

monthly litigation update

DECEMBER 2007

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. Our attorneys are licensed in twelve different states (Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Virginia and West Virginia) and the District of Columbia. Therefore, 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



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

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FEDERAL ARBITRATION ACT (WAIVER & ESTOPPEL)

Haenel v. Washington Mutual Bank, 2007 WL 4326828 (E.D.N.Y. Dec. 6, 2007)

Plaintiffs maintained a checking account with defendant bank. When opening the account the plaintiffs executed a check card and agreed to be bound by the terms and conditions governing their account. In addition to the account, the plaintiffs maintained a mortgage loan with the defendant. Monthly payments were automatically transferred from the plaintiffs' checking account to their mortgage account. After the defendant froze the plaintiffs' checking account, the plaintiffs brought a lawsuit against the defendant alleging certain violations of the Fair Credit Reporting Act (FCRA) and other state consumer protection laws. The bank moved to stay the action and compel arbitration under the Federal Arbitration Act (FAA). The plaintiffs did not dispute the presence of an arbitration agreement, but argued that the dispute did not fall within the scope of the clause. The plaintiffs also argued that because the bank litigated a previous dispute with the plaintiffs, they were estopped from seeking the right to arbitration in this action. The court first held that because the arbitration clause was broad and stated that "the parties must arbitrate any dispute concerning the checking account," that there was no doubt the action concerned the checking account, and therefore, the action fell within the scope of the agreement to arbitrate. The court then held that although the defendant did not exercise its right to arbitrate in previous litigation, that did not mean that it waived its right in this particular action. The court stated that because the small claims litigation was a separate matter, the defendant's participation in that matter in no way prejudiced the plaintiffs in this case. Finally, the court rejected the notion that the defendant was estopped from seeking to arbitrate the merits of the matter because of any findings of a small claims court. The court stated that any issue of estoppel was a matter for the arbitrator and not for the court. Therefore, the court granted the defendant's motion to compel arbitration.

FAIR DEBT COLLECTION PRACTICES ACT
(INDIVIDUAL LIABILITY)

Krapf v. Professional Collection Svc., Inc., 2007 WL 4377682 (E.D.N.Y. Dec. 12, 2007)

Defendant debt collector attempted to collect \$1,200 from the plaintiff still owed from the funeral of the plaintiff's father. Before the plaintiff made payment, her daughter was diagnosed with cancer, which forced her to attempt to bargain with the funeral company. After agreeing with the company that she could satisfy the amount owed with payment of \$600, the company reneged on the agreement and requested that the defendant attempt to collect the remaining \$1,200. The plaintiff brought suit in federal court alleging that the defendant violated the Fair Debt Collection Practices Act (FDCPA) and a state consumer protection law by acting in an abusive, harassing, and deceptive manner when attempting to collect a debt. The plaintiff also sued individual employees that worked for the defendant debt collector. Those individually named employees filed a motion to dismiss. The court held that individual FDCPA liability may be imposed under certain circumstances. The court stated that where the complaint contains sufficient allegations of personal involvement in the alleged violation, the plaintiff sufficiently states a claim for individual liability for violation of the FDCPA. Therefore, the court held that the plaintiff did state a claim for individual liability and denied the defendants' motion to dismiss.

FAIR DEBT COLLECTION PRACTICES ACT
(FALSE, DECEPTIVE, OR MISLEADING REPRESENTATIONS)

Nolan v. Credit Mgmt. Corp., 2007 WL 4460310 (D. Conn. Dec. 14, 2007)

Plaintiff brought suit against the defendant debt collector alleging that the defendant violated the Fair Debt Collection Practices Act (FDCPA) when it used false, deceptive and misleading representations in the collection of a debt. The defendant purchases tertiary debt and then brings lawsuits against debtors. After it was awarded a judgment in state court, the defendant sent the plaintiff a letter that informed the plaintiff an action to collect payment would be brought against the plaintiff if he did not return a judgment form in 30 days. The plaintiff alleged that the letter violated the FDCPA because it threatened to bring an action against the plaintiff and have a marshal escort the plaintiff to court when, in actuality, the defendant never intended to take such action against the plaintiff. The parties both waived their right to a trial by jury and consented to have a U.S. Magistrate conduct all proceedings, including trial and entry of a final judgment. The Magistrate first found that the plaintiff failed to introduce sufficient evidence in regard to the phone calls the plaintiff received from the defendant. The Magistrate held that the only evidence of the calls was the plaintiff's own testimony, which was contradicted by other testimony

and not credible. However, the Magistrate held that a letter sent by the defendant that threatened to have the plaintiff brought to court was deceptive and meant to intimidate the plaintiff. The letter exaggerated the actions that could be taken by the defendant under state law. Because the threatening letter was in conflict with the accurate state law procedures, the Magistrate found that the defendant violated 15 U.S.C. § 1692e, by using a deceptive or misleading representation in connection with the collection of a debt. Therefore, the court awarded \$1,000 in statutory damages to the plaintiff, plus reasonable attorney's fees and costs.

