

monthly litigation update

AUGUST 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. 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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1ST CIRCUIT DECISIONS



TRUTH-IN-LENDING ACT (RETROACTIVE INTEREST)

Shaner v. Chase Bank, USA, N.A., 2008 WL 3198678 (D. Mass. Aug. 8, 2008)

The plaintiff held a credit card account with the defendant. The agreement between the parties specified that if the plaintiff defaulted on the account, a higher interest rate would apply to the current month's purchases and purchases made in the previous billing cycle for which finance charges had not yet been calculated. The plaintiff, alleging that these retroactive interest charges were improper, brought suit, alleging violations of the Truth-in-Lending Act (TILA). The defendant filed a motion to dismiss, arguing that the charges were not improper, and were clearly outlined in the credit agreement. The court stated that the issue revolved around Comments 1 and 3 of Regulation Z of the TILA. The defendant interpreted Comment 1 to excuse notice of a change in interest rates where the cardmember agreement provides that the rates may be increased up to the maximum APR upon default. The plaintiff pointed to Comment 3, which seems to

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indicate that the defendant would be required to notify the plaintiff not later than the effective date of the change, i.e. the beginning of the billing cycle, that the interest rates were being increased because of her delinquency or default. The court stated that most other courts have agreed with the reading of the defendant. The court held that in the event of default or deficiency, notice of a rate change must be given, but not in advance of the charge. Therefore, because the charge was proper under the TILA, the court granted the defendant's motion to dismiss the plaintiff's claim.

2ND CIRCUIT DECISIONS



FAIR CREDIT REPORTING ACT (PRIVATE RIGHT OF ACTION & REASONABLE INVESTIGATION)

Donovan v. Bank of America, 2008 WL 4061073 (D. Me. Aug. 29, 2008)

The plaintiff was the victim of check fraud and attempted to deposit several very large checks into his account. After the checks were dishonored and found to be fraudulent, the defendant reported suspicious account activity to a credit reporting agency (CRA) and closed the plaintiff's accounts. The plaintiff then brought suit under the Fair Credit Reporting Act (FCRA) and various other federal and state consumer protection laws, alleging that the defendant wrongfully reported his account activity to a CRA and illegally closed his accounts. Both parties filed motions for summary judgment. The plaintiff first alleged that the defendant violated 15 U.S.C. § 1681s-2(a) of the FCRA. The court quickly dismissed that claim, holding that a private right of action is not recognized by § 1681s-2(a). The plaintiff then brought a claim under § 1681s-2(b), which imposes certain obligations upon furnishers of information once they have received notice of a dispute from a CRA. The court held that the plaintiff had failed to produce any information that the bank had not conducted a reasonable investigation and failed to show what a reasonable investigation would have changed. The court then stated that absent a showing that the bank's investigation was not reasonable, the plaintiff could not establish a claim under § 1681s-2(b). Accordingly, the court granted the defendant's motion for summary judgment on the plaintiff's FCRA claim.

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FAIR DEBT COLLECTION PRACTICES ACT (DEFINITION OF "DEBT COLLECTOR")

Sembler v. Advanta Bank Corp., 2008 WL 2965661 (E.D.N.Y. Aug 1, 2008)

Plaintiff brought suit against the defendant, alleging that the defendant violated several provisions of the Fair Debt Collection Practices Act (FDCPA). The defendant filed a motion to dismiss, arguing that it was not a debt collector as is defined by the FDCPA. The plaintiff countered, arguing that the defendant regularly engages in debt collection activities. The court stated that while that was true, the plaintiff failed to establish that the defendant's debt collection activities constituted the defendant's "principal purpose." The court also stated that the defendant did not violate the FDCPA by hiring an individual to collect its debt. The court stated that a creditor only remained liable if it used another name in order to collect its own debt and retained control over almost all aspects of the debt collection. Accordingly, the court granted the defendant's motion to dismiss.

TRUTH-IN-LENDING ACT (DISCLOSURE OF PRIVATE MORTGAGE INSURANCE)

Altamirano v. Copiague Funding Corp., 2008 WL 3845362 (D. Conn. Aug. 18, 2008)

Plaintiffs refinanced their home with the defendant bank. Before closing the defendant provided the plaintiffs with a good faith estimate that calculated the plaintiff's estimated mortgage payment and included a price for private mortgage insurance (PMI). The defendant also provided the plaintiff with a Truth-in-Lending Act (TILA) disclosure form. The TILA form contained the same estimate for a monthly payment but did not include the numbers for PMI. The plaintiffs filed suit, alleging that the lack PMI disclosure violated the TILA. The plaintiff filed a motion for summary judgment. The court, noting that PMI is a finance charge and must be included in the calculation of finance charges, held that the TILA disclosure was not "clear and conspicuous," and therefore, did not meet the strict requirements of the TILA. The

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defendant argued that the final TILA forms given to the plaintiff did comply with the TILA, and therefore, it should be protected by the TILA's "safe harbor provision." The court disagreed, stating that the final disclosures were also insufficient. Accordingly, the court granted the plaintiff's motion for summary judgment.

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3RD CIRCUIT DECISIONS



FAIR DEBT COLLECTION PRACTICES ACT (DECEPTIVE COLLECTION PRACTICES)

Rosenau v. Unifund Corp., 2008 WL 3852326 (3rd Cir. Aug. 20, 2008)

The defendant sent a collection letter to the plaintiff. The letter stated that it was from the defendant's "legal department" and threatened the plaintiff with legal action if his debt went unpaid. The defendant's legal department contained six employees, none of which were lawyers. The plaintiff filed suit on behalf of himself, and others similarly situated, alleging that the defendant's letter violated several provisions of the Fair Debt Collection Practices Act (FDCPA). The plaintiff filed a motion for class certification and the defendant filed a motion for judgment on the pleadings. The district court held that it would be "bizarre or idiosyncratic" to infer that the letter sent to the plaintiff came from an attorney and granted the defendant's motion. The plaintiff appealed to the Third Circuit Court of Appeals. The Third Circuit disagreed with the district court, stating that its' reading was unconvincing. The Third Circuit stated that the main issue was whether a least sophisticated debtor could reasonably read the letter to have two different meanings, one of which is inaccurate. The Third Circuit held that the letter could be read as stating that the defendant had attorneys who played a role in writing or sending the letter. Therefore, the Third Circuit held that there was a genuine issue of material fact and reversed the ruling of the district court.

TRUTH-IN-LENDING ACT & REAL ESTATE SETTLEMENT PROCEDURES ACT (NON- CREDITOR APPLICABILITY & FEE SPLITTING)

Hartman v. Deutsche Bank Nat. Trust Co., 2008 WL 2996515 (E.D. Pa. Aug. 1, 2008)

The defendant provided mortgage servicing for the plaintiffs after they refinanced their loan. Alleging that the defendant bank misrepresented the terms of their loan before closing, the plaintiffs filed suit alleging violations of the Truth-in-Lending Act (TILA), the Real Estate Settlement Procedures Act (RESPA) and other state consumer protection laws. The defendant loan servicing company filed a motion to dismiss. The defendant first argued that it could not be held liable under the TILA for violative acts or omissions. The defendant argued that TILA only applies to creditors and its assignees and not to loan servicing companies. The court agreed, and dismissed the TILA claims against the defendant. The defendant also argued that the plaintiffs' RESPA claim must be dismissed. The plaintiff argued that the defendant violated RESPA because it engaged in improper "fee splitting." However, the defendant noted that the plaintiff only alleged that the defendant earned a servicing fee for performing administrative functions, and did not allege that it received a fee for services other than those actually performed. The court agreed, and held that in the absence of such allegations, that the RESPA claims against the defendant must be dismissed. Accordingly, both federal law claims against the defendant were dismissed.

