

# monthly litigation update

JANUARY 2008

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



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

## SUPREME COURT DECISIONS

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

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



### TRUTH-IN-LENDING ACT (HOME OWNERSHIP AND EQUITY PROTECTION ACT (APPLICABILITY & STATUTE OF LIMITATIONS))

In re Vincent, 2008 WL 176065 (Bankr. D. Mass. Jan. 18, 2008)

Plaintiff refinanced her home through the defendant mortgage company. Shortly after refinancing, the plaintiff was unable to make payments on the loan, and the defendant notified the plaintiff that they would be foreclosing on her home. The plaintiff then filed for bankruptcy and filed a complaint against the defendant. The plaintiff alleged that the defendant violated the Truth-in-Lending Act, specifically 15 U.S.C. §1639(h), because the defendant loaned her money after failing to verify her income and without regard to her ability to pay the loan. The defendant asserted that it was entitled to dismissal of the TILA claim because the loan was not a "high cost" loan under the Home Owner's Equity Protection Act (HOEPA) and therefore § 1639(h) was inapplicable. The plaintiff did not specifically rebut the defendant's charges,

but instead argued that the defendant enticed her to enter into a transaction it knew she could not afford. The court first held that the defendant was correct, and because the total fees on the loan were only 5.8% of the total loan amount and the interest rate was less than 10% higher than treasury securities having comparable periods of maturity, the loan was not a HOEPA loan and dismissed the TILA claim. Additionally, the court stated that all TILA actions for damages must be brought within one year of the occurrence of the alleged violation. In this case, the court stated that even if the plaintiff had stated a claim for damages under the TILA, her claim would have been too late.

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



### TRUTH-IN-LENDING ACT (STATUTE OF LIMITATIONS)

McAnaney v. Astoria Financial Corp., 2008 WL 222524 (E.D.N.Y. Jan. 25, 2008)

Plaintiffs obtained a residential mortgage loan from the defendant savings and loan association. The plaintiffs alleged that the defendant improperly demanded and collected a satisfaction fee and a recording fee without disclosing the disputed fees in accord with the disclosure provisions of the Truth-in-Lending Act (TILA). The plaintiffs brought a class action lawsuit. The defendant then filed a motion for summary judgment alleging that the plaintiffs' TILA claims that accrued on or before March 15, 2003 violated the one-year TILA statute of limitations. The court granted the defendant's motion and dismissed those plaintiffs. The plaintiffs then filed a motion for partial consideration of the order arguing that the court mischaracterized a Home Equity Line of Credit as a "closed-end" line of credit instead of an "open-ended" line of credit. The court recognized this mischaracterization and stated that it would analyze the Home Equity Lines of Credit received by some plaintiffs under the applicable law. The court then stated that even with this new characterization of the plaintiffs' loans, the standard still requires the plaintiffs' claim to remain time-barred. The court held that with open-ended lines of credit, the statute of limitations begins tolling at the date that the first finance charge is accrued. Following this rule, the court stated that the plaintiffs would have had to have filed their lawsuit by June of 2003 in order to comply with

the TILA's one-year statute of limitations – nine months before the plaintiffs actually commenced the action. Therefore, the court granted the plaintiffs' motion for partial reconsideration, but found that their claim remained time-barred.

### FAIR CREDIT REPORTING ACT (NOTICE OF DISPUTE)

Cadet v. Equifax Credit Services, 2008 WL 189873 (E.D.N.Y. Jan. 28, 2008)

Plaintiff filed an action against the three major credit reporting agencies (CRAs) alleging violations of the Fair Credit Reporting Act (FCRA) when the defendants caused debts owed by his father to appear on his credit report. The defendants filed motions for summary judgment. The court first held that for the first two CRAs, the plaintiff provided no evidence that he notified them about the inaccurate information on his credit report prior to filing his initial complaint. Letters that the plaintiff had sent to the CRAs did not inform them of a dispute, but merely requested copies of the reports. The court held that not notifying a CRA of a dispute on a credit report was fatal to the plaintiff's negligence claim under the FCRA against the first two CRAs. The third CRA was alerted to the disputed information after the events transpired from which the plaintiff alleges damages. The court stated that to survive a motion for summary judgment, the plaintiff bared the burden of proving actual damages sustained as a result of the defendant's actions. In the instant case, the court held that there was no evidence that the CRA provided the plaintiff's credit information to any third party after the date he disputed information. Therefore, the court granted the defendants' motions for summary judgment.

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



### TRUTH-IN-LENDING ACT (NECESSARY DISCLOSURES)

Parker v. Long Beach Mortgage Co., 2008 WL 53276 (E.D. Pa. Jan. 3, 2008)

Plaintiffs financed two homes through the defendants with sub-prime, adjustable rate mortgage loans. After defaulting on the loans, the plaintiffs brought claims alleging that the defendants violated certain provisions of the Truth-in-Lending Act (TILA) and other state laws. After the beginning of the jury trial, the defendants filed a Rule 52(c) motion for judgment on partial findings. The

court first stated that while the plaintiffs claimed they did not receive some of the necessary information on finance charges in their TILA disclosures, they must overcome a rebuttable presumption of the delivery of the required disclosures. The plaintiffs argued that the yield spread premium (YSP) should have been disclosed as a finance charge on the TILA disclosures. The court stated that the Federal Reserve Board has ruled that fees paid to a broker as a YSP already included in the finance charge should not be double counted on the TILA disclosure statement. Additionally, the court stated that the plaintiffs' claims that they do not remember receiving the disclosure statements were not enough evidence to overcome the presumption that they received the required number of copies of the TILA notices. Therefore, the court granted the defendants' Rule 52 motion.

