

monthly litigation update

JULY 2008

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



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

SUPREME COURT DECISIONS

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

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1ST CIRCUIT DECISIONS



FAIR DEBT COLLECTION PRACTICES ACT (ACTUAL DAMAGES, STATUTORY DAMAGES & ATTORNEY'S FEES)

Sweetland v. Stevens & James, Inc., 2008 WL 2619757 (D. Me. July 2, 2008)

Plaintiff suffered a heart attack in April of 2007 and fell behind on paying her bills. The plaintiff sought legal advice concerning filing for bankruptcy. One of her outstanding debts was a \$9,428.51 debt for landscaping work. The landscaping debt was referred to the defendant, Stevens & James, Inc. (Stevens) in October of 2007. One of Stevens' employees (Employee) made two threatening phone calls to the plaintiff and one threatening call to a paralegal who was giving legal advice to the plaintiff. The plaintiff suffered anxiety attacks, crying spells, nausea, and disturbed sleep. After speaking with the paralegal, Employee made no further attempts to contact the plaintiff. The plaintiff brought suit against Stevens and Employee under the Federal Debt Collection Practices Act (FDCPA) and state law seeking \$15,000 in actual damages, \$1,000 in statutory damages, attorney's fees of \$3,115.00,

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and costs of \$718.50. The plaintiff moved for default against Stevens and the Clerk entered default in April 2008. A damages hearing was scheduled and at the damages hearing, the plaintiff, her daughter, and the paralegal testified to the effects of the threatening phone calls. Considering actual damages, the Court found that Employee's actions were improper but less egregious than the conduct in other cases. Noting that the purpose of actual damages are to fairly compensate the plaintiff rather than to punish or deter the defendant, the Court reduced actual damages to \$2,500.00 and awarded statutory damages of \$250.00, \$3,115.00 in attorney's fees and \$405.00.

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2ND CIRCUIT DECISIONS



TRUTH IN LENDING ACT (RIGHT TO RESCIND NOTICE)

Aubin v. Residential Funding Co., LLC, 2008 WL 2736037 (D. Conn. July 11, 2008)

Plaintiffs refinanced their home with two mortgages. The closing was originally scheduled for February 28, 2006, but did not occur until March 1, 2006. All of the documents were dated February 28, 2006, and were signed by the plaintiffs. The plaintiffs sought to rescind the mortgages by sending written notices of rescission approximately a year later. After receiving no response from the defendants, the plaintiffs filed suit alleging that the Rescission Notice violated the Truth in Lending Act (TILA)'s notice requirements. The plaintiffs argued that the rescission notice provided an inaccurate deadline because it was not dated the date of the closing and that the rescission notice containing no information defining the meaning of business days. The defendants responded that TILA requires only clear and conspicuous rather than perfect notice, that use of a Rescission Notice that is identical to the Federal Reserve Board (FRB)'s published and adopted model form provides an impenetrable shield against TILA attacks, and that use of the FRB model form entitles the defendants to the presumption of TILA compliance, which the plaintiffs had failed to rebut. The court held that the FRB form did not entitle the defendants to an impenetrable shield because the form did not provide the correct dates. In resolving the quality of

notice, the court held that TILA requires clear and conspicuous notice and that the defendants failed to provide such in that the Rescission Notice was dated incorrectly and did not define the meaning of "business days." Thus, the court found that the defendants had not provided clear and conspicuous notice and that the plaintiffs had overcome the presumption of TILA compliance. Accordingly, the court denied the defendants' motion to dismiss.

FAIR DEBT COLLECTION PRACTICES ACT (DEFINITION OF DEBT COLLECTOR & FALSE NAME EXCEPTION)

Williams v. Citibank, N.A., 2008 WL 2757079 (S.D.N.Y. July 17, 2008)

Plaintiff had two credit card accounts with the defendant. The plaintiff underpaid one of the accounts, and the defendant raised interest rates on both accounts. The plaintiff filed suit alleging violations of the Fair Debt Collection Practices Act (FDCPA) and other state law claims. The defendants moved to dismiss with prejudice the FDCPA claim and every state claim except one, arguing that the defendants are not "debt collectors" under the FDCPA and that the state law claims lacked subject matter jurisdiction. The court found that the plaintiff had not alleged facts indicating that either defendant was a debt collector. However, the court did find that the plaintiff might have intended to assert a claim under the false name exception, which allows creditors to become subject to the FDCPA if they use pseudonyms or false names to give the impression that a third party is collecting or attempting to collect such debts. In addition, the court found that the state law claims would more appropriately be heard by a state court. Accordingly, the court dismissed the plaintiff's claim without prejudice, allowing for the possibility of a second amended complaint.

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FAIR CREDIT REPORTING ACT (FAILURE TO INVESTIGATE A DISPUTE)

Klotz v. Trans Union, LLC, 2008 WL 2758445 (E.D. Pa. July 16, 2008)

Plaintiff sent documents prepared by a credit repair organization (CRO) to the defendant disputing certain items in the plaintiff's credit report. The credit reporting agency (CRA) sent the plaintiff form letters declining to investigate whether the disputed items were accurate. The plaintiff alleged that the CRA's refusal to investigate constituted a violation of the Fair Credit Reporting Act (FCRA). The defendant filed a motion for summary judgment on the basis that the disputes were not "by" the plaintiff but were instead by the CRO. The plaintiff played no role in formulating and bringing forth the disputes others than signing and mailing the disputes to the defendant. The plaintiff argued that the FCRA should be construed broadly to favor the consumer and that the FCRA does not forbid consumers from using credit counselors. In addition, the plaintiff filed a motion for additional discovery under Rule 56(f) of the Federal Rules of Civil Procedure. While agreeing that the law did not prohibit the plaintiff from seeking assistance from credit counselors, the court found that the plaintiff had played such a trivial role in the dispute process that the dispute could not be said to have come from him. In addition, the court held that a CRA is not required to reinvestigate a dispute submitted by a third party on behalf of a consumer. Finally, the court held that none of the information sought through further discovery by the plaintiff would preclude summary judgment. Accordingly, the court granted the defendant's motion for summary judgment, taking pains to note that this was a fact-specific decision, and denied the plaintiff's motion to allow additional discovery.