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

Colella v. University of Pittsburgh, 2008 WL 2959936 (W.D. Pa. Aug. 4, 2008)

Plaintiff filed suit on behalf of himself, and others similarly situated, alleging that the defendant University violated several provisions of the Fair and Accurate Credit Transactions Act of 2003 (FACTA), a subset of the Fair Credit Reporting Act (FCRA). The plaintiff alleged that the University often printed more than the last five digits of the credit card number and/or expiration date on receipts provided to debit and credit card cardholders transacting business with the University. The parties entered into a settlement agreement, which the plaintiff sought to have approved by the district court. The settlement agreement provided for all aggrieved plaintiffs to be given one ticket worth \$10 to one of two of the University's football games. After the settlement agreement, Congress passed a clarifying amendment, which stated that any person who printed an expiration date on a receipt between December 4, 2004 and June 3,

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2008, but otherwise complied with the requirements of the FACTA could not be held in willful noncompliance with the act. The defendant then moved to vacate the original ruling to approve the settlement. The court first stated that there was strong judicial policy in favor of voluntary settlement agreements. Additionally, the court stated that this principle was even stronger in class action cases. The court held that there was no doubt that the parties negotiated in good faith and at arm's length. The court then stated that had the clarifying amendment been passed before the settlement agreement, then the case might have been dismissed, but that the settlement agreement was not an admission that the defendant had violated the FACTA, and therefore, could not be reversed simply by invoking the new amendment to the FACTA. Accordingly, the court affirmed the agreement as being in the best interests of the class and granted the plaintiff's Motion for Final Approval.

FAIR DEBT COLLECTION PRACTICES ACT (STATUTE OF LIMITATIONS)

Shivone v. Washington Mut. Bank, F.A., 2008 WL 3154688 (E.D. Pa. Aug. 5, 2008)

In 1997, the plaintiff and her former husband purchased a house and executed a mortgage to pay for the residence. In 2004, years after the couple had separated, the defendant mortgage servicer brought an action in state court against the plaintiff in an attempt to collect on the defaulted mortgage loan. The plaintiff was never served and alleged that the defendant fraudulently informed the court that it had reached a settlement agreement with the plaintiff. The plaintiff filed suit, alleging various violations of the Fair Debt Collection Practices Act (FDCPA) and other state consumer protection laws. The defendant filed a motion to dismiss, alleging that the statute of limitations had already run on the plaintiff's FDCPA complaint. The court stated that the statute of limitations begins to run at the moment that a violation occurs and not when the plaintiff discovers the violation. Citing the Eighth Circuit Court of Appeals in *Mattson v. U.S. West Communications, Inc.*, 967 F.2d 259, 261 (8th Cir. 1992), the court stated that once a debt collector placed its letter in the mail, its violation of the FDCPA was complete. Therefore, the court found that the plaintiff's action was not timely and granted the defendant's motion to dismiss.

REAL ESTATE SETTLEMENT PROCEDURES ACT (FEE SPLITTING)

Barnett v. Chicago Title Ins. Co., 2008 WL 3411684 (E.D. Pa. Aug. 11, 2008)

The plaintiff purchased title insurance from the defendant. While the plaintiff was legally entitled to a discount on his title insurance because he was merely refinancing his loan, the defendant collected a higher rate from the plaintiff and pocketed the \$192.38 overage. The plaintiff, alleging that the overcharge constituted a referral fee or kickback, brought suit against the defendant claiming violations of the Real Estate Settlement Procedures Act (RESPA). The defendant filed a motion to dismiss, arguing that RESPA creates an exception for title insurance companies and that RESPA allows for the splitting of earned fees. The court held that RESPA does not provide a cause of action for mere overcharges. The court stated that an overcharge is actionable only when a portion of the fee is kicked back or split with a third party who did not perform any services. Accordingly, the court granted the defendant's motion to dismiss.

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4TH CIRCUIT DECISIONS



TRUTH-IN-LENDING ACT (FINANCE CHARGES & ADEQUATE DISCLOSURES)

Tripp v. Charlie Falk's Auto Wholesale Inc., 2008 WL 3992464 (4th Cir. Aug. 29, 2008)

The plaintiffs negotiated for the purchase of an automobile. After they signed the necessary documents and took the vehicle off the lot, they were informed that their credit was belatedly rejected and they would have to return the vehicle. Before their down payment was returned, they were forced to sign a release to relieve the defendants from liability for the transaction. The plaintiffs signed the release, but still filed suit, alleging that the

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defendants violated the Truth-in-Lending Act (TILA) and several other state consumer protection laws. Both parties filed motions for summary judgment. While the district court found that the release was unenforceable, it denied the plaintiffs' motion for summary judgment and granted the defendants' motion for summary judgment. The plaintiffs argued that there were genuine issues of material fact as to whether the defendants complied with the TILA by providing the required credit disclosures to the plaintiffs in the proper form and at the proper time. They first argued that the defendants failed to comply with the form and timing of the provision by waiting until after the contract was signed to give the plaintiffs a copy of the document. Second, they argued that the defendants failed to label the processing fee as a "finance charge" that was optional for cash purchasers. The court first disagreed with the plaintiffs, holding that the defendants were only required to show the plaintiffs the TILA documents, and not actually give them a copy for possession until after the transaction. The court then held that the defendants provided adequate evidence that the processing fee is charged regardless of a cash or credit transaction, and therefore, did not qualify as a finance charge. The plaintiffs then argued that the defendants violated the TILA by failing to make known that the disclosures were estimates. The court disagreed, holding that the terms of the contract were not estimates, but merely contingent upon the plaintiffs obtaining financing. Accordingly, the court held that the plaintiffs had failed to satisfy the standard for summary judgment and affirmed the ruling of the district court.

FAIR DEBT COLLECTION PRACTICES ACT (MISREPRESENTATION)

Cappetta v. GC Services Ltd. Partnership, 2008 WL 2964590 (E.D. Va. Aug. 1, 2008)

The defendant debt collector called the plaintiff at work and informed her that she was responsible for a debt incurred by her ex-husband. After the defendant informed the plaintiff that she must pay the debt within seven days, the plaintiff remitted a payment of over \$10,000 to the defendant. After making payment, the plaintiff contacted the defendant to obtain a refund on the ground that the account was not hers. The defendant failed to respond to the inquiry. The plaintiff then filed suit, alleging that the defendant violated various provisions of the Fair Debt Collection Practices Act (FDCPA) by misrepresenting that she was responsible for the debt. The defendant filed a motion to dismiss, alleging that several allegations were missing from her complaint. The defendant argued that the plaintiff had failed to allege that she notified the defendant of the dispute in writing or that she informed the defendant to cease communications. The court stated that the lack of those allegations would prevent a claim

under 15 U.S.C. § 1692(c) for continuing contact after a request to cease communications. However, the court stated that the lack of those specific allegations would not prevent a claim under § 1692(e), which prohibits a debt collector from using false, deceptive or misleading representations in connection with the collection of a debt. The court stated that even without a writing disputing the debt, the plaintiff did give the defendant notice of her claim with the letter written after she made payment. Therefore, the court stated that the plaintiff's allegations under § 1692(e) were sufficient to survive a motion to dismiss. Accordingly, the court granted-in-part and denied-in-part the defendant's motion to dismiss.

