

# monthly litigation update

## MARCH 2008

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



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

## SUPREME COURT DECISIONS

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

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



### FAIR CREDIT REPORTING ACT (FIRM OFFER OF CREDIT)

Sullivan v. Greenwood Credit Union, 2008 WL 726135 (1st Cir. Mar. 19, 2008)

Plaintiff brought action on behalf of himself, and others similarly situated, alleging that the defendant credit union impermissibly accessed his credit report to send the plaintiff an unsolicited letter offering credit for a home loan in violation of the Fair Credit Reporting Act (FCRA). The letter informed the plaintiff that he was "pre-approved" to receive a home loan up to 100% of the value of his home. The letter provided that rates and terms were subject to change and that if at any time the plaintiff no longer met the initial criteria, the offer may be revoked. The defendant argued that the letter was a firm offer of credit, and therefore, was a permissible purpose for accessing a credit report under the FCRA. After the district court granted summary judgment to the defendant, finding that the defendant's letter to the proposed plaintiff class constituted a firm offer of credit, the plaintiff appealed to the First Circuit Court of Appeals. The court

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first stated that construction of the FCRA's term "firm offer of credit" was a matter of first impression for the circuit. The court then stated that the statutory definition of "firm offer of credit" in the FCRA imposes no requirement that solicitations must provide terms including interest rates and duration. The court held that the only requirement is that the letter inform the consumer that he received the offer because he satisfied the criteria used to select the consumer for the offer, but does not purport to require that the creditor include more criteria than was used to select those who received the pre-screened offer. After finding that the defendant's letter did meet the minimal requirements, the court affirmed the entry of judgment for the defendant.

#### TRUTH-IN-LENDING ACT (NOTICE OF RIGHT OF RESCISSION)

McKenna v. First Horizon Home Loan Corp., 2008 WL 582194 (D. Mass. Mar. 3, 2008)

Plaintiffs filed a class action lawsuit against the defendant mortgage lender alleging that the defendant violated certain provisions of the Truth-in-Lending Act (TILA) and state consumer protection laws when it gave confusing notices of the borrower's right to cancel refinancing transactions. Both parties filed motions for summary judgment. The plaintiffs argued that the defendant's notice of the right of rescission was confusing because it combined terms of forms H-8 (the general rescission model form) and H-9 (the form used in connection with same-lender refinancing). The plaintiffs alleged that a borrower who had received their original loan from a previous lender would be confused as to which paragraph applied to them. The plaintiffs alleged that many of the paragraphs involving rescission were confusing because the plaintiffs were unaware whether they could rescind the entire loan amount, or just the amount loaned after the refinancing. The court rejected the plaintiffs' arguments and refused to follow the "hyper-technical" approaches of the Third and Seventh circuits. The court stated that while the defendant's notice was not perfect, it clearly and conspicuously disclosed to the plaintiffs the effects of the rescission. The court then stated that only a strained reading would suggest an outcome similar to the one that the plaintiffs proposed. Therefore, the court granted the defendant's motion for summary judgment and denied the plaintiffs' motion for summary judgment.

#### FAIR CREDIT REPORTING ACT (FIRM OFFER OF CREDIT)

Dixon v. Calusa Investments, L.L.C., 2008 WL 821607 (D.R.I. Mar. 27, 2008)

Plaintiff received unsolicited letters from the defendant investment company that informed her she was pre-selected as eligible to obtain a debt consolidation loan.

The mailers did not set forth specific terms for any proposed loan but did state that any loan would be conditioned on the plaintiff's credit information meeting the criteria that were used to select her to receive the mailer and that she would be required to post collateral in a residence. The plaintiff filed suit, alleging that the defendant violated the Fair Credit Reporting Act (FCRA) by accessing her consumer report without a permissible purpose. The defendant filed a motion to dismiss, claiming that the plaintiff's credit report was accessed for the permissible purpose of extending a "firm offer of credit." The plaintiff argued that the mailers did not include sufficient terms to indicate an offer, including an interest rate or repayment term. The court disagreed, holding that the First Circuit Court of Appeals' decision in Sullivan v. Greenwood Credit Union, 2008 WL 726135 (1st Cir., March 19, 2008) controlled the decision in the case. The court stated that the defendants' mailers met the low standard set forth in Sullivan which holds that the "firm offer of credit" does not require the offer to include additional terms other than the pre-selection criteria. Accordingly, the court granted the defendant's motion to dismiss.

