



Consumer Finance Monthly Litigation Update March 2007

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1ST CIRCUIT DECISIONS

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

2ND CIRCUIT DECISIONS

FAIR CREDIT REPORTING ACT (CONSUMER REPORTING AGENCIES)

Pietrafesa v. First American Real Estate Info. Svcs., Inc., 2007 WL 710197 (N.D.N.Y. March 6, 2007)

Defendant Aegis requested and received thousands of merged credit reports, including plaintiff's from defendant Credco, a credit report furnishing company. Thereafter, Aegis informed Credco that Aegis had improperly requested plaintiff's credit report. Plaintiff filed suit against defendant alleging, in part, that Credco obtained a copy of his credit report for an improper purpose in violation of the Fair Credit Reporting Act ("FCRA"). Credco filed for summary judgment arguing that the undisputed facts demonstrated that, as a consumer reporting agency, it complied with the applicable provisions of FCRA when it furnished the plaintiff's credit report to Aegis. The court held that Credco was a "consumer reporting agency" and also that it had complied with the requirements of FCRA when it furnished the plaintiff's credit report. However, because Credco also qualified as a reseller of consumer reports, it had additional obligations imposed upon it pursuant to § 1681e(e) of FCRA that precluded summary judgment in its favor.

FAIR CREDIT REPORTING ACT (FIRM OFFER OF CREDIT)

Nasca v. J.P. Morgan Chase Bank, N.A., 2007 WL 678407 (S.D.N.Y. March 5, 2007)

Plaintiff received a solicitation in the mail from defendant, J.P. Morgan Chase Bank stating that plaintiff was pre-qualified for a new home mortgage or a refinance of her existing mortgage. This offer specifically provided that "[it] is not guaranteed if you do not meet our criteria including providing acceptable property as collateral." Prior to mailing that solicitation, defendant had prescreened plaintiff's consumer report. Plaintiff filed suit against defendant that alleged a violation of the Fair Credit Reporting Act ("FCRA"), claimed that the solicitation did not constitute a "firm offer of credit" and that her consumer report was not used by defendant for a statutory "permissible purpose" because the offer was illusory. The district court granted defendant's motion to dismiss and held, in part, that the solicitation did indeed meet the statutory definition of a "firm offer of credit" found in 15 U.S.C. § 1681a(1).

FAIR CREDIT REPORTING ACT (FIRM OFFER OF CREDIT)

Schwartz v. Goal Financial LLC, 2007 WL 805770 (E.D.N.Y. March 15, 2007)

Defendant Goal Financial sent a mail solicitation to plaintiff regarding an offer of credit to consolidate plaintiff's student loans, which included an indication that plaintiff had been pre-screened based upon his credit report. Plaintiff filed suit under the Fair Credit Reporting Act ("FCRA") alleging that Goal Financial used a consumer report relating to him without a "permissible purpose" in violation of § 1681(b), or in the alternative, the solicitation violated FCRA for failing to make required disclosures in a clear and conspicuous manner. The court granted defendant's motion to dismiss, finding (1) that plaintiff, as a recipient of defendant's

solicitation, has a "firm offer of credit" with specific pre-set terms based on the provisions of the Higher Education Act ("HEA"), and (2) the required disclosures under FCRA were disclosed in a clear and conspicuous manner, in that the text of the disclosure was not disproportionately small and the signal to the reader about the disclosure was set-off in a box using the same font as found on the rest of the page.

FAIR CREDIT REPORTING ACT (FIRM OFFER OF CREDIT)

Soroka v. JP Morgan Chase & Co., 2007 WL 895249 (S.D.N.Y. March 19, 2007)

Defendants mailed plaintiff a letter that offered him a home loan from one of defendants' affiliates. This letter provided "[u]se our money to pay off your bills" and indicated that plaintiff was "pre-qualified* for up to \$100,000 or more." The asterisk led to a footnote that said to please read the reverse side for details. The reverse side of the letter indicated that plaintiff's credit information was used in connection with the offer, that defendants' affiliate believed plaintiff satisfied its criteria for credit worthiness, that plaintiff's residence would be used as collateral for the loan and that the offer might be withdrawn if plaintiff's application or other sources indicate that plaintiff does not meet the loan program requirements. The reverse side further provided that the offer was for a minimum loan of \$15,000. Based on this letter, plaintiff filed a class action lawsuit against defendants alleging that defendants violated the Fair Credit Reporting Act ("FCRA") because the letter was not a firm offer under FCRA and the letter failed to make the disclosures required by FCRA because it did not include the applicable interest rate and repayment period. The defendants filed a motion to dismiss. The Court granted defendants' motion to dismiss and held that the letter was a firm offer under FCRA because FCRA permits a creditor to make a conditional firm offer of credit and if plaintiff qualified for the offer, it provided plaintiff with value. The Court further held that the letter contained the terms required by FCRA and that FCRA does not require offers to include the applicable interest rate or repayment period. Notwithstanding the foregoing, the Court also provided that FCRA did not create a private cause of action relating to a defendants alleged failure to include clear and conspicuous disclosures.

