

# monthly litigation update

JUNE 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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## 1ST CIRCUIT DECISIONS



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

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## 2ND CIRCUIT DECISIONS



### FAIR DEBT COLLECTION PRACTICES ACT (DEFINITION OF DEBT COLLECTOR, TIMELINESS, & PLEADING WITH PARTICULARITY)

**Sembler v. Advanta Bank Corp.**, 2008 WL 2397657 (E.D.N.Y. June 12, 2008).

Plaintiff applied for and received a credit card from Advanta Bank Corporation (Advanta). The plaintiff

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transferred a balance from another credit card and made additional charges to the Advanta credit card. The plaintiff then received a monthly statement and was informed that his interest rate was 25.50%, which later increased to 34.99% per year. The plaintiff also incurred late fees and "overlimit" fees. The plaintiff alleges that he was offered a rate of 9.99%. Within three years, the plaintiff began to receive telephone calls and letters seeking payment of his outstanding balance from Advanta, one of the defendants. The plaintiff wrote to Advanta objecting to the calls and letters and alleged that the calls and letters continued. The plaintiff was then contacted by three other parties seeking payment of the outstanding balance. One of those parties was the second defendant: Attention Funding (succeeded by West Asset Management, Inc. (West)). The plaintiff filed a complaint alleging that the defendants violated the Fair Debt Collection Practices Act (FDCPA) and other state laws. Defendant Advanta moved to dismiss the plaintiff's complaint under Rule 12(b)(6) for failure to state a claim on the basis that it did not meet the definition of a debt collector under the FDCPA and also argued that the plaintiff's claims were untimely. Defendant West moved to dismiss the plaintiff's complaint under Rule 8(a) and Rule 12(b)(6) on the basis that the plaintiff's claims were vague, confusing, and repetitive. In the alternative, defendant West moved for the court to order the plaintiff to file a Second Amended Complaint. A magistrate judge heard the case and issued a Report and Recommendation. Fifteen days after receiving the Report and Recommendation, the plaintiff filed objections. The court found that defendant Advanta was not engaged in business with the principal purpose of the collection of debts and did not contact the plaintiff to collect any third party's debt. Therefore, the court held that defendant Advanta is not a "debt collector" under the FDCPA and accordingly granted Advanta's motion to dismiss. The court next considered the plaintiff's claims against the West defendants. The court found that the plaintiff's complaint failed to allege when the West defendants contacted the plaintiff, failed to allege the specific acts that the West defendants did to violate the FDCPA, and failed to allege which facts supported the plaintiff's claim against the West defendants. Accordingly, the court granted the West defendants' motion to order the plaintiff to file a Second Amended Complaint. Finally, the court held that the plaintiff's objections were untimely and were thus not due to be considered.

#### TRUTH-IN-LENDING ACT (RESCISSION & ADEQUATE DISCLOSURES)

Fiorenza v. Fremont Inv. & Loan, 2008 WL 2517139 (S.D.N.Y. June 20, 2008)

The defendant "cold called" the plaintiff in order to offer the plaintiff an option to refinance the existing mortgages

on the plaintiff's residence. The plaintiff provided the defendant with various information and the defendant informed the plaintiff that she was qualified for a \$634,500.00 loan. The closing of the loan occurred in May of 2006. Before the closing, the defendant did not provide the plaintiff with any documentation detailing the nature, status, or terms of the loan. However, during closing the defendant did provide the plaintiff with material disclosures and a Notice of Right to Rescind the transaction within three days. After defaulting on the loan and faced with foreclosure, the plaintiff filed suit in federal court seeking rescission of the loan under the Truth-in-Lending Act (TILA) and also alleged various state law violations. The defendant filed a motion to dismiss, arguing that it provided the plaintiff with adequate disclosures to prohibit a three-year rescission period. The court agreed with the defendant, holding that mere late disclosure, even if technically a violation of the TILA, will not give rise to an extended right to rescind the transaction. The court stated that the TILA allows for a three-day rescission period until the third business day following the consummation of the transaction or the delivery of the material disclosures and rescission forms. Therefore, even though the defendant may have been late with its required disclosures, the eventual delivery of the disclosures began the three-day rescission period and precluded application of the three-year rescission period. Accordingly, the court granted the defendant's motion to dismiss the TILA claims and refused to exercise supplemental jurisdiction over the remaining state law claims.

#### HOME OWNERSHIP EQUITY PROTECTION ACT (COMMERCIAL PROPERTY, HIGH RATE MORTGAGE)

Macheda v. Household Fin. Realty Corp. of N.Y., 2008 WL 2562003 (N.D.N.Y. June 26, 2008)

Plaintiffs refinanced their home mortgage loan with the defendant bank. On March 27, 2001, during the closing, the plaintiffs signed a Notice of Right to Cancel, but were not given copies by the defendant's agent. The plaintiffs' loan qualified as a high rate mortgage. Therefore, the transaction was subject to the additional disclosure requirements of the Home Ownership Equity Protection Act (HOEPA), which requires borrowers to be provided extra documents of notice three days prior to the consummation of the transaction. The defendant failed to deliver those disclosures. Because of the insufficient disclosures, the plaintiffs received an extra rescission time of three years under the Truth-in-Lending Act (TILA). In early March of 2004, the plaintiffs rescinded the transaction by sending a notice of rescission through the mail. After the defendant denied the plaintiffs the right to rescind, the plaintiffs filed suit. The first cause of action

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was for rescission and actual and statutory damages, pursuant to the TILA and HOEPA. Both parties filed motions for summary judgment. The defendant argued that it was entitled to summary judgment because the plaintiffs' loan was used to maintain property used primarily for a business purpose, not for personal, family or household purposes. Pointing to the plaintiffs' tax returns, the defendant argued that 52.13% of the plaintiffs' home was used for a daycare business. The plaintiffs countered, explaining that 52.13% was only a calculation of the total area of the home occasionally used for daycare. Instead, they argued that the proper calculation was the percentage of total area used for daycare, multiplied by the percentage of total time the house is used for daycare. Using that calculation, the plaintiffs only used 16.16% of their house for daycare. The court agreed with the plaintiffs, holding that TILA and HOEPA did apply to the loan transaction and denied the defendant's motion for summary judgment on that ground. The defendant then argued that the points and fees charged to the plaintiffs were below the eight percent threshold that qualifies a loan as a high rate mortgage. The defendant argued that because some of the plaintiffs' points and fees were financed, they could not be "payable" at or before closing, and could not be counted to reach the eight percent threshold under the HOEPA. The court disagreed, holding that the statute states that the points and fees must be "payable" and not "paid." The court held that points and fees that are financed are "payable" by the consumer at or before closing and must be counted when determining the eight percent threshold of HOEPA. Therefore, the court denied the defendant's motion for summary judgment on that ground. The court then held that there were genuine issues of material fact as to whether the plaintiffs were provided with the proper number of Notices of Right to Cancel and as to whether the plaintiffs' loan actually qualified as a high rate mortgage. Accordingly, the court denied the remaining motions for summary judgment.

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**BANKRUPTCY (DISCHARGE OF A LIEN  
ABSENT AN ADVERSARY PROCEEDING)**

In re Mansaray-Ruffin, 2008 WL 2498048 (3rd Cir. June 24, 2008)

The debtor obtained a loan from a bank that was secured by an interest on her home. Several months before she filed for Chapter 13 bankruptcy, the debtor sent the bank a letter stating that it had committed a number of Truth-in-Lending Act (TILA) violations, and informing the bank that the debtor would be rescinding the loan. The debtor then filed her reorganization plan, which informed the court that she would be filing an adversary proceeding against the bank, seeking to rescind the loan. The debtor, who continued making loan payments, then altered her plan, stating that the bank had not filed a proof of claim. The debtor stated that she would file a \$1,000 proof of claim for the bank, and that if the bank did not file to alter the claim, the \$40,000 mortgage debt would be invalidated. The bank did not immediately object to the claim. However, after the bank discovered the change, it commenced an adversary proceeding against the plaintiff, stating that a lien could only be invalidated through an adversary proceeding and that, its mortgage continued unaffected by the plan confirmation. The debtor filed a motion to dismiss, arguing that the confirmed plan was final under the Bankruptcy Code and that the bank had to live with the consequences of not objecting to her treatment of its claim. The bankruptcy court denied the debtor's motion to dismiss, holding that neither the debtor's proof of claim filed on behalf of the bank, nor the debtor's amended plan were sufficient to avoid the bank's lien. After the district court affirmed the bankruptcy court's decision, the debtor appealed to the Third Circuit Court of Appeals. The debtor first argued that she successfully invalidated the bank's lien without an adversary proceeding by filing a claim on the bank's behalf and treating the bank's claim as unsecured in her plan. She also alleged that when the bank failed to object to the treatment of its claim as unsecured, the bankruptcy court made the confirmed plans final. The court held that the general rule is that special status is afforded to liens, allowing them to pass through bankruptcy unaffected. The court stated that debtor failed to present any authority that her proof of claim was a proper "affirmative action"