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3RD CIRCUIT DECISIONS



FEDERAL ARBITRATION ACT (PROCEDURAL AND SUBSTANTIVE UNCONSCIONABILITY/ CLASS ACTIONS)

O'Shea v. Direct Fin. Solutions, LLC, 2007 WL 4373038 (E.D. Pa. Dec. 5, 2007)

Plaintiff filed suit against the defendant lenders alleging that by making short-term loans with high interest rates, they violated several state consumer protection laws. The plaintiff filed a motion for class certification seeking to represent a class of citizens who obtained loans from the defendants over the last five years. The defendants filed a motion to compel arbitration; the defendants argued that the plaintiff received eight different loans and each contained an Arbitration and Waiver of Jury Trial Agreement. The plaintiff claimed that the agreements were invalid and not enforceable under the Federal Arbitration Act (FAA) because they were procedurally and substantively unconscionable. The court first held that the agreements were valid because the parties entered into an agreement to arbitrate and the plaintiff's claims fall within the scope of the agreements. The court stated that the agreements were not procedurally unconscionable because the plaintiff did not allege that the agreements were in extremely fine print, in confusing language or hidden in the document. The court noted that the plaintiff's entire argument for procedural unconscionability wrongly rested on the borrower's lack of bargaining power and choice as to the arbitration clause. The court then held that the agreements were not substantively unconscionable. The court held that the arbitration clause did not have to contain mutuality. Additionally, the court held that the plaintiff's argument that the agreement lacked "meaningful choice" overlapped with the mutuality argument. Also, the

court stated that a ban on class action lawsuits did not make an agreement unenforceable. Finally, the court held that just because the plaintiff may only be entitled to \$300 in nominal damages, this did not require the court to require a class action lawsuit to be brought. Therefore, the court granted the defendant's motion to compel arbitration.

TRUTH-IN-LENDING ACT (RESCISSION)

Sewell v. Option One Mortgage Corp., 2007 WL 4355393 (E.D. Pa. Dec. 12, 2007)

Plaintiffs obtained a residential mortgage loan from the defendant. A year and a half after closing, the plaintiffs contacted the defendant and requested that the loan be rescinded based on material violations of the Truth-in-Lending Act (TILA). The defendant refused and then the plaintiff filed suit. Plaintiff's suit alleged that defendant violated TILA by not providing each plaintiff with two copies of the Notice of Right to Cancel and that defendant miscalculated the finance charges incurred by plaintiffs. The defendant filed a motion to dismiss. First, the court held that, because the transaction at issue was a residential mortgage transaction, it was excepted from the right of rescission under TILA. The court then held that a TILA violation cannot be found where the estimated charge is greater than the final charge. Additionally, the court held that while the plaintiffs allege that the final agreement did not state that the loan would have a variable rate, the contract clearly indicated that it would. Therefore, the plaintiffs' claim for rescission under TILA was dismissed.

TRUTH-IN-LENDING ACT (DISCLOSURE OF AMOUNT FINANCED)

Jackson v. CIT Group/Consumer Fin., Inc., 2007 WL 4462183 (W.D. Pa. Dec. 19, 2007)

Plaintiffs responded to a television advertisement that offered a loan, secured by the plaintiffs' house, in order to fund home improvements. The plaintiffs accepted the terms of the loan and had the loan financed with the defendant finance company. The company that organized the transaction and ran the television advertisement selected the contractor that performed the work on the plaintiffs' home. The loan money was given in a check to the plaintiffs and then immediately signed over to the contractor to complete the work. The plaintiffs were not allowed to retain the check to assure quality performance by the contractor. The contractor provided such poor work that it actually did damage to the plaintiffs' home. The plaintiffs brought an action under the Truth-in-Lending Act (TILA) against the defendant finance company in an attempt to rescind the contract or to terminate the security interest. The plaintiffs alleged that the contract, which provided that they receive the entire loan amount, was materially inaccurate in regard to the amount financed because the vast majority of the money went to the contractor. The court held that because the

check was given first to the plaintiffs and then signed over to the contractor, the process did not violate TILA. The court held that the practice of immediately transferring loan money to a contractor or seller was not unusual and did not require a separate itemization of loan proceeds in the agreement. The court also held that the disclosure of the amount financed was materially correct as defined in Regulation Z, 12 C.F.R. § 226.18(b). Finally, the court held that there was no evidence in the record that the defendant knew that the contractor would not provide adequate work on the home. The court held that the performance by the contractor could not retroactively invalidate the accuracy of a disclosure. Therefore, the court granted the defendant's motion for summary judgment.

**FAIR DEBT COLLECTION PRACTICES ACT
(INDIVIDUAL LIABILITY & SUMMARY
JUDGMENT STANDARD)**

McNally v. Client Svc., Inc., 2007 WL 4561152 (W.D. Pa. Dec. 20, 2007)

Plaintiff brought suit against defendant debt collector and individual employees alleging that they violated 15 U.S.C. § 1692 of the Fair Debt Collection Practices Act (FDCPA) by engaging in harassment or abuse, false or misleading representations, unfair collection practices, and failing to provide required notice of debts. The individual defendants made several phone calls to the plaintiff's parents' home and warned the plaintiff that "his credit would be shot for 10 years" and his paycheck would be garnished. The defendants also failed to provide notice required by the statute after the plaintiff requested it. The defendants filed a motion to dismiss for failure to state a claim, arguing that the plaintiff's conclusory statements were insufficient to state a cause of action. First, the court dismissed the claims against the individual defendants, stating that individuals are only held liable when they have been delegated certain powers which were not found in the current positions of the individual defendants. Also, because the plaintiff could pursue full relief from the corporate defendant, the court determined that dismissal of the plaintiff's claim against the individual defendants would not result in any prejudice to the plaintiff. Next, the court stated that because the facts must be viewed in a light most favorable to the plaintiff, his allegation that he did not receive any notice was enough to state a claim pursuant to § 1692g at the summary judgment stage of the litigation. The court then held that because the Federal Rules of Civil Procedure only require that the plaintiff's pleadings be simple, concise and direct, that the plaintiff satisfied his burden of putting the corporate defendant on notice of its alleged violations. Finally, the court rejected the defendant's allegation that emotional distress is not recoverable in a FDCPA action and denied the corporate defendant's motion to dismiss for failure to state a claim.