FAIR DEBT COLLECTION PRACTICES ACT (DEBT COLLECTION LETTER)

Mebane v. GC Services Ltd. Partnership, 2007 WL 776381 (S.D.N.Y. March 9, 2007)

Plaintiff instituted a Fair Debt Collection Practices Act ("FDCPA") action against defendant debt collector. Plaintiff alleged that defendant violated FDCPA by sending her a letter offering to settle an outstanding debt that specifically requested payment in the form of a cashier's check or money order, despite the fact that defendant also would permit payment in the form of a personal check. According to plaintiff, defendant's letter constituted a deceptive debt collection practice because it did not specifically list personal checks as an acceptable mode of payment. Defendant moved for summary judgment on plaintiff's claim and contended that, as a matter of law, FDCPA contains no requirement that all debt collection letters list every acceptable payment option. The Court, in granting defendant's motion for summary judgment, concluded that defendant conferred a benefit on plaintiff by offering to settle her indebtedness for a prompt payment of seventy percent of the amount due by cashier's check or money order. Nothing required defendant to allow the same generous discount for payment by any other means and, even if it would do so, nothing required defendant to inform plaintiff of this option. The Court

further noted that the instant action was "patently frivolous and a disturbing abuse of the privilege to practice in a federal court."

FAIR DEBT COLLECTION PRACTICES ACT (VALIDATION NOTICE)

Harry v. Pentagroup Financial, LLC, 2007 WL 812998 (E.D.N.Y. March 14, 2007)

Defendant Pentagon, a collection agency, was engaged to collect an alleged consumer debt, and issued a letter to plaintiff attempting to collect the debt. The letter read, in part, that "[i]f payment is not made in a timely manner, further collection activity may be instituted. Your prompt attention to this matter is appreciated." Plaintiff filed a putative class action, arguing that such language contradicted and overshadowed the "validation notice" required by the Fair Debt Collection Practices Act ("FDCPA") 15 U.S.C. § 1692(g), mandating that the debt collector include language advising debtors they have the right to dispute and/or verify the debt within 30 days. Defendant filed a motion for summary judgment. The court granted defendant's motion for summary judgment, finding that merely requesting "timely payment" and "prompt attention" does not violate FDCPA since it does not overshadow or contradict a debtor's FDCPA rights.

3RD CIRCUIT DECISIONS

FAIR DEBT COLLECTION PRACTICES ACT (DEBTS)

Dixon v. Golden-Masano-Bradley, Law Firm, 2007 WL 933757 (3rd Cir. March 28, 2007)

Plaintiff obtained a loan from a lender and in connection with the loan, executed a promissory note that provided that the proceeds of the note "WILL NOT be used for personal, family or household purposes." When plaintiff failed to make a required payment, a law firm initiated a collection proceeding against plaintiff. Thereafter, plaintiff filed a lawsuit against the lender and the law firm ("defendants") and then an amended complaint, claiming that defendants' collection efforts violated the Fair Debt Collection Practices Act ("FDCPA"). The district court dismissed plaintiff's amended complaint for failure to state a claim and plaintiff appealed. On appeal, the Third Circuit held that because plaintiff agreed to the purpose of the promissory note, he could not convert the amount owed on the promissory note to fall within the meaning of "debt" simply because he chose note to comply with the agreed upon terms. Thus, the Third Circuit affirmed the district court's ruling.

TRUTH IN LENDING ACT (TOLERANCES FOR ACCURACY/AFFIRMATIVE DEFENSE)

Sterten v. Option One Mortgage Corp., 2007 WL 867091 (E.D. Pa. March 22, 2007)

Plaintiff refinanced the mortgage loan on her home with defendant to consolidate her debt. Two years after she closed on the subject loan, plaintiff demanded rescission, claiming that she never received a disclosure statement or notice of right to cancel in connection with the loan. Plaintiff thereafter filed for bankruptcy and also filed an adversary complaint against defendant for an alleged violation of the Truth in Lending Act ("TILA"). Plaintiff included in her TILA claim that the fees imposed by the broker, the title insurance company and defendant were unreasonable and not properly disclosed finance charges. The bankruptcy court found that defendant had complied with TILA's notice requirements, but had not included the unreasonable

amounts of the appraisal fee and notary fees in the finance charge. However, the bankruptcy court relied on the "tolerances for accuracy" provision of TILA and held that despite a \$57 discrepancy, that the finance charges were accurate as a matter of law. In a post-verdict motion, plaintiff argued that TILA's "tolerances for accuracy" provision is an affirmative defense that must be plead and proved by defendant. The bankruptcy court agreed with plaintiff and reversed its ruling. Defendant then appealed to the district court, where it was held that TILA's "tolerances for accuracy" provision is not an affirmative defense that must be plead and proved by defendant.