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taken to invalidate the bank's lien. The court next concluded that the plaintiff did not strip the defendant's lien when she supplied a lower amount in her plan than was actually owed on the debt. The court held that cases allowing such action do not challenge the validity of the lien itself, and therefore have no bearing on the debtor's claim. The court then held that the bank's failure to object to the debtor's plan did not do away with the debtor's duty to file a complaint and serve the debtor pursuant to the Bankruptcy Code rules. The court held that the bank had a legal right to do nothing and insist upon being served with a summons and complaint in order for its lien to be invalidated. Finally, the court held that where the Bankruptcy Rules require an adversarial proceeding – which entails a fundamentally different, and heightened, level of procedural protections – to resolve a particular issue, a creditor has the due process right not to have that issue resolved without one. Therefore, the court concluded that the district court properly held that the bank's lien was not invalidated and passed through the debtor's bankruptcy unaffected. In a dissenting opinion, Judge Greenberg stated that the bank had adequate notice of the impairment of its lien and had an opportunity to object to its adverse treatment; therefore, it received the constitutionally required due process to which it was entitled. Therefore, Judge Greenberg stated that once the Bankruptcy Court confirmed the plan, the confirmation order bound the bank and precluded it from obtaining relief in a post confirmation adversary proceeding.

**FAIR DEBT COLLECTION PRACTICES ACT  
(ACTUAL DAMAGES, STATUTORY DAMAGES, &  
ATTORNEY'S FEES)**  
McNally v. Client Services, Inc., 2008 WL 2397489 (W.D. Pa. June 11, 2008)

Plaintiff incurred debt on a Citibank Visa credit card. The plaintiff was a young disabled student. The plaintiff filed a complaint alleging that the defendant violated the Fair Debt Collection Practices Act (FDCPA) by making threats and misrepresentations and by abusing and harassing the plaintiff. The defendant moved for summary judgment arguing: (1) that the plaintiff was not entitled to actual damages because the plaintiff had not offered expert medical testimony that the defendant's collections had caused the plaintiff to suffer emotional distress; (2) that the plaintiff was not entitled to statutory damages because the plaintiff could not prove actual damages and/or the defendant's conduct was not "frequent, persistent, or intentional"; and (3) the plaintiff was not entitled to costs and attorney's fees determined by the court because he refused a Rule 68 offer from the defendant. The court held that the plaintiff had presented sufficient evidence of actual damages by offering his own "sufficiently detailed" affidavit and the affidavit of his mother corroborating emotional distress. The court also held that the case fell

within the general exception to the rule requiring expert testimony of causation because the distressing impact of threatening/abusive/harassing debt collection is within the understanding of the layperson juror. In addition, the court held that the defendant's argument against statutory damages should be considered after a jury evaluates the plaintiff's claim for actual damages. Finally, the court rejected the defendant's argument based on Rule 68 because it was true in this case that the plaintiff could obtain a judgment more favorable than the defendant's offer. Accordingly, the magistrate judge recommended that the defendant's motion for summary judgment be denied.

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



**NATIONAL BANK ACT (STATE LAW  
PREEMPTION)**

Watkins v. Wells Fargo Home Mortgage, 2008 WL 2490306 (S.D. W. Va. June 19, 2008)

The plaintiff obtained an adjustable rate mortgage (ARM) from the defendant bank. After the rate increased on the mortgage, the plaintiff filed suit against the defendant for "predatory lending." The plaintiff brought a class action claim for unconscionable contract; an individual claim for unconscionable contract; and, an individual claim for fraudulent origination. The defendant filed a motion to dismiss, arguing that the claims for unconscionable contract were preempted by the National Bank Act (NBA) and failed to state a claim under the state law consumer protection act. The defendant argued that federal field preemption applied to the case because the NBA specifically allows for adjustable rate loans and prepayment charges, governs the underwriting requirements of loans by a national bank, and regulates the manner, substantive terms, and remedies related to loans. The plaintiff countered, arguing that while the defendant is a national bank, it is still subject to the "long-standing contract principle of unconscionability." Pointing to regulations

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from the Office of the Comptroller of the Currency (OCC), the plaintiff argued that her claims for unconscionability were contract claims that were excepted from the NBA. The court disagreed, holding that OCC regulations specifically allow for national banks to deal in ARMs “without regard to any state law limitations on those activities.” Therefore, the court held that the plaintiff’s claims for unconscionable contract were preempted by the NBA. Additionally, the court held that even if the plaintiff’s claims were not precluded by field preemption, they would fall within conflict preemption. Because the OCC provided specific regulations on the types of loan complained of by the plaintiff, the court held that the OCC regulations displace any state law that would relate to the area. The court held that to the extent that OCC regulations and the NBA conflict with state law specifically, the NBA has preemptive effect. Therefore, the court dismissed the plaintiff’s state law unconscionability claims due to federal law preemption.

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



### FAIR DEBT COLLECTION PRACTICES ACT (PLEADING WITH PARTICULARITY & DECEPTIVE SETTLEMENT OFFER)

Prophet v. Myers, 2008 WL 2328349 (S.D. Tex. June 4, 2008)

Plaintiff brought suit against the defendant credit company and the defendant attorney seeking a declaratory judgment and damages for alleged violations of the Fair Debt Collection Practices Act (FDCPA) and other state consumer protection laws. The plaintiff argued that the defendant attorney allowed a document to be printed that with her signature, stating “Attorney at Law,” when she did not actually sign the letter or personally handle the plaintiff’s account. The plaintiff also alleged that the

defendant attorney misrepresented the terms on which the defendant credit company would have agreed to settle the debt by stating that the defendant credit company would allow a settlement of the debt for 50% of the total amount owed. Also, the plaintiff alleged that he did not actually owe the debt in dispute. The defendant first argued that the plaintiff’s claims were actually those sounding in fraud, and were subject to the heightened pleading requirements located in Rule 9(b) of the Federal Rules of Civil Procedure. In addition, the defendant filed a motion to dismiss. The court first stated that most jurisdictions do not apply the more stringent pleading standard of Rule 9 (b) when looking at a FDCPA suit alleging a violation of 15 U.S.C. § 1692e. The court stated that under the FDCPA, a plaintiff need not prove actual reliance on a false representation . . . nor establish actual damages. The court then held that even if Rule 9(b) did apply, the plaintiff still met the standard. The court stated that the plaintiff adequately informed the court of the particulars of the time, place and contents of the false representations, as well as the identity of the persons making those representations. Accordingly, the court denied the defendant’s motion to dismiss as to the claim that the plaintiff did not plead with proper particularity. Looking to Fifth Circuit precedent, the court then held that the defendant’s letter could violate § 1692e(10). The letter stated that the plaintiff could receive 50% off of the total amount owed, but “[p]ayment must be received in our office within 30 days of the date of this letter.” The court stated that several previous courts had decided that such letters were deceptive, and held the issue of whether the language of the offer was deceptive, could not be resolved in a motion to dismiss. Therefore, the court denied the defendant’s motion to dismiss the plaintiff’s claims.

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**BANKRUPTCY (PREFERENTIAL TRANSFER)**  
In re Lee, 2008 WL 2520453 (6th Cir. June 26, 2008)

The debtor obtained a mortgage loan on his property from a bank. The bank then sold the mortgage loan to the creditor. The debtor and creditor then entered into a new mortgage loan transaction and used the proceeds of that transaction to pay off the original mortgage loan. Seventy-seven days after the new mortgage was recorded, the debtor filed for Chapter 7 bankruptcy. The bankruptcy trustee filed an adversary complaint against the creditor, seeking to avoid the new mortgage as a preferential transfer under the Bankruptcy Code. Both parties filed motions for summary judgment. The defendant asserted the earmarking doctrine as a defense, and argued that the trustee had failed to prove that the new mortgage caused a diminution of the estate's assets under the Bankruptcy Code. The bankruptcy court ruled that the new mortgage was a preferential transfer and found that the earmarking doctrine did not apply. The court held that because the new mortgage was not recorded and perfected for more than two months after the initial transaction, the perfection did not relate back to the initial transfer. The court then held that there was a diminution of the estate's assets. The district court reversed, finding that the trustee did not establish diminution and finding that the entirety of the refinancing was one transaction. The trustee then appealed the decision to the Sixth Circuit Court of Appeals. The court first held that the earmarking doctrine does not provide a refuge for late-perfecting secured creditors, and therefore, could not shield the creditor from preference exposure. The court then rejected the creditor's argument that perfection of its mortgage during the 90-day preference period did not result in diminution of the debtor's bankruptcy estate. The court held that when the debtor's unencumbered, non-exempt equity in his property became subject to a perfected lien, diminution of the bankruptcy estate occurred. Accordingly, the court reversed the decision of the district court and affirmed the decision of the bankruptcy court.