FAIR DEBT COLLECTION PRACTICES ACT (DIRECT & MISLEADING COMMUNICATIONS)

Smith v. Lyons, Doughty & Veldhuius, P.C., 2008 WL 2885887 (D. N.J. July 23, 2008)

The defendant was assigned the rights to collect a debt from the plaintiff through a contract with another debt collector. The assignor debt collector had sent a dunning letter to the plaintiff and the plaintiff had responded with a letter from his attorney informing the collector of the plaintiff's representation and requesting that the collector cease direct communications with the plaintiff. Several months later the assignee debt collector sent the plaintiff another dunning letter. The plaintiff filed suit on behalf of himself, and others similarly situated, alleging that the assignee debt collector's letter violated seven provisions of the Fair Debt Collection Practices Act (FDCPA). The

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FAIR DEBT COLLECTION PRACTICES ACT (ATTORNEY INVOLVEMENT)

Smith v. Harrison, 2008 WL 2704825 (D.N.J. July 7, 2008)

Plaintiff received medical services on from Cape Emergency Physicians (Cape). The defendant is an attorney who represents Cape. The defendant sent two collection letters to the plaintiff on attorney letterhead. Both letters were dated the same, and both identified Cape as the provider and the plaintiff as the patient. The letters identified two different account numbers and listed different balances owed (\$264.00 and \$364.00). The plaintiff alleged that the debt collection practices of the defendant violate the Fair Debt Collection Practices Act (FDCPA) because the letters indicate a level of attorney involvement without any meaningful attorney review. The letters also contained the following disclosure:

IN ACCORDANCE WITH THE FAIR DEBT COLLECTION PRACTICES ACT YOU ARE HEREBY ADVISED THAT THIS COMMUNICATION IS NOT INTENDED TO IMPLY THAT AN ATTORNEY HAS REVIEWED THE DETAILS OF YOUR ACCOUNT PRIOR TO THE SENDING OF THIS NOTICE. THIS OFFICE IS RELYING UPON THE REPRESENTATION OF THE CREDITOR THAT YOU OWE THE AMOUNT CLAIMED.

The defendant moved to dismiss the plaintiff's complaints on the basis that it included an appropriate disclaimer in the letters. Based on the letterhead and the "legalese" of the disclaimer, the plaintiff argued that the debt collection letters confuse the least sophisticated debtor. The court held that the plaintiff was correct in arguing that the defendant's disclaimer could mislead the least sophisticated debtor because it was written in legalese and because the letter could be interpreted in more than one way, one meaning being incorrect. Accordingly, the court denied the defendant's motion to dismiss the plaintiff's complaint finding that the plaintiff had stated a claim under the FDCPA.

plaintiff styled the class action as one brought on behalf of “all consumers and their successors in interest . . . who have received debt collection letters and/or notices from the [d]efendant[] which are in violation of the FDCPA” The defendant filed a motion to dismiss for failure to state a claim. The defendant first argued that the plaintiff’s two claims asserting FDCPA violations for contacting the plaintiff directly should be dismissed insofar as they seek class action relief. The court agreed with the defendant, stating that any class action claim involving the defendant contacting a debtor who is represented by counsel would require an individualized assessment of whether the defendant knew about the representation and whether the defendant contacted the debtor directly. The court stated that such an assessment would not allow the plaintiff to satisfy the predominance requirement of Rule 23(b)(3) of the Federal Rules of Civil Procedure. The plaintiff’s third claim stated that the defendant inadequately provided the amount due in the dunning letter by requesting payment “in the amount of \$5,740.55 plus unpaid accrued interest, which is \$5,028.90.” The defendant argued that this disclosure was sufficient; the court disagreed. The court stated that a debt collector must identify the date as of which payment would suffice to pay the debt in full and inform the plaintiff of whether interest would continue to accrue during collection. The plaintiff then argued that because of the inadequate balance information, the defendant purposely used misleading information in order to collect a debt. The defendant asserted that the letter was not deceptive; the court again disagreed. The court held that because the letter could have several different meanings concerning the interest due, that a least sophisticated consumer could find the letter misleading. The court then held that the defendant did not violate the FDCPA by stating in its letter that “*we* will assume that the debt is valid” if not disputed within 30 days. While the plaintiff argued the use of “*we*” was misleading due to the assignment of the debt, the court held that even an unsophisticated consumer would not be misled by the statement. The court then held that because the letter sent by the defendant was the second attempt at debt collection, it did not have a duty to inform the plaintiff that it was attempting to collect a debt and that any information provided would be used for that purpose. Finally, the court held that declaratory and injunctive relief were not available under the FDCPA and dismissed those claims. Accordingly, the court granted in part and denied in part the defendant’s motion to dismiss for failure to state a claim upon which relief could be granted.

TRUTH IN LENDING ACT (RESCISSION & STATUTE OF REPOSE)

Ocasio v. Ocwen Loan Servicing, LLC, 2008 WL 2856392 (E.D. Pa. July 23, 2008)

Plaintiff entered into a residential mortgage loan. Subsequently, the plaintiff filed suit seeking rescission of the loan as well as monetary and other relief under the Truth in Lending Act (TILA), Home Ownership and Equity Protection Act (HOEPA), Real Estate Settlement Procedures Act (RESPA), Equal Credit Opportunity Act (ECOA), Fair Credit Reporting Act (FCRA), Fair Debt Collection Practices Act (FDCPA), and other state law. The defendant filed a motion to dismiss certain counts under Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure and filed a motion for a more definite statement of the plaintiff’s other counts under Rule 12(e). The plaintiff withdrew the RESPA, ECOA, FCRA, FDCPA, and breach of fiduciary duty claims. The plaintiff also failed to respond to the defendant’s motion to dismiss certain other claims. The only claims that remained to be adjudicated concerned the TILA, HOEPA, and state law claims. The court found that the plaintiff’s TILA claim was barred by a statute of repose which would not be tolled under the discovery rule. The court granted the defendant’s motion to dismiss as to all federal claims.

FAIR DEBT COLLECTION PRACTICES ACT (VALIDATION NOTICE & NOTICE OF TRANSFER)

Oppong v. First Union Mortg. Corp., 2008 WL 2853252 (E.D. Pa. July 24, 2008)

Plaintiff obtained a loan secured by a mortgage on his residence and defaulted on the loan. Defendant First Union Mortgage Corp. filed a foreclosure complaint. While the foreclosure action was pending, defendant Wells Fargo sent a letter to the plaintiff stating that Wells Fargo would service the loan. A payoff figure was provided to the plaintiff, and judgment was entered for First Union in the foreclosure action. The plaintiff, thirty days later, disputed the amount of the debt. First Union responded stating that the plaintiff had not disputed the debt within thirty days of receiving notice of the debt in the servicing transfer notice sent by defendant Wells Fargo. Wells Fargo never attempted to collect the debt. After several years in the courts, only Wells Fargo remains in the case on the side of the defense. The plaintiff argued that he had not been provided with validation of the debt, either before or after the transfer of the loan to Wells Fargo. Wells Fargo argued that the plaintiff had been provided with the information in a validation notice from the representatives of First Union in the form of the foreclosure complaint. The court found that: (1) the

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foreclosure complaint constituted an initial communication; (2) the initial communication contained the needed validation information; (3) the foreclosure complaint could not induce the least sophisticated debtor to ignore his legal rights under the Fair Debt Collection Practices Act (FDCPA); (4) the plaintiff was timely advised of the transfer of the servicing of his loan; and (5) Wells Fargo had no duty to serve the plaintiff with a second validation notice. Accordingly, the court entered judgment in favor of the defendant Wells Fargo.