TELEPHONE CONSUMER PROTECTION ACT (STANDING & JUDICIAL ESTOPPEL)

Kopff v. World Research Group, L.L.C., 2008 WL 2944677 (D.D.C. Aug. 1, 2008)

Plaintiffs brought suit under the Telephone Consumer Protection Act (TCPA) alleging that the defendants sent dozens of unsolicited fax advertisement transmissions on a regular basis. After the plaintiff filed for Chapter 7 bankruptcy, he failed to disclose the pendency of his lawsuit. Subsequently, he received a discharge from his bankruptcy. He later amended his bankruptcy schedules to disclose the lawsuit and the bankruptcy trustee abandoned the lawsuit as an asset. The defendant filed a motion for summary judgment, arguing that the plaintiff lacked standing to pursue the lawsuit and was judicially estopped from maintaining the suit. The court first stated that the plaintiff did have standing to bring the suit. The court stated that while the plaintiff did initially fail to disclose the suit, he eventually did disclose, and the bankruptcy court abandoned the lawsuit as an asset. However, the court stated that the plaintiff was judicially estopped from bringing the action. The court stated that because the defendant failed to disclose the lawsuit when he filed for bankruptcy, he could not be allowed to pursue his claims as a result of misleading the bankruptcy trustee. Accordingly, the court granted the defendant's motion for summary judgment.

EQUAL CREDIT OPPORTUNITY ACT (NECESSARY PLEADING)

Wright v. SunTrust Bank, 2008 WL 3106884 (E.D. Va. Aug. 4, 2008)

Before the plaintiff purchased a new automobile, he contacted the defendant bank to ensure that he would be able to receive a loan for the automobile. The defendant informed the plaintiff that he would be approved for an amount up to 100% of the purchase price. The plaintiff

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then ordered the vehicle from the dealership. Once the vehicle arrived, the defendant refused to give the plaintiff a loan, citing the plaintiff's decreased credit score and new account delinquency as the reason. The plaintiff filed suit, alleging that the defendant violated the Equal Credit Opportunity Act (ECOA). The defendant filed a motion to dismiss, stating that it provided the plaintiff with an adverse action notice and reasons why he was denied credit. The plaintiff argued that the defendant's reasons for denial were mere pretext for discrimination. The court held that in order to have a violation of the ECOA, the plaintiff must plead a prohibited reason for denying a credit application. Because the plaintiff failed to plead such a reason, the court granted the defendant's motion for summary judgment.

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5TH CIRCUIT DECISIONS



FAIR DEBT COLLECTION PRACTICES ACT (DEFINITION OF “DEBT COLLECTOR” & ATTORNEYS' FEES)

Hester v. Graham, Bright & Smith, P.C., 2008 WL 2958984 (5th Cir. Aug. 4, 2008)

The plaintiff obtained a loan to pay for improvements made upon her house. After the plaintiff defaulted on the loan, the defendant attorneys were hired to file suit against the plaintiff in order to collect on the loan. The state court awarded the defendants a judgment of over \$9,000.00. The plaintiff then filed suit, alleging that the defendants engaged in “distant forum abuse” in violation of the Fair Debt Collection Practices Act (FDCPA) by filing suit against her on behalf of her creditor in an improper venue. The defendants argued that they were not “debt collectors” according to the definition provided

in the FDCPA. The district court found in favor of the plaintiffs, awarding \$1,000.00 in statutory damages to the plaintiff and over \$31,000.00 in attorneys' fees to the plaintiff's counsel. The defendants appealed the decision to the Fifth Circuit Court of Appeals. The defendants argued that they were not “debt collectors” because they did not regularly collect or attempt to collect debts. The court disagreed, stating that the attorneys had filed numerous collection lawsuits in the last few years and had sent several hundred demand letters on behalf of their clients. The court stated that this level of debt collection participation was enough to satisfy the definition of “debt collector” under the FDCPA. The defendants then argued that the FDCPA's definition of “debt collector” was unconstitutionally vague in violation of the Due Process Clause. The court again disagreed, stating that the definition gives the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Additionally, the court stated that no previous court had held the statute's definition was unconstitutionally vague. Therefore the court affirmed the district court's ruling that the defendants violated the FDCPA. The defendants then argued that the district court erred in awarding attorneys' fees to the plaintiff's counsel instead of to the plaintiff directly. The court agreed, holding that the plaintiff was the proper recipient of the award. Accordingly, the court vacated the award of attorneys' fees and remanded the case to the district court in order to determine the correct amount of fees to be awarded to the plaintiff.

TELEPHONE CONSUMER PROTECTION ACT (SUBJECT MATTER JURISDICTION & CLASS CERTIFICATION)

Gene And Gene LLC v. BioPay LLC, 2008 WL 3511766 (5th Cir. Aug. 14, 2008)

The defendant was in the business of sending fax messages advertising its services to potential clients in Louisiana. Some of the faxes were sent to current customers and individuals who had shown interest in their services. Other faxes were sent to individuals whose fax numbers were purchased by the defendant and who had no prior business relationship with the defendant. The plaintiff was one of the latter individuals. The plaintiff brought suit, alleging that the defendant's practice of sending unsolicited fax advertisements was in violation of the Telephone Consumer Protection Act (TCPA) and sought to certify a class of plaintiffs aggrieved by the defendant. The district court found the plaintiff's claim valid and certified the plaintiff's class. The defendant filed an immediate appeal to the Fifth Circuit Court of Appeals. The defendant first argued that the district court did not have subject matter jurisdiction over the proceedings. The court disagreed,

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holding that the district court had jurisdiction pursuant to the Class Action Fairness Act of 2005 (CAFA). The court held that minimal diversity was present and the amount in controversy exceeded \$5 million. The defendant then argued that the district court wrongfully certified the plaintiff's class despite the plaintiff's failure to satisfy the requirements of Rule 23(b)(3) of the Federal Rules of Civil Procedure. The defendant argued that the predominance requirement was not satisfied because individual factual determination would predominate over the proceedings. The plaintiff had convinced the district court that the predominance requirement was satisfied based on the defendant's common course of conduct, i.e., fax blasting. The court said that the major predominance issue would rest on the individual factual determination of whether each individual plaintiff had consented to the fax communications. The plaintiff argued that the defendant had never obtained prior express permission or invitation from any of the class members and that all of the faxes were sent in accordance with the same procedure. The defendant, however, argued that the recipients solicited some of the fax advertisements it sent, and determining which faxes were consented to would predominate over the proceedings. The court agreed with the defendant, stating that the plaintiff had not come up with a sensible method of establishing consent or the lack thereof on a class-wide basis. Therefore, the court stated that the consent problem prevents the purported class from having the required cohesiveness and defeats the predominance requirement of Rule 23(b)(3). Accordingly, the court reversed the decision of the district court and remanded the case for further proceedings consistent with the opinion.