**TRUTH-IN-LENDING ACT (ADEQUATE  
DISCLOSURES & NEGATIVE EQUITY)**  
Schultz v. Burton-Moore Ford, Inc., 2008 WL 2355588  
(E.D. Mich. June 5, 2008)

The plaintiff purchased an automobile from the defendant automobile dealer in January of 2007. In order to pay for the vehicle, the plaintiff traded-in her previous vehicle. Because the plaintiff had taken out a loan on her previous vehicle and owed more than the trade-in value, the defendant added the amount of "negative equity" that the plaintiff had in her previous vehicle into the amount for the purchase of her new automobile. When the price of the negative equity and the purchase price were added, the plaintiff received credit for over \$30,000. Arguing that the defendant did not provide her with adequate disclosures, the plaintiff brought suit against the defendant, alleging violations of the Truth-in-Lending Act (TILA), as well as other state and federal laws. The plaintiff filed a motion for summary judgment on the TILA claim. The defendant argued that the plaintiff was not entitled to summary judgment because the transaction was not for real property and exceeded \$25,000, and therefore, was exempt from TILA's disclosure requirements under 15 U.S.C. § 1603(3). The plaintiff argued that the "negative equity" from her trade-in should not be included in the amount financed. The court, looking to federal court precedent, held that the amount financed should include the plaintiff's negative equity. Therefore, the court held that the consolidated loan amount was clearly in excess of the jurisdictional limit and denied the plaintiff's motion for summary judgment on her TILA claim.

**FAIR DEBT COLLECTION PRACTICES ACT &  
FAIR CREDIT REPORTING ACT (POST  
PETITION DEBTS & DISPUTED DEBTS)**  
Malik v. Palisades Collection, L.L.C., 2008 WL 2397628  
(W.D. Mich. June 10, 2008).

Plaintiffs are married and live together but maintain separate mailing addresses. The plaintiff wife filed for Chapter 7 bankruptcy and subsequently incurred an \$80 debt for counseling services. The plaintiff wife disputed the debt. The defendant mailed validation of the debt, addressed to both the husband and wife, to the wife's mailing address. The wife received the validation letter, and left the letter in the plaintiffs' house. The husband opened the letter and brought it to the wife's attention. The defendant also reported the debt to credit reporting agencies as "disputed." The plaintiffs brought suit under the Fair Debt Collection Practices Act (FDCPA) and Fair Credit Reporting Act (FCRA) alleging that the debt was falsely presented as owed and open. The plaintiffs also brought suit under the Health Insurance Portability and Accountability Act (HIPAA) alleging that disclosure to the

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husband violated HIPAA. The defendant moved for summary judgment on all counts. The court held that the plaintiff wife's debt was owed because it was incurred after the petition for bankruptcy. Further, the court held that the defendant properly reported the debt as open and due upon demand. Finally, the court held that the validation letter did not violate the HIPAA because the only forms of evidence offered in support of the HIPAA claim were unnotarized, undated allegations not meeting the standards for affidavits. Accordingly, the court granted the defendant's motion for summary judgment.

#### FAIR CREDIT REPORTING ACT (STATUTE OF LIMITATIONS)

Shannon v. Experian Credit Co., 2008 WL 2478324 (E.D. Mich. June 17, 2008)

In October of 2005, after noticing that the defendant credit reporting agency (CRA) had mistakenly placed a judgment against the plaintiff's brother on the plaintiff's credit report, the plaintiff called the defendant and disputed the judgment. The defendant ignored the plaintiff's request to remove the judgment for two years. In February of 2008, the plaintiff's attorney again disputed the judgment online. The defendant's agent apologized and agreed to delete the judgment in thirty to forty days. The plaintiff then filed suit, alleging various violations of the Fair Credit Reporting Act (FCRA) and other state consumer protection laws. The defendant then filed a motion to dismiss, arguing that the plaintiff's FCRA claim was barred by the two-year FCRA statute of limitations. The plaintiff filed a reply but did not substantively respond to the statute of limitations defense. The court held that because the plaintiff discovered the presence of the judgment in February of 2005 and learned that the defendant refused to change the report in October of 2005, the applicable statute of limitations expired in October of 2007. The plaintiff did not file a complaint until February of 2008, outside of the limitations period. Therefore, the court granted the defendant's motion to dismiss the FCRA claims and remanded the state law claims to state court.

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



#### FAIR DEBT COLLECTION PRACTICES ACT (CLASS CERTIFICATION)

Acik v. I.C. System, Inc., 2008 WL 2514072 (N.D. Ill. June 11, 2008)

Plaintiff incurred a debt with a medical facility that was transferred to the defendant debt collector. The original debt was for \$200.00; however, at the time the defendant sent the plaintiff his first letter, an additional amount of \$78.50 for "Additional Client Charges," was added to the bill. The additional charges consisted of a \$60.00 collection fee and \$18.50 in interest, neither of which was specifically indicated on the bill. The plaintiff filed suit, on behalf of himself and others similarly situated, alleging that the additional charges and the lack of disclosure about the charges constituted violations of the Fair Debt Collection Practices Act (FDCPA). The plaintiff filed a motion to certify the putative class, pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. The court first held that the plaintiff satisfied the numerosity requirement by alleging that the collection letter forming the basis of his claim was sent to at least 100 individuals. The plaintiff also satisfied the commonality requirement by showing that all of the plaintiffs' claims would revolve around the same type of collection letter sent by the defendant. After the plaintiff agreed to drop his claim for emotional distress damages, which would require an individual assessment, the court concluded that the plaintiff satisfied the typicality element of Rule 23. The court also concluded that the plaintiff would adequately represent the putative class and that the plaintiff's counsel was adequate. The court rejected the defendant's argument that the plaintiff as not an adequate class representative because he personally was not confused or misled by the collection letter. The court stated that the adequate standard is whether an unsophisticated consumer would be misled, and therefore, the plaintiff's subjective interpretations of the letter were immaterial. Finally, the court held that the plaintiff met his burden of proving that issues common to the class would

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predominate over individual issues, and certified the class according to Rule 23(b)(3) without defining the specific characteristics of the class.

**ELECTRONIC FUNDS TRANSFER ACT  
(NOTICE & DETRIMENTAL RELIANCE)**

Voeks v. Pilot Travel Centers, 2008 WL 2485430 (E.D. Wis. June 19, 2008)

The defendant, a retail operator of travel centers, operates automatic teller machines (ATMs) at its locations. Upon the request for a withdrawal, the defendant's ATMs informed the consumer that a fee *may* be assessed. This is instead of a notice stating that a fee *will* be imposed as a part of the consumer's transaction. The plaintiff alleged that this language violated several provisions of the Electronic Funds Transfer Act (EFTA). The defendant filed a motion to dismiss, arguing that the plaintiff failed to show detrimental reliance on the notice. The defendant argued that the plaintiff must allege detrimental reliance to recover actual damages under 15 U.S.C. § 1693m(a)(1). The court held that the requirement is that the plaintiff's actual damages have to be proximately caused by the defendant's failure as recognized under the statute. This occurs when the defendant fails to give proper notice and then assesses a fee for the transfer service in violation of the statute. Therefore, the court held that improper notice plus a fee assessment equals a violation of the statute. However, the court held that the fee charged by the defendant was only \$2.95, and while a "real" loss, could not be judged a substantial one. Therefore, the court held that because the violation of the statute did not produce any actual damages, the plaintiff must plead and prove detrimental reliance to establish actual damages. The court stated that a remedy for a customer under the EFTA is to seek statutory damages under § 1653m(a)(2)(A) and then, to seek actual damages under § 1693m(a)(1). In order to show actual damages, the plaintiff must then plead and prove detrimental reliance. Accordingly, the defendant's motion to dismiss the actual damages claim was granted.