4TH CIRCUIT DECISIONS

FAIR DEBT COLLECTION PRACTICES ACT (ATTORNEY FEES)

Croy v. E. Hall & Assoc., PLLC, 2007 WL 676698 (W.D. Va. March 2, 2007)

This case was brought by plaintiff against defendants alleging that defendants violated the Fair Debt Collection Practices Act ("FDCPA") in attempting to collect a consumer debt from plaintiff. Defendants served plaintiff with an offer of judgment which was accepted by plaintiff. In addition to the \$2,890.50 in attorney fees sought for work done before receipt of the offer, plaintiff sought an additional sum of \$2,776.50 in attorney fees for time spent up until plaintiff accepted the offer. The district court held that when an offer of judgment clearly and unambiguously waives fees after the date of the offer, attorney fees after the date of such offer are generally excluded from an award. Because defendants' offer of judgment contained additional language of "attorney's fees accrued to date *and as determined by the Court*," the court held that the language left the court with discretion in awarding fees. Thus, the district court granted plaintiff's request for attorney's fees because of this ambiguity. The court also held that "while the amount of damages a plaintiff recovers is relevant to the amount of attorney fees awarded, it is only one of the several factors this court is to consider in determining the award of fees" and that courts have repeatedly held that proportionality between a consumer's recovery and the attorney's fees to be paid is not required in every action brought under consumer credit protection statutes.

5TH CIRCUIT DECISIONS

ARBITRATION (EFFECTIVE AGREEMENTS)

Johnson v. Caldwell Banker Real Estate Corporation, 2007 WL 906331 (N.D. Miss. March 22, 2007)

Plaintiffs obtained a mortgage loan from defendant. In connection with the loan, plaintiffs signed an arbitration agreement where they agreed to arbitrate any dispute with defendant. The arbitration agreement further provided that "[t]his agreement is effective and binding on both you and us when it is signed by both parties." Although plaintiffs signed the arbitration agreement, no representative of defendant signed it. Plaintiffs thereafter commenced a lawsuit against defendant and defendant moved to compel arbitration of plaintiffs' claims. The Court denied defendant's motion to compel arbitration and held that the arbitration agreement was ineffective because it had not been signed by both parties as required by the arbitration agreement.

TRUTH IN LENDING ACT AND HOME OWNERSHIP AND EQUITY PROTECTION ACT (JURISDICTION/REMOVAL)

Mitchell v. JP Morgan Chase Bank, 2007 WL 636157 (N.D. Tex. March 2, 2007)

Plaintiff filed a complaint in state court against defendant seeking relief for violations of the Truth in Lending Act ("TILA") and the Home Ownership and Equity Protection Act ("HOEPA"). Defendant removed the case asserting federal jurisdiction because the claims were brought under federal statutes. In response, plaintiff filed a motion to remand arguing (1) the language of the statutes is comparable to the Fair Labor Standards Act ("FLSA") and there is a split among federal district court opinions as to whether FLSA cases are removable; and (2) because HOEPA reserves the right of a federal agency to remove cases filed in state court to federal court, it implies that cases filed in state court are not otherwise removable. The district court did not accept these arguments and held that the TILA and HOEPA statutes provide plaintiffs a choice of state or federal court, subject to the defendant's right of removal and that simply because the HOEPA statute gives a federal agency the power to remove the case, this has no implication on a defendant's ability to remove the case. The district court denied plaintiff's motion to remand.

6TH CIRCUIT DECISIONS**TRUTH IN LENDING ACT (DISCLOSURES)**

Patton v. Jeff Wyler Eastgate, Inc., 2007 WL 756709 (S.D. Ohio March 8, 2007)

Plaintiff purchased a used vehicle from defendant, and included in the transaction was a Purchase Spot Delivery Agreement which provided, in part, that if defendant was unable to obtain third party financing approval within 45 days, plaintiff must immediately, upon being notified, return the vehicle or pay defendant the balance due. Plaintiff filed suit against defendant alleging that defendant violated the Truth in Lending Act ("TILA"), arguing that the facially valid disclosures on the Installment Contract were essentially rendered meaningless and illusory by the Purchase Spot Delivery Agreement. Plaintiff filed a motion for summary judgment, and defendant countered arguing, in part, that the use of Purchase Spot Delivery Agreement does not violate TILA because other federal courts have upheld this "spot delivery" practice. The court granted plaintiff's summary judgment motion and held that the purpose of TILA would be frustrated if automobile dealerships were permitted to rescind the terms of integrated automobile retail installment sales contracts by use of a second, contradictory form.