FAIR DEBT COLLECTION PRACTICES ACT (DEFINITION OF "DEBT COLLECTOR")

Fouche' v. Shapiro & Massey L.L.P., 2008 WL 3285742
(S.D. Miss. Aug. 5, 2008)

The plaintiff suffered a disabling back injury and became unable to work, and therefore, unable to pay his mortgage payments. The mortgagee hired the defendant law firm to foreclose on the plaintiff's home. The defendant sent the plaintiff a letter advising him that it was prepared to initiate foreclosure on the property. The letter was sent to satisfy the obligations of the Fair Debt Collection Practices Act (FDCPA). After the plaintiff applied for bankruptcy and had his case dismissed, the defendant sent the plaintiff another letter, this one informing the plaintiff again of foreclosure plans and stating at the bottom: "[p]ursuant to the [FDCPA], you are advised that this office is deemed to be a debt collector. Any information obtained will be used for that purpose." After the plaintiff again blocked the foreclosure sale by filing for bankruptcy, he also filed suit, alleging that the defendant violated several provisions of

the FDCPA in its attempts to foreclose upon his home. The defendant filed a motion for summary judgment, arguing that it was not a debt collector as is defined under the FDCPA, and therefore, was not subject to liability under the Act. The plaintiff disagreed, stating that while the main purpose of the firm may not be to collect debts, it regularly collects or attempts to collect debts, and therefore, it qualifies as a "debt collector." The court agreed with the defendant, stating that most courts have held that the enforcement of security interests is not covered under the FDCPA. Therefore, the court stated that the plaintiff had failed to show that the defendant regularly participated in the collection of unsecured debts. Accordingly, the court granted the defendant's motion to dismiss the plaintiff's FDCPA claim.

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6TH CIRCUIT DECISIONS



FAIR DEBT COLLECTION PRACTICES ACT (BONA FIDE ERROR)

Jerman v. Carlisle, McNelis, Rini, Kramer & Ulrich LPA,
2008 WL 3823056 (6th Cir. Aug. 18, 2008)

Plaintiff brought suit against the defendant debt collector, alleging that it violated the Fair Debt Collection Practices Act (FDCPA) by sending her a collection letter that required that any request for validation of the debt be "in writing." While the district court agreed with the plaintiff that the defendant violated the act, the court stated that the defendant qualified for the bona fide error defense and granted the defendant's motion for summary judgment. The plaintiff appealed to the Sixth Circuit Court of Appeals. The court first said that the issue of whether the bona fide error defense applies to mistakes of law was one of first impression for the court. Citing precedent in other

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circuits, including *Johnson v. Riddle*, 305 F.3d 1107 (10th Cir. 2002), the court held that under the FDCPA, the bona fide error defense was not limited to only clerical errors. The court stated that debt collectors could set up procedures to more often avoid mistakes of law. The court then held that by sending attorneys to FDCPA conferences, distributing FDCPA cases throughout the firm and training new attorneys on the FDCPA, the defendant had taken reasonable procedures to avoid mistakes of law. Accordingly, the court affirmed the judgment of the district court.

FAIR DEBT COLLECTION PRACTICES ACT (STATE COURT COMPLAINT)

Barany-Snyder v. Weiner, 2008 WL 3876193 (6th Cir. Aug. 22, 2008)

The defendants, a debt collection law firm and its individual attorneys, brought a state court lawsuit against the plaintiff in order to collect a debt. The credit agreement, which was attached to the state court complaint, stated that the plaintiff would be liable for any attorney's fees as a result of collection activity; however, the defendants did not ask for attorney's fees in the state court lawsuit. The plaintiff filed suit in federal court, alleging that the defendants violated Ohio law that prohibits creditors from collecting attorney's fees from debtors. The plaintiff argued that the violation of Ohio law also resulted in a violation of the Fair Debt Collection Practices Act (FDCPA). The defendants filed a motion for judgment on the pleadings. The district court rejected the defendants' claim of litigation immunity but granted their motion for judgment on the pleadings. Both parties appealed to the Sixth Circuit Court of Appeals. The plaintiff first argued that the defendants violated 15 U.S.C. § 1692e(5) and (10) by using a false deceptive or misleading representation to collect a debt. The court held in favor of the defendants, stating that merely attaching an agreement which includes an attorneys' fee provision to a complaint and a brief does not constitute a threat to exercise that provision. The plaintiff then argued that the defendants violated Section 1692e(2)(A) and (B) by giving a false representation about the status of a debt. The court held that while attaching the complaint to the lawsuit may have been misleading, it did not result in a false misrepresentation. Finally, the plaintiff argued that the defendants violated Section 1692f(1) by attempting to collect a debt not allowed by law. The court again disagreed with the plaintiff, stating that the defendants never made any attempt to collect attorney's fees beyond attaching the agreement to the complaint. Accordingly, the court affirmed the ruling of the district court in granting the defendants' motion for judgment on the pleadings.

FAIR CREDIT REPORTING ACT (FURNISHER LIABILITY)

Misialowski v. DTE Energy Co., 2008 WL 2998948 (E.D. Mich. Aug. 1, 2008)

The defendant wrongfully reported to several credit reporting agencies (CRAs) that the plaintiff was behind on his payments. The plaintiff informed the defendant of the error, but it was not corrected. The plaintiff filed suit, alleging that the defendant's actions violated the Fair Credit Reporting Act (FCRA) and other state and federal consumer protection laws. The defendant filed a motion to dismiss, arguing that it was not liable as a furnisher of information under the FCRA. While the plaintiff alleged that the defendant violated eight different provisions of the FCRA, the court concluded that only one provision of the FCRA applies to the defendant, a furnisher of information. The court held that 15 U.S.C. § 1681s-2 is the only provision that could be violated by the defendant. The court then held that the plaintiff could not recover because Section 1681s-2 requires that the plaintiff first notify a CRA of the dispute. Accordingly, the court granted the defendant's motion to dismiss.

FEDERAL ARBITRATION ACT (SCOPE & UNCONSCIONABILITY)

Price v. Taylor, 2008 WL 3200624 (N.D. Ohio Aug. 6, 2008)

The plaintiff filed suit against the defendant bank, alleging that it provided her with a loan that she could not repay, in violation of the Fair Housing Act (FHA) and other state laws. The defendant filed a motion to stay litigation pending arbitration. The plaintiff opposed the motion, arguing that the arbitration agreement accompanying the loan was unconscionable. The plaintiff first argued that her FHA claims were outside of the scope of the arbitration agreement. The court disagreed, holding that the agreement included any "claim" that arose from the loan transaction. The court stated that the agreement defined "claim" in the broadest possible terms. The plaintiff then alleged that the agreement: 1) lacked mutuality, 2) would result in prohibitive costs, and 3) would unreasonably limit her remedies. The court first stated that under Ohio law for a contract to be unenforceable, it must be both procedurally and substantively unconscionable. The court then held that the plaintiff's allegations were not sufficient to support a claim for procedural unconscionability. The court stated that she had not shown that her age, education or intelligence had prevented her from understanding the agreement. Additionally, the court found that the agreement did not lack mutuality and that arbitration would not be prohibitively costly. Accordingly, the court

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found that the arbitration agreement was enforceable and granted the defendant's motion to stay proceedings and compel arbitration.