**FAIR DEBT COLLECTION PRACTICES ACT  
(TIME-BARRED STATE COURT LAWSUIT &  
BONA FIDE ERROR)**

Ramirez v. Palisades Collection L.L.C., 2008 WL 2512679 (N.D. Ill. June 23, 2008)

The defendant is a debt collection company that purchases charged-off credit card debt and enforces the debt against consumers. The plaintiff obtained a credit card and made her final payment on the debt in December of 2000. Her credit card company charged-off the debt in June of 2001 and the defendant purchased that debt in December of 2005 and sued the plaintiff in state court to collect the debt in November of 2006. After the plaintiff retained counsel to defend the collection case, the defendant dismissed the suit without prejudice. The plaintiff then filed a class action lawsuit, alleging that the defendant violated various provisions of the Fair Debt Collection

Practices Act (FDCPA) by bringing state court lawsuits to collect debts that were barred by the statute of limitations. The plaintiff filed a motion for summary judgment, arguing that it was entitled to the motion because the debt collection suit was untimely under the five-year limitations period for unwritten contracts, rendering it a deceptive practice under the FDCPA. The defendant also filed a motion for summary judgment, arguing that it was entitled to the bona fide error defense. The defendant argued that the suit was subject to a ten-year limitations period allowed for written contracts. The plaintiff asserted that because the defendant did not attach a copy of a written credit card contract to its debt collection complaint and did not include an affidavit to explain its absence, the statute of limitations for an unwritten contract should apply. The court first explained Illinois law, stating that if parol evidence is necessary to show material terms of a writing, the contract is deemed unwritten for statute of limitations purposes. The court held that because a written contract was not attached to the debt collection complaint and no evidence was proffered that a written contract existed, the contract was unwritten under Illinois law. The court then held that 15 U.S.C. § 1692f prohibits a debt collector from filing a lawsuit to collect an apparently time-barred debt without first determining after a reasonable inquiry that the limitations period is due to be tolled. The defendant argued that summary judgment was unwarranted because issues of fact remained as to whether it was entitled to a bona fide error defense. The defendant submitted evidence of charts and graphs used to determine applicable statute of limitations periods, arguing that those documents were in place to avoid making mistakes of law. The court agreed with the defendant. The court held that a reasonable jury could find that the defendant committed an unintentional mistake of law and did have reasonable procedures in place to prohibit such an error. Accordingly, the court held there were still genuine issues of material fact remaining to be decided and denied the parties' motions for summary judgment.

**FAIR DEBT COLLECTION PRACTICES ACT  
(CLASS CERTIFICATION)**

Cotton v. Assent Acceptance, L.L.C., 2008 WL 2561103 (N.D. Ill. June 26, 2008)

The defendant debt collector purchased telecommunication debts that were owed by the plaintiffs. After making collection attempts, the defendant filed suit against the plaintiffs in state court. The plaintiffs each alleged that the lawsuits filed by the defendants were time-barred because they were brought in order to recover for telecommunications charges that were more than two years old. The plaintiffs argued that the defendant was in the regular practice of bringing lawsuits for time-barred debts and, therefore, filed suit on behalf of themselves and

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others similarly situated, alleging various violations of the Fair Debt Collection Practices Act (FDCPA). The plaintiffs filed a motion for class certification, attempting to certify a class pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. The class was defined as “(a) all individuals (b) against whom [the defendant] filed a lawsuit in Illinois, Wisconsin or Indiana (c) to collect a debt for cellular or other federally regulated telecommunications services (d) where any of the telecommunications charges ante the filing of the lawsuit by two years, (e) which lawsuit was pending at any time during a period beginning one year prior to the filing of this action and ending 20 days after the filing of this action.” The court first held that the plaintiffs satisfied the numerosity requirement by pointing to evidence that there were approximately 7,900 individuals who fit the class definition. The court then held that because the defendant’s alleged conduct was standardized as to the putative class members, that they shared factual and legal questions and satisfied the commonality requirement. The court then held that the typicality requirement was satisfied because the plaintiffs alleged that the defendant brought collection actions on telecommunications debts after the federal statute of limitations had run, something typical of all class members’ claims. The court then determined that the plaintiffs adequately represented the class and the plaintiffs’ chosen counsel was experienced and acceptable. Finally, the court held that the plaintiffs’ class could be certified under Rule 23(b)(3) because it satisfied the requirements of predominance and superiority. The defendant argued that because each member would have charges on their bill that could either be land-line or cellular charges, different statute of limitations would apply. However, the court held that an easy objective analysis could be done on a class-wide basis to determine whether an individual fit within the class definition. Therefore, the court granted the plaintiffs’ motion for class certification.

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



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

Riermersma V. Messerli & Kramer, P.A., 2008 WL 2390729 (D. Minn. June 9, 2008)

Plaintiff incurred debt on a Providian National Bank credit card and fell behind on his payments. Providian sold the plaintiff's account to Pipestone Financial, LLC, which hired the defendant on a contingency basis to collect the plaintiff's debt. The defendant sent the plaintiff a summons and complaint describing in the prayer for relief the debt "due and owing" as \$1,182.25 in principal, \$1,061.45 in interest and \$331.31 in reasonable attorney's fees, less payments of \$180. The plaintiff filed a class action complaint alleging that the defendant violated the Fair Debt Collection Practices Act (FDCPA) by listing attorney's fees as "due and owing." The defendant moved for either judgment on the pleadings or summary judgment. The plaintiff moved for summary judgment and class certification. The court held that a prayer for relief is addressed to the court and as such does not violate the FDCPA because it is not directed at the debtor. Accordingly, the court granted the defendant's motion for summary judgment, denied the plaintiff's motion for summary judgment, and denied the plaintiff's motion for class certification as moot.

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

Bankey v. Phillips & Burns, L.L.C., 2008 WL 2405773 (D. Minn. June 11, 2008)

The defendant debt collector attempted to collect a debt owed by the plaintiff. During the course of collection attempts, the plaintiff alleged that the defendant disclosed his debt to his parents during a phone call, threatened to sue him and threatened to place a lien upon his home. The plaintiff filed suit, alleging that the defendant's actions

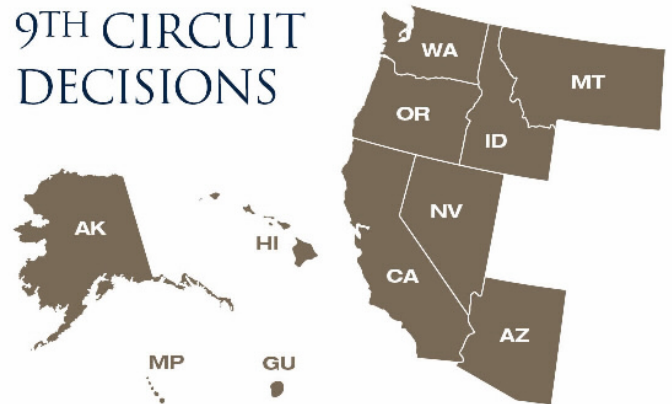
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violated several provisions of the Fair Debt Collection Practices Act (FDCPA). The defendant made an offer of judgment for \$2,500.00, pursuant to Federal Rule of Civil Procedure 68, which the plaintiff accepted. The plaintiff then filed a motion for attorney's fees, requesting fees in the amount of \$50,561.50, and costs of \$4,859.90. The defendant filed a motion challenging the amount requested. During the pendency of the action, the defendant requested a transfer because of improper venue. Therefore, the plaintiff had two separate sets of attorneys, in Minnesota and Pennsylvania. The court discussed their bills separately. The Minnesota attorneys originally requested \$400.00/hour for the two lead attorneys, and \$125.00/hour for the work of a first year associate. The plaintiff then submitted a letter lowering the request for the Minnesota attorney's fees to \$325.00/hour for the first lead attorney and \$300.00/hour for the other. The defendant argued that these rates were inflated because of much lower rates that the same attorneys had been awarded in previous cases. Looking to previous FDCPA cases in the same district, the court then determined that an award of \$325.00/hour for the first lead attorney and \$300.00/hour for the second was a reasonable award. The court also determined that \$125.00/hour for the first year associate was a reasonable fee. The plaintiff then submitted fee requests for his Pennsylvania attorneys ranging from \$390.00/hour for the most experienced attorney to \$275.00/hour for the least experienced attorney. The plaintiff also requested \$135.00/hour for paralegal work that was billed by the firm. The court stated that the plaintiff had failed to present evidence that the Pennsylvania firm had ever billed similar hours in other FDCPA or evidence that other firms in the area charge similar rates for FDCPA work. The court also stated that the Pennsylvania attorneys were only responsible for preparing and filing the plaintiff's 4-page Complaint, which included straightforward and simple FDCPA claims. Following that analysis, the court lowered the rate for the most experienced attorney to \$300.00/hour and allowed a fee of \$230.00/hour for the remaining three attorneys in the firm. The court also found that \$135.00/hour for paralegal work was reasonable. The court then lowered the amount of time that the Pennsylvania attorneys had spent on "file review" from 11.9 hours to 8.3 hours. The court stated that the use of so many attorneys added unnecessary duplication of efforts to the file. The court then held that because the case was filed in an inappropriate venue, the amount of time billed on transfer of venue to Minnesota was reduced by 4.0 hours. The court then reduced the amount of time billed by the Minnesota attorneys on "discovery." The court stated that the plaintiff had spent many needless hours attempting to compel overbroad discovery. At one point the district court judge had stated that the discovery requests "plainly exceeded the bounds of reasonableness." Therefore, the court reduced the Minnesota attorneys'

hours by 11.79. The Minnesota attorneys had also billed over 4 hours for a deposition that only took 1 hour and 17 minutes. After examining the relatively short driving time, the court concluded that a billing of only 2.4 hours was more reasonable. After making a few other minor adjustments in the attorney's fees, the court concluded that the costs requested were reasonable, especially in light of the fact that the defendant did not challenge the costs request. Accordingly, the court allowed \$2,476.50 to be billed by the Pennsylvania attorneys and a combined total of \$26,182.15 to be billed by the attorneys in Minnesota.