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4TH CIRCUIT DECISIONS



**FAIR CREDIT REPORTING ACT (ACTUAL
DAMAGES & ATTORNEY'S FEES)**

Sloane v. Equifax Info. Svc., L.L.C., 2007 WL 4535267
(4th Cir. Dec. 27, 2007)

Plaintiff filed an action against the defendant credit reporting agency (CRA) alleging that the defendant failed to correct errors in her credit report twenty-one months after she reported that a thief had stolen her identity and ruined her credit. After the plaintiff settled with all other defendants, including other major CRAs, the defendant refused to settle with the plaintiff. In district court, a jury found that the defendant had violated the Fair Credit Reporting Act (FCRA) and awarded the plaintiff \$351,000 in actual damages (\$106,000 for economic losses and \$245,000 for mental anguish, humiliation, and emotional distress). Additionally, without allowing the defendant to file a written opposition, the court also awarded the plaintiff attorney's fees in the amount of \$181,083. The defendant appealed to the Fourth Circuit and challenged the award of damages and attorney's fees. The defendant initially contended that the district court erred in refusing to nullify the jury verdict and grant it a judgment as a matter of law. The defendant argued that because the plaintiff suffered a single, indivisible injury, she should not recover any damages from the defendant, or her recovery should be reduced to take account of her prior settlements with other defendants. However, the court disagreed, holding that it could not find, as a matter of law, that the plaintiff had suffered from a single, indivisible harm. The defendant then argued that the evidence did not support any award for economic losses. The court again disagreed, holding that the plaintiff often tried to secure lines of credit and was denied. Next, the defendant argued that the district court failed in refusing to order remittitur of the mental anguish, humiliation, and emotional distress damages award to no more than \$25,000. Once again, the court disagreed, holding that the plaintiff presented substantial, if not overwhelming, objective evidence supporting an award of emotional distress. However, the court did state that because the plaintiff presented almost no evidence to suggest that the defendant's violations of the FCRA resulted in harm to her reputation, the award must be significantly less than other cases where there

were defamation awards. Therefore, the court stated that the evidence does support an award in the maximum amount of \$150,000. Finally, because the district court did not allow time for adversary submissions in regard to attorney's fees, the court vacated the district court's grant of attorney's fees and remanded the case to permit the defendant an opportunity to submit materials to the district court.

FAIR CREDIT REPORTING ACT (ACTUAL DAMAGES, RECKLESS DISREGARD, & PREEMPTION)

Williams v. Equifax Credit Information Svc., 2007 WL 4458914 (D.S.C. Dec. 17, 2007)

Defendant telephone company charged the plaintiff with the balance of his deceased wife's cellular phone account without his consent. After he failed to pay, the defendant reported the delinquency to a credit reporting agency (CRA). The plaintiff brought suit against the defendant alleging that it violated the Fair Credit Reporting Act (FCRA) by failing to properly investigate the matter and requesting the CRA to remove the disputed item from his credit report. The plaintiff contended that he was refused a loan for the purchase of a home due to the inaccuracy of the report. The defendant filed a motion for summary judgment arguing: 1) there was no causal relationship between the defendant's alleged violation of the FCRA and the plaintiff's loss of credit, therefore no proof of actual damages, and thus no cognizable claim under the act; 2) there was no evidence to support a willful violation of the FCRA; and 3) plaintiff's common law libel claim was preempted. The court first held that because of testimony from a loan officer of the bank in which the plaintiff attempted to gain a home loan proved that the plaintiff would have been denied the loan regardless of the delinquent account, the plaintiff failed to present evidence of a causal connection to the actual damage. Therefore, the court granted the defendant's motion in regard to the actual damages. The court then held that the plaintiff could still bring an action because he had presented enough evidence for a jury to believe that the defendant acted in reckless disregard of the FCRA. The court stated that actual damages were not necessary to bring a claim alleging a willful violation. Finally, the court held that because it was reasonable that the plaintiff could prove that the defendant acted with malice or willful intent, it could not grant the defendant's motion for summary judgment in regard to the state law claim for libel. Defendant's motion for summary judgment was granted in part and denied in part.

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5TH CIRCUIT DECISIONS



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

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6TH CIRCUIT DECISIONS



FAIR DEBT COLLECTION PRACTICES ACT (ATTORNEY REPRESENTATION & FALSE, DECEPTIVE OR MISLEADING REPRESENTATIONS)
McKeown v. Elliott P.C., 2007 WL 4326825 (E.D. Mich. Dec. 10, 2007)