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

Ehrheart v. Bose Corp., 2008 WL 64491 (W.D. Pa. Jan. 4, 2008)

Plaintiff used her credit card to purchase a set of headphones from the defendant by telephone. The headphones were delivered in a box that also contained a receipt from the plaintiff's transaction. The receipt included five digits of the plaintiff's credit card number and the expiration date of her card. The plaintiff then filed a purported class action complaint claiming that the defendant willfully violated the Fair and Accurate Credit Transactions Act of 2003 (FACTA), a subset of the Fair Credit Reporting Act (FCRA), when it printed and provided her with a register receipt disclosing the expiration date of her credit card. The defendant filed a motion for summary judgment arguing that because it did not provide a receipt to the plaintiff at the point of sale or transaction, that it was not required to comply with the truncation requirements of the FACTA. The plaintiff countered by arguing that the FACTA's language referring to the "point of sale" denotes an event in time, not a place. After stating that this was a question of first impression and that there was no definitive legal authority addressing the meaning of "point of sale," the court stated the general purposes underlying the FACTA favored the plaintiff's broader reading of the phrase "point of sale." The court elaborated, stating that the relevant factor is not where the receipt is provided to the cardholder, but rather, it is that the protected information is wholly unnecessary in the context of providing a customer receipt and its inclusion on such receipt, no matter where the customer receives it, can lead to identity theft. Finally, the court, noting that internet shopping is a significant component of the total retail market, stated that this holding would protect online customers. Therefore, the court denied the defendant's motion for summary judgment.

FAIR DEBT COLLECTION PRACTICES ACT (STATUTE OF LIMITATIONS)

Sprague v. Neil, 2008 WL 140718 (M.D. Pa. Jan. 10, 2008)

Plaintiff defaulted on several credit card accounts. The credit card company hired the defendant law firm to take collection actions against the plaintiff. The defendant informed the plaintiff of his rights under the Fair Debt Collection Practices Act (FDCPA) in April of 2003. After failing to receive payment, the defendants filed a state court collection action in September of 2003. The plaintiff filed a complaint in this instant action in August of 2005. The defendant filed a motion for summary judgment alleging that the plaintiff's claims violated the one year statute of limitations mandated by the FDCPA. The court first held that the one year statute of limitations begins to run either at the date that the letter is sent by the debt collector, or in the case of a lawsuit, on the date that the complaint is served upon the plaintiff. Because the last letter from the defendant was sent to the plaintiff in June of 2003 and the lawsuit was filed in September of 2003, both of these dates indicate that the plaintiff's filing of the FDCPA action in August of 2005 violated the one year statute of limitations imposed by 15 U.S.C. § 1692k(d). Therefore, the court granted the defendant's motion for summary judgment and refused to exercise supplemental jurisdiction over the plaintiff's state law claims.

TRUTH-IN-LENDING ACT (RESCISSION)

Colanzi v. Savings First Mortgage, L.L.C., 2008 WL 161170 (E.D. Pa. Jan. 16, 2008)

Plaintiffs refinanced their home loan through the defendant mortgage company. While the plaintiffs acknowledged signing the loan documents, they alleged that they were not left copies of the documents and only received copies in the mail three weeks after they signed the loan. The plaintiffs argued that this triggered their three year right to rescission under the Truth-in-Lending Act (TILA). The defendant filed a motion to dismiss arguing that the receipt of the forms precludes application of the three-year rescissory period even when the forms were allegedly untimely. The court agreed with the defendant and held that the statute specifically contemplates the current situation by allowing the rescissory period to begin after the disclosures are delivered. The court stated that once the plaintiffs received the copies of the forms, the three-year rescissory period was not triggered, and therefore, the plaintiffs' TILA claim was time-barred. The court granted the defendant's motion to dismiss.