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## 9TH CIRCUIT DECISIONS



**FAIR DEBT COLLECTION PRACTICES ACT  
(BONA FIDE ERROR & OFFER OF JUDGMENT)  
Bretana v. International Collection Corp., 2008 WL  
2264555 (N.D. Cal. June 2, 2008)**

The plaintiff incurred a casino debt. The casino hired the defendant debt collectors to obtain payment for the debt from the plaintiff. The defendants sent the plaintiff several letters, each threatening to collect "treble damages" from the plaintiff if he did not satisfy the amount owed on his NSF check. The final letter sent from the defendant stated that the plaintiff owed \$1,500.00 in principal and \$1,500.00 in treble damages. The plaintiff filed suit against the defendants on behalf of himself, and others similarly situated, alleging that they violated the Fair Debt Collection Practices Act (FDCPA) by attempting to use a California state law to collect treble damages, when the debt was incurred in Nevada. The plaintiff also maintained that the defendants committed other misrepresentations. The defendants filed a motion to dismiss and served the plaintiff with an offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. The plaintiff moved to strike the offer of judgment, or in the alternative, to certify the class. The defendants first argued that they should not be held liable because the FDCPA violation was unintentional and

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resulted from a bona fide error. The defendants argued that the lawsuit was unintentionally brought in the wrong venue. The court held that because the plaintiff had alleged other misconduct, including that the defendants violated the FDCPA by seeking and miscommunicating information about the availability of damages pursuant to California law for a debt incurred in Nevada, the plaintiff's factual allegations were sufficient to deny the defendants' motion to dismiss. The court then granted the plaintiff's motion to strike the defendants' offer of judgment. The court agreed with the plaintiff that allowing an offer of judgment to a single named plaintiff before class certification would encourage a "race to payoff" that would harm class actions before they began. Accordingly, the court denied the defendants' motion to dismiss and granted the plaintiff's motion to strike the defendants' offer of judgment.

FAIR DEBT COLLECTION PRACTICES ACT  
(STANDING, BONA FIDE ERROR & PRO SE  
LITIGANT)

Kerwin v. Remittance Assistance Corp., 2008 WL 2271126  
(D. Nev. June 2, 2008)

The plaintiffs received several automated phone messages from the defendant debt collector that were intended for debtors who had previously been assigned the plaintiffs' current home phone number. The plaintiffs sent several messages to the defendant requesting that they stop calling their number, however, errors in the defendant's computer system allowed the defendant to continue to call the plaintiffs' number. The plaintiffs filed a pro se complaint against the defendant, alleging violations of the Fair Debt Collection Practices Act (FDCPA). The defendant filed a motion to dismiss, and in the alternative, a motion for summary judgment. The court first held that the plaintiffs did have standing to sue under the FDCPA even though they owed no money to the defendant. The court held that a debt collector who fails to comply with the FDCPA with respect to "any person" is liable to that person. The court held that the Act was designed to protect any person who was victimized by unscrupulous debt collectors, regardless of whether a valid debt exists. The plaintiff argued that the defendant violated 15 U.S.C. § 1692d of the FDCPA by harassing the plaintiffs with debt collection calls regarding debts that they did not actually owe. The court held that because the plaintiffs had notified the defendant of the error, and the calls continued, there was a genuine issue as to whether the defendant had violated § 1692d. The court then held that there was a genuine issue as to whether the defendant's repeated phone calls constituted intentional abuse under § 1692d(5). The court stated that there was a genuine issue as to whether the debt collector's statement that the plaintiffs' should "go ahead and sue" constituted abusive language. Also, the court stated that there was a genuine issue as to whether the

defendant had violated § 1692c(c) by phoning the plaintiffs after they had given written notice that they wanted to cease further communication. Finally, the court held that there was a genuine issue as to whether the defendant had committed a bona fide error that would excuse it from compliance with the FDCPA. The defendant had presented evidence that its auto-dial machine could not sort or filter calls by telephone number. The court held that the statement was only a description of the defendant's equipment and was not sufficient to show that, as a matter of law, its procedures were reasonable or that its mistakes were merely clerical. Therefore, the court denied the defendant's motion for summary judgment. The defendant then argued that the court should dismiss the plaintiffs' complaint because the plaintiffs' had failed to prosecute and follow court orders. After filing their complaint in January of 2007, the plaintiffs had failed to contact the court or the defendant until September of 2007. The court stated that because one of the plaintiffs had been suffering from cancer, and because they were pro se litigants, the court should be especially hesitant to dismiss for procedural deficiencies. The court also stated that the defendant had failed to alleged specific allegations of prejudice. Therefore, the court denied the defendant's motion to dismiss.

FAIR DEBT COLLECTION PRACTICES ACT  
(STATUTE OF LIMITATIONS & INDIVIDUAL  
LIABILITY)

Cruz v. International Collection Corp., 2008 WL 2263800  
(N.D. Cal. June 2, 2008)

Defendant debt collector was hired to collect a debt that the plaintiff incurred while at a casino in mid-April of 2006. The defendant sent various letters to the plaintiff, beginning in mid-October of 2006, which threatened notice to credit reporting agencies (CRAs) and the application of treble damages to the amount owed. The defendant sent its final letter in late February of 2007 stating that a lawsuit may be initiated if payment was not received. In mid-February of 2008 the plaintiff filed suit against the defendant and an officer of the defendant's company, alleging various violations of the Fair Debt Collection Practices Act (FDCPA) and other state laws. The defendant filed a motion to dismiss, arguing that the plaintiff's claim was barred by the one-year FDCPA statute of limitations. The defendant officer then filed a motion to dismiss, alleging that an individual is not personally liable for any wrongful acts under the FDCPA. The court first stated that while some of the events, including the first letter sent to the plaintiff, predated the one-year statute of limitations, the plaintiff adequately alleged a continuing pattern of communications by letter in connection with her FDCPA claim. Therefore, the court held that the plaintiff was entitled to base her claims on

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the entire course of conduct that she had alleged, including correspondence that occurred more than one year before the lawsuit was filed. The court then held that while the defendant officer was just an employee of the defendant, within the meaning of 15 U.S.C. § 1692a(6), he is liable for acts of the defendant because he set and approved the defendant's collection policies, practices and procedures, including the activities alleged in the complaint. Accordingly, the court denied the defendants' motions to dismiss.

TRUTH-IN-LENDING ACT (ADEQUACY OF DISCLOSURES & TEMPORARY RESTRAINING ORDER)

Richardson v. Robison, 2008 WL 2338611 (S.D. Cal. June 5, 2008)

The plaintiffs were a husband and wife who owned their home together. After the plaintiffs became ill from separate ailments, the plaintiff's son, a defendant in the action, obtained power of attorney from both his mother and father. The defendant son used the powers of attorney to refinance his parents' home without their consent or knowledge. The son worked with the defendant real estate broker, defendant real estate salesperson and defendant money lender in refinancing the home. The plaintiffs learned of the refinancing one week after it was finished and were informed by the defendants that it was too late to rescind it. At that time, the son had left town with approximately \$75,000. The plaintiffs had difficulty making payments on the loan and sent the defendants a notice of rescission, pursuant to the Truth-in-Lending Act (TILA) because they had never received their legally required notices. The defendants informed the plaintiffs that there were no grounds for rescission and made plans to sell the plaintiffs' home in a non-judicial foreclosure. The plaintiffs filed suit against the defendants, alleging violations of the TILA and requested the judge grant a temporary restraining order (TRO) to prevent the sale of their home. The defendants argued that the plaintiffs' application for a TRO should be denied because they had no likelihood of success on the merits. The plaintiffs argued that they were entitled to rescission because the defendants had failed to make certain disclosures at least three days before consummation of the refinancing agreement, as is required by the Home Ownership Equity Protection Act (HOEPA). The defendants presented evidence that the defendant son had received the necessary disclosures seven days before the close of escrow and the recording of the security interest. The court stated that disclosures are required three days before the "consummation of the transaction," which is the date escrow closed and the security interest was recorded. Additionally, the court held that the plaintiffs were unable to establish that they would be able to return the loan amount to the defendants if rescission were

ordered, a requirement of rescission. Therefore, the plaintiffs had a very small likelihood of success on the merits. Finally, the court held that because the plaintiffs waited five months after default, and one month after notice of the non-judicial foreclosure sale, they were unable to prove that the hardships were balanced against them. The court stated that the defendants would also suffer prejudice if the foreclosure sale were enjoined. Therefore, the court denied the plaintiffs' application for a TRO.