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2<sup>ND</sup> CIRCUIT  
DECISIONS



FAIR DEBT COLLECTION PRACTICES ACT  
(STATUTORY DAMAGES & ATTORNEY'S FEES)  
Overcash v. United Abstract Group, Inc., 2008 WL  
686804 (N.D.N.Y. Mar. 10, 2008)

Plaintiff had an account with a credit card company that was in default. The company sold the debt to the defendant debt collector for \$1,353.15. Without receiving payment from the plaintiff, the defendant sent a letter to the plaintiff stating that the account was paid in full. Despite this letter, the debt was then sold several more times until it was purchased by the second defendant debt collector. That collector then sent the plaintiff a letter informing him that he owed \$41,701.58. The second debt collector then took action on the debt and reported the debt to several credit reporting agencies (CRAs). The plaintiff then brought this action against both defendants

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alleging several violations of the Fair Debt Collection Practices Act (FDCPA). The defendants failed to respond to the complaint and the plaintiff brought an action requesting entry of default against both defendants and awards of \$2,000 in statutory fees, \$2,750 in attorney's fees and \$405 in costs. The court first stated that because both of the defendants blatantly violated the FDCPA several times, the plaintiff was entitled to the maximum damages of \$1,000 per defendant. The court then awarded the plaintiff his full attorney's fees and costs, stating that the 11 hours of work at \$250 hours billed by his attorney were both reasonable. Accordingly, the court granted the plaintiff's motion for judgment.

FAIR DEBT COLLECTION PRACTICES ACT  
(ATTORNEY'S FEES)

Leyse v. Corporate Collection Services, Inc., 2008 WL 731976 (S.D.N.Y. Mar. 19, 2008)

Plaintiff filed suit against the defendant alleging violations of the Fair Debt Collection Practices Act (FDCPA) when the defendant left automated collection calls on several of the plaintiff's answering machines. After the plaintiff was granted summary judgment on several claims, the court awarded statutory damages in the amount of \$1,000. The plaintiff then moved for an award of attorney's fees in the amount of \$32,143.00. The plaintiff's counsel requested that his hourly rate be set at \$225.00/hour. The plaintiff also requested 94.3 hours to be billed at that rate and the loadstar figure be multiplied for 1.5 because of the novelty and difficulty of the issue and the undesirability of the case. Finally, the plaintiff requested a \$250.00 filing fee and \$52.50 service of process fee also be awarded. The defendant only objected to the number of hours claimed and the application of a multiplier to the loadstar. After finding that the plaintiff's counsel's hourly rate was reasonable, the court reduced the hours billed to the case. The court first reduced the hours because of a typographical error in the plaintiff's brief. The court then concluded that some of the time entries made by the plaintiff's counsel were excessive, vague and seemingly unnecessary. The court also stated that the fact that the plaintiff's counsel was a novice in litigating FDCPA matters led to an expenditure of more time than was necessary on certain aspects of the case. Therefore, the court determined that a reduction of 40% of the time billed was appropriate. The court then rejected the plaintiff's counsel's request for a 1.5 multiplier to be calculated on top of the loadstar amount. The court stated that the plaintiff's counsel did not adequately explain why the case was more difficult than other FDCPA cases. The court also rejected the plaintiff's counsel's argument that the case was undesirable, stating that undesirability is usually only discussed in civil rights cases where attorney's face hardships in their communities because of their desire to help a civil rights litigant. Accordingly, the court

awarded attorney's fees to the plaintiff in the amount of \$12,735.00 and \$302.50 in costs.

FAIR DEBT COLLECTION PRACTICES ACT  
(BANKRUPTCY JURISDICTION)

Jones v. Palisades Collection, L.L.C., 2008 WL 762121 (D. Conn. Mar. 19, 2008)

Plaintiff filed Chapter 7 bankruptcy in April of 2004. After the plaintiff informed the defendant debt collector of the bankruptcy status, the defendant continued to attempt to collect a debt from the plaintiff in February of 2006. The debt concerned charges that the plaintiff made on a telephone bill from January to May of 2003. The plaintiff filed suit, which alleged that by attempting to collect a debt while the plaintiff was in bankruptcy, the defendant violated various provisions of the Fair Debt Collection Practices Act (FDCPA). The defendant then filed a motion to dismiss, arguing that the appropriate venue for the claim was in bankruptcy court. The court stated that because the plaintiff's claims rested on the defendant's violation of the Bankruptcy Code, a bankruptcy court was the appropriate forum to determine whether the defendant had violated a discharge order. The court then stated that even though the plaintiff argued that the defendant violated the FDCPA in other ways, each of those claims was inextricably related to the issue of whether the defendant violated the discharge order. Therefore, the court granted the defendant's motion to dismiss, without prejudice, so the plaintiff could refile her case in the bankruptcy court.