REAL ESTATE SETTLEMENT PROCEDURES  
ACT & TRUTH-IN-LENDING ACT (CLASS  
CERTIFICATION)

In re Community Bank of Northern Virginia, 2008 WL  
239650 (W.D. Pa. Jan. 25, 2008)

Plaintiffs brought a class action lawsuit against the defendant banks alleging various violations of the Real Estate Settlement Procedures Act (RESPA), the Truth-in-Lending Act (TILA), the Racketeering Influenced Corrupt Organizations Act (RICO), and related state laws. After the first proposed class was rejected by the court of appeals because objectors filed complaints that some TILA violations were ignored in a settlement agreement, the court again discussed the issue of the plaintiffs' motion for class certification. The plaintiffs described the class as: "all persons: 1) who entered into a loan agreement with [the defendant banks]; 2) whose loan was secured by a second mortgage deed or trust on property located in the United States; whose loan was purchased by [defendant funding corporation]; and 3) who were not members of the class certified [in a previous action]." The objectors then filed a motion to intervene alleging that because of TILA claims that were not adequately discussed, the class should not be certified. After conducting a review of the class under Rule 23 of the Federal Rules of Civil Procedure, the court concluded that the class met all of the requirements and could be certified. The objectors argued that because TILA claims were ignored in the settlement, the class should not pass the adequacy requirement of Rule 23; however, the court ruled that the TILA claims were time-barred, and therefore, the plaintiffs' failure to assert those claims did not render them inadequate representatives. The court then stated that the proposed settlement between the parties appeared to be reasonable and rejected the objectors' motion to intervene.

FAIR DEBT COLLECTION PRACTICES ACT  
(CLASS CERTIFICATION)

Richburg v. Palisades Collection LLC, 2008 WL 223416  
(E.D. Pa. Jan. 28, 2008)

Defendant initiated a state court lawsuit in an attempt to collect a debt that was owed by the plaintiff. Asserting that the statute of limitations had expired on the defendant's ability to sue for the debt, the plaintiff brought a class action lawsuit against the defendant alleging violations of the Fair Debt Collection Practices Act (FDCPA) and other state consumer protection laws. The plaintiff then moved for class certification and the defendant filed a motion for summary judgment. The court first denied the plaintiff's motion for class certification for failure to satisfy the typicality and adequacy requirements of Rule 23 of the Federal Rules of Civil Procedure. The court stated that because there was an issue as to whether the plaintiff acknowledged her debt in a communication with the defendant, the defendant would have defenses at trial that were unique to the

plaintiff's claim. An acknowledgement of debt would toll the statute of limitations and eliminate the underlying wrong that the plaintiff's FDCPA claim attempted to remedy. The court stated that resolving that issue would require significant preparation on the part of both parties and leave a question of credibility to the jury. The court stated that this prevented the plaintiff from bringing a class action suit and dismissed her motion for class certification. The court then addressed the defendant's motion for summary judgment. The court first held that the plaintiff was correct in arguing that the four year Pennsylvania statute of limitations should apply. The court stated that the argument presented by the defendant, that a six-year statute of limitations applies for an "account stated," was inaccurate and did not properly describe the parties' credit transaction. Additionally, the court stated that a ruling on whether an acknowledgement defense applies would hinge on credibility determinations better left to a jury. Therefore, the court denied the defendant's motion for summary judgment.

FAIR DEBT COLLECTION PRACTICES ACT  
(VICARIOUS LIABILITY, STATUTE OF  
LIMITATIONS, SERVICE CHARGES &  
ATTORNEY REVIEW)

Martsolf v. JBC Legal Group, P.C., 2008 WL 275719  
(M.D. Pa. Jan. 30, 2008)

Plaintiff wrote two bad checks to a retail store. The store then sold the debt to the defendant debt collection agency, who then hired the defendant debt collection law firm to collect the debt. The firm sent two letters to the plaintiff that requested payment of the debt, threatened a lawsuit if payment was not received and described a service charge of \$30 on each check. The plaintiff filed a class action lawsuit against the defendants alleging that the letters violated several provisions of the Fair Debt Collection Practices Act (FDCPA). Additionally, the plaintiff advanced the theory that the debt collection agency was vicariously liable for any violations committed by the law firm that it hired to collect debts on its behalf. Both parties filed motions for summary judgment and the court discussed each claim in turn. First, the plaintiff argued that the defendants violated 15 U.S.C. § 1692e(2)(A) of the FDCPA by attempting to collect a time-barred debt. The court first stated that under the Pennsylvania Uniform Commercial Code (UCC), recovery for a dishonored check must be commenced within three years after the dishonor of the check or ten years after the date of the check, whichever expires first. The ten year limit expired one month before the defendants sent the letters to the plaintiff; therefore, the court stated that the relevant question was whether the least sophisticated consumer would perceive the letters as a litigation threat. The court held that because the letters contained the phrase "you may be subject to a civil penalty, court costs, and reasonable attorney fees after suit has been filed," that the letters would cause the least sophisticated debtor to believe