Plaintiffs filed suit against the defendant debt collector alleging that the defendant violated certain provisions of the Fair Debt Collection Practices Act (FDCPA) when it attempted to contact the plaintiffs directly even after it became aware that they were represented by counsel and attempted to collect a debt in a deceptive manner. The attorney that represented the plaintiffs was in a legal services clinic and the defendant argues that he did not represent the plaintiffs within the meaning of the FDCPA. Both parties filed motions for summary judgment. The defendant first argued that the attorney did not represent the plaintiffs because he was not admitted to practice in the state where the debt was incurred. The court held that

there was no indication that Congress enacted the FDCPA to prevent out-of-state attorneys from providing legal advice, and therefore, rejected the defendant's first argument. Second, the defendant argued that the attorney did not provide adequate representation because he stated that he only provided the plaintiffs with "limited representation." The court agreed with the defendant's argument, stating that the plaintiff was unable to demonstrate that the defendant had actual knowledge that the attorney was representing the plaintiffs with respect to such debt. The court noted that the attorney's letters to the defendant were ambiguous at best. The attorney never stated that he represented the plaintiffs in regard to the debt. Additionally, the evidence showed that the attorney specifically avoided phone calls from debt collectors. However, one of the plaintiffs did state that, during a phone call with the defendant, she informed the defendant an attorney represented her. Therefore, as to her claim, both parties' motions for summary judgment were denied in regard to § 1692c; however, the defendant's motions were granted as to the claims of the other plaintiffs under § 1692c. The plaintiffs then alleged that the defendant violated § 1692e by making false, deceptive or misleading representations when it sent the plaintiffs a settlement offer. First, the court held that the settlement letter was not misleading under the least sophisticated consumer standard because it repeatedly used the word settlement. Therefore, all references to legal action were framed in the light of possibility only. However, the court held that there was a triable issue as to whether a statement in the letter, which provided that the plaintiffs could receive "25% off" their debt, was deceptive. Accordingly, the court denied both the plaintiffs' motion for summary judgment and the defendant's motion, finding that there was a genuine issue of material fact as to whether the defendant violated § 1692e.

**FAIR DEBT COLLECTION PRACTICES ACT
(OFFER OF SETTLEMENT)**

Glover v. Elliott, P.C., 2007 WL 4557853 (W.D. Mich. Dec. 21, 2007)

Defendant, a debt collection law firm, sent the plaintiff an offer to settle his debt that stated the plaintiff would receive "25 % off." The plaintiff alleged that the offer violated the Fair Debt Collection Practices Act (FDCPA) because it: 1) failed to state the amount of debt; 2) falsely implied legal action had commenced; 3) threatened to take legal action that was not intended; and 4) falsely indicated that it was from an attorney. The defendant moved for dismissal or, in the alternative, summary judgment. The court first held that the offer was not misleading because it failed to state the amount of the debt. The court stated that while the offer did not give the consumer all of the relevant information, the lack of up-to-date information did not render the offer to settle confusing, deceptive or misleading. Second, the court held that because the offer said the defendant could bring an action "if" the plaintiff

did not pay, even naïve consumers would understand that a suit has not been filed and a judgment had not been entered. Therefore, the court stated that this part of the offer was not false, deceptive or misleading. Third, the court stated that there was nothing in the language of the offer that would suggest intent to undertake garnishment proceedings after settlement; therefore, the language could not be reasonably interpreted as a threat of legal action, which in actuality, could not be taken. Finally, the court stated that because the defendant was an attorney, there was no false representation that the defendant was an attorney when, in fact, she was. Therefore, the court granted the defendant's motion for summary judgment as to all claims.

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**7TH CIRCUIT
DECISIONS**



**FAIR CREDIT REPORTING ACT (FAIR AND
ACCURATE CREDIT TRANSACTIONS ACT OF
2003 – CLASS CERTIFICATION)**

Troy v. Red Lantern Inn, Inc., 2007 WL 4293014 (N.D. Ill. Dec. 4, 2007)

Plaintiff brought suit on behalf of himself, and others similarly situated, against the defendant alleging that it violated the Fair Credit Reporting Act (FCRA), and more specifically, the Fair and Accurate Credit Transactions Act (FACTA) when it unlawfully printed a computer-generated credit card receipt that displayed both the plaintiff's credit card expiration date and the last four digits of his credit card number. The plaintiff filed a motion for class certification pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure. The plaintiff sought class certification for a class defined as: "all persons to whom the [defendant] provided an electronically printed receipt at the point of sale or transaction, in a transaction occurring in [Illinois] after December 4, 2006, which displays either (a) more than the last five digits of the person's credit card or debit card number, or (b) the expiration date of the person's credit or debit card, or (c)

both.” The court determined that the plaintiff’s class was sufficiently defined, that he met all four requirements listed in Rule 23(a), and that he satisfied the requirements of Rule 23(b)(3). Additionally, the court rejected the defendant’s argument that granting class certification in this case would encourage abuse of Rule 23(b)(3) by plaintiff’s attorneys. The court stated that without any indication of foul play by the plaintiff’s attorneys, it could not conclude that there was any attorney abuse in this case. Therefore, the court granted the plaintiff’s motion for class certification.

FAIR DEBT COLLECTION PRACTICES ACT
(CLASS CERTIFICATION)

Ramirez v. Palisades Collection L.L.C., 2007 WL 4335293
(N.D. Ill. Dec. 5, 2007)