FAIR CREDIT REPORTING ACT (PRIVATE  
RIGHT OF ACTION & CREDITOR  
APPLICABILITY)

Howard v. Municipal Credit Union, 2008 WL 782760 (S.D.N.Y. Mar. 25, 2008)

Plaintiff maintained an automobile loan with the defendant credit union. The plaintiff alleged that the credit union incorrectly reported to several credit reporting agencies (CRAs) that he was in arrears on his automobile loan, despite him having evidence to the contrary. The plaintiff sent notice of dispute to the defendant, a furnisher of information, but claimed that he was met with minimal response. The plaintiff then filed suit alleging that the defendant violated several provisions of the Fair Credit Reporting Act (FCRA) and various state laws. The defendant filed a motion to dismiss. The court first dismissed the plaintiff's claim under 15 U.S.C. §1681s-2(a) because the statute does not allow for a private right of action. The court then held that while the plaintiff may have had a claim against the defendant, he had failed to produce evidence that he notified a CRA about the dispute, a prerequisite to holding a furnisher of

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information liable under 15 U.S.C. § 1681s-2(b). The court held that the defendant had no duty to investigate the accuracy of its information until it was notified by a CRA of a dispute that was filed by the plaintiff. Therefore, the court dismissed both of the plaintiff's FCRA claims, but dismissed the § 1681s-2(b) claim without prejudice to give the plaintiff time to appropriately plead under the statute.

**FAIR CREDIT REPORTING ACT (PERMISSIBLE PURPOSE & PRIVATE RIGHT OF ACTION)**

Ostrander v. Unifund Corp., 2008 WL 850329 (W.D.N.Y. Mar. 28, 2008)

Plaintiff brought an action against the defendant debt collectors alleging various violations of the Fair Credit Reporting Act (FCRA). Specifically, the plaintiff alleged that the defendants accessed his credit report without a permissible purpose and provided inaccurate information to consumer reporting agencies (CRAs). The defendants filed a motion to dismiss and a motion for summary judgment. The court first stated that the defendants accessed the plaintiff's consumer report for a permissible purpose. The court held that when the defendants acquired the plaintiff's debt it was delinquent. Therefore, the court concluded that the defendants acted properly in accessing the plaintiff's credit report for the permissible purpose of reviewing or collecting the assigned debt. The plaintiff also asserted that the defendants were liable under the FCRA for providing inaccurate information to CRAs, specifically a violation of 15 U.S.C. § 1681s-2(a). The court held that there is no private right of action under §1681s-2(a), and therefore, the plaintiff could not bring a claim against the defendants. The court then stated that the plaintiff could bring a claim under § 1681s-2(b), however, the plaintiff would have to show that the furnisher of information was given notice of a dispute by a CRA. The court stated that the defendant did not produce evidence of notice given to the defendants by a CRA, and therefore, failed to produce a plausible claim for relief under § 1681s-2(b). Accordingly, the court granted the defendants' motions and dismissed the plaintiff's claims.

**FAIR DEBT COLLECTION PRACTICES ACT (CREDITOR APPLICABILITY & BUSINESS DEBT)**

Utility Metal Research, Inc. v. Coleman, 2008 WL 850456 (E.D.N.Y. Mar. 28, 2008)

Plaintiff was the president of a business that purchased chemicals from the defendant corporation. After the plaintiff defaulted on a line of credit, the defendant corporation hired the defendant debt collector to attempt to collect the debt from the plaintiff. The plaintiff brought suit in federal court alleging that the defendants violated various provisions of the Fair Debt Collection Practices

Act (FDCPA) and other state laws while attempting to collect the owed balance. The defendants filed a motion for summary judgment as to all claims. The court first granted summary judgment in favor of the defendant corporation because it was not a debt collector under the purview of the FDCPA. The court held that the corporation was a creditor under the meaning of the FDCPA and was not liable for any violations of the statute. The court then dismissed the defendant debt collector because the debt it was attempting to collect was not a consumer debt. The plaintiff argued that while the debt was a business debt, the FDCPA was applicable because the defendant's actions were aimed at the president of the corporation personally. The court rejected this argument, stating that attempts to collect from the president did not convert the debt into a consumer debt that would be covered under the FDCPA. Therefore, the court granted the defendants' motion for summary judgment and dismissed the plaintiffs' FDCPA claims.