**FAIR DEBT COLLECTION PRACTICES ACT
(DEFINITION OF "DEBT COLLECTOR")**

Romberger v. Wells Fargo Bank, N.A., 2008 WL 3838026 (E.D. Mich. Aug. 14, 2008)

When the plaintiff defaulted on his mortgage loan, the defendant bank began foreclosure proceedings, which included several notices and the schedule of a foreclosure sale. After the sale, the plaintiff brought suit against the defendant, alleging various violations of the Fair Debt Collection Practices Act (FDCPA) and other state laws. The defendant filed a motion to dismiss, and in the alternative, a motion for summary judgment. The defendant argued that it was a creditor and not subject to the provisions of the FDCPA that apply only to "debt collectors." The court agreed, stating that the defendant was a bank that was only attempting to collect on a loan that was owed to them. Additionally, the plaintiff named the law firm that represented the defendant bank as a defendant in the action. The law firm insisted that it was hired only to handle the foreclosure proceedings and not to collect a debt. The court noted that the circuits were split on how to define law firms who institute foreclosure actions under the FDCPA. The court then held that it could not dismiss the plaintiff's action against the defendant law firm on the basis that it was not a debt collector. The court noted that there was evidence that the firm had attempted to collect a debt and did hold itself out as a debt collector. The firm then asked the court to grant its motion for summary judgment, arguing that the plaintiff did not satisfy his obligation to request validation of the debt. The court noted that the plaintiff had not provided any evidence that demonstrated that he submitted a request for validation to any of the defendants. Accordingly, the court granted the defendant bank's motion to dismiss and the defendant law firm's motion for summary judgment.

**FAIR DEBT COLLECTION PRACTICES ACT
(BONA FIDE ERROR)**

Ruthenberg v. Bureaus, Inc., 2008 WL 3979507 (E.D. Mich. Aug. 25, 2008)

The defendant sent the plaintiff several letters in an attempt to collect a debt. The plaintiff responded, sending a letter informing the defendant that he disputed the debt and ordering the defendant to cease and desist its communications. After receipt of the letter, the defendant sent the plaintiff one last collection letter. The plaintiff then filed suit, alleging that the defendant violated the Fair

Debt Collection Practices Act (FDCPA) and a state consumer protection law by sending communication after it informed the defendant that it disputed the debt. The defendant filed a motion for summary judgment. The defendant first argued that the plaintiff could not bring a claim under 15 U.S.C. § 1692g because it had sent the plaintiff a proper statutory notice under § 1692g(a)(4) but the plaintiff had failed to respond within 30 days. The court agreed with the defendant, stating that the defendant had shown that the plaintiff had missed the 30 day deadline, and that any claim under § 1692g would be dismissed. The defendant then argued that the plaintiff did not have a claim under § 1692c(c) because the language in the plaintiff's letter did not invoke the statutory protection. The court disagreed, arguing that there was a genuine issue of material fact as to whether the plaintiff's cease and desist letter did invoke statutory protection. The defendant then argued that it was entitled to the bona fide error defense, because it mistakenly sent out a collection letter to the plaintiff after it received the plaintiff's cease and desist letter. The court held that notations in the plaintiff's account history, as well as the fact that the plaintiff was only contacted once after receipt of the letter indicated that the defendant was entitled to the bona fide error defense. The defendant also set forth an affidavit explaining its established procedures to prevent communications to a debtor after a debt is disputed. Accordingly, the court granted the defendant's motion for summary judgment.

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7TH CIRCUIT DECISIONS



8TH CIRCUIT DECISIONS



FAIR CREDIT REPORTING ACT & TRUTH-IN-LENDING ACT (FIRM OFFER OF CREDIT)

Townsend v. Swiss Colony, Inc., 2008 WL 3009916 (N.D. Ill. Aug. 5, 2008)

The defendants sent the plaintiff several catalog mailings that included statements that she was “pre-approved” for \$400 of credit in order to purchase products from the catalogs. The mailings also included a fake “credit card” that was only a sample piece of plastic and did not include an actual account number. The plaintiff filed suit, alleging that the defendants had obtained her credit report for an impermissible purpose, and in doing so, violated several provisions of the Fair Credit Reporting Act (FCRA). The plaintiff also alleged the defendant violated the Truth-in-Lending Act (TILA) by sending a credit card in the mail before the plaintiff had applied for one. The defendant argued that the offer was a “firm offer of credit” as is allowed under the FCRA and filed a motion to dismiss, which the court then converted to a motion for summary judgment. The court first stated that the plaintiff had failed to present any evidence indicating that the offer was not a “firm offer” of credit. The court stated that specific terms were provided for in the mailing and a minimum amount of credit was specified. The court stated that these terms conferred some value on the consumer and were not akin to improper mailings that offer a useless amount of credit for the sake of pitching a product. Therefore, the court granted the defendant’s motion for summary judgment on the FCRA claim. The court then held that the defendant did not violate the TILA simply by sending a fake credit card in the mailing. The court stated that while the credit card did contain an application number, this was not the same as an account number and did not expose the defendant to any TILA liability. Accordingly, the court granted the defendant’s motion for summary judgment as to the plaintiff’s TILA claim.

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NATIONAL BANK ACT (JURISDICTION)

Mamot Feed Lot and Trucking v. Hobson, 2008 WL 3897769 (8th Cir. Aug. 26, 2008)

Plaintiffs filed a class action lawsuit against the defendant bank following the criminal indictment of the bank's president for defrauding the bank of nearly one million dollars. Relying on the National Bank Act (NBA), the plaintiffs brought federal usury and antitying claims against the bank. All of the defendants, which included the bank and several individual officers of the bank, filed a motion to dismiss for want of jurisdiction. The district court granted the motion and the plaintiffs appealed. The plaintiffs' claim alleged that the bank charged them usurious interest because the president took collateral from the plaintiffs and misstated the value of the defendant's collateral. The plaintiffs stated that all misappropriated collateral should be deemed excessive interest paid by the plaintiff. The defendants first argued that several provisions of the NBA did not apply to federally-insured state chartered banks. The court agreed, holding that Section 85 and 86, which prohibit the charging of usurious interest, apply only to federally chartered banks. The plaintiffs also alleged that the defendants violated Section 1831d, which prohibits banks from charging interest rates than those prescribed by law. The court noted that the NBA defines "interest" to "include [] any payment compensating a creditor or prospective creditor for an extension of credit" The court held that benefiting from another's fraudulent action does not amount to compensation within the definition of the NBA. Therefore, the court rejected the plaintiff's argument that the stolen funds were "interest" and affirmed the district court's ruling dismissing the plaintiffs' complaint.

FEDERAL ARBITRATION ACT (STATE LAW & UNCONSCIONABILITY)

Gutierrez v. State Line Nissan, Inc., 2008 WL 3155896 (W.D. Mo. Aug. 4, 2008)

After the plaintiffs purchased an automobile from the defendant dealership, they were charged a “documentation preparation fee.” Alleging that the fee was improper, the plaintiffs filed suit, alleging violations of various federal and state laws, including the federal Truth-in-Lending Act (TILA). The defendant filed a motion to compel arbitration, arguing that the claims arose from the purchase of the automobile and that the purchase contract contained an arbitration provision. The plaintiffs countered, arguing that the main question of several claims concerned whether the documentation fee involved the unauthorized practice of law or doing law business and that those claims were only appropriate for the state court. Citing the Missouri Supreme Court, the court held that Missouri law does not preclude an arbitrator from applying Missouri law to the plaintiffs’ case to determine if the defendant’s conduct constituted the unauthorized practice of law. The plaintiffs also argued that the arbitration clause was both procedurally and substantively unconscionable. The plaintiffs stated that the inclusion of a provision prohibiting class action lawsuits made the clause unconscionable. The court again disagreed, stating that invalid clauses are those that limit the plaintiff’s ability to obtain relief and also provisions that insulate the defendant from liability. The court held that none of those conditions were present in the arbitration provision. Additionally, the court held that the mere fact that a contract is a form contract does not render the agreement unenforceable. Accordingly, the court granted the defendant’s motion to compel arbitration.