Defendant brought a time-barred lawsuit against the plaintiff in state court in an attempt to collect a credit card debt that the defendant had purchased from a bank. The plaintiff alleged that the defendant often brought these time-barred lawsuits and brought a lawsuit against the defendant in federal court alleging that the defendant violated the Fair Debt Collection Practices Act (FDCPA) by bringing time-barred lawsuits against Illinois consumers, hoping for default judgments against them. The plaintiff sought to certify a class of individuals defined as: “1) all individuals with Illinois addresses, 2) against whom [the defendant] filed suit on a credit card debt originated by [the bank the plaintiff owed debt], 3) where both the date of charge-off and the date of last payment, as shown by [defendant’s] records, were more than five years prior to the date of filing, 4) where the lawsuit was filed or served on or after a date 12 months prior to the filing of this action and prior to a date 20 days after filing of this action, and 5) [where defendant] cannot produce [the] written contract [it sued upon] signed by both the original creditor and the putative debtor.” Although the court held that the plaintiff satisfied the requirements set forth in Rule 23(a) of the Federal Rules of Civil Procedure, the court held that the plaintiff did not propose a sufficiently defined class, and therefore, could not grant class certification. The court held that the class definition conditions membership on whether the defendant could produce a written contract that was signed by the debtor. The court stated that this type of definition requires an exhaustive, individualized inquiry into whether the defendant can presently find, in its own files, a written contract. The court held that this type of search would require an onerous individualized inquiry, and therefore, the definition of the class was not sufficient. Accordingly, the court denied the plaintiff’s motion for class certification without prejudice.

FAIR DEBT COLLECTION PRACTICES ACT
(CLASS CERTIFICATION)
Drinkman v. Encore Receivable Mgmt., Inc., 2007 WL
4458307 (W.D. Wis. Dec. 7, 2007)

Defendant attempted to collect a debt that the plaintiff owed to a retail store. The plaintiff alleged that by calling the plaintiff and leaving recorded messages, which did not identify the caller, the defendant violated certain provisions of the Fair Debt Collection Practices Act (FDCPA). The plaintiff filed a motion for class certification attempting to certify a class defined as: “[a]ll Wisconsin ‘consumers’ (as that term is defined by 15 U.S.C. § 1692a(3)) that received pre-recorded messages from the [d]efendant, within one year prior to the date of the filing of [the] suit, in which [d]efendant included nothing more than a person’s name, a phone number and a reference to some important matter.” The court first held that the plaintiff satisfied the “implicit” requirements of Rule 23 of the Federal Rules of Civil Procedure because the proposed class was definite and the plaintiff was a member of the class that he was proposing to represent. The court then held that the plaintiff met the requirements of numerosity, commonality, typicality and adequacy of representation as is required under Rule 23(a). Finally, the court held that the plaintiff could certify his class under Rule 23(b)(2) even though he was seeking statutory damages and injunctive relief. The court stated that the plaintiff’s request for statutory damages was a request for “incidental” damages that flow directly from the main relief sought for the class (i.e. declaratory relief). The court stated that an award of statutory damages would only require a mere calculation and that a need to analyze individual compensation would not be necessary. Therefore, the court certified the plaintiff’s class.

FAIR DEBT COLLECTION PRACTICES ACT
(DEFINITION OF INTEREST)
Smith v. First Nat. Collection Bureau, Inc., 2007 WL
4365335 (N.D. Ill. Dec. 10, 2007)

Defendant debt collector attempted to collect a credit card debt from the plaintiff. In a collection letter to the plaintiff, the defendant listed the total amount of claim as \$1,786.26 and the interest as \$0. The \$1,786.26 included interest, services fees, late fees and other charges added to the account by the creditor, but was the amount originally assigned to the debt collector. The plaintiff filed a lawsuit alleging that the defendant violated 15 U.S.C. § 1692e of the Fair Debt Collection Practices Act (FDCPA) (prohibiting false, deceptive, or misleading representations) by listing the interest as \$0. Both parties filed motions for summary judgment. The court first held that the defendant’s interpretation of the word “interest” was not unreasonable. The court stated that a reasonable inference from the language is that “interest” refers to interest charged on the amount listed in the “amount of claim.” The court also held that because the plaintiff failed to

point to a single person who either interpreted the letter to be confusing or was confused or misled by the letter, the plaintiff did not meet the necessary burden of proof to bring a successful FDCPA claim. Therefore, the defendant's motion for summary judgment was granted and the plaintiff's motion for summary judgment was denied.

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

Follman v. Village Squire, Inc., 2007 WL 4522614 (N.D. Ill. Dec. 18, 2007)

Plaintiff filed a lawsuit on behalf of himself, and others similarly situated, alleging that the defendant provided him with a computer-generated cash register receipt that displayed the plaintiff's credit card expiration date. The plaintiff alleged that the inclusion of the expiration date on the receipt was a violation of the Fair Credit Reporting Act (FCRA), and more specifically, the Fair and Accurate Credit Transactions Act of 2003 (FACTA). The defendant filed a motion to dismiss advancing three main arguments: 1) there is no private right of action to enforce 15 U.S.C. § 1681c(g); 2) the plaintiff's complaint does not plead facts sufficient to state a plausible claim for a willful violation of § 1681c(g); and 3) the plaintiff's request for statutory damages in the absence of actual injury violates principles of due process and recognized tort law. The court rejected each argument in turn. The court first held that the language of the statute is unambiguous and allowing a right of action to a cardholder is the same as allowing a right of action to a consumer under § 1681n. The court held that § 1681c(g) is clearly intended for the protection of consumers, even if it applies broadly to both individual cardholders and entity cardholders. Second, the court held that because the defendant had three years to comply with the requirements of the FACTA, and because companies that sell credit card registers informed the defendant about the change in law, the defendant could be found to have recklessly and knowingly violated the FACTA. Additionally, the plaintiff submitted evidence that most of the defendant's business peers readily brought their receipt printing process into compliance with the FACTA. Also, the court stated that it would not address the defendant's claim that the statute was too vague to allow a willful violation during the stage of a motion to dismiss. Therefore, the court rejected the defendant's argument that the plaintiff failed to demonstrate a plausible entitlement to relief under FACTA. Finally, the court held that it would not be excessive in this case - at the level of a single violation - to award the maximum statutory damages, even to a plaintiff who suffered no pecuniary damages. The defendant did not cite a single case where a complaint has been dismissed for failure to state a claim because it requested damages in an amount that might hypothetically be excessive. Accordingly, the plaintiff's request for statutory damages did not require dismissal of

the claim for violation of Constitutional Due Process standards. Finally, the court stated that it need not resort to principles of tort law because the intent of congress was apparent in the plain language of the applicable statute. Therefore, the court denied the defendant's motions to dismiss.