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3<sup>RD</sup> CIRCUIT  
DECISIONS



**FAIR CREDIT REPORTING ACT (FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003 (STANDING & WILLFUL NONCOMPLIANCE))**

Miller v. Sunoco, Inc., 2008 WL 623806 (E.D. Pa. Mar. 4, 2008)

Plaintiff purchased gasoline at the defendant's store and after paying by credit card, received a computer generated credit card receipt that contained the expiration date of the plaintiff's credit card. The plaintiff filed a class action lawsuit alleging that the defendant violated the Fair and Accurate Credit Transactions Act of 2003 (FACTA), a subset of the Fair Credit Reporting Act (FCRA). The defendant filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim. In the alternative, the defendant sought dismissal of the plaintiff's claim for injunctive relief. The defendant first argued that because the plaintiff did not suffer an "injury in fact" that the plaintiff lacked standing to assert his claims. The court dismissed this argument, stating that the statute conferred a private right of action, which was enough to satisfy the standing requirement. The defendant then argued that

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because the complaint failed to allege that the defendants willfully failed to comply with the requirements of the FACTA that the suit should be dismissed for failure to state a claim. The court held that the plaintiff had stated in the complaint that the defendant deliberately, willfully, intentionally, recklessly and negligently violated the FACTA, which was sufficient to preclude dismissal. Finally, the court agreed with the defendant that the plaintiff's claims for injunctive relief should be dismissed. The court stated that the FCRA reserves the right to seek injunctive relief purely for the Federal Trade Commission (FTC). Therefore, the court dismissed the plaintiff's claims for injunctive relief but allowed all other FACTA and FCRA claims.

FAIR DEBT COLLECTION PRACTICES ACT  
(STATE COURT PROCEDURE)

Phath v. J. Scott Watson, P.C., 2008 WL 623837 (E.D. Pa. Mar. 7, 2008)

Plaintiff owed tuition debt to a university. The university hired the defendant attorney to collect the outstanding debt. The defendant initiated a state court suit against the plaintiff which required him to submit a complaint and a verification of the debt. The plaintiff then filed suit in federal court alleging that the defendant violated state law by validating a debt to which he had no personal knowledge and that the violation of state law constituted a violation of the Fair Debt Collection Practices Act (FDCPA), specifically 15 U.S.C. §§ 1692e and 1692f. The defendant filed a motion to dismiss the claim. He argued that he was entitled to absolute judicial immunity because the statement on which the defendant brought the action was made in a pleading, and additionally, that the FDCPA is inapplicable to formal pleadings and violations of state court civil procedure rules. The court first disagreed with the defendant that the FDCPA does not apply to formal pleadings in compliance with a state court civil procedure rule; however, the court then held that the communication was not false. The defendant attested to the fact that he had knowledge of the facts to the best of his knowledge, information and belief. The court held that the defendant could attest to this fact and was not falsifying the complaint. The court then held that the verification was not deceptive, because the statement could only be read to mean that the defendant was verifying the facts contained were based on his own knowledge, information and belief. Because this statement was true and written in clear language, it could not be held to be deceptive. Finally, the court stated that if the verification could be read to create a false impression as to its source, the harm would be de minimis under Pennsylvania law and not cognizable under the FDCPA. Accordingly, the court granted the defendant's motion to dismiss.

TRUTH-IN-LENDING ACT (PROPER NOTICE)  
Chiles v. Ameriquest Mortgage Co., 2008 WL 724612  
(E.D. Pa. Mar. 17, 2008)

