-Lending Act (TILA), the Real Estate Settlement Procedures Act (RESPA), the Equal Credit Opportunity Act (ECOA) and other state laws. The defendant notary first moved to dismiss any TILA claims against her because she was not a creditor under the meaning of the TILA. The plaintiff admitted that the defendant notary was not a creditor, and therefore, the court dismissed the claims against her. The remaining defendants then argued that the rescission claim was time-barred. The court disagreed, holding that because the plaintiff did not receive adequate loan documents to satisfy the TILA, the three-year TILA rescission period applied. The defendants then argued that the plaintiff's claim for statutory damages under TILA was time-barred. The court agreed, stating that the plaintiff was put on notice that his mortgage payments had increased more than he had negotiated in October of 2005. The court held that this was when the TILA statute of limitations began to run. Because the plaintiff filed suit in January of 2008, his claims for statutory damages under TILA came well after the one-year statute of limitations. The defendant mortgage company then argued that an assignee is only liable for TILA violations if they are apparent on the face of the disclosure. The court held that because the plaintiff alleged that the defendant mortgage company was a successor-in-interest to the loan, the plaintiff pled sufficient facts to assert a right to rescind against the mortgage company. The defendants then argued that the plaintiff's RESPA claim should be dismissed because it was time-barred by the one-year statute of limitations. The court stated that while equitable tolling should be read into every statute and does apply to RESPA claims, the plaintiff should have been put on notice about RESPA

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violations at the same time he was put on notice about the TILA violations. The court found that the plaintiff failed to allege facts sufficient to support a tolling of the statute of limitations beyond the time he was notified of the violations. Therefore, the court dismissed the RESPA claims because they were time-barred by the statute of limitations.

#### FEDERAL ARBITRATION ACT (VALIDITY OF ARBITRATION AGREEMENT)

Burgess v. Qwest Corp., 2008 WL 1897696 (D. Or. Apr. 28, 2008)

After the plaintiff cancelled the defendant's telephone service, the defendant continued to bill the plaintiff for services not rendered. The plaintiff sued the defendant alleging violations of the federal Common Carrier Regulation and state consumer protection laws. The defendant filed a motion to stay proceedings and compel arbitration. The defendant alleged that the plaintiff had signed two contracts, one for internet services and one for wireless telephone services, and each contract included a valid arbitration agreement. The contract for internet service stated that if the defendant enrolled, activated or paid for the service, the arbitration agreement would become applicable. The plaintiff argued that she had never seen the arbitration paragraph, and therefore, was not bound by its provisions. The court held that the defendant provided no evidence, such as a signed agreement or documented communications to establish that the plaintiff was aware of the arbitration agreement in the internet contract. Therefore, the court declined to find that the plaintiff's failure to return a modem and continued use of the equipment constituted an objectively manifested meeting of the minds with respect to the arbitration agreement. The defendant then argued that the plaintiff was subject to an arbitration agreement when she first used the phone. The plaintiff activated the account during a telephone call in which the defendant informed the plaintiff that written terms and conditions applied to the service and would be included in hardware sent to the plaintiff. The court found that this arrangement also did not constitute a meeting of the minds and failed to find a valid arbitration agreement with respect to the telephone service. Accordingly, the defendant's motion to compel arbitration was denied.

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## 10<sup>TH</sup> CIRCUIT DECISIONS



#### FAIR DEBT COLLECTION PRACTICES ACT (DEBT COLLECTOR APPLICABILITY)

Scoles v. Spellings, 2008 WL 974702 (W.D. Okla. Apr. 8, 2008)

Plaintiff obtained student loans guaranteed by the United States Department of Education. After the plaintiff went into default, he entered into a settlement agreement with the defendant debt collector to pay the amount of \$1,200. The defendant debt collector did not discharge the loan after the payment, instead requesting that the plaintiff remit \$12,000. The plaintiff brought suit against the United States Secretary of Education and the debt collector, alleging both violated various provisions of the Fair Debt Collection Practices Act (FDCPA) by breaching the settlement agreement and falsely representing the amount and/or legal status of the debt. The Secretary moved to dismiss all claims for lack of subject matter jurisdiction and for failure to state a claim. The court first granted the Secretary's motion to dismiss for lack of subject matter jurisdiction, but granted the plaintiff's request for leave to amend his complaint. The court stated that jurisdiction is proper under 20 U.S.C. § 1082(a)(2) and gave the plaintiff opportunity to state that fact in his complaint. The defendant then argued that the plaintiff failed to state a claim upon which relief could be granted because the defendant was not a "debt collector" as is defined under the FDCPA. The court stated that the defendant was not a debt collector because: (1) collection of debts was not a principal purpose of the department; and (2) when the department seeks repayment of a student loan, it is collecting on its debt and not a debt owed or due to another. The court agreed with the defendant. Accordingly, the court granted the Secretary's motion to dismiss the FDCPA claim.