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4TH CIRCUIT DECISIONS



FAIR DEBT COLLECTION PRACTICES ACT (STATUTE OF LIMITATIONS)

Khaliq v. Draper & Goldberg, P.L.L.C., 2008 WL 2753983
(4th Cir. Va. July 16, 2008)

Plaintiffs alleged violations of the Fair Debt Collection Practices Act (FDCPA) in a complaint filed within the one-year statute of limitations. The district court dismissed the complaint for failure to timely perfect service of process. That same day, the plaintiffs filed an identical complaint, this time filed after the statute of limitations had run. The district court dismissed the plaintiff's complaint for failure to state a claim upon which relief can be granted because it was filed outside of the statutory limitations. The plaintiffs appealed, arguing that the existence of the identical suits tolled the statute of limitations, that the defendants had not been prejudiced by the delay, that the purpose of the statute of limitations would not be frustrated by allowing them to go forward with their claim, and that they should be permitted to refile their original claim because it was dismissed without prejudice. The court affirmed the district court's decision, holding that the dismissal of the plaintiff's prior complaint was based on a failure to show good cause for their delay in perfecting service of process and that they should not be allowed to avoid the consequences of that dismissal and

the statute of limitations by filing a new complaint immediately.

FAIR CREDIT REPORTING ACT (PREEMPTION)

Ross v. Washington Mutual Bank, 2008 WL 2620174
(E.D.N.C. July 2, 2008)

The defendant was the assignee of the plaintiff's former husband's mortgage loan. The defendant mistakenly transferred the mortgage loan to the plaintiff following her divorce from her husband, making her ultimately responsible for the payment of the loan. After the loan went into default, the defendant placed a negative trade line on one or more of the plaintiff's credit reports based upon the mistaken belief that she was responsible for the defaulted mortgage. The plaintiff contacted the consumer reporting agencies (CRAs) to inform them of a dispute, but they confirmed the validity of the mortgage based on the negative trade line. The plaintiff then filed suit, alleging that the defendant violated several provisions of the Fair Credit Reporting Act (FCRA) and state consumer protection laws by adversely reporting information on her credit report concerning a loan that was not hers. The defendant moved for summary judgment. Because the defendant signed a letter in 2003 stating that it had made a mistake and informed the CRAs of that mistake, the court concluded that the plaintiff's cause of action accrued in 2003. Therefore, the court held that the two-year FCRA statute of limitations barred any action brought by the plaintiff. The defendant then argued that federal law preempted the plaintiff's state law claims. The Court agreed, holding that the FCRA preempted the plaintiff's state law claims to the extent it was based on defendant's alleged reporting of false loan information. Accordingly, the court granted the defendant's motion for summary judgment on both the plaintiff's FCRA claim and its state law claims.

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5TH CIRCUIT DECISIONS



FAIR DEBT COLLECTION PRACTICES ACT (DEFINITION OF CONSUMER DEBT)

Hetherington v. Allied Intern. Credit Corp., 2008 WL 2838264 (S.D. Tex. July 21, 2008)

Plaintiff wrote a check from a joint account held with his wife at the Brazos Credit Union (check 1) to cover a second check written on a Bank of Texas account used for both business and personal expenses (check 2) to pay for car repairs. Check 1 was returned for insufficient funds. However, check 2 paid out to the auto repair shop. The Bank of Texas account was closed with a negative balance of \$692.18. The plaintiff brought a claim against the defendant (and others, though only the defendant remains in the lawsuit) alleging violations of the Fair Debt Collections Practices Act (FDCPA) and other state laws. The defendant filed a motion for summary judgment. The plaintiff filed a cross-motion for partial summary judgment. Both parties agreed that the FDCPA applies only to consumer, not commercial or business, debts. The defendant argued that the account in question was a commercial account even if occasionally used for non-business purpose and thus does not fall under the FDCPA. The plaintiff argued that the bounced check was for personal car repairs. The court held that there was substantial dispute, supported by evidence, over the nature of the account and that the characterization is material because it determines whether the debt falls under the FDCPA. Accordingly, the court denied both the plaintiff's and the defendant's motions for summary judgment.

FAIR CREDIT REPORTING ACT (ACTUAL DAMAGES)

Vlasek v. Wal-Mart Stores, Inc., 2008 WL 2937760 (S.D. Tex. July 22, 2008)

Plaintiff brought suit against the defendant, her former employer, alleging that it wrongfully terminated her only

because she was a registered sex offender. During the defendant's internal investigation concerning her status as a sex offender, it requested that the plaintiff sign a Fair Credit Reporting Act (FCRA) disclosure form authorizing a criminal background check. The plaintiff alleged that the defendant violated the FCRA by using information obtained in a credit/background check as a basis for firing her without providing her with a copy of the report. The defendant filed a motion for summary judgment, arguing that the plaintiff could not assert a FCRA claim because the facts demonstrated that she suffered no damages from the violation and because there was no evidence that the defendant willfully violated the FCRA. The court agreed with the defendant, stating that the plaintiff would have been fired whether or not she was provided with a copy of the report. Additionally, the court stated that the plaintiff produced no evidence that the defendant acted willfully in failing to give the plaintiff a copy of her credit report. Accordingly, the court granted the defendant's motion for summary judgment.

6TH CIRCUIT DECISIONS



FAIR CREDIT REPORTING ACT (PRIVATE CAUSE OF ACTION & FEDERAL PREEMPTION)

Arnold v. GMAC, LLC, 2008 WL 2783255 (W.D. Mich. July 17, 2008)

Plaintiffs leased a vehicle from a car dealership, financed through the defendant. The plaintiffs missed a payment, and the defendant sent a letter informing the plaintiffs that their payment was past due. The plaintiffs then mailed a check for the late payment that did not clear the bank until thirty-one days had passed. The defendant subsequently informed credit reporting agencies that the plaintiffs had made one payment 30 or more days past due. The

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plaintiffs contacted the defendant to request that the defendant remove the negative mark from their credit report. Two months later, the negative credit history had not been removed. Though the plaintiffs wrote a note to one of the credit reporting agencies, there is no evidence that the defendant was notified by a credit reporting agency of a dispute. The plaintiffs brought suit under the Fair Credit Reporting Act (FCRA) and Michigan Consumer Protection Act (MCPA), alleging violations by virtue of the defendant reporting the payment history to the credit reporting agency. The defendant moved for summary judgment, arguing that § 1681s-2(a) of the FCRA does not provide a private cause of action, that § 1681s-2(b) of the FCRA does not provide a private cause of action, that the defendant had never received notice of a dispute from a credit reporting agency, and that the MCPA claim was preempted by the FCRA. In response to the defendant's motion for summary judgment, the plaintiffs requested leave to amend their complaint to add new causes of action. The court held that: (1) § 1681s-2(a) of the FCRA does not recognize a private cause of action; (2) that the defendant had never received notice of a dispute from a credit reporting agency, which was inadequate to sustain a claim under § 1681s-2(b) of the FCRA; (3) that the MCPA claim was preempted by language in the FCRA; and (4) that the plaintiffs had not shown good cause, while the defendant had shown it would suffer prejudice, for modifying the scheduling order and allowing leave to amend. Accordingly, the court granted the defendant's motion for summary judgment on all counts and denied the plaintiff's request to be given leave to amend their complaint.

