



Consumer Finance Monthly Litigation Update August 2007

[Alan D. Leeth](#)

[R. Frank Springfield](#)

[Jason R. Bushby](#)

Burr & Forman LLP

420 North 20th Street, Suite 3400

Birmingham, Alabama 35203

Phone: 205.251.3000

Fax: 205.458.5100

www.burr.com

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.

SUPREME COURT DECISIONS

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

1ST CIRCUIT DECISIONS

FAIR CREDIT REPORTING ACT (FIRM OFFER OF CREDIT)

Sullivan v. Greenwood Credit Union, 2007 WL 2309866 (D. Mass. Aug. 13, 2007)

Plaintiff brought suit under the Fair Credit Reporting Act (FCRA), alleging that the Defendant sent an unsolicited mailer to the Plaintiff, and 2,055,000 other consumers, in which the Defendant had accessed the Plaintiff's credit report and did not give a firm offer of credit. The Defendant's mailer stated that the Plaintiff was pre-approved for a home loan, up to 100% of the value of the Plaintiff's home. The mailer gave no terms and conditions, including an interest rate, and stated that the Defendant could revoke the offer if the Plaintiff did not meet the initial criteria. After the Court reviewed the Seventh Circuit's law on firm offers of credit, noting a dearth of case law in their own circuit, the Court held that if a letter assures the consumer that he is guaranteed to receive credit if he meets certain conditions, and there is no evidence that the letter is a sham intended to lure recipients into something other than a bonafide credit transaction, the letter is a firm offer of credit under the FCRA. The Court then stated that as long as the loan is in fact available, and is not a pretense for another transaction, the requirement of the FCRA is met. Therefore, the Court held that the Defendant's offer did satisfy the statutory requirements of a firm offer of credit, granted the Defendant's motion for summary judgment and rejected the notion that a FCRA firm offer of credit must be a definite offer within the meaning of state contract law.

FAIR DEBT COLLECTION PRACTICES ACT (LIABILITY FOR FILING COLLECTIONS SUIT IN AN IMPROPER VENUE & FILING FOR IMPROPER DEFAULT JUDGMENT)

Harrington v. CACV of Colorado, L.L.C., 2007 WL 2452891 (D. Mass. Aug. 30, 2007)

Plaintiff filed suit against the Defendant debt collector claiming violations of the Fair Debt Collection Practices Act (FDCPA) arguing that the Defendant's actions in filing a state court lawsuit against the Plaintiff were improper. The Defendant had brought a suit against the Plaintiff in order to collect a debt. After the Plaintiff replied to the Defendant's discovery request, the Defendant moved the Court to default against her, claiming that she had failed to respond. When the Plaintiff informed the Court she had responded, the Defendant moved to vacate the judgment; the Court complied. The Plaintiff then was able to dismiss the collection suit because the Defendant was not registered with the Massachusetts Secretary of State as a foreign corporation as required under Massachusetts law. In the Plaintiff's FDCPA claim, she alleged that the Defendant violated the FDCPA through four acts. First, the Plaintiff argued that the Defendant filed the state court lawsuit in the improper venue. Although the Plaintiff's claims were dismissed because they were time-barred by the statute of limitations, the Court still discussed the claim because it was relevant to her state law claims. 15 U.S.C. § 1692i requires a debt collector to bring a legal action only in the judicial district in which the consumer who signed the contract resides. The Court held that because the Plaintiff lived in a judicial district

that was separate from the one in which the Defendant brought its action, the Defendant was in plain violation of the FDCPA. Second, the Court held that the Defendant's filing for default judgment was unreasonable, in violation of § 1692f, and constituted a threat to take legal action that could not be legally taken, in violation of § 1692e. Because the debt collector had reason to know that the filing of default judgment was improper, it can be held liable under the FDCPA. For the third and fourth allegations, the claims were dismissed because they surpassed the one-year period for the statute of limitations allowed under the FDCPA.

2ND CIRCUIT DECISIONS

REAL ESTATE SETTLEMENT PROCEDURES ACT (UNEARNED, UNDIVIDED FEES)

Cohen v. JP Morgan Chase & Co., 2007 WL 2231106 (2d Cir. 2007)

Plaintiff brought a suit against the Defendant bank on behalf of herself, and a class of others similarly situated, alleging that the Defendant violated the Real Estate Settlement Procedures Act (RESPA) § 8(b) by charging a post-closing fee for which the Plaintiff alleges the bank performed no services. After the district Court dismissed her case, the Plaintiff appealed. The Department of Housing and Urban Development (HUD) has interpreted § 8(b) as indicating three types of unearned fees. The Plaintiff alleges that the Defendant charged a fee where "one service provider charges the consumer a fee where no, nominal, or duplicative work is done." The Court first concluded that the district court erred in stating that the United States Court of Appeals for the Second Circuit's decision in *Kruse v. Wells Fargo Home Mortgage, Inc.* controlled the construction of § 8(b). The Court stated that *Kruse* did not control the issue because the Plaintiff was suing for a charge being levied for no service at all. *Kruse*'s holding, which stated that the RESPA § 8(b) was not a price control statute, does not address the same issues. HUD's concern is not on lenders who overcharge for services actually provided; it is on lenders who charge fees for no services at all. Second, the Court decided that it was necessary to use the *Chevron* analysis to determine if § 8(b) created a prohibition on all unearned fees or just on divided unearned fees. The Court began with an analysis of the first step of the *Chevron* analysis. After the Court studied the statutory construction of the statute, and then looked at the structure, purpose and history of § 8(b), it determined that the statute was ambiguous and it was necessary to analyze HUD's interpretation of the statute. The Court concluded that HUD reasonably construed the RESPA § 8(b) to prohibit one service provider from charging the consumer a fee for which no work is done. Therefore, any unearned undivided fee is prohibited under RESPA § 8(b) and the Court vacated the district court's dismissal of the Plaintiff's complaint.

FAIR DEBT COLLECTION PRACTICES ACT (OFFER OF JUDGMENT & APPLICABILITY TO NON-DEBT COLLECTORS)

Milton v. Rosicki, Rosicki & Associates, P.C., NCB, 2007 WL 2262893 (E.D.N.Y. Aug. 3, 2007)

Plaintiff filed suit against Defendant alleging that the Defendant law firm's debt collection practices violated the Fair Debt Collection Practices Act (FDCPA) when, at the instruction of its client, the Defendant sent letters to the Plaintiff to collect maintenance fees that were unpaid by the Plaintiff. Plaintiff refused to pay the maintenance fees for his apartment because he alleged

that he was living in terrible conditions because his apartment was not properly maintained. The Defendant argued that it did not engage in debt collection activity and, therefore, the FDCPA did not apply to its actions. Additionally, the Defendant argued that because it presented the Plaintiff with an Offer of Judgment for \$5000 pursuant to Federal Rule of Civil Procedure 68, which exceeded the maximum relief that the Plaintiff could obtain, the Court lacked jurisdiction as there was no longer a controversy. The Court stated that where a Defendant offers judgment in a FDCPA case for the maximum relief obtainable by the Plaintiff, an action becomes moot and subject to dismissal because there exists no controversy pending Court adjudication. The question then becomes if the Defendant can meet its burden of proving that the Rule 68 offer is more favorable than an award the Plaintiff could receive by judgment. The Court first held that because the FDCPA does not contain a provision allowing injunctive or declaratory relief, the Plaintiff could not object to the Offer of Judgment because he was asking for those remedies. Second, the Court stated that additional damages are limited to \$1000 per FDCPA action. Third, although attorney's fees are allowed under the FDCPA, because the Plaintiff was *pro se* he could not recover attorney's fee. Because of those three factors, the final issue rested on if the Plaintiff's actual damages could possibly be more than \$4000. The Court stated that because there was no reasonable nexus between the nature of the Defendant's conduct and the emotional and physical distress which the Plaintiff claimed to have suffered, he could not possibly recover actual damages above \$4000. The Plaintiff complained of many ailments including: sleeplessness, insomnia, nightmares, fatigue, diarrhea, constipation, and many others. However, because the Plaintiff had complained that the conditions of his apartment were causing many of these problems in a letter to the apartment complex before he received a debt collection letter, it is impossible that these ailments could be linked to his receipt of the collection letter. The Court finally stated that even if there was a reasonable nexus, the Plaintiff would receive damages on the low end of the allowable \$500 to \$5000 actual damages range. The final issue discussed by the Court was whether the law firm that was normally used by the apartment complex, but not for debt collection, could be sued under the FDCPA. The Court stated that because the law firm spent less than 1% of its time assisting customers attempting to collect debts, and did not market itself as a debt collection firm, they were not debt collectors under the meaning of the FDCPA.