Plaintiff refinanced his home loan with the defendant mortgage company. The plaintiff brought suit against the defendant requesting rescission of his home loan pursuant to the Truth-in-Lending Act (TILA), alleging that the defendant failed to provide the plaintiff with the required material disclosures based on the variable interest rate to which the plaintiff agreed. The defendant argued that the disclosures were sufficient and filed a motion for summary judgment. The plaintiff first alleged that by only giving notification of a variable rate, and not giving additional disclosures about the rate, the defendant violated the TILA. The court disagreed, holding that all that was required of the defendant was to give notice to the plaintiff that the loan had a variable rate. After the defendant presented evidence that the plaintiff signed a notice which included information regarding the existence of the variable rate, the court held that the TILA did not give the plaintiff the extended right to rescind. The plaintiff also argued that he was entitled to a discounted "refinancing" title insurance rate. After he did not receive that rate, the plaintiff argued that the defendant should have listed the price of the title insurance in the TILA disclosures. The court disagreed, stating that TILA only requires a lender to list the price of title insurance if it is not bona fide and reasonable in amount. Because the plaintiff failed to provide evidence of an earlier policy at the closing, the court stated that he was not entitled to a special refinancing rate and the defendant was not required to list the cost of title insurance. Finally, the court held that the defendant was not required to list the appraisal and tax certification fees because the plaintiff failed to provide any evidence that the fees were unreasonable. Because the plaintiff could not prove that his right to rescind was extended as a result of any actions on the part of the defendant, the court granted the defendant's motion for summary judgment.

TRUTH-IN-LENDING ACT (YIELD SPREAD PREMIUM)

Abbott v. Washington Mut. Finance, Inc., 2008 WL 756069 (E.D. Pa. Mar. 20, 2008)

Plaintiff filed suit against the defendant bank alleging violations of the Truth-in-Lending Act (TILA) when the defendant failed to disclose the yield spread premium (YSP) on the TILA itemized disclosure form as a finance charge. In the bench trial, the plaintiff argued that she should have been given the interest rate that the lender approved her for and that the yield spread premium was, in actuality, a finance charge. The court held that a YSP was purposefully excluded from the required disclosures

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specified by TILA and the defendant was not responsible for including it as a finance charge on its disclosure form. Accordingly, the court entered judgment in favor of the defendant.

**FAIR DEBT COLLECTION PRACTICES ACT  
(STATUTE OF LIMITATIONS)**

Schaffhauser v. Burton Neil & Associates, 2008 WL 857523 (M.D. Pa. Mar. 27, 2008)

Plaintiffs defaulted on a debt that was owed to a credit card company. The defendant law firm was hired to collect the overdue balances. The defendant brought suit against the plaintiffs in state court. The plaintiffs then filed suit in federal court alleging that the defendants violated several provisions of the Fair Debt Collection Practices Act (FDCPA). The defendant filed a motion for summary judgment alleging that the plaintiffs' claims were time-barred by the one year FDCPA statute of limitations. The plaintiffs argued that although the state court lawsuit was filed four years before they filed their FDCPA lawsuit that each time communications were sent by the state court or the defendant to the plaintiff, that there was a continuing violation of the FDCPA and the statute of limitations was not violated. The court held that the communications were ones that ordinarily occur in the course of litigation and were not actionable under the FDCPA. Therefore, the court held that the plaintiffs' claims were time-barred and granted the defendant's motion for summary judgment.

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



**TRUTH-IN-LENDING ACT & REAL ESTATE  
SETTLEMENT PROCEDURES ACT (NOTICE  
OF RESCISSION & STATUTE OF LIMITATIONS)**  
Caminero v. Wells Fargo Bank, N.A., 2008 WL 640264  
(E.D. Va. Mar. 5, 2008)

Plaintiffs entered into an agreement with the defendant bank to refinance the plaintiffs' home. At the closing, the

plaintiffs contend that they only received two copies of the Notice of Right to Rescind instead of the four that are required. After the plaintiffs sent the defendant a Qualified Written Request (QWR) for more disclosures, the defendant responded, but did not include all of the requested disclosures. The plaintiffs then submitted another QWR along with a rescission notice. The plaintiffs then filed suit alleging that the defendant bank and the defendant servicing company violated certain provisions of the Truth-in-Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA) and sought damages and rescission of the loan. The defendants filed a motion to dismiss. The plaintiffs first argued that the defendant loan servicer violated the TILA by only giving one copy each to the two plaintiffs of the Notice of Right to Rescind, instead of the two each that is required under the TILA. The defendant servicer argued that because the plaintiffs later executed a General Warranty Deed and conveyed their property to a trust, that their right to rescind the transaction expired upon the execution of that deed and they should not be allowed to bring a TILA claim. The plaintiffs countered, arguing that because they were beneficiaries to the trust, that they still retained an interest in the property and had the ability to rescind the transaction. The court disagreed, holding that when the plaintiffs sold and conveyed their property to the trust, their entire interest in the property terminated. Therefore, the court dismissed the TILA claims against both the defendant servicer and the defendant bank on the grounds that the plaintiffs did not have the right to rescind the transaction. The court then found that any damage claim the plaintiffs might have under the TILA would be barred by the statute of limitations because they did not bring suit until more than one year after they conveyed the property to the trust. The plaintiffs then argued that the defendant servicer failed to fully respond to its QWRs in violation of the RESPA. The defendant countered, stating that the letters in question were not QWRs. The court held that the response from the servicer, which provided some of the documents and gave explanations for those that could not be provided, was sufficient. Therefore, the court granted the defendants' motions to dismiss.