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8TH CIRCUIT DECISIONS



FAIR CREDIT REPORTING ACT (FIRM OFFER OF CREDIT)

Klutho v. Fourth Fleet Fin., Inc., 2007 WL 4333194 (E.D. Mo. Dec. 7, 2007)

Defendant mailed the plaintiff a letter stating that she had been pre-qualified for a loan to refinance a lease on her vehicle. The plaintiff brought a lawsuit on behalf of herself, and others similarly situated, alleging that the defendant accessed her credit report without a permissible purpose, in violation of 15 U.S.C. § 1681a of the Fair Credit Reporting Act (FCRA). The defendant filed a motion to dismiss arguing that the letter constituted a firm offer of credit, and therefore, was allowable under the FCRA. The court held that the letter was not a firm offer of credit and denied the defendant's motion. First, the court held that there was no value in the offer to distinguish it from a sales pitch. The letter contained only a statement indicating that the plaintiff had been approved for "the best loan at the best possible rate." Second, the letter did not include a minimum loan amount or any reference to interest rates. Finally, the court stated that the plaintiff could bring the action even without proof of actual damages. The court stated that the plaintiff would be entitled to prove a willful violation of statutory damages if he could. Therefore, the court denied the defendant's motion to dismiss.

FAIR DEBT COLLECTION PRACTICES ACT
(COMMERCIAL DEBTS)

Shafe v. Tek-Collect, Inc., 2007 WL 4365726 (W.D. Mo. Dec. 10, 2007)

Plaintiff, the manager of a retirement home, hired defendant advertiser. After the advertiser completed its services, the plaintiff's company did not pay for the services and incurred a debt greater than \$4,000. The advertiser then engaged the defendant debt collector to collect on the debt. The debt collector informed the plaintiff that it would "come after" him for payment and informed him that he was personally liable for the debt. The debt collector also called the residents of the retirement home and informed them that the plaintiff and the principles at the home were "dead beats." The plaintiff filed a three-count complaint against the defendants alleging that they violated the Fair Debt Collection Practices Act (FDCPA) and other state laws. The defendant filed a motion to dismiss the FDCPA claim and, if successful, to dismiss the state claims for lack of supplemental jurisdiction. The court held that the debt was incurred for commercial purposes (i.e., radio advertising). The court held that the nature of the debt did not change just because the defendant attempted to collect from the plaintiff individually. Therefore, because the FDCPA only covers consumer debts, the court dismissed the plaintiff's FDCPA complaint with prejudice and dismissed the state law complaints for lack of jurisdiction.

FAIR DEBT COLLECTION PRACTICES ACT
(FEDERAL QUESTION JURISDICTION & PREEMPTION)

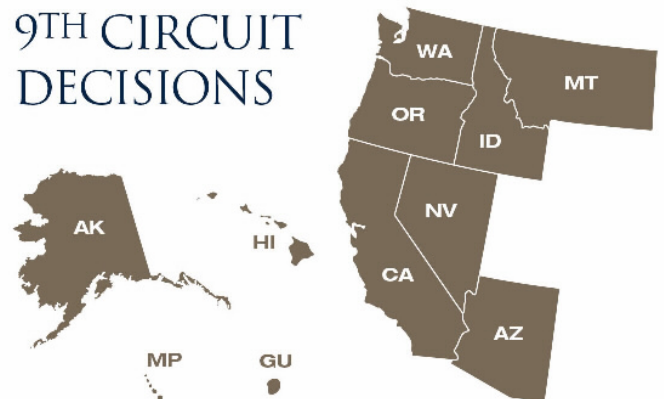
Heidelberger v. American Express Travel Related Svc. Co., Inc., 2007 WL 4404027 (E.D. Ark. Dec. 13, 2007)

Defendant credit card company filed suit against the plaintiff alleging that the plaintiff owed over \$75,000 in credit card debt. The case was tried in front of a jury, and the jury found for the defendant in the amount of \$50,000. The plaintiff then filed a motion for judgment notwithstanding the verdict, which was granted by the court. The defendant debt collector then contacted the plaintiff in an attempt to collect \$75,000 of the credit card company's debt. The plaintiff filed suit alleging that the defendant violated state law by attempting to collect a debt that the plaintiff did not owe. The defendant maintained that despite the state law language in the plaintiff's complaint, the claims were actually claims brought under the Fair Debt Collection Practices Act (FDCPA) and that federal jurisdiction was appropriate and the state law claims were preempted by the FDCPA. The plaintiff filed a motion to remand the proceedings to state court. The defendant argued that removal was appropriate under the artfully-pled complaint rule because the plaintiff disguised federal claims as state law claims. The court first held that the plaintiff's complaint alleging the defendant was negligent in failing to verify whether a debt existed before

trying to collect was an allegation of negligence that falls outside of the scope of the FDCPA. The court held that the plaintiff was suing for outrage, alleging that the defendant harassed her as retaliation for previous litigation, and this is different than alleging harassment while attempting to collect a debt under the FDCPA. Therefore, the court held that the plaintiff's claim of outrage also did not arise under the FDCPA. Additionally, the court held that even if the plaintiff's claims arose under the FDCPA, the Act does not preempt all state law claims. The court held that the plaintiff's claims were not inconsistent with the FDCPA, therefore, the FDCPA did not preempt the plaintiff's claims of negligence and outrage; the plaintiff's motion to remand was granted.