that he or she would be presented with a summons and complaint if payment was not made. Therefore, the court granted summary judgment for the plaintiff on this claim. Second, the plaintiff alleged that, by law, the defendants were not allowed to collect a \$30 service fee, and therefore, violated § 1692f(1) of the FDCPA. Citing other authority, the court stated that the UCC authorizes the collection of a returned check fee and that Federal Trade Commission (FTC) commentaries further support this conclusion. Therefore, the court granted the defendants' motion for summary judgment on this claim, and denied that of the plaintiff. Third, the plaintiff argued that because the letters contain the \$30 service fee, they are a misrepresentation of the amount of debt actually owed and violate § 1692e(2)(A) of the FDCPA. The court held that because the letters itemize the amounts owed, and rightfully include the \$30 service fee, the defendants did not misrepresent the amount due. Therefore, the court granted the defendants' motion with respect to that claim and denied the plaintiff's motion. Fourth, the plaintiff alleged that because the letters had the signature of an attorney at the bottom of the page, they violated § 1692e(3) of the FDCPA which prohibits falsely representing or implying that any individual is an attorney or that any communication is from an attorney if, in fact, no attorney reviewed the debt. The court stated that evidence showed the defendants used a computer program which examined the information in a file and generated the letters without individual review. The defendants' attorneys personally reviewed the files in bulk numbers based upon the results of computer programs applied to large amounts of data. The court stated that this rapid review process did not demonstrate the sort of independent analysis and personal opinion required by § 1692e(3) of the FDCPA and granted the plaintiff's motion for summary judgment; the defendants' motion was denied. Finally, the plaintiff argued that the debt collection agency should be vicariously liable for any infractions committed by the defendant law firm hired to collect debts on its behalf. The court agreed with the plaintiff, stating that the client of an attorney who is a debt collector is vicariously liable for the attorney's misconduct if the client is itself a debt collector. After confirming that both defendants were debt collectors, the court found that the debt collection agency was liable for any violations of the FDCPA committed by its law firm and granted summary judgment on the issue in favor of the plaintiff; the court denied the defendants' motion for summary judgment.

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



### TRUTH-IN-LENDING ACT (EQUITABLE MORTGAGE DOCTRINE)

Clemons v. Home Savers, L.L.C., 2008 WL 140846 (E.D. Va. Jan. 15, 2008)

Plaintiff was late on her mortgage payments and close to losing her home to foreclosure. She then contacted defendant corporation that offered to assist her in escaping foreclosure. The defendant purchased the plaintiff's house, paid some of her arrearages, her current due mortgage payment and some outstanding payday loans. The plaintiff agreed to pay rent on her home for five months with an option to repurchase the property for 90 percent of its then appraised fair market value. After the plaintiff fell behind on her rental payments and failed to follow other instructions under the contract for the purchase of her house, the defendant informed her that it would begin eviction proceedings. The plaintiff then filed this action alleging that the defendant violated the Truth-in-Lending Act (TILA) and other state consumer protection laws. Both parties filed motions for summary judgment. The court first stated that the pivotal question was whether the transaction was an absolute sale or, under the equitable mortgage doctrine, was actually a loan. The court held that because there was no debt owed by the grantor to the grantee after the transaction that the transaction was actually a sale; therefore, federal law did not govern the transaction and the parties were bound by the terms of their agreement. The court stated that while the plaintiff had the option to repurchase the property, that option did not give rise to a debt. The court then granted the defendant's motion for summary judgment on the TILA and state law claims.

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



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

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



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

King v. Ocwen, 2008 WL 111260 (E.D. Mich. Jan. 8, 2008)

Plaintiffs allege that the defendants violated certain provisions of the Fair Debt Collection Practices Act (FDCPA). The plaintiffs argued that the defendant law firm sent the plaintiffs a letter stating that they were a debt collector attempting to collect a debt. The debts listed were those of the plaintiffs' mortgage loans which were in default. The defendants threatened foreclosure and sale of the property if the debts were not paid by the plaintiffs. The plaintiffs further alleged that they requested validation of the debts which was never received. The defendants filed motions to dismiss. The court first held that the defendant mortgage lender could not be held liable for any violations of the FDCPA because it was not a debt collector. Second, the court held that the defendant

mortgage servicing company was also not a debt collector. The court stated that the plaintiff failed to state any allegations that defendant's business was the collection of debt, or that it regularly collected or attempted to collect debts owed or due another. Third, the defendant bank asserted the same arguments (that it was not a debt collector) and the court found them persuasive. The court stated that because the debt was not in default at the time it was transferred to the defendant bank, it could not be held liable under the FDCPA. Therefore, the court dismissed the plaintiffs' FDCPA claims against all defendants.

### FAIR DEBT COLLECTION PRACTICES ACT (ARBITRATION AGREEMENT)

Myles v. Wolpoff & Abramson, L.L.P., 2008 WL 126620 (E.D. Mich. Jan. 14, 2008)

Defendant initiated an arbitration proceeding to collect on a debt that was owed by the plaintiff. Although the arbitration decision favored the plaintiff, the plaintiff brought the current action alleging that the defendant failed to provide a signed agreement to arbitrate between the parties. The plaintiff argued that this failure to provide a document, yet still force arbitration, constituted a false, deceptive, or misleading representation in violation of 15 U.S.C. § 1692e of the Fair Debt Collection Practices Act (FDCPA) and other state consumer protection laws. The defendant filed both a motion to dismiss and a motion for summary judgment. The plaintiff cited to authority in which a state court dismissed an arbitration award because there was no signed document provided by the creditor. The court stated that these cases do not support the plaintiff's broad proposition that a written arbitration agreement is not binding upon a party unless the document providing for arbitration is signed by that party. The court continued, stating that even if it did, the cases are inapplicable because the plaintiff does not seek to confirm or vacate the arbitrator's order. Finally, the court held that because the plaintiff chose to collaterally attack the arbitration award in federal court by alleging federal claims under the FDCPA instead of utilizing the Federal Arbitration Act's (FAA) exclusive remedy for challenging arbitration awards, his FDCPA claims failed as a matter of law. Therefore, the court granted summary judgment to the defendant on the plaintiff's FDCPA claims and declined to exercise supplemental jurisdiction over his state law claims.