FAIR DEBT COLLECTION PRACTICES ACT (ATTORNEY'S FEES)

Sial v. Professional Collection Consultants, 2008 WL 2415037 (C.D. Cal. June 12, 2008)

The plaintiff brought suit against the defendant debt collector, alleging violations of the Fair Debt Collection Practices Act (FDCPA). The defendant made an offer of judgment for the sum of \$2,500.00, plus court costs and reasonable attorney's fees. The plaintiff accepted the offer and then brought a motion to recover attorney's fees in the amount of \$5,572.00 and costs in the amount of \$395.00. The defendant argued that the requested amount of fees was unreasonable. The plaintiff submitted a request that detailed an expenditure of 22.1 hours of work. The defendant submitted a declaration by an experienced debt collection attorney who estimated that the reasonable time expended on the case should have been no more than four hours. The court stated that while the time expended was too high, four hours was less than reasonable. After examining the plaintiff's accounting records, the court concluded that the interests of justice were best served by making an "across-the-board" percentage reduction in the plaintiff's billing. The court held that the plaintiff's attorneys acted with a degree of zeal and thoroughness beyond which would have been exercised by a reasonable attorney for the particular matter. The court reduced the hours billed for writing the complaint from ten to five. The court then stated that because it "considers the defendant's suggested four hours as too little and [p]laintiff's 22 hours as too much . . . the court deems it appropriate to simply reduce [p]laintiff's request by 50%." Therefore, without specific discussion of the plaintiff's hourly rate, the court awarded the plaintiff \$2,786.00 in attorney's fees and because the plaintiff failed to timely file an application for costs, denied the plaintiff's request for costs.

TRUTH-IN-LENDING ACT (ADEQUATE NOTICE & STATUTE OF LIMITATIONS)

Buick v. World Savings Bank, 2008 WL 2413172 (E.D. Cal. June 12, 2008)

The plaintiffs, a husband and wife, entered into a mortgage loan transaction with the defendant bank. The plaintiffs alleged that the defendant's agent induced them into agreeing to a mortgage loan with an extremely low 1.95% interest rate for the first two months, but were unaware that the rate could climb as high as 11.950%. The plaintiffs filed suit, alleging that the defendant violated various provisions of the Truth-in-Lending Act (TILA) and other state laws. The defendant filed a motion to dismiss. The plaintiffs first argued that at closing they did not receive the proper number of notices of their right to rescind. The plaintiffs alleged that the wife only received one copy of the Notice, and therefore, their period for rescission of the loan should increase to three years. The defendant presented a signed copy of the Notice from both plaintiffs, which created a rebuttable presumption of adequate delivery. The plaintiffs argued that while the wife did sign the document, she never received a copy of the document. The court held that by construing all facts in the light most favorable to the plaintiffs, the court could not say that they failed to state a claim. The defendant, relying on an unpublished Ohio state case and a Federal Bankruptcy Court case from Kansas, then argued that married co-borrowers are only entitled to one notice each. The court distinguished the cases and held that both plaintiffs were entitled to receive two copies of the Notice. The defendant then asked the court to strike the plaintiff's TILA claim for damages because the plaintiffs admitted that they did not read the loan documents, and therefore, could not prove the reliance necessary to show causation. The court disagreed, holding that the plaintiffs' prayer for damages is sufficient to the extent it is based upon the defendant's failure to provide the proper number of notices or to honor the plaintiffs' request to rescind. The court held that a showing that the plaintiffs actually read the notices is not necessary. Finally, the defendant argued that the plaintiffs' claim was barred by the one-year TILA statute of limitations. The court held that the one-year limitations period would run from the time that the defendants failed to honor the plaintiffs' rescission request, not from the time of the consummation of the loan transaction. Because the plaintiffs filed suit within one year of the denial of the rescission request, the court rejected the defendant's argument. Therefore, the defendant's motion to dismiss the plaintiffs' TILA claims was denied.

FAIR CREDIT REPORTING ACT (PRIVATE ENFORCEMENT, ADVERSE ACTION NOTICE & WILLFULNESS)

Asby v. Farmers Ins. Co. of Oregon, 2008 WL 255792 (D. Or. June 20, 2008)

Plaintiffs filed a class action lawsuit against the defendant insurance company. Plaintiffs alleged that the defendant violated several provisions of the Fair Credit Reporting Act (FCRA), by failing to send adverse action notices to some new insureds, and by sending inadequate adverse action notices to renewal insureds, whose premiums increased based on information that the defendant obtained from the plaintiffs' consumer credit reports. Both parties filed motions for summary judgment. The defendant first argued that the plaintiffs' FCRA claims were barred, because the enactment of the Fair and Accurate Credit Transaction Act of 2003 (FACTA), eliminated the FCRA right to private enforcement of 15 U.S.C. § 1681m(a). The court stated that the issue revolved around whether FACTA should be applied retroactively to bar prosecution of actions filed before the FACTA was enacted. The court then held that the application of FACTA retroactively would impair the right of each class member to recover statutory damages. Such a result would be impermissible without Congressional direction to the contrary. Therefore, the court denied the defendant's motion for summary judgment requesting that FACTA bar the plaintiffs' action. The defendants then argued that they did not take any adverse actions against the plaintiffs, and therefore, were not responsible for sending adverse action notices to the plaintiffs. The court looked to the U.S. Supreme Court decision in *Safeco Ins. Co. v. Burr*, 127 S.Ct. 2201 (2007), in which the Supreme Court found that insurance companies needed to assign a "neutral" baseline rate that an individual would receive without a credit score, and then send adverse action notices to individuals whose premium rates were increased from the baseline because of a poor credit score. The plaintiffs alleged that the defendant assigned a rating of "N" to all new insureds, and that the rating of "N" indicated the lowest possible rate, so that any additional credit information could only result in the same, or better rate. The plaintiffs alleged that the system would not require the defendant to send any adverse action notices because a credit score could not be worse than a rating of "N." The court held that while the defendant did not need to establish a baseline that required adverse action notices to be sent to all new applicants who did not receive the best premium available, a more neutral baseline needed to be established. The court then stated, however, that the defendants did not have the benefit of the Supreme Court's guidance in *Safeco* when it implemented its program, and therefore, their conduct was not objectively unreasonable as to new applicants who did not receive an

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adverse action notice. Therefore, the court held that the defendant was not liable for sending adverse action notices to new insureds based upon their previous baseline program. The plaintiffs then alleged that the defendant violated the FCRA with its renewal insured's baseline program. The defendant countered, arguing that there should only be a responsibility to send an adverse action notice if the renewal premium is increased by a worsening of the insured's credit score. The court agreed with the defendant, holding that there is not an adverse action under Safeco unless the cost of the renewal premium actually increases. The court also held that any increase must be caused, in part, by the insured's consumer credit score. The court then applied the standard to several of the named plaintiffs and granted in part and denied in part the defendant's motion for summary judgment. The defendant then requested that the court grant its motion for summary judgment arguing that any violation of the FCRA was not done with the requirement of willfulness. Looking to Safeco, the court determined that a FCRA violation is "willful" if it arises from a "reckless disregard" of a consumer's right to an adequate adverse action notice. The court first held that because the defendant did not have a clearly established baseline for determining which new insureds must receive adverse action notices, a jury would be precluded from finding that the defendant willfully violated the FCRA's adverse action notice requirement as to any particular new insured. However, the court did hold that the adverse action notices that were actually sent to some consumers were objectively unreasonable. The notices informed the insured of their rights under the FCRA, but did not include any information that would convey to the consumer that an adverse action had been taken. The court held that the defendant consistently chose not to identify that an adverse action had been taken based on information obtained in a credit report. The court then held that a genuine issue of material fact existed as to whether inadequate notices constituted a willful violation of FCRA under the standard mandated in Safeco. Accordingly, the court granted in part and denied in part the defendant's motion for summary judgment on the issue of willfulness.