FAIR CREDIT REPORTING ACT (PRIVATE CAUSE OF ACTION & NOTICE)

Khalil v. Transunion, LLC, 2008 WL 2782912 (E.D. Mich. July 17, 2008)

Plaintiff's brother defrauded mortgage companies through identity theft including using the plaintiff's name. Upon discovery of the loans, the plaintiff contacted the mortgage lender which denied relief and continued to report the debts to national credit reporting agencies (CRAs). The plaintiff then contacted the three nationwide CRAs demanding a reinvestigation of the debts. After reinvestigating, two of the CRAs removed all references to the debts. The defendant failed or refused to remove the debts. The plaintiff filed suit alleging that the defendant violated the Fair Credit Reporting Act (FCRA) by not forwarding all relevant information it received regarding the debts to co-defendant Washington Mutual (WaMu) and by willfully failing to reinvestigate the disputed debts pursuant to § 1681s-2(b). WaMu filed a motion to dismiss the complaint. The district judge referred the motion to the magistrate judge. WaMu argued that the FCRA does

not recognize a private cause of action under § 1681s-2(b) and that WaMu had no duty to reinvestigate because it did not receive notice from a CRA, as is required under the FCRA. The court held that plaintiff is permitted to bring a private cause of action under § 1681s-2(b); however, the plaintiff had failed to sufficiently plead that a CRA had contacted WaMu. The court granted plaintiff 21 days to amend his complaint.

FAIR DEBT COLLECTION PRACTICES ACT (ATTORNEY'S FEES)

Lee v. Javitch, Block & Rathbone, LLP, 2008 WL 2917087 (S.D. Ohio July 30, 2008)

After the defendant attempted to collect money owed on a default judgment from the plaintiff, the plaintiff brought suit alleging various violations of the Fair Debt Collection Practices Act (FDCPA) and other state consumer protections laws. The case went to trial and the jury found for the plaintiff, the court then granted a partial remittitur of the verdict. The plaintiff requested attorney's fees in the amount of \$137,132.75 and the court concluded that federal law would apply to both the plaintiff's state and federal law attorney's fees claims. The defendant first argued that the plaintiff was not entitled to an award of attorney's fees because it contracted to allow the plaintiff's attorneys to collect the award. The defendant stated that this amounted to a proprietary interest in the cause of action and was void as a matter of law. The court held that the fee arrangement did not amount to an improper acquisition of a proprietary interest and acknowledged that the nature of fee shifting statutes sometimes creates difficult fee situations for plaintiffs and their attorneys. The plaintiff requested hourly billing rates of \$265.00 for the lead attorney on the case and \$250.00 for the second attorney. The defendant argued that the rates were inflated and that the plaintiff did not produce sufficient evidence to establish relevant community rates. While the court agreed that the plaintiff did not submit evidence of community rates, it stated that the plaintiff did provide a very recent case in the district that approved the same lead attorney for a rate of \$250.00/hour. The court concluded that, based upon its knowledge of attorney's fees in the area, the attorneys' requested hourly rates were reasonable. The defendant then argued that the plaintiff's attorneys should not be allowed to bill for clerical work or for travel time. The attorneys admitted that the billing for travel time was too high and agreed to lower it by one-half; however, they argued that because they did not have clerks, they had to bill clerical work at an attorney's rate. The court agreed with the plaintiff, holding that there was no requirement that a lawyer employ a paralegal to do research or to draft pleadings and held that the hours billed for clerical work were reasonable. The plaintiff's

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attorneys then requested compensation for 440 hours billed on the case. The defendant argued that many billings were duplicative and argued that time spent on conferences between the co-counsels should be reduced. The court disagreed, stating that if the defendant's attorneys spent 800 hours on the case, it was entirely reasonable that the plaintiff's counsel spent 440 hours on the case. The court also stated that conferences were necessary because the case went to trial and involved many difficult issues. Therefore, the court held that the plaintiff's attorneys' hours were reasonable. Finally, citing the difficulty of the case and the importance to consumers of the jury's verdict, the plaintiff's attorneys requested a fee enhancement of 75%. The court rejected this argument, concluding that the difficulty of the case and the success of the plaintiff's claim was reflected in the lodestar amount. However, the court did state that a 10% fee enhancement was permissible under the FDCPA and state law due to the undesirability of the case. The court cited the plaintiff's attorneys' evidence that they were the only attorneys in the area willing to accept contingent fee referrals to prosecute consumer claims against debt collectors. The court commended the attorneys for their actions and allowed for the 10% enhancement. Accordingly, the court awarded the plaintiff \$125,315.30 in attorney's fees and costs in the amount of \$2,206.18.

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7TH CIRCUIT DECISIONS



FAIR CREDIT REPORTING ACT (FIRM OFFER OF CREDIT)

Cavin v. Home Loan Center, Inc., 531 F.3d 526 (7th Cir. July 2, 2008)

Defendant mailed the plaintiffs a mailer offering a loan program. The mailer informed the recipient that they were "pre-approved" to receive the defendant's loan and contained boxes that gave loan amounts and calculated monthly payments. The letter also stated that there were

no fees to start a loan and that the recipient could qualify in minutes over the phone. Finally, the letter gave different APR rates for varying loan amounts. The plaintiffs filed suit in federal court alleging that the defendant violated several provisions of the Fair Credit Reporting Act (FCRA) by accessing its credit report without a permissible purpose. The plaintiffs alleged that the defendant's mailer did not constitute a firm offer of credit as is defined under the FCRA. Both parties filed motions for summary judgment. The district court entered summary judgment in favor of the defendant, holding that the mailing did constitute a firm offer under the FCRA. The plaintiffs appealed to the Seventh Circuit Court of Appeals. The plaintiffs alleged that the mailer did not disclose or adequately explain the terms of the loan program. The court noted that the mailer identified the basis for calculating interest, the length of the loan, the possibility of a rate change after thirty days, the minimum payment option with accompanying deferred interest, and the information needed to obtain the loan. The court stated that the FCRA does not require senders to disclose everything in the first contact. The court also distinguished the case from its holding in *Cole v. U.S. Capital, Inc.*, 389 F.3d 719 (7th Cir. 2004), stating that the holding in *Cole* only required some sort of value only if the mailer was a solicitation for merchandise rather than an offer of credit. The court held that the current letter was not a solicitation for merchandise and was "firm." Accordingly, the court concluded that the mailer was a firm offer of credit and affirmed the ruling of the district court granting the defendant's motion for summary judgment.