REAL ESTATE SETTLEMENT PROCEDURES ACT (PREEMPTION & OVERCHARGE OF FEES)  
Molosky v. Washington Mutual Bank, 2008 WL 183634  
(E.D. Mich. Jan. 18, 2008)

The plaintiffs paid off their home mortgage loan before the maturity date. After the payment, the defendant charged the plaintiff a \$30 payoff settlement fee and a \$14 recording fee. The plaintiffs claimed that by charging these fees, the defendant violated the Real Estate Settlement Procedures Act (RESPA) and other state laws. The defendant filed a motion to dismiss. The court first held that the state law claims were preempted by the federal claims. The court held that federal regulations have no less preemptive effect than federal statutes and the Federal Home Loan Bank Board has completely occupied the field of regulating federal savings associations. The court stated that state law may not regulate matters related to the defendant's collection of improper loan-related fees or prepayment charges. Therefore, the court dismissed all state law claims. In regard to the RESPA claims, the court stated that the plaintiffs failed to state a claim for two reasons. First, the court held that RESPA has no application to the satisfaction, prepayment, or release of a mortgage. The court continued, stating that RESPA only applies to fees received for the rendering of a real estate settlement service. The court interpreted settlement to indicate the final transaction between the buyer and seller. Second, the plaintiffs alleged that the defendant violated 12 U.S.C. § 2607(b) which prohibits persons from splitting any charge made or received for the rendering of a real estate settlement service. The court held that the plaintiffs did not allege that the defendant split the fee, but rather charged a fee that was greatly disproportionate to the actual administrative costs endured by the defendant. The court stated that the overwhelming weight of case law holds that overcharges are not covered by § 2607(b). Therefore, the court granted the defendant's motion to dismiss the RESPA claims.

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7<sup>TH</sup> CIRCUIT  
DECISIONS



FAIR DEBT COLLECTION PRACTICES ACT (DISCLOSURE OF INTEREST)  
Wahl v. Midland Credit Mgmt, Inc., 2008 WL 149962  
(N.D. Ill. Jan. 10, 2008)

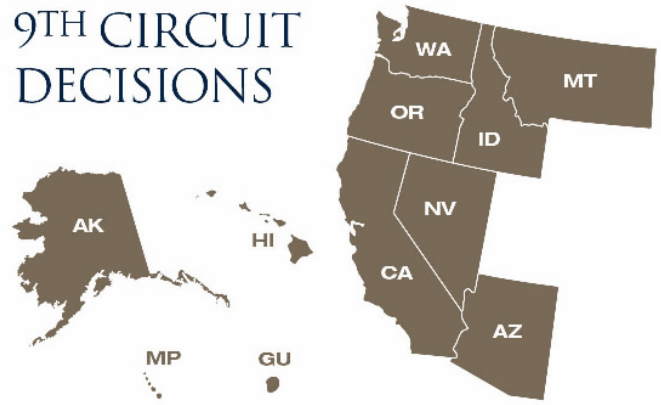
Plaintiff filed suit, on behalf of herself and others similarly situated, alleging that the defendant debt collectors violated the Fair Debt Collection Practices Act (FDCPA). Specifically, the plaintiff alleged that the defendants sent collection letters containing false statements regarding the breakdown of principal and interest owed by debtors. Both parties filed cross-motions for summary judgment. The plaintiff's argument rested upon her receipt of two letters from the debt collection agency. Neither letter provided the plaintiff with the amount of interest charged on her balance by the original creditor before it charged-off the debt. The letters listed the original balance and interest as "principal balance" and provided only the interest charged after the debt collector assumed the debt. Looking to Seventh Circuit precedent, the court held that the defendants were correct in arguing that only the interest charged by the defendants should be described on the collection letters. The court stated that it was of no consequence how much of the principle balance owed to the original creditor was interest. Therefore, the court held that the plaintiff failed to establish that the collection letters contained false statements in violation of the FDCPA and granted the defendants' motion for summary judgment.

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



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



TRUTH-IN-LENDING ACT (RESCISSION)  
Reck v. Town & Country Credit Corp., 2008 WL 53768  
(D. Minn. Jan. 3, 2008)

Plaintiff refinanced her home with the defendant credit corporation. The plaintiff signed the loan, but stated that she never received her notice of rescission or material disclosures from the defendant as required under the Truth-in-Lending Act (TILA). Nearly three years after she signed the loan agreement, the plaintiff filed suit in state court asserting her right of rescission under the loan. The defendant removed the case to federal court and filed a motion to dismiss. The defendant argued that the doctrine of unclean hands and laches barred the plaintiff from the equitable remedy of rescission. The defendant stated that the plaintiff received and signed the documents, that her signature creates a presumption of receipt, and that the plaintiff failed to overcome that presumption. The court first stated that the plaintiff's claim that she never received the loan documents was without any support in the record. The defendant presented clear evidence that the plaintiff actually did receive the loan documents. Therefore, the court held that the plaintiff had until three days after executing the mortgage to rescind. Accordingly, the court held that the notice of rescission the plaintiff mailed to the defendant was not timely and was dismissed her federal and state law claims.