EQUAL CREDIT OPPORTUNITY ACT (DEFINITION OF A CREDITOR)

Cochran v. Northeast Mortgage, L.L.C., 2007 WL 2412299 (D. Conn. Aug. 21, 2007)

Plaintiff filed suit against the Defendant alleging violations of the Fair Credit Reporting Act (FCRA) and the Equal Credit Opportunity Act (ECOA) when the Defendant failed to notify the Defendant that it took an adverse action on her loan application because of information contained within her consumer report. The Plaintiff submitted a motion for partial summary judgment. The counsel for the Defendants moved for leave to withdraw, but it was not yet granted. The Defendant filed no opposition to the motion for partial summary judgment. Because the Defendant admitted in its answer that it failed to notify the Plaintiff of the adverse action, the only issue was whether the Defendant was a "creditor." Courts have defined a creditor as any person who regularly arranges for the extension, renewal or continuation of credit. Also a creditor can be defined as a person who, in the ordinary course of business, regularly participates in a credit decision. The Court held that because the Defendant, a mortgage broker, decided not to submit the Plaintiff's loan application to any lenders, it participated in a credit decision and is

a creditor and subject to the ECOA. Therefore, the Court concluded that the Plaintiff was entitled to summary judgment on the issue of liability.

FAIR DEBT COLLECTION PRACTICES ACT (NON-DEBT COLLECTOR APPLICABILITY)

Cyphers v. Litton Loan Servicing, L.L.P., 2007 WL 2412159 (N.D.N.Y. Aug. 27, 2007)

Plaintiffs brought an action against the Defendant loan servicing partnership alleging violations of the Fair Debt Collection Practices Act (FDCPA). After the Plaintiffs were late on several mortgage payments, the Defendant made attempts to collect the payments. These attempts included calling the Plaintiffs at work, after nine o'clock in the evening and also faxing reinstatement quotes to the Plaintiff's work faxes. The Defendant moved for summary judgment as to the Plaintiffs' FDCPA claims on the ground that it is not a debt collector and is therefore not bound by the FDCPA. The Court held that the Defendant was not a debt collector under the FDCPA because when it bought the loan, the Plaintiff's loan was not in default. According to 15 U.S.C. § 1692a(6)(F), a person is not a debt collector if the debt was not in default at the time it was obtained by the person. Although the Plaintiff attempted to state that the Defendant believed that the loan was in default, the Court did not find the arguments persuasive and granted the Defendant's motion for summary judgment.

3RD CIRCUIT DECISIONS

FAIR CREDIT REPORTING ACT (ADVERSE ACTION NOTICE)

Whitfield v. Radian Guaranty, Inc., 2007 WL 2452641 (3d Cir. Aug. 30, 2007)

Plaintiffs filed a class action suit against Defendant, a company that provides mortgage guaranty insurance to a mortgage lender at a premium rate, alleging violations of the Fair Credit Reporting Act ("FCRA"). Plaintiffs' dispute arose when Countrywide agreed to provide Plaintiffs with a mortgage loan, lending them 98% of the purchase price of their home. However, as a condition to this agreement, Countrywide required that Plaintiffs pay for mortgage insurance. Subsequently, Countrywide requested Defendant to provide the mortgage insurance for Plaintiffs and provided Defendant with Plaintiffs' credit report to assist in Defendant's determination of how much they would charge Plaintiffs for the insurance. Ultimately, Defendant accepted the request for insurance, but did not send Plaintiffs an adverse action notice. Therefore, Plaintiffs alleged that Defendant violated FCRA by failing to provide them with an adverse action notice. Defendant filed a motion for summary judgment which was granted by the trial court, and the Third Circuit reversed this decision finding that (1) a higher initial interest rate can be an adverse action under FCRA, (2) although Defendant claims it only retrieved Plaintiffs' credit score in making its insurance determination, Defendant still made its action "based . . . on" a credit report, and (3) whether or not Defendant acted willfully (so as to be liable under FCRA) was a question of fact to be determined by the factfinder, rather than the Court.

FAIR CREDIT REPORTING ACT (FIRM OFFER OF INSURANCE)

Gelman v. State Farm Mut. Auto. Ins. Co., 2007 WL 2306578 (E.D. Pa. Aug. 9, 2007)

Plaintiff filed suit against Defendant insurance company alleging violations of the Fair Credit Reporting Act (FCRA). The Defendant had obtained information from the Plaintiff's credit report to send him an unsolicited mailing advertising insurance. The mailer did not contain any concrete terms. The Plaintiff alleged that the mailing violated FCRA and did not qualify as a firm offer of insurance because it was 1) vague and totally lacking in terms and 2) it failed to provide clear and conspicuous disclosures as required by 15 U.S.C. § 1681m(d). The Defendant filed a motion to dismiss all of the Plaintiff's claims. The Court rejected the Plaintiff's claim that the offer was not a firm offer of insurance for two main reasons. First, the Court stated that the Plaintiff's reading of the FCRA has no basis in the statutory text. The Plaintiff argues that the offer must have sufficient value and have material terms; however, the Court stated that nowhere in the text of the statute are those words found. The only requirement is that the offer of insurance to a consumer be honored. Second, the Plaintiff has failed to provide any cases in which a Court discusses a firm offer of insurance. Instead, all of the Plaintiff's cases rely on firm offers of credit. The Court stated that it may not even be possible in insurance cases to state all of the material terms of a firm offer in an initial solicitation. The Court stated that the fact that the Plaintiff does not actually allege nor argue in his briefing what material terms of insurance should have been present implicitly supports the position that it would be difficult to supply such terms without having further particularized information. The Court also rejects the Plaintiff's third claim that the Defendant failed to provide disclosures in a clear and conspicuous manner because the FCRA explicitly excludes private rights of action for § 1681m(d) violations. Finally, the Court rejects the Plaintiff's claims for declaratory and injunctive relief because the civil liability provisions of the FCRA expressly refer to damages and attorney fees, but not to injunctive or declaratory relief. Therefore, all of the Plaintiff's claims were dismissed with prejudice.

FAIR CREDIT REPORTING ACT (PRIVATE RIGHT OF ACTION)

Beisel v. ABN Ambro Mortgage, Inc., 2007 WL 2332494 (E.D. Pa. Aug. 10, 2007)

Plaintiffs defaulted in their mortgage with Defendant and filed Chapter 13 bankruptcy. After the Defendant filed a proof of claim alleging pre-petition arrearage of \$8,491.98, the Plaintiffs argued that they had paid the arrearage in full and the Defendant inaccurately claimed the remaining unpaid balance of the loan was \$28,000. The Plaintiffs did not dispute the Defendant's report with a credit reporting agency (CRA). Instead, they filed suit under the Fair Credit Reporting Act (FCRA) arguing that the statute permits a private right of action against any person, including the Defendant, and that the Defendant willfully and negligently violated the FCRA. The Defendant moved to dismiss because the Plaintiffs did not dispute the information with any CRA and stated that the Defendant itself is only a furnisher of information. The Court stated that furnishers of information only have duties under the FCRA after the complaining party has disputed the questionable credit information with a CRA and the CRA has notified the furnisher of the dispute. The Court held that because the Plaintiffs failed to report the dispute with a CRA, they failed to state a claim for relief under 15 U.S.C. § 1681s-2(b) and the Court dismissed their suit pursuant to Federal Rule of Civil Procedure 12(b)(6).