Procedures Act (RESPA), and the Fair Debt Collection Practices Act (FDCPA). The plaintiff requested that the court certify the class in accordance with Federal Rule of Civil Procedure 23. The plaintiff requested a class definition for his federal claims that included: “those individuals who from three years before the filing of this matter until present, inclusive, whose loans were in [d]efault or treated as being in [d]efault by [d]efendant, but not accelerated, and who incurred or were assessed late fees and/or [d]efault-[r]elated fees including, without limitation, fees denominated by [d]efendant as “inspection fees” and attorney’s fees in alleged violation of TILA, RESPA, and the FDCPA.” The court first stated that before even looking at Rule 23, there were several issues with the plaintiff’s proposed class. The court held that the plaintiff’s TILA claim would not be typical of the whole class. The court stated that there was nothing in the record that showed the defendant was a creditor as is defined under the TILA. Therefore, the court stated that the plaintiff would not be a proper representative for a TILA claim. Second, the court stated that the plaintiff’s RESPA claim requires that the plaintiff had made a specific request for information from the defendant. The court then noted that the class definition included no requirement that a plaintiff made a specific request for information. Finally, the court noted that the FDCPA claim required that the defendant assign certain fees to all of the plaintiffs. The court stated that this requirement would significantly limit the number of individuals that could participate in the class and would create a numerosity problem. The court stated that at the current stage of the proceeding, there were serious problems with the plaintiff’s proposed class and denied the plaintiff’s motion for class certification without prejudice.

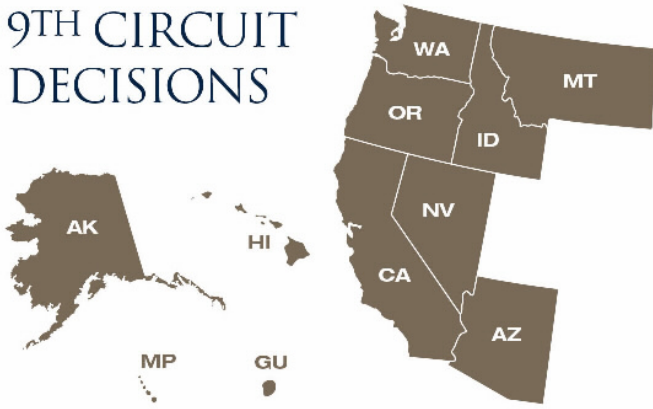
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TRUTH-IN-LENDING ACT, REAL ESTATE SETTLEMENT PROCEDURES ACT & FAIR DEBT COLLECTION PRACTICES ACT (CLASS CERTIFICATION)

Amos v. Bayview Loan Servicing, LLC, 2008 WL 3070196 (E.D. Ark. Aug. 4, 2008)

Plaintiff obtained a home mortgage loan that was serviced by the defendant. After the plaintiff filed bankruptcy, the bankruptcy court judge ordered the defendant to show upon its books and records that the plaintiff’s loan was current. The defendant admitted that the plaintiff’s loan was not treated as current after the entry of the bankruptcy order, but asserted that it did not receive a copy of the order. After the defendant made additional mistakes with respect to his loan, the plaintiff filed suit on behalf of himself, and others similarly situated, alleging that the defendant violated various provisions of the Truth-in-Lending Act (TILA), the Real Estate Settlement

9TH CIRCUIT DECISIONS



FAIR DEBT COLLECTION PRACTICES ACT (ACTUAL & STATUTORY DAMAGES)

Schwarm v. Craighead, 2008 WL 3286797 (E.D. Cal. Aug. 6, 2008)

The defendant was the founder and chief executive officer of a company that contracted with twenty-five California district attorneys' offices to administer debt collection and diversion programs pursuant to California's Bad Check Diversion Act (BCDA). Based on the defendant's role in the company's operations and the collection letters and procedures utilized, the court entered summary judgment against the defendant for violations of the Fair Debt Collection Practices Act (FDCPA). The plaintiffs were class members who wrote bad checks in California and were pursued by the defendant's company. The plaintiffs filed the instant motion for summary judgment seeking actual damages totaling over \$770,000.00; actual damages in the amount of \$85.00 each for the named plaintiffs; statutory damages for the three named plaintiffs in the amount of \$1,000.00; and prejudgment interest totaling more than \$50,000.00. The court granted the plaintiff's motion for actual damages totaling more than \$740,000, which was the amount that the defendant admitted it collected in illegal diversion fees between July 1, 2004 and March 4, 2006. The court rejected the individual class representatives' claim for actual damages however, stating that the actual damages awarded to the class would satisfy the representatives' request for actual damages. The court also rejected the plaintiffs' request for statutory damages for the class representatives. The court stated that the plaintiff had failed to prove that the defendant's noncompliance was intentional. Finally, because the plaintiffs were unable to prove the intention of the defendant during the proceedings, the court concluded that an award of prejudgment interest was not proper. Accordingly, the court granted the plaintiff's motion for actual damages, but denied the plaintiff's motions for any other damages.

TRUTH-IN-LENDING ACT (CHANGES TO CREDIT CARD TERMS)

Rubio v. Capital One Bank (USA), N.A., 2008 WL 3863878 (C.D. Cal. Aug. 11, 2008)

Plaintiff received a mailer from the defendant offering a credit card with an annual percentage rate (APR) of 6.99%. The solicitation stressed that the rate was not an introductory rate; however, fine print below the offer indicated that subject to certain conditions, including late payments, the rate could rise. In response to the solicitation, the plaintiff applied and was accepted for the credit offer. A few years later, the defendant sent the plaintiff a letter informing her that the APR was about to rise to 15.9% because of "rising interest rates over the past few years." The plaintiff alleged that the solicitation violated the Truth-in-Lending Act (TILA) and other state consumer protection laws, because it disclosed an APR that was not subject to change, yet was later changed by the defendant for a reason not stated in the solicitation. The defendant filed a motion to dismiss, arguing that the solicitation complied with the TILA. The plaintiff first argued that the defendant failed to make its APR disclosures "clear and conspicuous" and used the word "fixed," which led the plaintiff to believe that the APR would remain the same unless she violated a stated condition. The court first rejected the plaintiff's claim that the word "fixed" was used inappropriately. The court stated that "fixed" is used opposite "variable," and simply means that the interest rate is not tied to an underlying interest rate index. The court then held that the conditions for an APR increase provided by the defendant were clearly listed under the headline of "penalty rates." The court stated that rising interest rates are not consumer defaults for which a penalty rate may be imposed upon a consumer. The court stated that the defendant specifically, and legally, reserved the right to change the interest rate in its disclosure. The defendant adequately informed the plaintiff that rates were "subject to change," a provision that is allowed by the TILA. Accordingly, the court granted the defendant's motion to dismiss.