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FAIR DEBT COLLECTION PRACTICES ACT  
(DEBT COLLECTOR'S STATE COURT  
ATTORNEY'S FEES)  
Cisneros v. Neuheisel Law Firm, P.C., 2008 WL 65608 (D.  
Ariz. Jan. 3, 2008)

Plaintiff defaulted on a debt owed to a credit card company. The credit card company assigned the debt to a debt collector that then hired the defendant law firm to represent it in an action to collect the outstanding balance, attorney's fees and court costs from the plaintiff. The plaintiff then filed the current action stating that by requesting attorney's fees and court costs in its state court action, the defendant violated the Fair Debt Collection Practices Act (FDCPA). Specifically, the plaintiff alleged that because the fees were 25% of the principal amount owed, the fees were not reasonable and the defendant was false and deceptive in not disclosing how the fees were calculated or informing the plaintiff that some of the fees would be paid to a non-legal entity. The defendant filed a motion for summary judgment. The court first held that it would not decide the issue of whether a state court complaint is a creditor-debtor communication under the FDCPA. The court then held that if the communication was covered by the FDCPA, the statute would not be offended by the complaint's prayer for attorney's fees. The court held that the defendant was allowed to set a percentage for attorney's fees instead of collecting what was actually charged to the debt collection agency. The court allowed this percentage charge because the cardholder agreement stated that the defendant could recover "reasonable" attorney's fees and not "actual" attorney's fees. Finally, the court stated that this was not the arena to discuss the reasonableness of the attorney's fee award. The court held that the plaintiff could have challenged the ruling in the state court, however, it did not. Therefore, the court granted the defendant's motion for summary judgment.

## TRUTH-IN-LENDING ACT (ATTORNEY'S FEES)

Moore v. Bank of America, N.A., 2008 WL 68851 (S.D. Cal. Jan. 7, 2008)

After the defendant failed to refund the plaintiff for a disputed purchase on his credit card, the plaintiff filed suit alleging various violations of the Truth-in-Lending Act (TILA). The parties entered into a settlement agreement and the plaintiff moved the court for an award of attorney's fees. The court granted attorney's fees in favor of the plaintiff in the amount of \$390,765.79. The defendant appealed the award to the Ninth Circuit. That court then affirmed the ruling of the district court. The plaintiff then filed this motion, requesting attorney's fees for the appeal submitted to the Ninth Circuit by the defendant. The plaintiff requested \$172,408.00 in fees incurred in opposing the appeal and in filing the instant motion for fees. The court first found that rates for the plaintiff's attorneys ranging from \$550/hour to \$150/hour were all reasonable. The defendant then argued that the 459.5 hours of attorney and paralegal work on the appeal and the instant motion was excessive. The defendant submitted evidence that its own legal counsel only spent 251 hours on the appeal. The court stated that while a comparison of fees incurred by the non-prevailing party is useful, it should not control the analysis. The court held that because of the success achieved by the plaintiff's counsel and because the descriptions of time on the plaintiff's submissions were specific, the plaintiff's request for hours was deemed reasonable. The court did state that 9.35 hours of the total amount billed had descriptions that were too vague and removed them from the total. Therefore, the court awarded the plaintiff \$170,257.25 in attorney's fees based upon 450.15 hours of work at hourly rates from \$150 to \$550.

## REAL ESTATE SETTLEMENT PROCEDURES ACT (FEE SPLITTING/MARKUPS)

Morales v. Countrywide Home Loans, Inc., 2008 WL 239185 (N.D. Cal. Jan. 10, 2008)

Plaintiff, on behalf of herself and others similarly situated, brought suit alleging that the defendant charged consumers improperly for services related to mortgages in violation of the Real Estate Settlement Procedures Act (RESPA). Specifically, the plaintiff alleged that the defendant violated section 8(b) of the RESPA when it marked-up charges for services associated with mortgages. The plaintiff argued that the defendant charged higher fees for tax services and flood certification by engaging third-party vendors to perform these services and then charging the plaintiffs a much higher rate. After acknowledging a circuit split on the issue, the court held that the anti-kickback provision of section 8(b) was intended to prohibit referral fee arrangements and that it does not prohibit markups unless a portion of the charge is split or kicked back to the third-party vendor. The court stated

that the text of the statute is clear and unambiguous and does not import a price-control into section 8(b). The court stated that the defendant could charge customers any rate for services that it performs without violating the RESPA. Therefore, the court granted the defendant's motion to dismiss the plaintiff's RESPA claim.