ELECTRONIC FUND TRANSFERS ACT (CLASS CERTIFICATION)

Martz v. PNC Bank, N.A., 2007 WL 2343800 (W.D. Pa. Aug. 15, 2007)

Plaintiff, individually, and on behalf of all others similarly situated, brought an action against the Defendant complaining that it violated the Electronic Fund Transfers Act (EFTA). The Plaintiff alleged that the Defendant violated the EFTA because the Defendant's automatic teller machines (ATMs) did not provide the Plaintiff notice that a fee *will* be charged and collected as part of his transaction; rather, the ATMs informed him that a charge *may* be assessed, even though the Defendant then assessed a fee and collected it. The Plaintiff moved to certify a class of consumers who used the Defendant's ATMs and were informed that they *may* be charged for a cash withdrawal, and were subsequently charged. The Defendant argued that the Plaintiff's class did not meet several prerequisites under Federal Rule of Civil Procedure 23. The Court addressed four different certification factors, finding that the Plaintiff satisfied the first two, but failed to adequately prove the final two. The Court first found that the Plaintiff satisfied the commonality requirement because the Plaintiff shared at least one question of fact or law with the grievances of the prospective class. The claim that the Defendant failed to adequately disclose the ATM fees on its ATM screens would be shared by all potential Plaintiffs. The Court also held that because the Plaintiff's EFTA claim arises from the same alleged misconduct and is based on the same legal theory as those of the proposed class, the typicality requirement is met. However, the Court held that the Plaintiff would fail to fairly and adequately protect the interests of the class. The Plaintiff and class counsel were college roommates, have remained close friends since college, and the class counsel approached the Plaintiff about serving as the main plaintiff in this case. Additionally, the Plaintiff is serving as the named Plaintiff in another similar EFTA action brought by the class counsel. Also, the Plaintiff is not an adequate class representative because he abdicated control of the litigation to the class counsel. In fact, the Court found that the Plaintiff could not even recall whether the screen on the ATM he used had said he *may* be charged a fee or *will* be charged a fee. Finally, the Court held that because the Plaintiff could not remember what the ATM screen said, he could not satisfy the predominance requirement. To prove actual damages, the issue of the Plaintiff's own recollection of what his personal ATM machine said would predominate over common issues of law shared with the rest of the class. The Plaintiff's admissions would not be shared by all class members who would proffer different facts to support their claims of actual damages. Therefore, the Plaintiff's motion for class certification was denied.

FAIR AND ACCURATE CREDIT TRANSACTIONS ACT (ACTUAL DAMAGES, PLAIN READING & WILLFULNESS)

Korman v. Walking Co., 2007 WL 2437958 (E.D. Pa. Aug. 28, 2007)

Plaintiff sued Defendant alleging a violation of the Fair and Accurate Credit Transactions Act (FACTA). Plaintiff alleged that she made a purchase using a credit card, the Defendant provided her with a receipt that contained four digits from her credit card number and also her credit card's expiration date, in violation of 15 U.S.C. § 1681c(g)(3)(A). The Defendant moved to dismiss on three main arguments. First, the Defendant argued that the Plaintiff had not alleged that she suffered any injury and thus, that the Plaintiff lacked standing to bring the suit. The Court rejected the Defendant's argument and stated that the Plaintiff's allegation is that she has a legally protected interest in receiving a receipt from a merchant with certain credit card

information omitted and that the Defendant injured her when it handed her a receipt with the offending information on it. The Court adds that being handed a receipt that omits certain of one's credit card information is a legally protected interest created by the FACTA and when one receives a receipt with information on it, one suffers an injury sufficient to confer standing. Second, the Defendant relied on a tortured reading of the FACTA to argue that a business does not run afoul of the FACTA if it prints six digits (but not the expiration date) or if it prints the expiration date (but not six digits). The Court stated that the disjunctive "or" means "or" and not "and." In other words, printing the six digits alone, or printing the expiration date alone violates the FACTA. Finally, the Defendant argued that it should not be held in willful violation of the FACTA because its reading of the statute (referring to the second argument) is plausible. The Court stated that determining if the Defendant's reading was plausible is not appropriate for the motion to dismiss stage. Also, the Court stated that looking to the merits of the Defendant's argument, its reading was not reasonable. The Court stated that the Defendant's reading of the statute has no basis in the statutory text. Therefore, the Defendant's motion to dismiss was denied.

4TH CIRCUIT DECISIONS

FEDERAL DEPOSIT INSURANCE ACT (PREEMPTION)

Republic Bank & Trust Co. v. Kucan, 2007 WL 2376927 (4th Cir. Aug. 21, 2007)

Plaintiff (lender) brought federal court action in response to Defendants (borrowers) state court claims alleging certain loan transactions violated North Carolina's usury laws and its Consumer Finance Act. The Plaintiff, who was the only named Defendant in the state case, was a non-bank entity that acted as the marketer and provider of "payday" loans for a state-chartered bank. The district court had concluded that the Plaintiff lacked jurisdiction to maintain the action and dismissed it without considering whether subject matter jurisdiction existed. The Plaintiff argued that federal question jurisdiction existed because the borrower's usury claims were completely preempted by the Federal Deposit Insurance Act (FDIA). The Fourth Circuit stated that the FDIA completely preempted state-law usury claims against state-chartered banks. Additionally, usury claims that are nominally asserted against a non-bank are preempted if a state-chartered bank in fact is the real subject of the claims asserted by the Defendants. Because such a determination is fact intensive, the case needed to be remanded to the district court for a determination of whether the state-chartered bank is the real subject of the claims asserted by the Defendants.

FAIR CREDIT REPORTING ACT (CLASS CERTIFICATION)

Williams v. LexisNexis Risk Management Inc., 2007 WL 2439463 (E.D. Va. Aug. 23, 2007)

The Defendant is a credit reporting agency (CRA) that provides criminal background checks to customers. All of the Plaintiffs worked for the same employer. The employer did background checks on the Plaintiffs using the Defendant's system. Each of the employees in the lawsuit was fired because the Defendant reported that they had negative criminal records to their employer. The day after the report, and complying with the Defendant's policy to following the Fair Credit Reporting Act (FCRA), the Defendant sent notices to the Plaintiffs that a potential adverse action was taken with respect to the Plaintiffs' consumer reports and an employer was likely notified.

The Plaintiffs are attempting to certify two classes in bringing their claims under the FCRA. First, the Plaintiffs desired to certify a class based on the alleged violation of 15 U.S.C. § 1681i for all persons that the Defendant refused to conduct a reinvestigation of a dispute on their consumer report unless they returned a form with two specific pieces of photocopied identification. Second, the Plaintiffs desired to certify a class based on the alleged violation of § 1681k for all persons to whom the Defendant did not provide notice that it was furnishing a consumer report on them prior to or contemporaneously with its provision of the report. In order to certify a class pursuant to Federal Rule of Civil Procedure 23(b)(3), the Plaintiffs must meet several requirements. First, because the classes will consist of 430 and 557 members, the Court ruled that the Plaintiffs satisfied the numerosity requirement. Second, because the Defendant did not dispute that the Plaintiffs had at least one or more questions of law or fact which were common to the entire class, the Plaintiffs satisfied the commonality requirement. Third, because all of the Plaintiffs were required to submit two forms of identification before a reinvestigation took place, the Court held that the Plaintiffs satisfied the typicality requirement. Fourth, the Court held that the Plaintiffs satisfied the requirement of adequacy of representation because the prerequisite does not require that the interests of all of the named representatives and the absentee class members be identical. The Plaintiffs all brought a separate § 1691e(b) claim with the counsel, but that does not prohibit them from passing the adequacy requirement. Finally, the Plaintiffs sought class certification under Federal Rule of Civil Procedure 23(b)(3) which required that the Plaintiffs' questions of law or fact common to the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for a fair and efficient adjudication of the controversy. First, because neither "group" relied on different theories of liability, common issues predominate. However, the Court stated that there was an issue with the § 1681i class. Because the way the class was defined, it would include individuals who were refused an investigation unless they filled out and returned a specific form and/or provided photocopies of two forms of identification. The Court concluded that because of the way that § 1681i is structured, the definition would be too broad and would include in the class individuals whose individual claims would predominate over issues common to the class. Second, because both classes that the Plaintiffs seek to have certified represent large groups of individuals with common claims who would be unlikely to litigate on their own, the class action device is superior for resolving these claims. Therefore the Court granted the class certification of the Plaintiffs for the § 1681k class, but requested that the Plaintiffs create a more limited class for the § 1681i class so that they satisfy the predominance requirement in Rule 23(b)(3).