FAIR DEBT COLLECTION PRACTICES ACT (DEFINITION OF "DEBT COLLECTOR")

Yang v. DTS Financial Group, 2008 WL 3401658 (S.D. Cal. Aug. 12, 2008)

Plaintiffs had incurred debts to creditors that they were having trouble paying. After discovering the defendant's website, the plaintiffs entered into the defendant's "debt settlement strategy plan" by which the plaintiffs would pay the defendant and the defendant would negotiate and use the payments to satisfy creditors. After entering into the program, the plaintiffs were sued by several creditors. The

(Continued on page 13)

defendant recommended that the plaintiffs file for bankruptcy or hire an attorney. The plaintiffs then sued the defendant, alleging various violations of the Fair Debt Collection Practices Act (FDCPA). The defendant filed a motion to dismiss, or in the alternative, a motion for summary judgment, arguing that it was not a “debt collector” as is defined under the FDCPA. The defendant urged the court to find that it was an organization that provided credit counseling services, and not a debt collector. The court rejected the defendant’s argument, stating that if Congress had wanted to exclude all consumer credit counseling services from FDCPA liability it could have. The defendant pointed to 15 U.S.C. § 1692a (6)(E), which exempted “any *nonprofit* organization which, at the request of consumers, performs bona fide consumer credit counseling” The court held that the defendant was in fact a *for profit* organization, and therefore, did not fall within the purview of the exception. Accordingly, the court denied the defendant’s motion to dismiss and refused to consider the defendant’s motion for summary judgment until the parties had more time to exchange discovery.

TRUTH-IN-LENDING ACT (PREEMPTION)

Fultz v. World Savings and Loan Ass’n, 2008 WL 3826238 (W.D. Wash. Aug. 18, 2008)

The plaintiffs obtained two mortgage loans from the defendant banks. The plaintiffs alleged that the banks misstated the true costs and terms of the mortgages and failed to provide loan documentation in a timely manner. The plaintiffs filed suit, alleging various violations of the Truth-in-Lending Act (TILA) and state consumer protection laws. The defendants filed a motion to dismiss, arguing that the federal Home Owners’ Loan Act (HOLA) preempted the plaintiffs’ state law claims. The court first stated that the main issue was whether regulations issued by the Office of Thrift Supervision (OTS) barred the plaintiffs’ state law claims. Using the multi-step analysis created by the OTS to determine if federal law preempts state law, the court held that the actions complained of by the plaintiff all involved the defendant’s failure to provide timely and meaningful disclosure of the costs and terms of their loans. The court stated that the federal government already had recourse for such actions in the TILA. Therefore, the court held that the plaintiffs’ actions were preempted by the TILA and granted the defendants’ motion to dismiss.

FAIR CREDIT REPORTING ACT (FURNISHER LIABILITY)

Ehreth v. Capital One Services, Inc., 2008 WL 3891270 (W.D. Wash. Aug. 19, 2008)

Plaintiff attempted to make a payment on his credit card debt by the internet and received a “payment complete” message. Although he received the message, his payment was rejected by the defendant bank. The defendant then charged the plaintiff a late fee that the plaintiff alleged was greater than was allowed by the cardholder agreement. The plaintiff filed suit on behalf of himself, and others similarly situated, alleging that the defendant violated 15 U.S.C. § 1681s-2(b) of the Fair Credit Reporting Act (FCRA) by furnishing false information to a credit reporting agency (CRA) that negatively affected the plaintiff’s consumer report. The defendant filed a motion to dismiss, arguing that the plaintiff failed to notify a CRA about his dispute, thereby failing to trigger liability for a furnisher of information under the FCRA. The court agreed, holding that the plaintiff must notify a CRA of the dispute, and that agency must then notify the furnisher of information in order for liability to attach. The plaintiff then sought leave to amend his complaint in order to show that he notified several CRAs two days before he filed suit. The court stated that furnishers of information are given thirty days under the FCRA to investigate a dispute that is sent to them by a CRA before they are liable for a breach of the FCRA. Because the plaintiff commenced his action before he had yet suffered a cognizable injury, the court granted the defendant’s motion to dismiss.

FAIR DEBT COLLECTION PRACTICES ACT (USING A FALSE BUSINESS NAME & WINDOWED ENVELOPE)

Owens v. Brachfeld, 2008 WL 3891958 (N.D. Cal. Aug. 20, 2008)

The defendants sent the plaintiff a letter attempting to collect a debt. The letter was sent with an address window that allowed others to be able to see the debt information without opening the letter and was printed with the names of businesses that were not registered as corporations allowed to collect debt in the state of California. The plaintiff brought suit, alleging that the letter violated the Fair Debt Collection Practices Act (FDCPA) and other state consumer protection laws. The plaintiff then filed a motion for summary judgment. The court stated that mailing a collection letter in an envelope that can easily be read by third parties is a violation of 15 U.S.C. § 1692b of the FDCPA. Additionally, the court stated that searches of the California Secretary of State found no listing of the defendants and that using a false name to collect a debt is a violation of Section 1692e(14). Because the defendants

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failed to reply to the plaintiff's motion for summary judgment, the court granted the motion.

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10TH CIRCUIT DECISIONS



FAIR DEBT COLLECTION PRACTICES ACT (OFFER OF JUDGMENT)

Lomas v. Emergency Medical Billing, L.L.C., 2008 WL 4056789 (D. Utah Aug. 25, 2008)

The plaintiff received \$271.00 worth of medical treatment that she could not pay for. She made arrangements with the defendant billing service to pay \$25.00 a month for the treatment. After the plaintiff made several payments, the defendant brought suit in state court to recover the sum of \$291.00 plus interest and attorney's fees. The plaintiff alleged that the bill contained unlawful charges and collection fees and brought suit on behalf of herself, and others similarly situated, alleging violations of the Fair Debt Collection Practices Act. Shortly after the plaintiff filed suit, the defendant tendered an Offer of Judgment, pursuant to Rule 68 of the Federal Rules of Civil Procedure, in the amount of \$5,001.00 as well as reasonable attorney's fees and costs. The plaintiff never responded to the offer, and the defendant filed a motion to dismiss. The court held that the Offer made by the defendant was far in excess of the maximum that the plaintiff could hope to recover at trial under the FDCPA. The court stated that the plaintiff no longer had a dispute over which to litigate and no longer had a stake in the action. The court held that the plaintiff would no longer be considered an adequate class representative because she would not have an incentive to fairly and adequately protect the interests of the class. Accordingly, the court dismissed the plaintiff's claims against the defendant.

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11TH CIRCUIT DECISIONS



FAIR CREDIT REPORTING ACT (PRIVATE RIGHT OF ACTION)

Green v. RBS Nat. Bank, 2008 WL 2957118 (11th Cir. Aug. 4, 2008)

The plaintiff brought suit against the defendant bank, alleging that it gave inaccurate information about his credit to several credit reporting agencies (CRAs) in violation of the Fair Credit Reporting Act (FCRA). The defendant filed a motion for summary judgment, arguing that the FCRA only allows for a private right of action against a furnisher of information if it failed to timely investigate a dispute submitted by a consumer to a CRA. The court agreed, holding that the plaintiff was alleging not that the investigations were not done properly, or in a timely fashion, but rather that the original information was inaccurate. The court stated that there was no private right of action under the FCRA for such a claim and granted the defendant's motion for summary judgment.