FAIR DEBT COLLECTION PRACTICES ACT  
(OFFER OF JUDGMENT & ACTUAL DAMAGES)  
Harris v. Anderson, Crenshaw & Assoc., L.L.C., 2008 WL  
1766572 (D. Colo. Apr. 14, 2008)

Plaintiff incurred a debt with a company that installed alarm systems. After she defaulted on the debt, it was assigned to the defendant for collection. The plaintiff alleged that the defendant repeatedly called her at her place of employment and during the conversations threatened to continue calling her “everyday” until the debt was paid. The plaintiff filed suit against the defendant alleging that the defendant’s collection activities violated several provisions of the Fair Debt Collection Practices Act (FDCPA). The defendant then filed a breach of contract counterclaim. The defendant also filed a motion for summary judgment on both claims. The defendant argued that it was entitled to summary judgment on the plaintiff’s FDCPA claim because the plaintiff could not prove actual damages. With respect to statutory damages, the defendant claimed that they were moot because the plaintiff refused an offer of judgment for \$1,001.00. The court first held that the defendant’s settlement offer could not have mooted the plaintiff’s claim because it was not an offer of complete relief. It did not offer to compensate the plaintiff for actual damages. The court held that even if it had found that the plaintiff could not prove actual damages, that would have been at the summary judgment stage and, therefore, would not have made the offer complete at the time that it was made. Therefore, the court denied the defendant’s motion for summary judgment as to the plaintiff’s FDCPA claim.

FAIR CREDIT REPORTING ACT (PRIVATE  
RIGHT OF ACTION)  
Greene v. Capital One Bank, 2008 WL 1858882 (D. Utah  
Apr. 23, 2008)

Plaintiff maintained an open credit line with the defendant credit card company. After the plaintiff fell behind in payments, the parties agreed to settle the plaintiff’s debt for a payment of \$1,000. The defendant then erroneously reported to several credit reporting agencies (CRAs) that the defendant had to charge off \$3,000 of the plaintiff’s bad debt. The plaintiff reported his dispute to various CRAs and the defendant bank. After the plaintiff was rejected for credit, he brought suit in state court and won a default judgment against the defendant. After the lawsuit, the plaintiff was again rejected for credit. He brought suit again, this time in federal court, alleging that the defendant violated various provisions of the Fair Credit Reporting Act (FCRA) when it reported the inaccurate information. The defendant filed a motion to dismiss, arguing that the plaintiff failed to allege that the defendant received a statutory notice from a CRA. The court held that the plaintiff had failed to prove that he again gave notice of

dispute to the necessary CRAs after his first lawsuit. The court held that any notice given before the first lawsuit was insufficient to satisfy the notice requirement of 15 U.S.C. § 1681s-2(b) for claims after the lawsuit. Because the plaintiff could not prove that he again notified the appropriate CRAs, the court granted the defendant’s motion to dismiss the FCRA claims.

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11<sup>TH</sup> CIRCUIT  
DECISIONS



FAIR DEBT COLLECTION PRACTICES ACT  
(PERMISSIVE COUNTERCLAIM)  
Thomas v. Commercial Recovery Systems, Inc., 2008 WL  
906770 (M.D. Fla. Apr. 1, 2008)

Plaintiff filed suit against the defendant bank, alleging that the defendant violated various provisions of the Fair Debt Collection Practices Act (FDCPA) when it attempted to collect on the plaintiff’s automobile loan that was in default. The defendant then filed a counterclaim alleging that the plaintiff breached the contract by failing to pay the debt and by failing to insure the automobile. The plaintiff moved to dismiss the counterclaim, arguing that the debt in no way related to the defendant’s alleged use of abusive and deceptive debt collection practices. The court stated that because the counterclaim did not raise a novel or complex issue of state law, did not substantially predominate over the original claim, because the court had not dismissed all other claims, and because there were no other compelling reasons to decline jurisdiction over the claim, the defendant’s counterclaim would be allowed. The court also stated that there were no considerations of fairness and judicial economy that provided a valid basis for declining to exercise jurisdiction over the counterclaim. Accordingly, the plaintiff’s motion was denied.

TRUTH-IN-LENDING ACT (BONA FIDE ERROR)

In re Gordon, 2008 WL 1776836 (Bkrtcy. N.D. Ala. Apr. 16, 2008)

Plaintiff entered into a retail sales contract with the defendant in which the required APR disclosure was absent. The plaintiff brought suit, alleging that the absence of the APR disclosure constituted a violation of the Truth-in-Lending Act (TILA). Both parties filed motions for summary judgment. While the defendant admitted that the contract lacked the necessary disclosures, it argued that the omission was a bona fide error and that it occurred despite reasonable procedures that were in place to avoid such errors. The court first agreed with the plaintiff that evidence of an oral disclosure of the APR was not enough to satisfy the requirements of the TILA. The defendant argued, however, that it had a system in place that normally would prevent the omission of the APR on the contract. The contracts are typically reviewed by the sales representatives and the bookkeepers before they are given to the customers. The defendant stated that because the plaintiff had failed to pay the down payment in full, its computer system would not allow the salesperson to calculate the APR on the contract. The court held that the plaintiff's failure to return to the store to satisfy the down payment prevented or inhibited the defendant from following its own standards of procedure that were designed to prevent the omission of the APR from the contract. Accordingly, the court granted the defendant's motion for summary judgment on the TILA claim.

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