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9TH CIRCUIT
DECISIONS



FAIR DEBT COLLECTION PRACTICES ACT
(FALSE, DECEPTIVE AND MISLEADING REPRESENTATIONS & UNFAIR MEANS TO COLLECT A DEBT)

Goray v. Unifund CCR Partners, 2007 WL 4260017 (D. Haw. Dec. 4, 2007)

Plaintiff owed nearly \$10,000 on a credit card account. After the defendant debt collector purchased the accounts from the creditor, the debt collector hired the defendant law firm to file a state court collection action against the debtor. After the state court dismissed the lawsuit with prejudice, the plaintiff filed this suit in district court alleging the defendants violated several provisions of the Fair Debt Collection Practices Act (FDCPA). The plaintiff brought four counts, alleging: 1) that the defendants contacted the plaintiff's former employer and obtained location information in violation of 15 U.S.C. § 1692b and § 1692c(b); 2) that the defendants sent a letter that constituted false, deceptive and misleading representations in violation of § 1692e; 3) that the defendants' state court collection complaint was an unfair means to attempt to collect a debt in violation of § 1692f; and 4) that the defendants failed to send proper notices and verifications to the plaintiff in violation of § 1692g.

Both parties filed cross-motions for summary judgment. The court first held that because the defendants had put forth undisputed evidence that it did not contact the plaintiff's former employer and because the plaintiff has failed to present any evidence to the contrary, it was necessary that the court grant summary judgment in favor of the defendants on the first claim. The plaintiff's following three claims all revolved around a demand letter and the state court complaint that the plaintiff alleges both violated provisions of the FDCPA. The plaintiff alleged that the demand letter violated the FDCPA because it did not: 1) explain the exact amount due as of the date it was sent, 2) failed to explain the amount was adjustable on a daily basis; and 3) did not break down the amount into principal, interest, finance and other charges. The court held that the letter did not violate the FDCPA for several reasons. First, the court held that by stating in the letter that the plaintiff owed a certain amount "as of" the date sent, it was reasonable that a least sophisticated consumer would understand that interest on the debt was continuing to accrue. Additionally, because the defendants did not add additional attorney's fees or collection costs, it was unnecessary to itemize the debt and a simple statement that \$0 was owed for attorney's fees, and other costs, was sufficient. The court then held that the letter did not need to break up the amount into principal and interest and there was nothing confusing or misleading about the amount of the debt stated. The court next held that the state court complaint was not an initial communication by the defendant, and therefore, the defendant was not required to include a validation notice with the complaint. The court held that the demand letter was the initial communication and it complied with the FDCPA. The court held that just because the debt collector hired a law firm to initiate the action did not mean that a new validation notice was required. The court then held that the fact that an affidavit of indebtedness included with the complaint was dated three months earlier did not make the complaint false and misleading. The court stated that the affidavit was clearly dated three months earlier and did not verify the contents of the complaint. However, the court did hold that the defendant violated § 1692e(5) because it threatened to take a legal action that it could not legally take. Because the debt collector was not licensed as a collection company, as was required by state law, it could not file an action; therefore, the court allowed the plaintiff's claim under § 1692e(5) to proceed. Accordingly, the court granted the defendants' motions for summary judgment in part and denied them in part, and granted the plaintiff's motions in part and denied them in part.

FAIR DEBT COLLECTION PRACTICES ACT
(VERIFICATION & DISPUTE OF DEBT)

Blome v. Johnson, Rodenburg & Lauinger, 2007 WL 4374498 (D. Mont. Dec. 11, 2007)

Plaintiff purchased a car with a loan that he received from a finance company. After the plaintiff defaulted on the loan, the finance company sold the car and had a deficiency of approximately \$8,000. The finance company hired the defendant law firm to collect the deficiency balance. After the defendant sent a dunning letter to the plaintiff seeking to collect the debt, the plaintiff returned the letter seeking verification of the debt. The defendant replied by enclosing the verification information. The plaintiff then replied again, seeking validation: 1) that he was the debtor; 2) that the financing company's debt had been assigned to the defendant, and 3) as to the intimate knowledge of the debt. The defendant did not reply but brought suit in state court seeking collection of the debt. The plaintiff then brought this action in federal court alleging that the defendant violated certain provisions of the Fair Debt Collection Practices Act (FDCPA). The plaintiff alleged that the defendant did not properly validate the alleged debt, falsely stated that the defendant must request validation in writing, and overshadowed and nullified his right to dispute the debt when they filed suit in state court. The court first held that the verification provided by the defendant was valid. The court stated that all that was necessary was information from the creditor about the nature and balance of the outstanding bill and documentary evidence in the form of an itemized statement. The court also held that it was acceptable for the defendant to provide only copies of such documents. Because the defendant provided this information, the court held that the verification was valid. The court then held that because the plaintiff only sought verification of the debt, and did not dispute the debt, the court did not need to determine whether the defendant violated the FDCPA by sending a letter that could be interpreted to require plaintiffs to dispute debts in writing. Finally, the court held that the defendant gave the plaintiff more than 30 days to dispute the debt before it brought suit in state court, and therefore, it complied with the 30-day period allowed for dispute provided in the FDCPA. Because the plaintiff failed to raise any material issues of fact, the court granted the defendant's motion for summary judgment in regard to all of the FDCPA claims.