## TRUTH-IN-LENDING ACT (NOTICE OF RATE CHANGE)

Williams v. Washington Mutual Bank, 2008 WL 115097 (E.D. Cal. Jan. 11, 2008)

Defendant issued a credit card to the plaintiff. In the initial cardholder agreement, the defendant informed the plaintiff that it could raise his default annual percentage rate (APR) at anytime upon default. The plaintiff then defaulted on the agreement and the defendant raised the default APR before informing the plaintiff in his monthly billing statement. The plaintiff then filed suit alleging that by not informing him of the change in APR, the defendant violated the Truth-in-Lending Act (TILA) and other state consumer protection laws. The defendant filed a motion to dismiss the claims. The court first held that because the change in APR was adequately described in the original cardholder agreement, notification upon default was not necessary. Additionally, the court held that the terms of the original agreement, which specified the amount of the potential rate increase, and the actions that would trigger such an increase, were specific enough to satisfy the TILA. Therefore, the court dismissed the plaintiff's TILA claims for failure to state a claim upon which relief could be granted.

## FAIR CREDIT REPORTING ACT (ATTORNEY'S FEES)

Yeagley v. Wells Fargo & Co., 2008 WL 171083 (N.D. Cal. Jan. 18, 2008)

Plaintiff filed a class action lawsuit claiming that the defendant bank obtained the plaintiff's credit report without a permissible purpose in violation of the Fair Credit Reporting Act (FCRA). The parties entered into a settlement agreement by which each individual plaintiff was awarded two free credit reports and a \$50 rebate on a mortgage loan through the defendant. The court stated that of the 3.8 million class members who received the mortgage solicitation, only 29,168 submitted qualified claims forms (less than one percent of the class). The settlement required the defendant to pay 1.5 million in attorney's fees; however, the court stated that it did not have to uphold such an amount for the settlement to remain valid. The court first stated that it accepted the settlement offer because, while it offered little value to the class, the plaintiff's case was weak and the class could not do better if the court rejected the settlement. The court held that, despite the class counsel's claim that the settlement was worth \$114 million, the actual value of the settlement was, at most, \$1,042,500.00. Therefore, the

court held that an appropriate attorney's fee award in such a case is 25 percent of both the amount of the settlement and the amount of the attorney's fee award as well. Accordingly, the court awarded the plaintiff's counsel \$260,625.00 as 25 percent of the settlement value and \$65,156.00 as 25 percent of the attorney's fee award, for a total of \$326,000.00 in total attorney's fees.

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

Kinh Tong v. Capital Mgmt. Svc. Group, Inc., 2008 WL 171035 (N.D. Cal. Jan. 18, 2008)

Defendant was found liable for technical violations of the Fair Debt Collection Practices Act (FDCPA). The court entered the parties' stipulated settlement which awarded the plaintiff \$1,500 plus reasonable attorney's fees and costs provided for under the FDCPA. The plaintiff moved for attorney's fees in the amount of \$16,968.50 and costs and expenses in the amount of \$401.07. The court found that the fee request was unreasonable for several reasons. First, the court found that the dispute was a relatively simple one and the lawsuit resulted in a modest recovery that could have resulted in a defense verdict. Second, the court held that the defendant did not likely intend to violate the statute and the FDCPA violation was a mistake. Third, the court stated that the dispute was likely not settled earlier because of the counsel's desire for more fees rather than any concern about the adequacy of the recovery available for his client. The court stated that it did not have an issue with the \$300/hour fee charged by the plaintiff's counsel and the \$125/hour for the law clerk because of their experience in FDCPA cases. However, the court stated that the case was not complex and should not have required counsel to have expended 65.5 hours. The court stated that with a focus on reasonableness, the case could have been resolved with no more than ten hours of work by the plaintiff's counsel and twelve hours of work by a law clerk. Therefore, the court awarded \$4,500 in attorney's fees. The court stated that the reduction was based on the court's judgment of what hours would have been necessary to expend to resolve the case if counsel had been reasonably focused on the agenda. Finally, the court awarded the \$401.07 in fees requested by the plaintiff because the defendant did not oppose the request.

**REAL ESTATE SETTLEMENT PROCEDURES  
ACT (FEE SPLITTING)**

Stetler v. Greenpoint Mortgage Funding, Inc., 2008 WL 192405 (E.D. Cal. Jan. 23, 2008)

Plaintiff filed suit against the defendant mortgage company alleging that it violated the anti-kickback provision of the Real Estate Settlement Procedures Act (RESPA) by paying a mortgage broker a yield spread premium (YSP) on the plaintiff's home mortgage loan. The defendant filed a motion for summary judgment. The court held that the

plaintiff's argument failed as to the RESPA claim because YSPs do not violate the fee splitting provision of the statute. The court stated that where a YSP was paid to a mortgage broker for exchange of services actually rendered, the RESPA anti-kickback provision is not violated. Therefore, the court granted summary judgment in favor of the defendant on the RESPA claim.