5TH CIRCUIT DECISIONS

FAIR CREDIT REPORTING ACT (FEDERAL QUESTION JURISDICTION)

McCraney v. Hibernia Nat'l Bank, 2007 WL 2406987 (E.D. La. Aug. 20, 2007)

Plaintiff filed a state court action against the Defendant alleging that the Defendant's misapplication of payments to the Plaintiff's loan account had caused the Defendant to wrongly report to credit reporting agencies (CRAs) that the Plaintiff's payments have been in arrears. Over the next two years, the Plaintiff sent the Defendant several documents which alluded to the Plaintiff's rights under the Fair Credit Reporting Act (FCRA). Finally, two years later the Plaintiff filed a motion for leave to file an amended petition and in that petition specifically

alleged that the Defendant violated the FCRA. The Defendant then filed a notice of removal asserting federal question jurisdiction under 28 U.S.C. § 1331. The Plaintiff argued that because the notice of removal came after the one year period allowed by federal statute, and the Defendant had notice that the lawsuit involved federal claims, that the case should be remanded to state court. The Defendant's position was that because it was only recently clear, when the Plaintiff officially filed the FCRA complaints, that federal law was involved and it was allowed to remove the case pursuant to 28 U.S.C. § 1446(b). The Court held that some of the communication between the Plaintiff and the Defendant that alluded to federal claims should have put the Defendant on notice. The Court also noted that because the Defendant had discussed in Court filings that it was going to use the FCRA to defend some of the claims, it should have become aware of the FCRA claims. Therefore, the Court remanded the claims back to state court because of the Defendant's untimely filing for removal.

6TH CIRCUIT DECISIONS

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

7TH CIRCUIT DECISIONS

TRUTH-IN-LENDING ACT & HOME OWNERSHIP AND EQUITY PROTECTION ACT (HIGH-COST LOAN DISCLOSURES)

Cunningham v. NationsCredit Fin. Serv. Corp., 2007 WL 2302175 (7th Cir. Aug. 14, 2007)

Plaintiff brought multiple claims against Defendant lender alleging state law violations and violations of the Truth-in-Lending Act (TILA). The Plaintiff had obtained a loan through a local loan agency which collected a fee of 7.97%. Because this amount is under the 8% threshold for requiring the lender to make additional disclosures pursuant to the HOEPA (Home Ownership and Equity Protection Act), the lender made only the disclosures required for a lower rate loan. Because of fraud and illegal activity on behalf of the local loan agency, the Plaintiff paid over \$10,000 to a non-existent company which was actually the local loan officer's bank account. The Plaintiff sued under the TILA alleging that the \$10,000 stolen from the loan amount should count as a broker's fee and should have required the Defendant lender to make additional disclosures for high cost or high rate loans, pursuant to HOEPA. The Court held that because neither the non-existent company, nor the local loan officer could be considered the Plaintiff's mortgage broker, the money that was stolen from the Plaintiff cannot constitute a brokerage fee. The Court also stated that TILA is not a general prohibition of fraud in consumer transactions. It's limited to protecting customers from being misled about the cost of credit and the individual fraud claims should be sorted out elsewhere. Because the loan was not a high rate loan, the Defendant was not required to make HOEPA disclosures.

FAIR CREDIT REPORTING ACT (FIRM OFFER OF CREDIT)

Bernal v. American Money Centers, Inc., 2007 WL 2288066 (E.D. Wis. Aug. 6, 2007)

Plaintiff brought suit on behalf of himself and others similarly situated, alleging that unsolicited mailers received by the Plaintiffs violated the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681b(c)(1)(B)(I), by not constituting a firm offer of credit. The mailer stated that the Defendant

could save the Plaintiffs “100’s, even 1,000’s of dollars every month, WE GUARANTEE it, or we’ll pay you cash.” The mailer also stated that if the Defendant could not save the Plaintiffs money, that the Defendant would pay \$300. The mailer also gave examples of different types of loans given to sample borrowers. The example listed an interest rate of 4.89% and stated that it may or may not reflect the interest rate on which loans are currently closed. The Defendant moved for summary judgment. The Court stated that in order to qualify as a firm offer of credit, the mailing must have value to the recipient. The Court stated that the interest rate and the terms of the sample loan in the offer provide little to no basis for determining what terms a consumer might actually receive. Also, the Court stated that the offer did not disclose other material terms of an offer. It did not disclose the precise rate of interest charged, a method for computation of such interest, the length of the repayment period, or if there was a minimum loan amount. The Court stated that the offer was too vague to constitute an offer capable of acceptance. Additionally, the \$300 guarantee in the offer did not make the mailing a firm offer of credit. The Defendant also did not present any evidence that a consumer responding to the mailing would be treated differently than any other consumer who called about a loan. The Defendant also argued that summary judgment was appropriate because the Plaintiff did not allege any actual damages, and statutory damages are only available for willful violations of FCRA. However, recent decisions have held that reckless disregard in a violation of FCRA would also be considered a willful violation. The Court held that a reasonable finder of fact could conclude that the Defendant displayed a reckless disregard for consumers’ rights to privacy under the FCRA. Accordingly, the Court denied the Defendant's motion for summary judgment.

FAIR DEBT COLLECTION PRACTICES ACT (MISREPRESENTATION & BONA FIDE ERROR)

Whitaker v. Hudson & Keyse, L.L.C., 2007 WL 2265057 (S.D. Ind. Aug. 6, 2007)

Plaintiff sued Defendant debt collector under the Fair Debt Collection Practices Act (FDCPA) for failing to give proper notice of the debt it was seeking to collect. He also brought a claim alleging that the amount of the debt stated in a dunning letter was a false representation of the amount and legal status of his debt in violation of 15 U.S.C. § 1692e(1)-(2)(A). The Plaintiff denied the claims, but pleaded that even if they were true, the Defendant was protected by the bona fide error defense of § 1692k(c). Both parties filed motions for summary judgment. The Court first addressed the Plaintiff’s misrepresentation claim. The Defendant argued that because the Plaintiff did not dispute the debt within thirty days it should have been assumed valid by the debt collector. The Court rejected this argument because it is only applicable if the amount that the collector is trying to obtain is actually the correct debt amount. Here, the amount of the debt was incorrect, so the Defendant may not assume that the debt is valid under § 1692g. The Court then stated that because of the strict-liability standard imposed by § 1692e, there is little breathing room for a Defendant that misstates a debt. While the Defendant satisfied the first part of the bona fide error defense because its conduct was the result of a good-faith error, the Court stated that the Defendant did not present enough evidence that it had appropriate procedures in place for assuring that interest calculations were correct. Accordingly, the Court denied the Defendant's motion for summary judgment and granted in part and denied in part the Plaintiff's motion for summary judgment. That is, at trial, the jury will be instructed that the debt amount was misstated, and it will be the Defendant's burden to prove that the bona fide error defense applies. If not, the jury will then determine what damages, if any, to award the Plaintiff.

FAIR DEBT COLLECTION PRACTICES ACT (BONA FIDE ERROR)

Henderson v. Biel, 2007 WL 2286129 (S.D. Ind. Aug. 7, 2007)

The Defendant debt collection agency purchased a debt from the original creditor which had maintained a credit card account owed by the Plaintiff. The account was turned over to the Defendant law firm which ultimately filed a lawsuit on behalf of the debt collection agency and against the Plaintiff. The Plaintiff was served with a summons naming the debt collection agency as a party, and not the original creditor, containing language that stated the Plaintiff had to answer the complaint within twenty-three days of receipt of the summons or a judgment by default may be rendered against her. The twenty-three day limit was misstated when the Defendant relied on an inaccurate filing form in the Court clerks office. The Court concluded that the reliance on this inaccurate form allowed the Defendant to utilize the bona fide error defense. The Court stated that the violation was made in reliance on the interpretation of Indiana law from a county clerk and that the Defendant's error was made in good faith.