7TH CIRCUIT DECISIONS**FAIR CREDIT REPORTING ACT (CLASS CERTIFICATION)**

Larson v. Capital One Auto Finance, Inc., 2007 WL 704473 (N.D. Ill. Mar. 5, 2007)

Plaintiff sued defendants alleging that defendants willfully violated the Fair Credit Reporting Act ("FCRA") because defendants accessed his credit report and those of the other addressees without their consent and without complying with FCRA's "firm offer of credit" exception. Plaintiff moved for class certification under Fed. R. Civ. P. 23 of a class consisting of all persons with Illinois addresses to whom defendants prescreened and sent the solicitation, except for those

who obtained credit as a result of responding to the solicitation. The district court granted plaintiff's motion to certify the class.

FAIR CREDIT REPORTING ACT (DISCLOSURES OF CREDIT HISTORIES)

Gillespie v. Trans Union Corp., 2007 WL 777658 (7th Cir. March 16, 2007)

Plaintiffs requested their credit histories from Trans Union, a credit reporting agency ("CRA"), pursuant to 15 U.S.C. § 1681g(a)(1) which states that every CRA shall upon request disclose "(1) All information in the consumer's *file* at the time of the request...." When providing this information to plaintiffs, Trans Union omitted any mention of the date of delinquency or the purge date. Plaintiffs filed suit against Trans Union for violations of the Fair Credit Reporting Act ("FCRA"), arguing that the word "file" in § 1681g(a)(1) includes the date of delinquency and purge date. The trial court granted summary judgment in favor of Trans Union. The Seventh Circuit affirmed, noting that the language of § 1681g(a)(1), the FTC's interpretive guideline, and the Senate Committee Report all support Trans Union's argument that "file" only means information included in a consumer report.

FAIR CREDIT REPORTING ACT (FIRM OFFER OF CREDIT)

King v. Commerce Bancshares, Inc., 2007 WL 781732 (N.D. Ill. March 12, 2007)

Defendant sent a mailer to plaintiff offering a Visa credit card with an indication that the offer was based on information in their credit report and that they could opt-out pursuant to the Fair Credit Reporting Act ("FCRA"). The offer contained some terms of the offer, including a 0% interest rate for the first 12 months, how the subsequent interest rate would be computed and that plaintiff would receive a credit line, convenience checks and travel insurance. Plaintiff, on behalf of himself and others similarly situated, brought a putative class action complaint alleging a violation of § 1681(b) of FCRA. The court granted defendant's motion to dismiss, finding that the mailer was a "firm offer of credit" in that there was sufficient information in the mailer for the court to determine that the credit card offered is of value to the normal consumer.

FAIR CREDIT REPORTING ACT (FIRM OFFER OF CREDIT)

Bonner v. Home 123 Corp., 2007 WL 778447 (N.D. Ind. March 9, 2007)

Plaintiffs received solicitations for first mortgage loans from defendant wherein plaintiffs were pre-screened by an evaluation of their credit reports. Plaintiffs claim that defendants violated 15 U.S.C. § 1681(b) of the Fair Credit Reporting Act ("FCRA") by sending mortgage offers that did not constitute a "firm offer of credit." Both plaintiffs and defendant filed motions for summary judgment. The court granted plaintiffs' motion for summary judgment and denied defendants', finding that the letters were not "firm offers of credit" because they did not include an interest rate or a range of interest rates, an indication whether the mortgage offer was for a fixed or variable rate mortgage loan, any specific terms of the loan, the underwriting guidelines, points charged or whether a prepayment penalty may apply.

**FAIR CREDIT REPORTING ACT (PREEMPTION/CLASS CERTIFICATION/
EQUITABLE RELIEF)**

Krey v. Castle Motor Sales, Inc., 2007 WL 914268 (N.D. Ill. March 21, 2007)

Plaintiff received a flyer in the mail from defendants indicating that he had been "pre-approved for an auto loan." This flyer indicated that information contained in plaintiff's credit report was used by defendant to select plaintiff for this offer. Plaintiff filed a class action complaint against defendants, purporting to represent a class of customers of defendant, alleging that defendant accessed his credit report without any permissible purpose. Plaintiff's complaint asserts claims against defendant for its alleged violation of the Fair Credit Reporting Act ("FCRA"), seeking injunctive relief, and various state law claims. Defendant filed a motion for judgment on the pleadings and plaintiff filed a motion for class certification. In response to these motions, the Court dismissed the portion of plaintiff's FCRA claim seeking equitable relief and held that FCRA does not provide plaintiff with the ability to obtain equitable relief. The Court also dismissed plaintiff's state law claims and held that they were entirely encompassed by whether defendant could meet the terms of FCRA (§ 1681(b)) and, therefore, were preempted by FCRA. However, the Court did certify a class (of between 200 and 20,000 plaintiffs) relating to plaintiff's remaining FCRA claim seeking affirmative relief.