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



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

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



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

Thornton v. Wolpoff & Abramson, L.L.P., 2008 WL 185517 (11th Cir. Jan. 23, 2008)

Defendant debt collector contacted the plaintiff in an attempt to collect a debt owed by her ex-husband. After the plaintiff informed the defendant that she was not responsible for the debt and would not pay it, the defendant later left her a voicemail message concerning the debt. The plaintiff sued claiming several violations of the Fair Debt Collection Practices Act (FDCPA). The court granted summary judgment for the defendant on all claims except for her claim that the defendant communicated with her after she notified the defendant that she refused to pay the debt. The jury then returned a verdict for the plaintiff on her final claim, refused to award her actual damages, and awarded statutory damages in the amount of one dollar. The plaintiff then filed a motion requesting attorney's fees in the amount of \$49,502.50. The district court reduced the amount to \$7500, stating that the plaintiff's counsel needlessly pursued litigation when a reasonable resolution was available without the necessity of trial. Both parties then appealed the decision to the Eleventh Circuit. The court first held that reducing the lodestar rate by 85% in light of the nominal amount of the statutory damages awarded was not an abuse of discretion. The court then stated that the defendant's argument that the plaintiff is not entitled to any attorney's fees because she did not bring a "successful action" was incorrect. The court stated that the difference between zero dollars and one dollar is the difference between an unsuccessful action and a successful action. The court recited previous precedent which stated that when damages are nominal, the district court may award low fees or no fees without reciting the twelve factors bearing on reasonableness. Therefore, the court affirmed the ruling of the district court and did not adjust the award of attorney's fees.

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

St. Claire v. Trauner, Cohen & Thomas, L.L.P., 2008 WL 151542 (N.D. Ga. Jan. 11, 2008)

Defendant debt collection law firm sent letter to plaintiff informing her of her right to dispute a debt owed under the Fair Debt Collection Practices Act (FDCPA). The plaintiff then requested validation and disputed the debt sought to be collected by the defendant. The defendant never responded. The plaintiff then filed this lawsuit alleging that the defendant violated several provisions of the FDCPA. After discussions, the plaintiff accepted a settlement offer that allowed for the maximum statutory damages and an award of reasonable attorney's fees. The plaintiff filed a motion for attorney's fees requesting a rate of \$300/hour for her counsel. The defendant objected to the rate, arguing that the plaintiff's counsel "makes her living filing FDCPA cases" and was previously questioned for her conduct in another case. The court first held that neither of those issues were relevant to determining the counsel's hourly rate in the instant case. The court then held that because of the relative simplicity of the case and the fact that it did not involve any complex issues \$250/hour was a more reasonable rate. The court decided that the 8.85 hours expended by the plaintiff's counsel was reasonable, multiplied the two together and awarded the plaintiff \$2,212.50 in attorney's fees and \$375 in court costs.

### FAIR DEBT COLLECTION PRACTICES ACT (CONSUMER DEBT)

Laufman v. Phillips & Burns, Inc., 2008 WL 190604 (M.D. Fla. Jan. 22, 2008)

Plaintiff sued the defendant debt collector alleging various violations of the Fair Debt Collection Practices Act (FDCPA) and other state consumer protection laws. The defendant moved for summary judgment arguing that the debt owed by the plaintiff was not a consumer debt, and therefore, was not subject to the collections provisions of the FDCPA. Additionally, the defendant argued that there was no evidence of any emotional distress suffered by the plaintiff. In a brief opinion, the court stated that evidence showed that the debt was, in fact, a consumer debt. An affidavit by the plaintiff stated that the debt arose from the use of his private credit card. Additionally, the defendant's president stated that the company purchases consumer debts, not business debts and that the defendant purchased the debt from a company that sells mainly credit card debts. Additionally, the president stated that the debts are all debts arising from household and family purchases, not business-related debts. Finally, without explanation, the court held that the record also included evidence that the plaintiff suffered emotional distress. Therefore, the court denied the defendant's motions for summary judgment.

REAL ESTATE SETTLEMENT PROCEDURES  
ACT (FEE SPLITTING)

Mallory v. GMS Funding, LLC, 2008 WL 276578 (S.D.  
Ala. Jan. 30, 2008)

Plaintiff obtained a real estate mortgage loan from the defendant. The defendant charged the plaintiff a “title insurance” charge of \$255.85 and a “recording fee” of \$90.00. The actual cost for the insurer’s filed rate was \$179.00 and the fee charged the defendant by the probate court for recording was \$50.50. The plaintiff alleged that by overcharging the amounts to the plaintiff, the defendant violated section 8(b) of the Real Estate Settlement Procedures Act (RESPA). The court first held that the \$76.85 charged to the plaintiff beyond the filed title insurance rate did not actually compensate the defendant for services performed under 8(b), but because it had already accounted for these costs in other fees, the \$76.85 was split with the title insurer. The court stated that while previous cases have shown that section 8(b) supplies no cause of action for an overcharge, the plaintiff actually alleged that the defendant was already compensated for its services in connection with the title policy by payments it received from the plaintiff under other line items. Therefore, the court held that because the defendant did not acknowledge or dismiss this argument, it was not entitled to dismissal. The court then stated that the plaintiff did not adequately plead the other sections of her complaint and the court would not devise arguments on her behalf. Therefore, the court denied the defendant’s motion to dismiss in regard to the insurance charge, but granted the motion to dismiss in respect to all other claims.



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