ELECTRONIC FUNDS TRANSFER ACT (ERROR RESOLUTION)

Gale v. Hyde Park Bank, 2007 WL 2358625 (N.D. Ill. Aug. 8, 2007)

Plaintiff, using his checking debit card, charged an item to his checking account in December. Defendant bank failed to post the charge until April. The Plaintiff had already believed his account had been charged and the addition of the charge in April caused him to overdraw his checking account, thereby acquiring numerous fees. The Plaintiff brought several actions against the Defendant, including one under the Electronic Funds Transfer Act (EFTA). The Court granted the Defendant's motion for summary judgment for several reasons. First, the Plaintiff failed to notify the Defendant of the problem with his account within sixty days of receiving the bank statement where the error occurred, an act that is required by 12 C.F.R. § 205.11(b)(1)(i). Second, the Defendant followed the regulations set forth in 12 C.F.R. § 205.11. The Defendant sufficiently investigated the Plaintiff's complaint, responded to his complaint within four days and credited his account for the amount changed during the April statement period. Additionally, the Plaintiff had issued an error resolution form to the Plaintiff and complied with that form as required by 12 C.F.R. § 205.7(b)(10).

FAIR DEBT COLLECTION PRACTICES ACT (CLASS CERTIFICATION)

Blarek v. Encore Receivable Mgmt., Inc., 2007 WL 2325923 (E.D. Wis. Aug. 8, 2007)

Plaintiff filed suit alleging that Defendant violated the Fair Debt Collection Practices Act (FDCPA) and, specifically, 15 U.S.C. § 1692e, when it sent a debt collection letter that failed to state the correct name of the creditor as is required by 15 U.S.C. § 1692g(a)(2). The Plaintiff filed a motion to certify a class. In order to gain class certification, the Plaintiff must satisfy the four requirements listed under Federal Rule of Civil Procedure 23(a). First, the Court stated that the Plaintiff satisfied the numerosity requirement because over forty other Plaintiffs would be involved in the lawsuit and joinder would be considered impracticable. Second, the Court stated that the Plaintiff satisfied the requirement of commonality because the Defendant engaged in standardized conduct by mailing to the proposed class members allegedly illegal form letters; therefore, there existed a common nucleus of operative fact. Third, because the Plaintiff's claim arose from the same course of conduct which gave rise to the other class members' claims, the

Court held that the typicality requirement was satisfied. Each class member's claim relies on the same legal theory under the FDCPA and all Plaintiffs received a letter with the wrong creditor attached. Fourth, the Court determined that the Plaintiff satisfied the adequacy requirement for two reasons. First, because the Plaintiff's counsel had considerable experience in consumer and class action litigation, they were considered adequate. Second, because the Plaintiff can demonstrate at least minimal knowledge of her complaint, she is an adequate class representative. The Court stated that the burden for establishing a class representative's adequacy is not heavy. Finally, the Court held that the Plaintiff satisfied the requirements for a class in Rule 23(b)(3). First, common questions of law and fact predominate over any individual questions because all class members received the same form letter, and the legal determination of whether that letter violated the FDCPA will occur without regard to individual experiences. Second, a class action is superior to other methods because there are many Plaintiffs with small claims and the financial award is unlikely to provide enough incentive to bring a solo suit.

FAIR DEBT COLLECTION PRACTICES ACT (ATTORNEY COMMUNICATION & BONA FIDE ERROR)

Massa v. I.C. System, Inc., 2007 WL 2316470 (S.D. Ind. Aug. 10, 2007)

Plaintiff owed a debt to the Defendant debt collector after an account was turned over to the Defendant. The Plaintiff then filed bankruptcy and at this time no money became due to the Defendant because of the bankruptcy. The Defendant continued to make calls to the Plaintiff and the Plaintiff's attorney without knowledge of the bankruptcy. The Plaintiff brought suit against the Defendant debt collector alleging that the Defendant attempted to collect a debt that was subject to a bankruptcy in violation of the Fair Debt Collection Practices Act (FDCPA), specifically 15 U.S.C. § 1692e. The Defendant filed a motion for summary judgment on the basis that it was not aware that the account was in bankruptcy, relying on the bona fide error defense, and that a debt collection letter to the Plaintiff's attorney could not constitute a violation under the FDCPA. The Court granted the Defendant's motion in part. Specifically, the Court held that communications between a debt collection agency and a debtor's attorney are not covered under the FDCPA because the FDCPA was not enacted to protect well-trained and educated attorneys. The Court also held that the Defendant's attempt to collect additional damages from the Plaintiff for late collections was a bona fide error because the Defendant did not intentionally try to collect the illegal debt and did so only because the debt collector's customer verified that the debt was allowed.

ELECTRONIC FUND TRANSFERS ACT (DETRIMENTAL RELIANCE)

Mayotte v. Associated Bank, N.A., 2007 WL 2358646 (E.D. Wis. Aug. 17, 2007)

Plaintiff filed suit, individually, and on behalf of others similarly situated, against Defendant bank alleging a violation of the Electronic Fund Transfers Act (EFTA). The Plaintiff's complaint stated that the Defendant failed to provide adequate notice of a surcharge fee when the Plaintiff, and others, used the Defendant's Automated Teller Machines (ATMs), in violation of 15 U.S.C. § 1693(d)(3)(C). The Plaintiff argues that because the Defendant's ATMs only stated that the consumer *may* be charged a surcharge fee, that there was not adequate notice. The Defendant moved to dismiss the Plaintiffs claim, pursuant to Federal Rule of Civil Procedure 12(b)(6), to the extent that she sought to recover actual damages. The Defendant argued that

because the Plaintiff did not allege detrimental reliance in her complaint, that actual damages are not allowed under the EFTA. The Court concluded that the statute requires the alleged violation must be the cause of the harm to recover actual damages, but that the statute does not require that causation be proved through a showing of detrimental reliance. Rather, the Court stated that whether a showing of detrimental reliance is required to prove causation of harm is dependent on the specific statutory provision alleged to have been violated. The Court differentiates the instant statute from others, stating that the Defendant would fail to comply with the EFTA if it charged a fee without providing proper notice. Therefore, the actual violation is not predicated on defective notice, but on the improper imposition of a fee. A Plaintiff only has to show that her damages were as a result of the Defendant's improperly charging her a fee, which would be the cause of her damages. Accordingly, because the Plaintiff alleged in her complaint that she suffered damages by paying an ATM fee, the Court stated that her complaint contained sufficient factual allegations to raise a right to relief above the speculative level and denied the Defendant's motion to dismiss.

ELECTRONIC FUND TRANSFERS ACT (DETRIMENTAL RELIANCE)

Voeks v. Wal-Mart Stores, Inc., 2007 WL 2358645 (E.D. Wis. Aug. 17, 2007)

Plaintiff filed suit, individually, and on behalf of others similarly situated, against Defendant retail store alleging a violation of the Electronic Fund Transfers Act (EFTA). Plaintiff alleged that the Defendant failed to provide adequate notice of a surcharge fee when the Plaintiff used the Defendant's Automatic Teller Machine (ATM), a violation of 15 U.S.C. § 1693(d)(3)(C). The Plaintiff argued that because the Defendant's ATMs only stated that the consumer *may* be charged a surcharge fee, that there was not adequate notice. The Defendant filed a motion to dismiss the claim for actual damages pursuant to Federal Rule of Civil Procedure 12(b)(6). The Defendant argued that because the Plaintiff did not allege detrimental reliance in her complaint, that actual damages are not allowed under the EFTA. The Court concluded that the statute requires the alleged violation must be the cause of the harm to recover actual damages, but that statute does not require that causation be proved through a showing of detrimental reliance. Rather, the Court stated that whether a showing of detrimental reliance is required to prove causation of harm is dependent on the specific statutory provision alleged to have been violated. The Court differentiates the instant statute from others, stating that the Defendant would fail to comply with the EFTA if it charged a fee without providing proper notice. Therefore, the actual violation is not predicated on defective notice, but on the improper imposition of a fee. A Plaintiff only has to show that her damages were as a result of the Defendant's improperly charging her a fee, which would be the cause of her damages. Accordingly, because the Plaintiff alleged in her complaint that she suffered damages by paying an ATM fee, the Court stated that her complaint contained sufficient factual allegations to raise a right to relief above the speculative level and denied the Defendant's motion to dismiss.