FAIR DEBT COLLECTION PRACTICES ACT (CLASS CERTIFICATION)

Foreman v. PRA III, LLC, 2007 WL 704478 (N.D. Ill. March 5, 2007)

Plaintiff sued defendants alleging that the debt collection practices of defendants were "false, deceptive, misleading, and unfair" in violation of the Fair Debt Collection Practices Act ("FDCPA"). Plaintiff claims that defendants engage in two particular debt collection practices that violate FDCPA: (1) the alleged practice of filing collection actions in state court and attaching affidavits in which defendants' employees purport to have knowledge of the alleged debtor's "account balance," when in fact defendants have no documents establishing the particular debtor's indebtedness; and (2) the alleged policy and practice of bringing state court collection actions without the means to prove a particular debtor's indebtedness. Plaintiff moved for class certification. Although the district court recognized that FDCPA expressly provides for class certification, it denied plaintiff's motion for class certification holding that the predominance of individual issues among the members of the class would render the class action mechanism inefficient and inconvenient in the case.

FEDERAL JURISDICTION (AMOUNT IN CONTROVERSY)

Countrywide Home Loans, Inc. v. Stewart Title Guaranty Co., 2007 WL 906154 (E.D. Wis. March 23, 2007)

Plaintiff held a mortgage in the amount of \$183,500 on property titled to the residents. Defendant issued a final title policy to insure that the mortgage would be in first lien position. A bank subsequently filed a foreclosure action on the property to recover its \$26,416.98 lien and plaintiff learned that its mortgage was not in the first lien position. Plaintiff then filed a title claim with defendant in order to compel the defendant to defend plaintiff in the bank's foreclosure action. Defendant refused to do so and plaintiff filed an action in circuit court raising various claims in connection with defendant's failure to discover the prior mortgage and to

defend the claim. Plaintiff's complaint sought an unspecified amount of compensatory and punitive damages, as well as attorney's fees. Defendant removed the case to federal court and plaintiff moved to remand arguing that the federal court lacked jurisdiction because the amount in controversy between the parties was less than \$75,000. In response, defendant argued that the jurisdictional amount was satisfied merely by examining the four corners of the plaintiff's complaint. The Court held that, although the plaintiff's complaint did not specify an amount in controversy, the essentially \$26,416.98 in compensatory damages, together with the punitive damages and attorney's fees that plaintiff sought, left the court with no reason to believe that it was legally impossible for plaintiff to recover more than \$75,000. Plaintiff's motion to remand was, therefore, denied.

8TH CIRCUIT DECISIONS

FEDERAL SAVINGS ASSOCIATIONS (DIVERSITY JURISDICTION)

First Midwest Bank-Deerfield Branches v. Metabank, 2007 WL 913893 (D.S.D. March 23, 2007).

In this action, the plaintiffs, two banks, commenced an action against defendant bank in state court alleging breach of contract, negligence, fraud, unjust enrichment and breach of fiduciary duty. The claims arose out of the defendant's placing of a loan with plaintiffs. Defendant subsequently removed the action to federal court and the plaintiffs filed a motion to remand, arguing that the defendant failed to establish diversity jurisdiction. After the motion to remand was fully briefed by the parties, the district court was notified by defendant of an amendment to the Homeowners' Loan Act that President Bush signed on October 13, 2006 which recognizes a federal savings association as being a citizen of the state in which it has its home office for the purpose of diversity jurisdiction. The issue before the Court then became whether the amendment applied to cases actually pending at the time of enactment. The Court, in reviewing the holdings of several cases, followed the Supreme Court's consistent practice of applying jurisdictional statutes to cases pending when the statute was enacted and determined that the amendment should indeed be applied to the present case. The Court held that complete diversity existed and denied the plaintiffs' motion to remand.