FAIR DEBT COLLECTION PRACTICES ACT (CLASS CERTIFICATION)

Sadler v. Midland Credit Mgmt., Inc., 2008 WL 2692274 (N.D. Ill. July 3, 2008)

Plaintiff incurred \$527.09 credit card debt with First Consumer National Bank. First Consumer National Bank sold the debt to defendant MRC Receivables Corporation (MRC), a subsidiary of Encore Capital Group (Encore), Inc. Midland Credit Management (MCM), another subsidiary of Encore, was in the business of collecting debts for MRC. The defendant MCM sent several letters trying to collect on the debt and was informed in a telephone conversation that the debt was old and would not be paid. MCM then twice threatened to bring a lawsuit to collect on the debt. The plaintiff then filed suit under the Fair Debt Collection Practices Act (FDCPA) alleging that the defendants had violated the FDCPA by threatening, and actually bringing, lawsuits against Illinois residents on time-barred debts. The plaintiff moved to certify a class defined as: (1) all natural persons with

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Illinois addresses; (2) who were sued or received correspondence referring to "legal action;" (3) on or between a date one year prior to the filing and twenty days after the filing of the action; (4) with respect to a debt that was charged off five or more years prior to the filing of the lawsuit or the correspondence; (5) as to which the defendants cannot produce a suitable writing. The defendant argued that the plaintiff's proposed class fails to meet the requirements for a proposed class identified in Federal Rule of Civil Procedure 23. The court held that individual evaluation of the 12,000 relevant accounts would be required, that the demand to produce a written contract would be overly burdensome, and that the defendant could not ascertain critical information about the individuals in the proposed class from its files or by contacting the original creditor. Considering that the parties were unable to identify an alternative means for finding the needed information and that an inquiry necessary to determine the class would involve an impermissible investigation of the merits of every potential class member's claim, the court held that class treatment of this case would be unmanageable. Accordingly, the court denied without prejudice the plaintiff's motion for class certification.

TRUTH IN LENDING ACT (NOTICE OF RATE INCREASES)

Swanson v. Bank of America, N.A., 2008 WL 2738083 (N.D. Ill. July 15, 2008)

Plaintiff opened a credit card account with the defendant. The terms of the agreement specified that the defendant could increase the interest rate on the account if the plaintiff twice exceeded the credit limit. The plaintiff did so, and the defendant increased the interest rate 14% and applied the interest rate from the beginning of the most recent billing cycle. The plaintiff filed suit alleging that: (1) the defendants violated the Truth in Lending Act (TILA) by failing to provide her with written notice of the specific rate increase before the increase became effective; (2) the defendants were unjustly enriched by the retroactive rate increase; and (3) the defendants violated the Illinois Consumer Fraud & Deceptive Business Practices Act (ICFA) by engaging in unfair and deceptive practices. The defendant moved to dismiss the Second Amended Complaint for failure to state a claim and federal preemption reasons. The court found that the defendants' initial disclosures had set forth the specific change of which the plaintiff complained, that a claim for unjust enrichment could not be brought when a contract governed the parties' agreement, and that compliance with TILA was a total defense to the ICFA claim. The court did not reach the question of whether federal law preempted the state law claims. Accordingly, the court dismissed the TILA claim with prejudice and the state law claims without prejudice.

FAIR DEBT COLLECTION PRACTICES ACT ("COMMUNICATION" AND BONA FIDE ERROR)

Ramirez v. Apex Financial Management, LLC, 2008 WL 2879681 (N.D.Ill July 28, 2008)

Plaintiff opened an MBNA credit card account on which he later defaulted. Hilco Receivables, LLC, a "debt buyer," purchased the account from MBNA and then outsourced the plaintiff's account to its subsidiary, Apex Financial Management, LLC, to collect any amount that the plaintiff still owed on the account. The plaintiff and Apex worked out a payment plan under which the plaintiff made three installment payments toward his defaulted account. On November 21, 2005, Apex sent to the plaintiff a letter confirming its receipt of one of the plaintiff's installment payment. On February 9, 2006, the plaintiff sent to Apex a "cease and desist" letter, requesting that Apex cease all communications in regard to his outstanding debt. On February 21, 2006, seven days after Apex received the "cease and desist" letter, the plaintiff entered it into Apex's computer system. During the seven-day period, Apex had the plaintiff's letter, but before Apex entered it into their system, Apex placed twenty-one (21) phone calls to the plaintiff. The plaintiff brought suit against defendants for alleged violations of the Fair Debt Collection Practices Act (FDCPA). The parties filed joint motions for summary judgment. The plaintiff's summary judgment motion centers around defendants' contact with the plaintiff after receiving the "cease and desist" letter. In response, Apex first argued that the plaintiff failed to submit sufficient evidence to show that Apex "communicated" with the plaintiff, because the plaintiff failed to show that Apex's phone calls were "regarding the debt." The court disagreed refusing to adopt a narrow interpretation of "communication" and held that the twenty-one (21) calls conveyed pertinent information to the plaintiff, including the fact that there was a matter that he should attend to and instruction on how to do so. The court held that, the calls, in the very least, constituted an indirect communication regarding the plaintiff's debt in violation of the FDCPA. Apex then asserted that a "bona fide error" caused it to violate the FDCPA, namely a "clerical error." The court disagreed and found that the violation was not the result of a "clerical error," but a loose procedure that resulted in a seven-day delay in processing and twenty-one (21) collection calls to the plaintiff. Accordingly, the court granted the plaintiff's motion for summary judgment as to his individual FDCPA claims and denied Apex's summary judgment motion. The court reserved ruling on the motions with regard to Hilco.

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8TH CIRCUIT DECISIONS



FAIR DEBT COLLECTION PRACTICES ACT (BANKRUPTCY)

Middlebrooks v. Interstate Credit Control, Inc., 2008 WL 2705496 (D. Minn. July 9, 2008)

Plaintiff incurred a debt for an apartment lease. The debt was referred to the defendant for collection. The debt became stale pursuant to a six-year statute of limitations. Six years later, the plaintiff filed for Chapter 13 bankruptcy. The defendant was listed as an unsecured nonpriority claim. As a result, the defendant submitted a proof of claim to collect the debt. The plaintiff filed suit, alleging that filing a proof of claim on a stale debt violates the Fair Debt Collection Practices Act (FDCPA). The plaintiff moved to dismiss the complaint. The plaintiff argued that filing a proof of claim on a stale debt constitutes a threat of litigation or actual litigation, which the FDCPA prohibits. The court did not reach the issue. Rather, the court held that an FDCPA claim cannot be premised on proofs of claim filed during the bankruptcy proceedings. Accordingly, the court granted the defendant's motion to dismiss.