#### FAIR DEBT COLLECTION PRACTICES ACT (BANKRUPTCY & STANDING)

Yack v. Washington Mutual, Inc., 2008 WL 2492169 (N.D. Cal. June 23, 2008)

The plaintiffs defaulted on a credit card account and the defendant debt collector instituted an action to collect the debt in state court. After the defendant obtained a judgment against the plaintiff, it prepared a Writ of Execution and issued a copy to the Los Angeles County Sheriff's office. Pursuant to the Writ, a Notice of Levy was mailed to the defendant bank, which then withdrew \$237.00 from the plaintiff's checking account to satisfy the

writ. The defendant bank also withdrew a legal processing fee. The plaintiffs then filed a claim of exemption, arguing that the funds were exempt from withdrawal. The plaintiffs then filed suit under the Fair Debt Collection Practices Act (FDCPA), against the defendant bank and debt collector, alleging that the defendants withdrew and transferred the plaintiffs' funds despite having knowledge that the money was exempt from attachment. The defendants filed a motion to dismiss, arguing that after the occurrence of the facts leading to this case, the plaintiffs filed for voluntary Chapter 7 bankruptcy. During the proceedings the plaintiffs failed to disclose these claims to the bankruptcy court and were discharged from bankruptcy three days before they filed their current claims. The defendants alleged that because the plaintiffs failed to disclose the claims, they lacked standing to assert the claims in federal court. The court agreed with the defendants, holding that property of a bankruptcy estate includes all legal or equitable interests of the debtor in property as of the commencement of the case. The court held that this included the causes of action in the current complaint. The court further noted that when the plaintiffs attempted to cure the problem with the bankruptcy court, the bankruptcy trustee rejected abandonment of the claims at issue. Accordingly, the court held that all of the plaintiffs' claims were barred due to lack of standing.

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



#### FAIR CREDIT REPORTING ACT (STATUTE OF LIMITATIONS & PREEMPTION)

Pinson v. Equifax Credit Information Svc. Inc., 2008 WL 2329137 (N.D. Okla. June 2, 2008)

The plaintiffs filed suit against the defendant credit reporting agency (CRA), alleging various violations of the Fair Credit Reporting Act (FCRA) and other state laws. The defendant filed a motion for summary judgment

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alleging that the plaintiffs had brought suit long after the two-year FCRA statute of limitations. The defendant argued that in October of 2003, after the plaintiffs alleged inaccuracies in their credit reports, the defendant took the plaintiffs' credit reports offline. The defendant argued that it had not published the plaintiffs' credit reports to third parties after March 16, 2004. The plaintiffs argued that the court should use the new FCRA statute of limitations that became effective on March 31, 2004. The new statute of limitations, outlined in 15 U.S.C. § 1681p, provided that a FCRA action may be brought "not later than the earlier of [:] (1) 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or, (2) 5 years after the date on which the violation that is the basis for such liability occurs. The court held that application of the new statute of limitations would allow for a claim that previously would have not been allowed for by the older FCRA statute of limitations. Therefore, the statute would require retroactive application, and accordingly, could not be allowed. The plaintiffs then argued that because they had filed the same lawsuit previously, and had it dismissed without prejudice, that the original date of the complaint should be used to determine the statute of limitations. The court rejected the plaintiffs' argument, concluding that a previously filed but dismissed lawsuit does not operate to toll the statute of limitations. Finally, the court concluded that the plaintiffs' state law claims that the defendant acted in "willful disregard of their rights" should be dismissed. The court held that the plaintiffs had failed to allege any facts showing that the defendant had acted with malice or in willful disregard of their rights. The court then held the FCRA preempts certain state law claims absent malice of willful intent. Therefore, the court held that the plaintiffs' state law claims of libel and false light invasion of privacy were preempted by the FCRA. Accordingly, the court granted the defendant's motion for summary judgment.

**FAIR DEBT COLLECTION PRACTICES ACT  
(MISREPRESENTATION OF OWNERSHIP &  
AMOUNT OF DEBT)**

Kelly v. Wolpoff & Abramson, L.L.P., 2008 WL 2397689  
(D. Colo. June 10, 2008)

Plaintiff defaulted on a credit card debt that she had owed to a bank. The bank then transferred the debt to the defendant law firm for collections. The defendant initiated arbitration proceedings on behalf of the bank to recover over \$15,000.00 from the plaintiff. Sometime during the arbitration proceedings, the bank charged-off the debt but did not inform the arbitrator or plaintiff. The plaintiff then alleged that the debt was actually sold to the defendant, although the plaintiff was still being informed that it was owned by the bank. The plaintiff then filed suit, alleging that the defendant had misrepresented the ownership, existence and/or amount of the debt in violation of the Fair Debt Collection Practices Act

(FDCPA). Both parties filed motions for summary judgment. The plaintiff first claimed that the defendant had violated 15 U.S.C. § 1692(d)(1) when committing perjury during the arbitration proceeding by not informing the arbitrator or the plaintiff that the plaintiff's debt had been sold to the defendant. The court held that the plaintiff had submitted no evidence that the debt was actually owned by the defendant, and therefore, held that there was no genuine issue of fact as to whether the defendant had committed perjury. The defendant submitted a sworn affidavit stating that the debt was still owned by the bank, whereas, the plaintiff had only submitted evidence of her own interrogatory response. The plaintiff's response consisted of a phone conversation that she had with one of the bank's agents. The court stated that the statements were hearsay, and did not qualify as admissions by a party opponent, because the defendant, and not the bank, was the actual opponent in the case. Therefore, the court dismissed the plaintiff's § 1692(d)(1) claim. The plaintiff then claimed that the defendant misrepresented the amount of the debt, in violation of § 1692e(2)(A), because the bank had "charged off" the debt and because the defendant informed the plaintiff that she owed the debt irrespective of any financial benefit that the bank received from writing off the debt as a loss. The court first held that by "charging off" the debt, in no way did the bank "extinguish" the debt and make it uncollectable. The court, referring to the plaintiff's "sophistic" argument, explained that a debt "charge off" is not equivalent to a debt discharge. The court then held that the defendant did not misrepresent the amount of the debt merely because it did not disclose tax benefits that it received from charging off such debt. The court stated that the plaintiff pointed to no law suggesting that the amount of a private debt is affected by the tax burdens and benefits relating thereto. Accordingly, the court granted the defendant's motion for summary judgment.

**FAIR DEBT COLLECTION PRACTICES ACT  
(SECURITY INTEREST & CREDITOR  
APPLICABILITY)**

Maynard v. Cannon, 2008 WL 2465466 (D. Utah June 16, 2008)

The plaintiff obtained a mortgage loan from a finance corporation. The parties then entered into a "Loan Repayment and Security Agreement" that gave the finance corporation a security interest in the plaintiff's property after the plaintiff executed a Deed of Trust that listed her as the trustor and borrower and the defendant as the beneficiary and lender. After the plaintiff fell behind on her loan payments, the finance corporation began to initiate a non-judicial foreclosure. It contracted with the defendant to attempt to collect on the debt and made the defendant the trustee of the trust. The plaintiff, upset with

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several of the defendant's tactics, filed suit alleging various violations of the Fair Debt Collection Practices Act (FDCPA). The defendant filed a motion to dismiss, arguing that the FDCPA does not apply to the foreclosure of a home or collection of a security interest. While the court acknowledged that some courts have applied the FDCPA to transactions involving security interests, the court held that there was no evidence in the case that the defendant met the definition of a "debt collector." The court held that there was no evidence that the defendant normally collects debts; in fact, the defendant was only brought into the action in order to commence a non-judicial foreclosure sale. The court also stated that the evidence indicated that the finance company never used the defendant to collect deficiency judgments. Therefore, the court held that the defendant's activities fell outside of the FDCPA's general provisions. Additionally, the court held that even if the defendant's actions did fall within the purview of the FDCPA, they did not violate the Act. The plaintiff claimed that when the defendant filed a Notice of Default with the county recorder's office that it was a communication with a third party about the plaintiff's debt in violation of 15 U.S.C. § 1692c(b). The court disagreed however, holding that the plaintiff gave the defendant permission to allow the trustee to record a notice of default when she signed the Deed of Trust. Accordingly, the court granted the defendant's motion for summary judgment.

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



### BANKRUPTCY (SUBJECT MATTER JURISDICTION & VIOLATION OF AN AUTOMATIC STAY)

In re Saylor, 2008 WL 2397344 (M.D. Ala. June 9, 2008)

The debtor filed for Chapter 13 bankruptcy. The creditor, servicer of the plaintiff's mortgage loan, then filed a proof of claim, which the Bankruptcy Court approved and inserted in the debtor's plan. The debtor then submitted a Qualified Written Request (QWR) in accordance with the Real Estate Settlement Procedures Act (RESPA) to the

creditor so that the debtor could review charges made to his mortgage. Noticing that some of the information in the QWR showed charges after the debtor's bankruptcy was filed, the debtor filed an adversary proceeding against the creditor alleging that the creditor violated the automatic stay. The creditor filed a motion to dismiss. Holding that it lacked subject matter jurisdiction to hear the claim and, in the alternative, that the debtor failed to state a claim for relief, the Bankruptcy Court granted the motion. The creditor then appealed the decision to the district court. The plaintiff first held that the Bankruptcy Court did have subject matter jurisdiction because the debtor alleged a violation of the automatic stay. The creditor argued that the court lacked subject matter jurisdiction because the claims did not involve property of the bankruptcy estate. The court held that because the plaintiff brought a claim that was based on a substantive right that is contained in Title 11, the Bankruptcy Court had subject matter jurisdiction over the debtor's claims. Next, the creditor argued that the charges listed in its response to the debtor's QWR did not violate the automatic stay because the creditor took no action to collect the charges. The creditor argued that they were merely bookkeeping entries, and were only sent to the debtor because of the QWR query. The court agreed with the creditor, holding that the entries were "merely unilateral notations," until the creditor took action by instituting collection proceedings or transmitting harassing communications. The court stated that the creditor had not "acted" as is required under the Code, by sending the transaction history report and payoff letter in response to the debtor's request. Accordingly, the court affirmed the ruling of the district court.