**FAIR CREDIT REPORTING ACT (FURNISHER  
LIABILITY)**

Mierek v. Bank of America Corp., 2008 WL 746981  
(D.S.C. Mar. 18, 2008)

Plaintiff maintained credit card accounts with the defendant bank. While the accounts remained current for eight years, in 2000 each account became delinquent and the defendant charged off more than \$25,000 in loss. The plaintiff argued that the defendant had not been properly reporting information to several credit reporting agencies (CRAs) and that some of the information they reported

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was outside of a seven year statutory period of limitations. Therefore, the plaintiff brought suit under the Fair Credit Reporting Act (FCRA). The defendant filed a motion for summary judgment. The plaintiff first argued that the defendant violated 15 U.S.C. § 1681c by providing incorrect information to several CRAs more than seven years past the date of his last transaction. The court held that while the defendant provided information that the information given to the CRAs was correct, the plaintiff failed to produce any evidence to the contrary. Additionally, the court held that the requirement that CRAs cannot create any consumer report containing accounts charged for collection that are more than seven years old only applies to CRAs and not to furnishers of information. The plaintiff then argued that the defendant violated 15 U.S.C. § 1681s-2 by failing to reasonably investigate a consumer dispute. The court held that because the plaintiff failed to present any evidence of inaccurate information, this claim must also fail. Accordingly, the court granted the defendant's motion for summary judgment.

**TRUTH-IN-LENDING ACT (POST-SALE DAMAGES)**  
In re Ebron, 2008 WL 819888 (E.D. Va. Mar. 25, 2008)

Plaintiff maintained a mortgage loan with the defendant bank. After the plaintiff filed Chapter 13 bankruptcy, she sent a notice of rescission to the defendant. The defendant took no action in response to the letter. The plaintiff then executed an agreement to sell the property. The plaintiff brought suit, arguing that she still was entitled to damages under the Truth-in-Lending Act (TILA) because of disclosures the defendant failed to make, and the defendant's failure to recognize her timely notice of rescission. The defendant filed a motion to dismiss. The question before the court was: if one assumed that the original transaction's finance charges were not fully disclosed, did a notice of rescission sent to the defendant within three years entitle the plaintiff to claim statutory damages under the TILA despite her subsequent sale of the property? The court held that the plaintiff was entitled to seek statutory damages based upon the failure of the defendant to honor a timely rescission notice. The court also stated that if the plaintiff had sought rescission in this case, the court would not likely have granted the remedy. The court stated that public policy concerns dictate that the court not undo a transaction subsequent to the original transaction, as there would be no finality in sales of property securing TILA covered transactions. Accordingly, the court denied the defendant's motion to dismiss.

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



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

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



**FAIR DEBT COLLECTION PRACTICES ACT (CREDITOR APPLICABILITY)**  
Martin v. Select Portfolio Servicing Holding Corp., 2008 WL 618788 (S.D. Ohio Mar. 3, 2008)

Plaintiffs, a married couple, filed suit against the defendant corporation alleging that the defendant violated several provisions of the Fair Debt Collection Practices Act (FDCPA) when it made dozens of phone calls to the plaintiffs' residence and places of employment requesting payment on the plaintiffs' mortgage loan. The parties both consented to having the case tried before a U.S. Magistrate