FAIR CREDIT REPORTING ACT (ACCURACY, DAMAGES, NEGLIGENCE & WILLFULNESS)

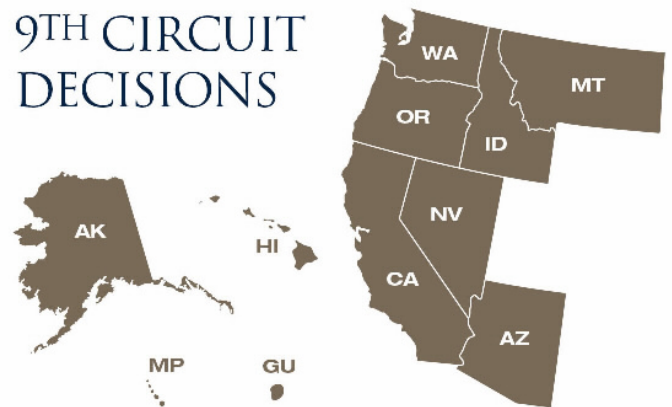
Fahey v. Experian Info. Solutions, Inc., 2008 WL 2831801 (E.D. Mo. July 23, 2008)

The plaintiff, now divorced, was married when two credit card accounts were opened in both he and his wife's name. The plaintiff contacted the defendant and initiated a dispute, stating that the accounts belonged solely to his former wife. The defendant sent consumer dispute verification forms to the holder of the credit card accounts, U.S. Bank. The forms were incompletely filled out and returned. No further follow up was conducted. The plaintiff filed suit alleging that the defendant negligently failed to follow reasonable procedures to

ensure the maximum possible accuracy of information disseminated about him, failed to properly investigate the dispute, and did so willfully, all violations of the Fair Credit Reporting Act (FCRA). The defendant moved for summary judgment on each claim in the plaintiff's complaint, arguing that there was no evidence that the report was inaccurate, that there was no evidence of actual damages or causation, that it followed reasonable procedures to ensure the accuracy of the credit information, and that there was no evidence of willfulness. The court found that: (1) there were material disputes of fact concerning accuracy; (2) there was evidence sufficient to show evidence of actual damages in the form of a possible lost mortgage loan; (3) there was no evidence to support the claim that the plaintiff's credit card accounts were affected by the credit report; (4) there was evidence of emotional distress as a result of the allegedly erroneous credit report; (5) there was evidence in support of the claim that the defendant had not followed reasonable procedures to ensure accuracy of the credit report; and (6) there were genuine issues of material fact concerning whether the defendant acted willfully in failing to ensure the accuracy of the report and investigate disputes. Accordingly, the court granted summary judgment for the defendant on the issue of whether its credit report caused Capitol One to deny plaintiff credit and Chase to increase its interest rate, and granted summary judgment on all other claims.

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9TH CIRCUIT DECISIONS



FAIR DEBT COLLECTION PRACTICES ACT (BONA FIDE ERROR)

Reichert v. National Credit Systems, Inc., 2008 WL 2633064 (9th Cir. July 7, 2008)

Plaintiff entered into a residential lease with La Privada Apartments, LLC ("La Privada") and terminated it before the lease expired. La Privada notified the plaintiff that he owed \$1,899.20 under the lease agreement. La Privada

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assigned the debt for collection to the defendant National Credit Systems, Inc. ("NCS"). NCS sent two demand letters. The first demand letter stated that the debt owed totaled \$1,899.20. The plaintiff disputed the debt and requested verification of the debt. NCS sent written verification of the debt to the plaintiff stating that the debt owed was now \$2,124.20 because of the addition of a \$225.00 charge for "Atty Fee, Letter." The plaintiff filed suit alleging that NCS violated the Federal Debt Collection Practices Act (FDCPA) by seeking to collect the \$225.00 fee which was not expressly authorized by the lease. The plaintiff moved for summary judgment. The defendant also moved for summary judgment arguing it properly relied on La Privada's representation of the debt and, alternatively, that it had established a bona fide error defense. The district court granted the plaintiff's motion for summary judgment and awarded damages of \$1,000.00 and attorney's fees of \$11,000.00 to the plaintiff. NCS appealed, arguing that the creditor's submission of accurate information in the past meant that NCS could reasonably rely on the creditor's representations and that NCS reasonably relied on La Privada. The Court of Appeals for the Ninth Circuit affirmed the district court, holding that: (1) the FDCPA makes debt collectors liable for violations whether knowing and intentional or not; (2) the *bona fide error* defense requires the defendant to show that it maintains reasonable preventative procedures to avoid errors; (3) NCS did not have any reason to believe that the attorney's fees could be properly added; (4) reasonable reliance is defined by reliance on the basis of procedures maintained to avoid mistakes; and (5) a showing of procedures reasonably adapted to avoid error requires more than an assertion than procedures were in place, it requires an explanation of the procedures and the ways that the procedures were adapted to avoid error.

FAIR DEBT COLLECTION PRACTICES ACT (LEAST SOPHISTICATED DEBTOR)

Cruz v. MRC Receivables Corp., 2008 WL 2627143 (N.D. Cal. July 3, 2008)

Plaintiff was unable to pay HSBC the balance due of a credit card. HSBC sold the debt to defendant MRC. Defendant Midland Credit Management, Inc. (Midland) was appointed to collect on the plaintiff's account. Midland sent the plaintiff form collection notices including an offer to settle with the typewritten signature of defendant A. Syran (Syran), the Senior Vice President of Operations & Marketing. The collection notices also informed the plaintiff that a negative report reflecting on her credit record could be submitted to a credit-reporting agency. The plaintiff filed suit alleging that using the typewritten signature of Syran and the notification that a negative report could be submitted to a credit-reporting agency violated the Fair Debt Collection Practices Act

(FDCPA). The defendants moved for summary judgment, and the plaintiff opposed the motion and moved for partial summary judgment on the issue of liability. The Court applied the "least sophisticated debtor" test to evaluate the plaintiff's claims. The Court found that even the least sophisticated debtor would not believe that Syran had personally reviewed the debtor's account and authored the collection letter. Furthermore, the Court found that the defendants did not say they would submit a negative credit report, that the defendants did not say that they were required to submit a negative credit report, that the defendants were actually required by law to provide notice of a possible negative credit report, and that the question of whether notice was required by law would make no difference to the plaintiff's credit report. Therefore, the Court granted the defendants' motion for summary judgment.