TRUTH-IN-LENDING ACT (RESCISSION &  
ADEQUACY OF DISCLOSURES)  
McMillian v. AMC Mortgage Services, Inc., 2008 WL  
2357236 (S.D. Ala. June 10, 2008)

The plaintiffs obtained a residential mortgage loan from the defendant in April of 2004. The plaintiffs alleged that the defendant failed to provide them with the Notice of Right to Rescind, as is required under the Truth-in-Lending Act (TILA). The plaintiffs alleged that because of the notification failure, the plaintiffs were allowed three years to rescind their loan under the TILA. The plaintiffs then attempted to rescind their loan in October of 2007. The defendant refused to honor the October 2007 rescission. The plaintiffs then filed suit, alleging that the defendant wrongfully failed and refused to honor their rescission. The defendant filed a motion to dismiss for failure to state a claim. The defendant first argued that the plaintiffs were outside of the three year rescission period allowed under TILA in 15 U.S.C. § 1635(f). The defendant argued that the plaintiffs' loan closed on April

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24, 2007, but they failed to invoke their right to rescind until October of 2007, more than three years later. The plaintiffs countered, first attempting to invoke the doctrine of class action tolling, claiming that their claims were involved in at least one of several class actions pending against the defendant. The plaintiffs argued that pendency of a putative class action tolls the statute of limitations indefinitely for all prospective class members, even those who were not relying on the class action mechanism to protect their rights, or who were relying on it opportunistically and only to the extent necessary to validate otherwise time-barred claims. The court disagreed with that interpretation of precedent. Additionally, the court stated that the three-year TILA rescission period was “emphatically not” a statute of limitations that is subject to tolling. The plaintiffs then argued that § 1635(f) applied to their case. Section 1635(f) allows a plaintiff to bring a TILA claim past the three-year rescission period if an agency empowered to enforce TILA brings a successful claim that is based on matters involved in the plaintiff’s proceeding. A plaintiff is then allowed to bring a rescission claim within three years of the date of consummation of the original transaction, or up to one year following the conclusion of the proceeding. The plaintiffs pointed to certain proceedings in California, brought by several states’ attorneys general to trigger the statutory extension of the three-year rescission period. The defendant countered, arguing that the plaintiffs had not satisfied the provisions of § 1635(f) by failing to allege that their right to rescind arose from that action. The court held that the plaintiffs did not have an affirmative duty to negate the statute of limitations defense in their initial pleading and held that the defendant had failed to rebut the plaintiffs’ argument that they timely exercised their rescission rights within the limits prescribed by § 1635(f). The defendant then argued that the plaintiffs were not even entitled to the three-year rescission period under § 1635 because they received proper notice of the right to rescind. The plaintiffs countered, arguing that defendant left blank boxes on the notices that were meant to provide the signing date and the final date of cancel. Additionally, the plaintiffs argued that the heading of one notice stated, “One Week Cancellation Period,” while the body of the document only provided for the standard three-day rescission period. The court acknowledged that the defendant had committed a technical violation of TILA, but also noted that while some circuits provide that a technical violation triggers the three-year rescission period, the Eleventh Circuit does not. The court held that the TILA does not require “perfect” notice and stated that the defendant’s notice clearly and unambiguously informed the plaintiffs of their right of rescission within three business days of the date of closing or receipt of disclosures. Therefore, the court held that the three-year rescission period was inapplicable to the plaintiffs, granted the defendant’s motion to dismiss and dismissed the

plaintiffs' complaint as untimely.

FAIR DEBT COLLECTION PRACTICES ACT  
(COMPULSORY COUNTERCLAIMS)  
Ghazal v. RJM Acquisitions Funding, L.L.C., 2008 WL  
2439508 (S.D. Fla. June 16, 2008)

The plaintiff opened a credit card account with a bank. After the plaintiff defaulted, the bank sold the account to the defendant debt collector. The defendant sent the plaintiff an original dunning letter. The plaintiff responded by disputing the validity of the debt. The plaintiff then alleged that the defendant continued to attempt to collect on the debt and reported the debt to a credit reporting agency (CRA). The plaintiff filed suit, alleging that the defendant’s practices violated several provisions of the Fair Debt Collection Practices Act (FDCPA). The defendant filed a counterclaim, asserting a claim for reestablishment of a lost document, a breach of contract claim and claims for account stated and open account. The plaintiff then filed a motion to dismiss the defendant’s counterclaim for lack of subject matter jurisdiction. The plaintiff argued that the defendant’s counterclaims were not compulsory under supplemental jurisdiction, and therefore, should not have been allowed. The court held that the defendant’s counterclaim and the plaintiff’s FDCPA claims bore such a sufficient factual relationship to constitute the same “case” within the meaning of Article III of the United States Constitution. The court stated that only a logical relationship between the two claims was required. The court then considered the standards set forth in 28 U.S.C. § 1367(a) to determine if the court should use its discretion to refuse to exercise subject matter jurisdiction over the counterclaim. The court held that the counterclaim did not raise a novel or complex issue of state law. Additionally, other claims over which the court had original jurisdiction survived dismissal. The court held that the counterclaim did not predominate over remaining claims and that there were no exceptional circumstances which created compelling reasons for declining jurisdiction. Therefore, the court denied the plaintiff’s motion to dismiss the defendant’s counterclaim.

REAL ESTATE SETTLEMENT PROCEDURES  
ACT (APPLICABILITY TO SELLERS)  
Estate of Ellison v. Class.com, Inc., 2008 WL 2468570  
(S.D. Ala. June 16, 2008)

Plaintiff sold his home using the defendant real estate company. During the transaction, the defendant charged the plaintiff a “processing fee” of \$295.00. The plaintiff filed suit on behalf of himself, and others similarly situated, alleging that by charging a “processing fee,” the defendants violated the Real Estate Settlement Procedures

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Act (RESPA). The defendants filed a motion to dismiss, claiming that the RESPA was inapplicable to the plaintiff's transaction. The plaintiff argued that the defendant violated provisions in the RESPA prohibiting kickbacks for business referrals and splitting real estate charges with individuals that did not actually perform a service rendered. The defendant asserted that the RESPA was inapplicable to the transaction because the plaintiff was the seller in the transaction. Citing the Eleventh Circuit in *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314 (11th Cir. 2008), the court held that the RESPA applied both to purchasers and to sellers. Therefore, the court held that the plaintiff had stated a cause of action under the RESPA and denied the defendant's motion to dismiss.

FEDERAL ARBITRATION ACT (CARDMEMBER AGREEMENT & NON-SIGNATORY TO AN ARBITRATION PROVISION)

Jefferson v. HSBC Bank, Nevada, N.A., 2008 WL 2559395 (M.D. Ala. June 23, 2008)

The plaintiff applied for a credit card from the defendant bank and then immediately used it to purchase a computer from the defendant retailer. The signed cardholder application contained an arbitration provision. When the plaintiff returned the computer, instead of crediting his credit card account, the defendant retailer charged his account a second time. The plaintiff filed suit in state court alleging various violations of federal consumer protection status and other state law tort claims. The defendants removed the case to federal court and then filed a motion to compel arbitration and stay proceedings, or, in the alternative, to dismiss. The court held that when the plaintiff used the defendant's credit card, he agreed to be bound by the terms of the cardmember agreement. Citing Alabama law, the court held that a contract may incorporate the terms of another document by reference, including terms that require arbitration. The defendant retailer then argued that it should be allowed to enforce the arbitration agreement against the plaintiff because the scope of the arbitration encompassed the type of claim brought by the plaintiff. The court stated that because the agreement allowed for arbitration of "any" dispute "arising from or relating to [the] agreement or the relationships which result from this agreement," it was broad enough to include enforcement of the plaintiff's claims against the retailer. The court then stated that because the claims against both defendants arose out of the same interdependent set of facts, they were sufficiently intertwined to allow the defendant retailer to invoke the arbitration agreement contained in the defendant bank's cardmember agreement. Accordingly, the court granted the defendants' motion to compel arbitration and stay proceedings.

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