FAIR DEBT COLLECTION PRACTICES ACT (FALSE AND MISLEADING COMMUNICATIONS)

Omaria v. A. Alliance Collection Agency, Inc., 2007 WL 2409794 (N.D. Ill. Aug. 21, 2007)

Plaintiff sued the Defendant debt collector alleging two violations of the Fair Debt Collection Practices Act (FDCPA). The Defendant had sent the Plaintiff a letter attempting to collect a debt

owed by the Plaintiff. The Plaintiff argued that the letter violated two provisions of the FDCPA. First, the Plaintiff alleged that because the Defendant's letter said that they had thirty days to dispute the debt, then stated that "collection proceedings will be instituted as soon as possible notwithstanding this notice," that the letter is confusing to an unsophisticated consumer and violates 15 U.S.C. § 1692g. The Court rejected this argument and held that the phrase "collection proceedings" did not indicate a demand for payment. Second, the Plaintiff argued that the letter violates § 1692e of the FDCPA because the statement "please be advised that this office claims a lien for fees plus costs related to this matter," is false and/or misleading. The Court stated that there are two ways to understand the meaning of the phrase. The first is that the debt collector has issued a lien against the debtor. This could be misleading because the debt collector has not issued a lien against the debtor. The second is to understand it as meaning that the lien is against the original creditor for a stake in the resolution of the debt. Because there are two meanings that are possible, the Court stated that without additional evidence, it could not grant summary judgment in favor of the Plaintiff. Because the Plaintiff did not present any additional evidence besides the letter, the Court concluded that the Defendant's motion for summary judgment must be granted.

FAIR DEBT COLLECTION PRACTICES ACT (SECURITY ENFORCEMENT ACTIVITIES)

Overton v. Foutty & Foutty, L.L.P., 2007 WL 2413026 (S.D. Ind. Aug. 21, 2007)

Plaintiffs brought an action against the Defendant law firm alleging several violations of the Fair Debt Collection Practices Act (FDCPA). After the Plaintiffs' mother had died, the Defendant, without contacting the estate of the mother, attempted to foreclose on the mother's home. They also initiated a Sheriff's sale in which the house was sold to a buyer. The mother's estate was never informed of any foreclosure proceedings. The Defendant moved for a motion to dismiss all FDCPA claims. The Defendant argued that there was no valid FDCPA claim because its alleged activities were only "security enforcement activities," not "debt collection practices." The Court held that if a person invokes judicial remedies only to enforce the security interest in property, then the effort is not subject to the FDCPA; however, if the person is also seeking additional relief, such as a personal judgment against the borrower, then the FDCPA applies. The Court stated that in the present action, the Defendant was seeking both interest in the property, and a judgment against the Plaintiffs' mother. Therefore, the Court denied the Defendant's motion to dismiss.

FAIR DEBT COLLECTION PRACTICES ACT (STATE COURT PROCEEDINGS)

Foster v. Velocity Investments, LLC, 2007 WL 2461665 (N.D. Ill. Aug. 24, 2007)

Plaintiffs, individually and on behalf of all others similarly situated, filed suit against the Defendant alleging violations of the Fair Debt Collection Practices Act ("FDCPA"). Plaintiffs' complaint arose after the Defendant, a purchaser of charged-off debts alleged to be owed by consumers to various creditors, filed a collection suit against Plaintiffs to collect purported credit card debts. Attached to the Defendant's complaint was an affidavit signed by an employee of the Defendant attesting that the Plaintiffs owed a debt to the Defendant. The affidavits also included information regarding the principal balance owed and the amount allocated for interest and fees. One plaintiff alleged that a substantial portion of the amount represented as the principal balance

also consisted of interest, finance charges, and fees and was, therefore, a mischaracterization of the debt in violation of FDCPA. Another plaintiff alleged that she did not have an unpaid debt owed to the Defendant and, therefore, the Defendant misrepresented whether the affiant to the affidavit actually gave accurate testimony in violation of the FDCPA. Defendant moved to dismiss the complaints in their entirety. The Court denied the Defendant's motion to dismiss, in part, on the grounds that the FDCPA applied to documents filed in state court proceedings.

8TH CIRCUIT DECISIONS

FAIR CREDIT REPORTING ACT (CLASS CERTIFICATION)

Gardner v. Equifax Info. Serv., L.L.C., 2007 WL 2261688 (D. Minn. Aug. 6, 2007)

Plaintiffs sought class certification on behalf of themselves and others similarly situated based on the Defendant's alleged violations of the Fair Credit Reporting Act (FCRA). The first Plaintiff purchased her credit report from Defendant. She then reported to the Defendant that she was a victim of identify theft and she disputed several inaccuracies on her credit report. The Defendant sent back a letter informing the first Plaintiff that it was forwarding her complaint to CSC, a company that researches disputes arising in the zip code in which the first Plaintiff lived. The second Plaintiff leased a car through Wells Fargo. She returned the car to the dealership and paid the lease in full. The dealership was late in making payments on the vehicle lease and Wells Fargo reported the car as repossessed. She was denied a student loan on behalf of her son and she communicated the alleged inaccuracy of the repossession to the Defendant who never sent a reply. The Court held that the Plaintiff satisfied the numerosity, commonality and typicality requirements for class certification. However, the Court held that the Plaintiffs were not adequate class representatives because they chose to forgo filing claims negligence and actual damages. The Plaintiffs argued that those class members that wished to sue in negligence or for actual damages could opt out; however, the Court stated that this places too heavy of a burden on too many absent class members who may have a significant actual damage claim. The Court also stated that determining the Defendant's liability for a violation of 15 U.S.C. § 1681i would be an inappropriate question for resolution on a class wide basis because of the individual nature of the reasonableness and willfulness standards. Therefore, the Court denied the Plaintiffs' motion for class certification.

FAIR CREDIT REPORTING ACT (FIRM OFFER OF CREDIT)

Poehl v. Countrywide Home Loans, Inc., 2007 WL 2302491 (E.D. Mo. Aug. 7, 2007)

The Defendant mailed the Plaintiff two flyers stating that he had been pre-approved for at least a \$50,000 loan. The Plaintiff filed a purported class action claim alleging that the Defendant violated his rights under the Fair Credit Reporting Act (FCRA) because it had obtained information about his credit without his consent in order to send him the flyers. The Defendant moved for a judgment on the pleadings, pursuant to Federal Rule of Civil Procedure 12(c), arguing that it was allowed to access the Plaintiff's credit information because the flyers constituted a firm offer of credit under the FCRA. The first flyer congratulated the Plaintiff and informed him that he had been pre-approved for a refinance loan for up to 90% of the value of his home. The reverse side of the flyer indicated that the Plaintiff was entitled to a minimum loan amount of \$50,000. The flyer then stated that the offer may be withdrawn if the Plaintiff

does not meet the credit, income, debt and property value criteria. The second flyer was very similar. The Court stated that 15 U.S.C. § 1681b(c)(1)(B)(i) allows a credit provider to access consumer information in order to make a firm offer of credit. The Court articulated that while Congress did not state what credit terms had to be included to make a firm offer of credit, a firm offer of credit must have some value to a consumer that is more than nominal. In this case, the Court stated that because the minimum loan amount was \$50,000 a reasonable consumer viewing the mailer would believe it contains some value. Accordingly, the Court granted the Defendant's Rule 12(c) motion for a judgment on the pleadings.