FAIR DEBT COLLECTION PRACTICES ACT (CHOICE OF LAW, STATUTE OF LIMITATIONS & MISREPRESENTATION)

Gaisser v. Portfolio Recovery Assoc, LLC, 2008 WL 3824746 (S.D. Fla. Aug. 5, 2008)

After the plaintiff defaulted on a credit card debt, the credit card company transferred his debt to a debt collector. The collector then hired the defendant attorney to file a lawsuit to collect the debt. The last payment made by the plaintiff on the account was on April 10, 2003. The defendant did not file its lawsuit in Florida state court to collect on the debt until February 8, 2007. In the state court complaint, the defendant stated that if attorney's fees were awarded during the legal process, a fee of \$750 would be reasonable. The plaintiff argued that New Hampshire law applied to the lawsuit because of a choice of law provision in the contract, and that the defendant violated the three-year statute of limitations that governed the

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transaction. The plaintiff brought suit on behalf of himself, and others similarly situated, alleging that the state court lawsuit violated several provisions of the Fair Debt Collection Practices Act (FDCPA). The defendant filed a motion to dismiss, arguing that even if New Hampshire law applied to the debt, the suit was not filed outside of the applicable three-year statute of limitations, because the period was tolled under New Hampshire law. The court first held that because Florida law considers statute of limitations to be substantive, that the choice of law provision in the parties' contract should be applied to the action. The defendant then stated that the inclusion of a standard attorney's fee rate in the state law complaint did not violate the FDCPA. The plaintiff argued that the inclusion of a standardized attorney fee was intended to misrepresent the amount of the debt. The court disagreed, stating that the defendant did not characterize the amount to be a sum certain and did not state that the fee was required by the contract between the parties. The court held that because the defendant did not mischaracterize the fees, there was not a violation of the FDCPA. Accordingly, the court granted-in-part and denied-in-part the defendant's motion to dismiss.

NATIONAL BANK ACT (PREEMPTION)

Gunter v. Chase Bank U.S.A., N.A., 2008 WL 3211293 (S.D. Ala. Aug. 6, 2008)

Plaintiffs obtained a mortgage loan from the defendant. After the plaintiffs paid a "loan discount fee" they expected that they would receive a lower interest rate; such a rate reduction never occurred. The plaintiffs then filed suit, alleging that the defendant violated several provisions of the Real Estate Settlement Procedures Act (RESPA). The plaintiff then sought to amend their complaint in order to add a state law claim of suppression. The defendant objected, arguing that the National Bank Act (NBA) preempted the state law suppression claim. The defendant argued that 12 C.F.R. § 34.4 of the NBA specifically preempts any state law that "obstruct[s], impair[s], or condition[s] a national bank's ability to fully exercise its Federally authorized real estate lending powers. . . ." The court endorsed a previous district court decision in the Eleventh Circuit, which stated that a plaintiff's exercise of their rights under state contract and tort law does not incidentally affect a bank's NBA powers. The court held that the NBA does not completely preempt state law claims for excessive interest and failing to disclose interest charges. Accordingly, the court granted the plaintiffs' motion to amend its complaint.

FAIR DEBT COLLECTION PRACTICES ACT (COLLECTION AGENCY REGISTRATION)

McCarrison v. L.W.T., Inc., 2008 WL 3243865 (M.D. Fla. Aug. 7, 2008)

After the defendant debt collector brought a time-barred lawsuit in state court in order to collect a debt from the plaintiff, the plaintiff filed suit in federal court alleging that the defendant violated several provisions of the Fair Debt Collection Practices Act (FDCPA). In a previous ruling, the court granted the defendant's motion for summary judgment on the basis of the defendant's bona fide error defense, however, the plaintiff still alleged that the defendant had violated the FDCPA by never registering with the state of Florida as a collection agency. Both parties filed motions for summary judgment. The defendant submitted three defenses: 1) that the defendant was not required to register as a collection agency; 2) that failure to register under Florida law did not constitute a violation of the FDCPA; and 3) that the defendant was entitled to the bona fide error defense. First, the court held that because the plaintiff's loan was already in default when the defendant purchased it, the defendant would not be considered a creditor, but rather, a debt collector. Therefore, there would be a requirement for the defendant to register as a collection agency with the State. The plaintiff then argued that the defendant's failure to register violated certain provisions of the FDCPA. First, the plaintiff argued that because they were not registered, the defendant was not able to properly bring a lawsuit in state court, and thus made a "threat" to take action that it was not authorized to take. The court dismissed this argument, stating that the filing of a lawsuit was not a "threat" as it is defined under the FDCPA. The plaintiff then argued that by not registering as a debt collection agency, the defendant used "unfair or unconscionable means" to collect a debt. Again, the court disagreed with the plaintiffs, holding that the failure to register did not amount to a "means" of collecting a debt. Finding that the plaintiff had not alleged that the defendant had collected any amount that was not permitted by law, the court granted the defendant's motion for summary judgment.

FAIR DEBT COLLECTION PRACTICES ACT (VENUE)

Black v. Zarzaur & Schwartz, P.C., 2008 WL 3211304 (M.D. Ala. Aug. 7, 2008)

After the defendant filed suit in state court to collect on a debt that was owed by the plaintiff, the plaintiff filed suit in federal court in the Middle District of Alabama asserting that the defendant violated various provisions of the Fair Debt Collection Practices Act (FDCPA) by filing the state

(Continued on page 16)

court lawsuit. The defendant filed a motion to transfer venue, arguing that venue was appropriate only in the Northern District of Alabama, where the collection letters in question were created and mailed by the defendant. The plaintiff argued that the appropriate venue was where the defendant filed its state court lawsuit and where the plaintiff received the collection letters. The court agreed with the plaintiff, holding that venue is appropriate in the district where the plaintiff resides, because the injury did not occur until the mail was received. Therefore, a substantial part of the events that gave rise to the plaintiff's claims occurred in the Middle District and the court denied the defendant's motion to transfer venue.

FAIR DEBT COLLECTION PRACTICES ACT (CLASS CERTIFICATION)

Gaalswijk-Knetzke v. Receivables Mgmt. Svc. Corp., 2008 WL 3850657 (M.D. Fla. Aug. 14, 2008)

The plaintiff filed suit on behalf of herself, and others similarly situated, alleging that the defendant violated certain provisions of the Fair Debt Collection Practices Act (FDCPA) and other state laws when it sent illegible collection letters to the plaintiffs. The plaintiff sought to define the class as “[a]ll residents of the State of Florida who received debt collection notices and/or letters from [the defendant] relating to a consumer debt on or after March 14, 2006. While the defendant stipulated that the plaintiff satisfied the numerosity and commonality elements of Rule 23 of the Federal Rules of Civil Procedure, it argued that the proposed class was too numerous and would defeat the superiority of the class action method under Rule 23(b)(3). The defendant argued that over 156,000 individuals received its letters and stating that any recovery would be *de minimus* and an abuse of the statute. The plaintiff countered, arguing that only 16,000 individuals received the letters. While not resolving the numbers argument, the court stated that applying the *de minimus* rule would be inappropriate. The court stated that Congress intended for the class action to overcome the problem that small recoveries do not provide incentive for any individual to bring a solo action. Therefore, the court stated that the chance of a *de minimus* recovery would not defeat the class action. Accordingly, the court granted the plaintiff's motion for class certification.

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