9TH CIRCUIT DECISIONS

FAIR CREDIT REPORTING ACT (NOTICE)

Grismore v. Capital One F.S.B., 2007 WL 841513 (D. Ariz. March 16, 2007)

Plaintiff, an individual consumer, brought an action for damages against the defendants for violations of the Fair Credit Reporting Act ("FCRA"). Plaintiff's action stems from credit card accounts she maintained with defendant Capital One Bank. Plaintiff began a series of correspondence with the defendants and various credit reporting agencies to dispute her credit card accounts. Plaintiff's original complaint named several Capital One entities to the lawsuit. She later filed an amended complaint adding another Capital One entity, Capital One Services ("COS"). COS then filed a motion to dismiss for failure to state a claim alleging that the plaintiff had not set forth sufficient facts under the FCRA. Defendant further asserted that with the exception of its appearance on a tradeline on a credit report prepared by TransUnion, plaintiff

made no specific allegations with respect to COS. The plaintiff subsequently filed a motion to strike the defendant COS's motion to dismiss. In addition, the plaintiff filed a motion for partial summary judgment and also a motion for sanctions against defendants. The Court initially determined that the plaintiff's motion to strike was improper under Federal Rule 12(f) because it did not allow a court to "strike" a motion. The Court then addressed COS's motion to dismiss for failure to state a claim and granted it in part and denied it in part. First, the Court determined that the plaintiff set forth sufficient facts to state a claim against COS. COS previously argued that it was not a "furnisher of information" under the FCRA; however, the Court disagreed and denied this portion of COS's motion. On the other hand, the Court held that COS did not receive the proper notice of the dispute as required by the FCRA and thus, the notice portion of COS's motion to dismiss was granted. The Court then held that the plaintiff's motion for partial summary judgment was procedurally defective and denied the motion without prejudice. Finally, the Court determined that the Rule 11 motion for sanctions was filed with the Court by the plaintiff without prior service on the defendants, thereby violating Rule 11. For this reason and because the defendants had already corrected the allegedly sanctionable conduct, the Court denied the plaintiff's motion for sanctions.

FAIR CREDIT REPORTING ACT (SUMMARY JUDGMENT AND DAMAGES)

Cairns v. GMAC Mortgage Corp. et al., 2007 WL 735564 (D. Ariz. Mar. 5, 2007)

Plaintiffs brought claims against defendant alleging violations of the Fair Credit Reporting Act ("FCRA"). The district court denied defendant Equifax's motion for summary judgment holding that a material issue of fact existed as to whether the reports received constituted a "credit report" under FCRA and that the issues of determining whether Equifax's procedures for preparing a customer's file were reasonably designed to prevent inaccuracies pursuant to 15 U.S.C. § 1681e(b) and whether the agency followed its procedures was a question of fact reserved for the jury. The district court also found that under FCRA a plaintiff may recover actual damages and attorney fees for negligent failure to comply with the statute, and statutory damages, attorney fees and punitive damages for willful noncompliance of the statute. Actual damages have been interpreted to include emotion distress damages. The district court denied Equifax's motion for summary judgment as to punitive damages holding that because of the conflicting evidence, the issue of punitive damages in the case was best left for the jury.

FAIR DEBT COLLECTION PRACTICES ACT (AWARD OF COSTS AND ATTORNEYS' FEES)

Camacho v. Bridgeport Financial, Inc., 2007 WL 781534 (N.D. Cal. March 13, 2007)

Plaintiff prevailed on a Fair Debt Collection Practices Act ("FDCPA") claim against defendant for illegally requiring debtors to submit their disputes regarding debt collection in writing. Plaintiff prevailed on her claim, obtained a settlement of \$1,000.00 in damages, and *cy pres* award of \$341.50 to be paid by defendant to Legal Services of Northern California. Plaintiff filed a motion to recover costs and attorneys' fees pursuant to 15 U.S.C. § 1692(a)(3), seeking to recover \$6,809.36 in litigation expenses and \$160,625.00 in attorneys' fees. Defendant argued that the court should award no more than \$5,000.00. Court determined that an appropriate reasonable rate for fees for an action brought under the FDCPA was \$200.00 per hour. Subsequently, the court awarded \$6,809.36 in total costs and \$73,170.00 in attorneys' fees.

FAIR DEBT COLLECTION PRACTICES ACT; CALIFORNIA FAIR DEBT COLLECTION PRACTICES ACT (DEFAULT JUDGMENT/DAMAGES)

Panahiasl v. Gurney, 2007 WL 738642 (N.D. Cal. March 8, 2007)

Plaintiffs filed suit against defendants for harassment and abusive collection practices under the Fair Debt Collection Practices Act ("FDCPA") and California Fair Debt Collection Practices Act (CA FDCPA). Defendants failed to defend the action and a default judgment was entered. Court held that under the FDCPA plaintiffs were entitled to actual damages, including emotional distress damages even without proving the state law cause of action for intentional infliction of emotional distress. Moreover, the court determined that the defendants' acts constituted an invasion of privacy (intrusion upon seclusion) and further awarded plaintiffs statutory damages pursuant to CA FDCPA.