FAIR DEBT COLLECTION PRACTICES ACT
(IDENTIFICATION & EMOTIONAL DISTRESS
DAMAGES)

Costa v. Nat. Action Fin. Svc., 2007 WL 4526510 (E.D.
Cal. Dec. 19, 2007)

Defendant debt collector attempted to collect a credit card debt owed by the plaintiff to a creditor. The defendant placed calls to the plaintiff's home answering machine that did not contain specific information informing the plaintiff that the defendant was a debt collector. The defendant's employee advised the plaintiff to get a job or file bankruptcy. The plaintiff then filed a lawsuit against the defendant alleging that the defendant violated 15 U.S.C. §§ 1692d(6) & e(11) of the Fair Debt Collection Practices Act (FDCPA) in failing to provide meaningful disclosure of the defendant's identity in voicemail messages left on the plaintiff's home phone. Defendant argued that because the messages left for the plaintiff on her home phone were not "communications" as defined by the FDCPA, the messages did not violate the FDCPA. Both parties filed motions for partial summary judgment. The court first held that the defendant violated § 1692d(6) by not leaving the caller's name and nature of business on the answering machine. However, the court then held that in subsequent phone conversations, the defendant was not responsible for disclosing the same information made in the initial phone conversation if the call was made in regard to the plaintiff's same delinquent account. Therefore, the court granted the plaintiff's motion for partial summary judgment with respect to the FDCPA claims and awarded the plaintiff statutory damages in the amount of \$1,000. Finally, the court stated that because the plaintiff only presented her own testimony as evidence of her emotional distress, she failed to satisfy the burden of proof in regard to actual damages. Therefore, the court granted the defendant's motion for summary judgment in regard to emotional distress damages.

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10TH CIRCUIT DECISIONS



REAL ESTATE SETTLEMENT PROCEDURES
ACT (ACKNOWLEDGEMENT AND
INVESTIGATION OF WRITTEN COMPLAINT)
Harris v. Am. Gen. Fin., Inc., 2007 WL 4393818 (10th Cir.
Dec. 18, 2007)

Plaintiffs financed their home and automobile through loans with the defendant in two separate accounts. One of the plaintiffs' accounts carried disability insurance and the other did not. When disability insurance was paid out, defendant distributed the proceeds toward both loans and did not remit any payment to the plaintiff. The plaintiffs sent three letters to the defendant requesting information about the account and reporting a problem. The plaintiffs brought suit against the defendant alleging that the defendant violated the Real Estate Settlement Procedures Act (RESPA). The district court granted the defendant's motion for summary judgment. The plaintiff then appealed the decision to the Tenth Circuit. The court held that while RESPA requires a servicer of a federally regulated mortgage loan to acknowledge the receipt of correspondence of a qualified written request by the borrower within 20 days, and requires appropriate corrections or an investigation be made within 60 days, the defendant did not violate these provisions. The court stated that for the first letter the plaintiff sent, the defendant sent information about the request within 60 days. As for the second two letters, the court stated that the plaintiff filed a lawsuit too fast, and therefore, the applicable time limits never expired. Therefore, the plaintiff's claims were not ripe and the court affirmed the district court's grant of summary judgment in favor of the defendant in regard to the RESPA claim.

FAIR DEBT COLLECTION PRACTICES ACT
(MISCHARACTERIZATION OF A DEBT IN
STATE COURT)
Hollis v. Stephen Bruce & Associates, 2007 WL 4287623
(W.D. Okla. Dec. 5, 2007)

Defendant, a law firm debt collector, and its partner attempted to collect a debt that the plaintiff owed to a credit card company. After the defendants initiated a

collection action against the plaintiff in state court, the plaintiff filed this action in federal court alleging that the defendants violated several provisions of the Fair Debt Collection Practices Act (FDCPA). The defendants filed a motion to dismiss. While the plaintiff had three different claims, only his claim that the defendants failed to note that the debt was disputed in the collection petition filed in state court survived dismissal. The court held that, without any other evidence, the plaintiff's own disagreement about the validity of a debt is not sufficient to prove that the defendants' collection letters and subsequent verification were inadequate. Therefore, the court held that without more, the letters could not provide the basis for claims that the defendants used false, deceptive, and misleading representations to collect a debt in violation of § 1692e(10). Second, the court held that the defendant provided adequate validation of the debt when it sent the plaintiff verification that the amount being demanded is the amount owed. Additionally, the court held that even if the creditor's affidavit by an employee that verified the amount of the debt was false, an attorney is, generally, not liable under the FDCPA for filing a lawsuit based upon a client's affidavit. However, the court held that the defendants' failure to identify the debt as disputed in the state court petition might have violated the obligation imposed by § 1692e. The court stated that the plaintiff's allegations reasonably suggest that the defendants publicly mischaracterized the legal status of the debt by omitting information that it was disputed. Accordingly, the plaintiff's claims based on the collection petition remain, and the defendant's motion to dismiss was denied.

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11TH CIRCUIT DECISIONS



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

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