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Judge. After the plaintiffs' mortgage loan was transferred to the defendant for servicing, the defendant began making phone calls to the plaintiffs requesting payment. The plaintiffs allege that because of the defendant's harassing calls, the husband suffered a heart attack. The defendant argued that because it only serviced a loan, and was not a debt collector, that it was not responsible for violations of the FDCPA. The court agreed, holding that because the defendant acquired the loan merely to service the loan, and did not believe that the loan was in default when it acquired it, the defendant was a creditor and not responsible for violations of the FDCPA. The court stated that while the debt may have been outstanding when it was purchased by the defendant, outstanding does not equate default under the FDCPA. The court stated that the defendant did not consider a payment in default until it was 45 days past due; therefore, because the plaintiffs' account was less than 45 days past due when the defendant acquired the plaintiff's loan, it was not in default. Finally, the court held that even if the defendant was a debt collector, the plaintiff had not presented sufficient evidence to prove a violation of the FDCPA. Therefore, the court found that the defendant was not liable to the plaintiffs for violations of the FDCPA.

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

Passa v. City of Columbus, 2008 WL 687168 (S.D. Ohio Mar. 11, 2008)

Plaintiff entered into several "pay day" loan transactions with several lenders primarily in the business of negotiating cash advances. As collateral for the loan, the plaintiff submitted a post-dated check that was to be cashed after a specified period of time. When the plaintiff discovered she would not be able to immediately pay back the loan, she informed the defendant lender that the check would not be valid if cashed. The defendant attempted to negotiate the check. When the check was found to have insufficient funds, the defendant filed a claim with the city's Check Resolution Program that allowed eligible merchants to submit unsatisfied checks and receive a timely hearing date scheduled for the local docket. The city then sent notices from the prosecutor's office to the delinquent plaintiff requesting that she appear at several mediations. The plaintiff filed suit against the city and several cash advance lenders, alleging that by participating in the Check Resolution Program, the city lent its official status to the defendant lenders to use in the collection of debts, thereby violating several provisions of the Fair Debt Collection Practices Act (FDCPA). The court originally held that the plaintiff's individual claims were subject to arbitration. The arbitrator first denied the defendant lender's motion to dismiss. After a hearing, the arbitrator then dismissed with prejudice all of the plaintiff's FDCPA claims. The plaintiff then sought to modify, vacate and

correct the arbitration awards. In regard to the FDCPA, the plaintiff requested that the court deny the arbitrator's determination that the defendant lender did not act as a debt collector, and therefore, did not violate the FDCPA. The plaintiff first argued that the only creditor was the defendant's localized office where the pay day loan was administered and that the collection activities instituted from its main office constituted collection work by a third party. The defendant argued that its activities were exempt under 15 U.S.C. § 1692a(6)(B). The court agreed with the defendant, holding that the plaintiff's argument amounted to nothing more than a mere disagreement with the arbitrator's statutory interpretation. Therefore, the court held that the plaintiff failed to establish that the arbitrator manifestly disregarded the law. The plaintiff then asserted that the defendant violated the FDCPA by using the Check Resolution Program and a pseudonym. The court concluded that the arbitrator was correct in finding that the Check Resolution Program was not designed as a check collection device and did not violate the FDCPA. The court stated that it was a utilization of the Municipal Court System that was available to all citizens. The plaintiff also alleged that by using a different name, which included in it its original name, to collect debts, the defendant used a pseudonym to violate the FDCPA. The court also disagreed with the plaintiff, holding that it was highly unlikely that anyone would be confused by the language. Accordingly, the court upheld the arbitrator's findings and dismissed the plaintiff's FDCPA claims.

**FAIR DEBT COLLECTION PRACTICES ACT  
(LETTER NOT IN CONNECTION WITH  
COLLECTION OF A DEBT)**

Mabbitt v. Midwestern Audit Service, Inc., 2008 WL 723507 (E.D. Mich. Mar. 17, 2008)

Plaintiff and her sister lived together and split the bills evenly. When the plaintiff defaulted on the amount she owed to a utility company, the debt was transferred for collection to the defendant debt collector. After the plaintiff and her sister moved to a new location, the sister began utility services under her name. When the defendant realized this, it sent the plaintiff and her sister a letter stating that the plaintiff's previous unpaid debt would be applied to her sister's new account with the utility company. The letter did not request any form of payment. The plaintiff sued the defendant alleging that the defendant violated the Fair Debt Collection Practices Act (FDCPA) by sending a letter to her sister that was "her business." The defendant filed a motion for summary judgment. The defendant argued that the letter sent by the defendant was not covered under the FDCPA because it was not sent in connection with the collection of a debt as is required by the FDCPA. The court agreed with the defendant, holding that the letter simply informed

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the plaintiff that a previous balance had been transferred to her current account and makes no attempt to obtain payment. Therefore, the court granted the defendant's motion for summary judgment.