FAIR DEBT COLLECTION PRACTICES ACT (STATUTE OF LIMITATIONS & LITIGATION PRIVILEGE)

Nutter v. Messerli & Kramer, P.A., 2007 WL 2285944 (D. Minn. Aug. 8, 2007)

Plaintiffs sued the Defendant debt collector alleging several violations of the Fair Debt Collection Practices Act (FDCPA). The Defendant had previously instituted state court proceedings to try to collect the Defendant's debt and had sent letters asking for payment and discovery material. Eventually the parties entered into a stipulation of dismissal with prejudice in the state court action. Subsequently the Plaintiffs brought this FDCPA action. Because the Plaintiffs only focused on supporting the 15 U.S.C. § 1692e claim for making false or misleading representations, and abandoned all others, the Court granted summary judgment on the unsupported claims. The Plaintiffs alleged three different types of allegations; however, the Defendant argued that these allegations are immaterial because the Plaintiffs violated the one year statute of limitations attached to any FDCPA claim. While the Plaintiffs acknowledged that their claims were outside of the year, they alleged that their claims show a continuing violation of the FDCPA. The Court stated that new communications regarding an old claim do not start a new statute of limitations period. The statements made by the Defendant all related back to the original outstanding debt. Therefore, all claims except the Plaintiffs' claim regarding a false representation in discovery were barred. The Defendant then alleged that because the discovery claim was created during litigation, the Plaintiffs were barred from asserting the claim because of a Minnesota state law which states that absolute privilege exists for any statement made during litigation. However, the Court held that FDCPA applies to lawyers engaged in litigation for two reasons. First, the FDCPA defines those engaged in the collection of debt, including lawyers, as debt collectors. Second, because Congress first enacted the FDCPA with an exception for attorneys, but then repealed the exception, that indicates lawyers are subject to the FDCPA when they meet the general debt collector definition. Therefore, the discovery claim was allowed and all others denied.

NATIONAL BANK ACT/DEPOSITORY INSTITUTIONS DEREGULATION AND MONITORING CONTROL ACT (USURIOUS INTEREST)

Mamot Feed Lot v. Hobson, 2007 WL 2462611 (D. Neb. Aug. 28, 2007)

Plaintiffs filed a class action lawsuit against a bank, a bank holding company, and various shareholders, officers, directors or employees of the bank. Plaintiffs alleged that defendant Scott Hobson (formerly the president of defendant Exchange Bank) misstated the value of plaintiff's collateral, took the collateral of plaintiffs or misappropriated the funds of the plaintiffs and thereby collected usurious interest on behalf of the bank in violation of the National Bank Act of

1984 and the Depository Institutions Deregulation and Monitoring Control Act of 1980 ("DIDA"). Moreover, Plaintiffs alleged that there was federal question jurisdiction under the National Bank Act, 12 U.S.C. §§ 1972 and 1975 and DIDA. All defendants, except Hobson, filed motions to dismiss under 12(b)(1) and (b)(6) or for summary judgment under Rule 56. The Court granted the motions to dismiss and denied the summary judgment motions as moot, finding that (1) the Court did not have subject matter jurisdiction over the case to the extent it was predicated on the National Bank Act because the Exchange Bank is a state-chartered bank and the "interest" provisions of the National Bank Act do not apply under any circumstances to state banks, (2) the complaint fails to state a claim for relief under the federal anti-tying statutes because no facts are alleged that suggest tying, (3) the complaint fails to state a claim for relief under DIDA because there are no facts alleged that suggest the receipt of "interest," (4) the complaint fails to state a claim for relief under DIDA because the statute does not allow recovery by any person other than the person who paid the interest, and (5) the complaint fails to state a claim against the bank holding company or any of the individual defendants because DIDA only allows recovery against the bank.

9TH CIRCUIT DECISIONS

FAIR DEBT COLLECTION PRACTICES ACT (HARASSING METHODS & ATTORNEY COMMUNICATIONS)

Guerrero v. RJM Acquisitions L.L.C., 2007 WL 2389825 (9th Cir. Aug. 23, 2007)

Plaintiff filed suit against Defendant debt collector alleging that they violated provisions of the Fair Debt Collection Practices Act (FDCPA). After the Defendant purchased the Plaintiff's debt, it sent two identical letters, with only a slightly different account number, to the two addresses the Plaintiff provided to the previous creditor. The Plaintiff's attorney sent back an incendiary letter which threatened a lawsuit and requested validation of the debt. The Defendant responded to the Plaintiff's attorney, providing documentation of the debt, but did not verify the debt because they ceased debt collection efforts. The Plaintiff alleged that the two letters violated provisions of the FDCPA because they were harassing and abusive collection methods, made false or misleading representations and employed unfair practices. The Court held that the standard to be applied to these provisions is whether the least sophisticated debtor would likely be misled by the letters and that the letters did not violate the FDCPA because they: 1) were sent to addresses provided by the Plaintiff; 2) had an identical balance; 3) had nearly identical account designators; and 4) contained the same "last payment date." The Court also concluded that communications directed solely at a debtor's attorney, and not accompanied by any threat to contact the debtor, are not actionable under the FDCPA. The Court gave several reasons for this rule, including that prohibition on attorney communication would hinder the parties' ability to settle, something encouraged by the enactment of the FDCPA. The Plaintiff also alleged that because the Defendant did not verify the debt, but instead stopped collection efforts, that it violated 15 U.S.C. § 1692g(b) of the FDCPA. However, the Court disagreed with the Plaintiff, stating that the FDCPA does not require debt collectors to actually provide validation, rather, it requires that the debt collector cease all collection activity until it provides the requested validation.

FAIR CREDIT REPORTING ACT (PREEMPTION & SUBJECT MATTER JURISDICTION)

Schreiber v. Simmons, 2007 WL 2344885 (N.D. Cal. Aug. 14, 2007)

Defendant sued the Plaintiff in state court alleging several violations of California state law prohibiting the intentional transmission of false debt-related credit information to credit reporting agencies (CRAs). An arbitrator granted a non-binding judgment in favor of the Defendant and awarded \$100,000. The Plaintiff then requested a trial *de novo* which is scheduled for the end of 2007. The Plaintiff then brought this declaratory action on the same nucleus of operative facts that form the basis of the Defendant's state law claims and contended that the Defendant's state law claims were preempted by the Fair Credit Reporting Act (FCRA). Thereafter, the Defendant filed a motion to dismiss based on lack of subject matter jurisdiction. The Court determined that because the claims in this declaratory judgment action are similar to those in the state court action, and the Court does not want to encourage forum shopping, that an exercise of subject matter jurisdiction is not appropriate. With respect to Plaintiff's FCRA preemption argument, the Court stated that because they denied subject matter jurisdiction with regards to the declaratory judgment action, that the Plaintiff is free to introduce the FCRA preemption defense in state court.

FAIR CREDIT REPORTING ACT (REASONABLE INVESTIGATIONS)

Saenz v. Trans Union, L.L.C., 2007 WL 2401745 (D. Or. Aug. 15, 2007)

Plaintiff brought an action against the Defendant, a credit reporting agency, alleging that the Defendant willfully violated the Fair Credit Reporting Act (FCRA), under 15 U.S.C. § 1681n(a), and in the alternative, negligently violated the FCRA § 1681o(a). After the Plaintiff satisfied a balance he owed on a medical bill, the Defendant still reported an outstanding balance on the Plaintiff's credit report. The Plaintiff challenged the mistake on his credit report twice and the second time provided the Defendant with documents allegedly indicating the bill had been paid in full. Both times, the Defendant contacted the furnisher of information using its automated system, who verified (incorrectly) that the account was being reported correctly. The Plaintiff's complaint asserted two claims against the Defendant: (i) that the Defendant did not follow § 1681e(b) by adopting and following reasonable procedures to assure the maximum possible accuracy of consumer reports; and (ii) that the Defendant violated its obligation to conduct a reasonable reinvestigation pursuant to § 1681i. The Defendant moved for summary judgment on both sets of claims. The Court granted the Defendant's motion for summary judgment relating to the Plaintiff's first set of claims because the Defendant contacted the furnisher of information to check the accuracy of the report and cannot be faulted for receiving inaccurate information. The Court also stated that § 1681e(b) obligations relate to the maintenance and operation of the Defendant's own internal databases rather than to investigation of the accuracy of information received from external sources. With respect to the Plaintiff's reinvestigation claims, the Court held that the Defendant's motion for summary judgment should be denied because of the Defendant's over-reliance on its automated system to determine the accuracy of disputed information. The Court stated that the Defendant was incorrect in stating that creditors are better situated than credit reporting agencies to determine the accuracy of disputed information. The burden of reinvestigation is placed on the credit reporting agencies. The Court adds that where a credit reporting agency is on notice that information received from a creditor may be suspect, it

is not reasonable for the agency simply to verify the creditor's position without additional investigation. The Court held that a reasonable jury could infer from the Defendant's failure to provide the creditor with copies or a summary of the evidence it received, or to conduct any independent consideration or investigation of the Plaintiff's assertion that the balance had been paid, that the agency's investigation was unreasonable.