FAIR CREDIT REPORTING ACT (BANKRUPTCY NOTATIONS)

Smith v. Ohio Sav. Bank, 2008 WL 2704719 (D. Nev. July 7, 2008)

Plaintiff acquired a vehicle via a loan and security agreement in her name alone. The plaintiff's husband filed a Chapter 13 Bankruptcy petition, listing the plaintiff's vehicle as an asset which he declared as exempt. The plaintiff's husband was thus able to enjoy the benefits of a community stay and co-debtor filing. The plaintiff's husband also listed the defendant as a secured creditor and listed the defendant as a creditor to be notified of the petition. The defendant reported to national credit reporting agencies that the plaintiff's loan was included in bankruptcy. The plaintiff was unaware of the reporting until denied she was twice denied credit. The plaintiff requested her credit report from two agencies and discovered notations stating "Chapter 7 Bankruptcy," "Debt included in Chapter & Bankruptcy Nov. 30, 2004," and "Discharged through Bankruptcy." The plaintiff contested the notations with the credit reporting agencies, which in turn referred the dispute to the defendant pursuant to the Fair Credit Reporting Act (FCRA). The defendant concluded that the account had been referenced in a bankruptcy case but added the notation "paid or paying as agreed" to the reports. The plaintiff then filed suit under the FCRA alleging that the defendant violated the FCRA by intentionally or negligently reporting inaccurate information to a credit reporting agency and by failing to investigate and correct inaccurate information once placed on notice by a consumer. The defendant subsequently removed the bankruptcy notations from the plaintiff's credit report profile. Both parties moved for summary judgment. The defendant moved for summary judgment arguing that its notations were accurate, that its

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investigation was adequate and reasonable, and that it is standard industry practice for creditors operating in community property states to place a bankruptcy notation on the credit report of both spouses. The plaintiff moved for summary judgment as to liability relying on case law that condemned credit reports that can mislead the reader to make inaccurate conclusions. The court held that: (1) determining whether the reported information is misleading is a question for a trier of fact, (2) there are genuine issues of material fact regarding the defendant's investigation of the disputed notations because there was no evidence presented concerning particular steps that were taken and the defendant did not follow its own policy manual, (3) the defendant's community property presumption defense could be overcome with clear and convincing evidence, and (4) summary judgment for the plaintiff on liability was due to be denied because issues of fact exist regarding the defendant's statutory compliance and what might be misleading. Accordingly, the court ordered that both parties' Motions for Summary Judgment be denied.

TRUTH IN LENDING ACT (STANDING & STATUTE OF LIMITATIONS)

Johnson v. First Fed. Bank of California, 2008 WL 2705090 (N.D. Cal. July 8, 2008)

Plaintiffs are married and lived at a residence in Carmel-by-the-Sea since 1995. Plaintiff Deborah Johnson submitted two loan applications to the defendant bank. Based on documentation provided by plaintiff Deborah Johnson, the defendant bank approved the loan and provided a notice of right to cancel within three business days of the close of escrow. Prior to the close of escrow, both plaintiffs were named as borrowers on the loan papers. Plaintiff Gerald Johnson's name was later removed from the loan papers, and he executed a quitclaim to the residence at the close of escrow to facilitate final approval of the loan. Gerald Johnson executed the final loan documents on behalf of his wife, acting as her counsel on May 5, 2005. Later that same day, Gerald Johnson provided the bank with notice of his right to cancel the loan. Finally, Gerald Johnson rescinded the right to cancel and sent the bank notice of Deborah Johnson's decision to proceed with the loan. The bank then funded the loan and paid the mortgage broker. The loan included high monthly payments and a high prepayment penalty. In 2007, the bank sought to exercise its power of sale, recording a notification of default and election to sell under a deed of trust. Later that year, plaintiff Deborah Johnson filed an individual Chapter 13 bankruptcy petition identifying her house as an asset of the estate and the loan from the bank as a liability. As a result, the trustee sale was postponed until February of 2008. In January of 2008, Deborah Johnson sought to convert her Chapter 13

case to Chapter 7 bankruptcy case. Thereafter, the bank filed a motion for relief from the automatic stay to allow the bank to proceed with foreclosing the residence. Deborah Johnson's bankruptcy case was dismissed as a result of her failure to provide proper documentation of her current monthly income. Plaintiff Gerald Johnson also filed a Chapter 7 Bankruptcy petition. His bankruptcy case was dismissed for failure to file the proper schedules. On February 8, 2008, the bank proceeded with foreclosure. The plaintiffs filed a complaint and amended complaint alleging, in part, violations of the Truth in Lending Act (TILA). The defendant bank moved to dismiss the first amended complaint. The defendant alleged that plaintiff Gerald Johnson lacked standing to prosecute any violations of the TILA because he was not a consumer and he was not coerced into removing his name. The court dismissed plaintiff Gerald Johnson's TILA claims with prejudice, holding that plaintiff Gerald Johnson was not a consumer because he was not a borrower on the loan and was not including the documents approving plaintiff Deborah Johnson's loan. The court dismissed the remaining claims under TILA because the statute of limitations had run and there was nothing to suggest that it should have been tolled and because plaintiff Gerald Johnson had in fact exercised the right to rescind the loan.

TRUTH IN LENDING ACT & REAL ESTATE SETTLEMENT PROCEDURES ACT (FAILURE TO STATE A CLAIM)

Beaton v. Chase Home Fin. LLC, 2008 WL 2724834 (E.D. Cal. July 11, 2008)

Defendant holds the mortgage on the plaintiff's home. The defendant raised the mortgage payment to cover increases property taxes. The plaintiff contacted the defendant seeking information concerning those property taxes, and later contacted the county tax assessor who the plaintiff alleged told him that a tax increase did not appear on the tax rolls yet. The plaintiff's complaint, as amended, alleged that the defendant's increase of the plaintiff's mortgage payment and its explanation of the increase as necessary to cover increased property taxes is a "perjury" and a violation of the Truth in Lending Act (TILA). The plaintiff also alleged that he and his wife were misled to pay a higher payment than what they could afford. The plaintiff alleged that these actions constituted fraud and violations of TILA and Real Estate Settlement Procedures Act (RESPA). Ten days later, the defendant moved to dismiss the amended complaint for failure to state a claim. The magistrate judge evaluating the motion found that the allegations regarding RESPA failed to state a claim because the plaintiff cited provisions of the act but did not allege facts to support causes of action under RESPA. The

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magistrate found that the plaintiff failed to state a claim under TILA because the plaintiff did not allege that the defendant is a creditor subject to TILA, that it failed to make any required disclosures, and that its vague references to violations of the TILA were insufficient to state a claim or put the defendant on notice of the claims against it and, therefore, recommended that the motion to dismiss be granted.

FAIR CREDIT REPORTING ACT (EQUITABLE RELIEF FOR PRIVATE PARTIES)

Yasin v. Equifax Info. Serv.'s, LLC, 2008 WL 2782704 (N.D. Cal. July 16, 2008)

Plaintiff's debt was charged off. She subsequently paid the debt. Defendant Equifax Information Services, LLC describes her account as "paid and closed," but another field with the title "current status" describes the account as "charge-off." The plaintiff brought suit against the defendant on behalf of a putative class under the Fair Credit Reporting Act (FCRA) claiming that the defendant's language on her credit report has impaired her ability to obtain further credit on favorable terms. The defendant moved to dismiss the plaintiff's claims, arguing that the FCRA does not provide for equitable relief in actions brought against a private party. The court held that Congress did not intend that consumers be able to obtain equitable relief when bringing an action under the FCRA against a private party because the FCRA expressly includes injunctive relief in certain provisions of the FCRA and omits it in other provisions, even after judicial interpretation and Congressional amendment. Accordingly, the court granted the defendant's motion to dismiss the complaint to the extent that the plaintiff sought injunctive and declaratory relief.