FAIR DEBT COLLECTION PRACTICES ACT (STANDING TO SUE)

Guillory v. WFS Financial, Inc., 2007 WL 879017 (N.D. Cal. March 21, 2007)

Plaintiff financed the purchase of a car for her son with defendant in 2002. Plaintiff's son started out making payments on the loan, but plaintiff assumed the payments and gave the car to her daughter in 2003. At this time, plaintiff noticed that the annual percentage rate ("APR") on the loan did not match the rate that she had originally contracted for. Defendant stopped accepting plaintiff's payments, repossessed the car from the daughter and filed a deficiency action against plaintiff. Thereafter, plaintiff and her daughter filed suit against defendant alleging, among other things, that defendant violated the Fair Debt Collection Practices Act ("FDCPA") when it repossessed the car, because the subject loan was fraudulent. Defendant filed a motion to dismiss the daughter from the FDCPA claim because she was not a party to the loan. The Court granted defendant's motion to dismiss and held that the daughter was due to be dismissed from the FDCPA claim because she was not a debtor under the FDCPA and without a property interest in the car, she cannot assert any injury under the FDCPA.

FAIR DEBT COLLECTION PRACTICES ACT (CLASS ACTIONS)

Hunt v. Check Recovery Systems, Inc., 2007 WL 853031 (N.D. Cal. March 21, 2007)

Plaintiffs received collection letters from defendant in attempt to collect on checks issued by plaintiffs that were returned unpaid. These letters demanded payment of the amount of the check, a statutory service charge and interest. Plaintiffs filed a class action complaint against defendant for defendant's alleged violation of the Fair Debt Collection Practices Act. The purported class that plaintiffs sought to represent was defined as follows: "All persons to whom defendant mailed a collection demand at any time since December 5, 2004, (1) which included a demand for both interest and a statutory service charge on a dishonored check; (2) where the check was written in the State of California for personal, family or household purposes; and (3) whole mail was not returned as undeliverable." The plaintiffs filed a motion for class certification, which was granted by the Court. The Court certified a Rule 23(b)(2) class for all class members that did not pay any portion of the statutory service charge demanded and certified a Rule 23(b)(3) class for all class members that paid any portion of the statutory service charge demanded.

TRUTH IN LENDING ACT; FAIR CREDIT BILLING ACT (NOTICE OF BILLING ERROR)

Cunningham v. Bank One, 2007 WL 777654 (W.D. Wash. March 12, 2007)

In this Truth in Lending Action ("TILA") action, filed on December 20, 2005, the plaintiff asserted that the defendant bank who issued the plaintiff's credit cards was liable for violations of TILA arising from the defendant's failure to investigate the plaintiff's alleged billing error. In August 2004, plaintiff stopped making payments on the accounts. On November 25, 2004, plaintiff sent defendant letters notifying it of "billing errors." Defendant did not recognize plaintiff's letters as proper notice of billing errors, and instead charged off and closed the accounts on November 30, 2004. Both plaintiff and defendant filed motions for summary judgment. The defendant, in its motion for summary judgment, argued that the plaintiff's billing dispute letters to the defendant, on their face, did not constitute valid written notices of billing error under the Fair Credit Billing Act ("FCBA") which is part of TILA. The Court disagreed with defendant on this issue but, nonetheless, found that defendant's obligations under TILA were not triggered because plaintiff's November 24, 2004 letters were not sent within 60 days of the first statement reflecting the alleged billing errors. The Court further found that the defendant had no duty to acknowledge or investigate alleged billing errors and thus, the plaintiff's action failed as a matter of law. The Court granted defendant's motion for summary judgment and dismissed the case.

10TH CIRCUIT DECISIONS

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

11TH CIRCUIT DECISIONS**FAIR CREDIT REPORTING ACT (INJUNCTIVE RELIEF)**

Varricchio v. Capital One Service, Inc., 2007 WL 917226 (S.D. Fla. March 23, 2007)

In this case, the plaintiff claimed that the defendant credit reporting agencies had reported incorrect information on his credit report and failed to comply with the requirements of the Fair Credit Reporting Act ("FCRA"). The plaintiff sought an award of damages and declaratory relief, including an order directing the defendant to immediately delete all of the allegedly inaccurate information from his credit report. The defendant, in its motion to dismiss, argued that equitable relief is not available under the FCRA and, therefore, sought dismissal of the plaintiff's complaint to the extent it sought an order enjoining it from further reporting of the allegedly inaccurate information. The district court granted the defendant's motion to dismiss noting that it lacks jurisdiction to provide such relief because private individuals may not sue for injunctive relief under the FCRA -- Congress gave this power only to the Federal Trade Commission.