TRUTH-IN-LENDING ACT (DISCLOSURE OF TERMS & FINANCE CHARGES)

Van Slyke v. Capital One Bank, 2007 WL 2385108 (N.D. Cal. Aug. 17, 2007)

Plaintiffs were offered and accepted credit cards from the Defendants. The action concerned the Defendants' sub-prime credit card business. The Defendants allegedly targeted the sub-prime credit card market hoping that cardholders would default on at least one account allowing the Defendants to charge very high fees. The Plaintiffs also alleged that the Defendants' disclosures relating to the cost of credit for its products were inadequate and deceptive. The Defendants moved to dismiss the Plaintiffs' claims brought under the Truth-in-Lending Act (TILA). Those claims are divided into four allegations. First, the Plaintiffs alleged that the unsolicited submission of "pre-approved" credit card offers violates the TILA and Regulation Z. 15 U.S.C. § 1642 states that no credit card can be issued except in response to an application or request for a card. The Court held that the mere sending of a pre-approved credit card application is not prohibited because no credit card is issued except on the recipient's request. Second, the Plaintiffs alleged that the Defendants violated § 1637(b)(9), by failing to disclose that the minimum payment listed on the monthly statements does not include all of the fees charged so that cardholders are continually in default on their accounts. Section 1637(b)(9) requires disclosure of the date by which the payment must be made and the consumer can then avoid a finance charge. The Plaintiffs argue that the fees are not included in the finance charge because the Defendants have an expectation that the Plaintiffs will pay fees on these sub-prime accounts. The Court held that overlimit fees and late fees are specifically excluded from the TILA's definition of finance charges. Additionally, the TILA does not require card issuers to disclose a minimum payment. The regulations only require the disclosure of the "free-ride period" or the date by which cardholders must pay to avoid finance charges. Third, the Plaintiffs allege that the Defendants violated the TILA because the Defendants' customer agreement required that cardholders and applicants write a letter to determine the true costs of credit. The Defendants' website indicates that the terms disclosed are only good until the January 1, 2007 and that after that date the cardholder would have to write-in to obtain the most recent terms. The Court held that the Plaintiffs' allegations are unfounded. The credit card company is only required to disclose, on monthly statements, the amount of any finance charges added to the amount during the period. There is no requirement for constant term and condition updates. Finally, the Plaintiffs argue that when the Defendants considered accounts uncollectible, they stopped sending out statements, and this was a violation of the TILA. The Court rejected this claim stating that if an account is deemed uncollectible after 180 days, the company is allowed to write off the item and charge them as a loss. Therefore, the Court dismissed all of the Plaintiffs' claims in regard to the TILA violations.

FAIR CREDIT REPORTING ACT (ATTORNEY-CLIENT & WORK-PRODUCT PRIVILEGE)

Anderson v. Equifax Info. Serv., L.L.C., 2007 WL 2412249 (D. Or. Aug. 20, 2007)

Plaintiff sued the Defendant, a credit reporting agency, alleging a violation of the Fair Credit Reporting Act (FCRA). During discovery, the Plaintiff requested a current copy of his credit report. After objecting, the Defendant agreed to send the credit report, but withheld the one page cover letter of the report. The Defendant stated that this page was covered by attorney-client and work-product privilege because it had comments about the Plaintiff's account that the company's attorneys suggested be added. The Court held that the document was not covered by attorney-client privilege because it did not reflect any confidential communication between the Defendant and its counsel. Also, the document did not reflect any legal advice; it was only a summarization of the Plaintiff's current personal credit file. The Court also rejected the Defendant's work-product argument stating that the document was not prepared for the Defendant in anticipation of litigation. The document is automatically created with every credit report and it reflects the Plaintiff's personal credit information. Therefore, the Court denied the Defendant's motions and ordered the Defendant to disclose the document.

10TH CIRCUIT DECISIONS**FAIR DEBT COLLECTION PRACTICES ACT (ROOKER-FELDMAN DOCTRINE, THREAT OF VIOLENCE & RES JUDICATA)**

Kelly v. Wolpoff & Abramson, L.L.P., 2007 WL 2381536 (D. Colo. Aug. 17, 2007)

Plaintiff filed suit against the Defendant alleging violations of the Fair Debt Collection Practices Act (FDCPA) after the Defendant bought the Plaintiff's debt from a creditor, and before notifying the Plaintiff of the purchase, brought an arbitration action against the Plaintiff and received an award that was confirmed in state court. The Defendant moved for dismissal in accordance with Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The Defendant first argued that the *Rooker-Feldman* doctrine barred the Court from asserting subject-matter jurisdiction over the Plaintiff's claim because the claims were actually decided by a state court that affirmed the arbitration award in favor of the Defendant. The Court disagreed with the Defendant and stated that the Plaintiff's FDCPA claims are independent claims asserted by neither party in state court. Second, the Defendant argued that the Plaintiff's claims brought under 15 U.S.C. § 1692d(1) should be dismissed because the Plaintiff did not allege that the Defendant used or threatened to use violence in the collection of a debt. The Court disagreed with the Defendant, stating that because the Plaintiff is alleging that the Defendant used perjury to collect the debt, it satisfied the requirement that the Defendant has to use a threat of violence "or other criminal means." Third, the Defendant argued that the FDCPA one year statute of limitations barred the Plaintiff from bringing the claim. The Court held that a discovery rule applied to the Plaintiff's FDCPA claims and that the Plaintiff was allowed to bring the claim because she only discovered the Defendant's alleged violation three days before she brought the complaint. The Court also concluded that the Plaintiff's claims were not barred by *res judicata* because the FDCPA claims were not litigated in the state court proceeding and therefore there are no concerns about an identity of subject matter. Therefore, the Defendant's motion to dismiss was denied as to all FDCPA claims.

11TH CIRCUIT DECISIONS

FAIR DEBT COLLECTION PRACTICES ACT (EMOTIONAL DISTRESS & ATTORNEY'S FEES)

Knight v. Integrity Resolution Group, L.L.C., 2007 WL 2345249 (N.D. Ga. Aug. 14, 2007)

After the Court entered a default judgment against the Defendants with respect to the Plaintiff's lawsuit brought under the Fair Debt Collection Practices Act (FDCPA), a hearing was held to determine the extent of damages to be awarded to the Plaintiff. The Court had already awarded the standard \$1000 in statutory damages and brought the Plaintiff's claims for emotional distress, attorney's fees and costs up for consideration. The Court stated that because the Plaintiff failed to show any evidence of emotional distress and did not testify that she was upset or distressed emotionally by any of the Defendants' actions, damages for emotional distress were not allowed. The Court granted the Plaintiff's request for attorney's fees because it deemed both the 25.3 hours expended on the case by the Plaintiff's attorneys and the \$250/hour rate reasonable. The Court denied the Plaintiff's request for costs in relation to money spent on parking, postage, and certain photocopies, describing those as business overhead costs that are not recoverable. Additionally, the Court denied the Plaintiff's request to be reimbursed for a \$118.75 witness fee whose precise purpose and recipient was not disclosed. Finally, the Court awarded costs in the amount of \$499.86 for items the Court did not discuss.

No representation is made that the quality of legal services to be performed is greater than legal services performed by other lawyers.

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