FAIR DEBT COLLECTION PRACTICES ACT (COLLATERAL ESTOPPEL & VIOLATION OF AN AUTOMATIC STAY)

Stoiber v. Preboski, 2008 WL 2909855 (Bankr. D. Or. July 25, 2008)

The debtor filed a complaint against the defendant alleging that the defendant filed a lawsuit to collect upon a debt in violation of an automatic stay issued by the bankruptcy court. The debtor alleged that the violation of the automatic stay also amounted to a violation of the Fair Debt Collection Practices Act (FDCPA). The defendant filed a motion for summary judgment. The defendant alleged that she was unaware of the plaintiff's bankruptcy filing and did not learn of the filing until after the automatic stay was issued. The defendant also argued that the issue of her liability had already been argued by the plaintiff in a suit against another similar party and that the

doctrine of collateral estoppel should prevent the plaintiff from bringing suit. The court examined the four collateral estoppel factors and noted that the previous lawsuit was brought against the defendant's attorney. The court noted that the defendant's motion for summary judgment was unopposed and held that collateral estoppel was appropriate for the issue of whether the automatic stay was violated. Additionally, the court held that the plaintiff's FDCPA claim must fail because the bankruptcy code provides the exclusive remedy for violation of the automatic stay. Accordingly, the court granted the defendant's motion for summary judgment.

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10TH CIRCUIT DECISIONS



FAIR DEBT COLLECTION PRACTICES ACT (CHARGED OFF DEBT)

Maresh v. Borenstein, 2008 WL 2797037 (D. Colo. July 18, 2008)

Plaintiff obtained and defaulted on a line of credit from U.S. Bank, N.A. The account was charged off the bank's records and referred to the defendant for collection. Defendant filed suit in Colorado court to recover the balance owed to the bank, and summary judgment was granted for the defendant. The order of summary judgment was reduced to a final judgment and the court issued a bench warrant to counter the plaintiff's failure to appear and avoid service of process. The plaintiff was arrested and incarcerated as execution of the bench warrant and the plaintiff subsequently filed suit against the defendant. The plaintiff alleged that the defendant's attempt to collect on the "charged off" debt was a violation of the Fair Debt Collection Practices Act (FDCPA). Specifically, she alleged that: (1) the defendant falsely represented the character, amount, or legal status of her debt because her debt was charged off and thus a "non-existent" debt; (2) the defendant reported false credit

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information; and (3) the defendant used false representation or deceptive means to collect a debt. The defendant argued and the court agreed that the plaintiff had confused "charged off" with "discharged" under her "extinguishment theory." The court held that the "extinguishment theory" was without merit because there was no law suggesting that charging off a bad debt was the equivalent of discharging that debt, and that there was ample case law making a distinction between the two. The court further found that the second and third claims relied on the first claim to succeed. Thus, the court found that there was no triable issue of fact as to whether the plaintiff's debt was extinguished. Accordingly, the court granted summary judgment in favor of the defendant.

FAIR DEBT COLLECTION PRACTICES ACT (DEFINITION OF DEBT COLLECTOR)

Lyons v. WM Specialty Mortg. LLC, 2008 WL 2811810 (D. Colo. July 18, 2008)

Plaintiff obtained a loan secured by a deed of trust encumbering a piece of real property. The plaintiff defaulted on the loan, and the lender initiated a public trustee's foreclosure proceeding against the property. After some wrangling in state court, the Public Trustee for Denver issued a Public Trustee's Deed to the defendant WM. The plaintiff alleged claims under the Fair Debt Collection Practices Act (FDCPA) and sought a declaration that the state foreclosure was invalid and unlawful. The defendants moved for summary judgment. The case was heard by a magistrate judge. The court found that the state law issues were properly determined by state courts. Furthermore, the court found that the defendants did not meet the FDCPA definition of a debt collector and therefore fell outside of the purview of the FDCPA. Accordingly, the magistrate recommended that the motion for summary judgment be granted to the extent it seeks summary judgment in favor of the defendants on the FDCPA claims. Finally, the court recommended that the state law claims be dismissed.

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11TH CIRCUIT DECISIONS



REAL ESTATE SETTLEMENT PROCEDURE ACT (EXCESSIVE FEES)

Moody v. Commonwealth Land Title Ins. Co., 2008 WL 2610765 (11th Cir. July 3, 2008)

Morrisette v. Novastar Home Mortg., Inc., 2008 WL 2610550 (11th Cir. July 3, 2008)

Williams v. Countrywide Home Loans, Inc., 2008 WL 2609339 (11th Cir. July 3, 2008)

These three cases were decided on the same day, with essentially the same facts, where the plaintiffs were charged a title fee in excess of the \$200.00 title insurance premium authorized by Alabama law. The plaintiffs brought suit under the Real Estate Settlement Procedure Act (RESPA) alleging that the amount charged constituted a fee for something "other than services actually performed" within the meaning of RESPA. The defendants moved to dismiss at the district court level, and the district courts granted the motion. On appeal, the court affirmed the decision of the district courts holding that: (1) RESPA does not govern excessive fees because it is not a price control provision; (2) courts should not break single fees into components for evaluation; and (3) section 8(b) of RESPA requires that a plaintiff allege that no services were rendered in exchange for a settlement fee rather, while the appellants merely claimed that they were charged an inflated fee for service that was in fact provided.

TRUTH IN LENDING ACT (JURY WAIVER)

Anderson v. Apex Financial Group, Inc., 2008 WL 2782684 (M.D. Fla. July 16, 2008)

Plaintiff filed a state court suit against the defendants alleging violations of the Truth in Lending Act (TILA). The plaintiff claimed that the defendants violated TILA by failing to provide accurate numeric disclosures concerning finance charges and notice of the right to rescind during the origination of the mortgage loan. The defendant

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removed to federal court, filed its answer and affirmative defenses to the complaint, and a motion to strike the plaintiff's demand for a jury trial based on a jury waiver clause in the mortgage. The plaintiff did not oppose the defendant's motion. The court found that the mortgage contained a conspicuous and unambiguous jury trial waiver provision. Without applying its factors for determining whether a party knowingly and voluntarily waived its right to a jury trial, the court found that the defendant's unanswered claim of a valid waiver was justified because the plaintiff failed to come forward with some proof that calls into question whether the waiver was agreed to knowingly and voluntarily. Accordingly, the court granted the defendant's motion to strike the plaintiff's demand for a jury trial.

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