FAIR DEBT COLLECTION PRACTICES ACT; FLORIDA CONSUMER COLLECTION PRACTICES ACT (LIABILITY; SUMMARY JUDGMENT)

Garcia v. Jefferson Capital Systems, LLC, 2007 WL 853754 (M.D. Fla. March 16, 2007)

Plaintiffs filed suit against BSL, a corporation, and Baker, the sole shareholder of BSL, for alleged violation of the Fair Debt Collection Practices Act ("FDCPA") and the Florida Consumer Collection Practices Act ("FCCPA"). Both defendants filed motions for summary judgment. First, the court granted summary judgment in favor of Baker determining that he cannot be held personally liable simply by virtue of his position as sole shareholder and finding no facts in the complaint to support disregarding BSL's corporateness in this case. Second, the court denied BSL's summary judgment motion, determining that the plaintiffs produced affidavits describing the date, time, and substance of several telephone calls which could have constituted prohibited collection practices.

FAIR DEBT COLLECTION PRACTICES ACT; REAL ESTATE SETTLEMENT PROCEDURES ACT; TRUTH IN LENDING ACT (FEDERAL SUPPLEMENTAL JURISDICTION)

Riley v. Fairbanks Capital Corp., 2007 WL 778545 (11th Cir. March 16, 2007)

Riley, a pro se plaintiff, filed suit against Fairbanks in federal district court, alleging violations of federal law under the Fair Debt Collection Practices Act ("FDCPA"), Real Estate Settlement Procedures Act ("RESPA"), and the Truth in Lending Act ("TILA"), and raising numerous state law claims including breach of contract, negligence, and others. Riley claimed that the district court had federal question jurisdiction over her federal law claims and supplemental jurisdiction over her state law claims. After being ordered by the magistrate to file an amended complaint with more clarity, Riley filed a first amended complaint and, soon thereafter, a second amended complaint; however neither of these amended complaints included any federal law claims but instead only asserted state law claims. Fairbanks filed a motion for summary judgment on all claims. The district court granted Fairbanks' summary judgment while determining that it had subject matter jurisdiction, finding that because Riley originally brought both federal and state law claims, it retained supplemental jurisdiction over the state law claims. The Eleventh Circuit, however, found reversible error in determining that no supplemental jurisdiction existed because Riley abandoned her federal law claims at an early stage of the litigation. As a result, the Eleventh Circuit vacated the summary judgment and remanded for the district court to dismiss without prejudice.

FAIR HOUSING ACT; EQUAL CREDIT OPPORTUNITY ACT (STATUTE OF LIMITATIONS; DISPARATE IMPACT CLAIMS)

Beaulialice v. Federal Home Loan Mortgage Corp., 2007 WL 744646 (M.D. Fla. March 6, 2007)

This case involved a minority plaintiff bringing a disparate impact claim under both the Fair Housing Act ("FHA") and the Equal Credit Opportunity Act ("ECOA") in relation to her application for a mortgage loan. Plaintiff contended that the discrimination occurred when defendant's automated underwriting software returned a "caution" in response to a submission relating to plaintiff's application for a mortgage loan. Plaintiff alleged that, as a result, she was denied an \$85,000 loan and instead was required to accept less favorable lending terms than

would have been extended to a non-minority applicant. The defendant mortgage corporation moved for summary judgment arguing, in part, that plaintiff's claims were barred by the applicable statute of limitations and neither the ECOA or the FHA authorize a disparate impact claim. The Court found that plaintiff may bring a disparate impact claim under the FHA, and assumed without deciding that she may bring such a claim under ECOA. The Court found, however, that plaintiff's claims were barred by the two-year statute of limitations and that although the continuing violation doctrine applied to an FHA claim (but not an ECOA claim), the doctrine did not apply to plaintiff's claims in the case. Thus, the Court granted the defendant's motion for summary judgment.

TRUTH IN LENDING ACT (STATUTE OF LIMITATIONS; CLAIM PRECLUSION)

Graves v. First Educators Credit Union, 2007 WL 824059 (Bkrtcy. N.D. Ala. March 14, 2007)

This is an adversary proceeding where, on September 13, 2006, the debtors sued defendant for alleged violations of the Truth in Lending Act ("TILA") on a loan that took place on September 8, 2004 under a theory of "recoupment." The bankruptcy court granted defendant's motion to dismiss holding that because the TILA claims were raised as a main or original action initiated by the debtors, they cannot be described as being asserted defensively, even though they were subsequently and more particularly described in an adversary proceeding. The court concluded that the debtor's TILA claims are due to be dismissed because they were pursued affirmatively, not defensively, after the lapse of the one-year statute of limitations. 15 U.S.C. § 1640(e). The court concluded that even if the TILA claims were not time-barred, the debtors were precluded from raising such claims after confirmation of their Chapter 13 plan in which they committed to pay defendant's secured debt in full without conspicuously reserving rights of recoupment or setoff for TILA violations. The provisions of the Confirmed Plan bind the debtors and their creditors. 11 U.S.C. § 1327(a).

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