NATIONAL FLOOD INSURANCE ACT OF 1994  
(PRIVATE CAUSE OF ACTION)  
Nicholson v. Countrywide Home Loans, et al., 2008 WL 731032 (N.D. Ohio Mar. 17, 2008)

Plaintiffs were the owners of condominiums in a complex that was completely flooded in 2006. The plaintiffs sued various banks and financing institutions alleging that by failing to verify that adequate flood insurance was in place prior to making mortgage loans to the plaintiffs, the defendants violated the National Flood Insurance Act of 1994 (NFIA). The plaintiffs argued that the defendants were required to cause the plaintiffs to purchase flood insurance or to "force place" flood insurance pursuant to the NFIA. The defendants filed a motion to dismiss, arguing that the plaintiffs could not bring a private cause of action under the NFIA. The court agreed with the defendants, stating that courts have unanimously held that the NFIA does not create a private cause of action for borrowers and that the federal treasury is the intended beneficiary. The plaintiffs then alleged that they should be allowed to bring a claim of negligence on the theory that the NFIA creates a duty between the lender and the borrower. The court again disagreed, finding no legal basis for such a conclusion. The court held that the separation of powers doctrine did not allow a court to interpret a federal statute to define a state law standard of care in a negligence action. Accordingly, the court granted the defendants' motion to dismiss the plaintiffs' claims.

FAIR CREDIT REPORTING ACT (PRIVATE  
RIGHT OF ACTION)  
Best v. West Point Bank, 2008 WL 793641 (W.D. Ky. Mar. 24, 2008)

Plaintiff maintained several loan agreements with the defendant bank. The plaintiff alleged that the defendant violated several provisions of the Fair Credit Reporting Act (FCRA) and other state laws when it provided incorrect loan status and payment information to credit reporting agencies (CRAs) with respect to loans made to the plaintiff by the bank. The defendant submitted a declaration to the court from its president which stated that the defendant does not report information regarding the accounts of its consumers to any CRA, but rather, the task was handled by the defendant's holding company. The court stated that even though full discovery could not be conducted, the defendant could not be liable for any FCRA violations and granted the defendant's motion for summary judgment as to the FCRA claims. The court then stated that even if the FCRA claims were

substantively discussed, the plaintiff's claims would still be dismissed. The plaintiff had argued that the Bank had consistently and repeatedly provided incorrect loan status or payment information to various CRAs. The court stated that the plaintiff had no private right of action under the FCRA based on its allegations. Therefore, the court granted the defendant's motion for summary judgment.

FAIR CREDIT REPORTING ACT (PRIVATE  
RIGHT OF ACTION & STATUTE OF  
LIMITATIONS)  
Sweitzer v. American Express Centurion Bank, 2008 WL 820090 (S.D. Ohio Mar. 24, 2008)

Plaintiff maintained a credit card account with the defendant bank. In 2002, the plaintiff alleged that a former business partner illegally made charges to his credit card account. The plaintiff alleged that the defendant violated various provisions of the Fair Credit Reporting Act (FCRA) and state laws when it did not timely correct information that the plaintiff disputed. The defendant filed a motion for summary judgment. The defendant first argued that the court should prohibit the plaintiff's claim because 15 U.S.C. § 1681s-2(b) does not create a private cause of action. The court rejected this argument, holding that the majority of courts hold that § 1681s-2(b) does create a private cause of action. The defendant then stated that the plaintiff's claims were time-barred by the two-year FCRA statute of limitations. The court agreed, holding that the two-year statute of limitations began when the defendant furnisher of information was informed of a dispute by a credit reporting agency (CRA). The plaintiff filed suit more than two years after the March 2002 notification, thereby prohibiting his FCRA claims. The plaintiff argued that there were other discrete violations of § 1681s-2(b)(1) that should have extended the statute of limitations. The court held that because the plaintiff admitted in a deposition that he was unaware of any credit report subsequent to the March 2002 report, that there was no additional violation of the FCRA. Accordingly, the court granted the defendant's motion for summary judgment on the plaintiff's FCRA claims.

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

Matthews v. United Retail, Inc., 2008 WL 618960 (N.D.  
Ill. Mar. 5, 2008)

Plaintiff brought suit, on behalf of herself and others similarly situated, against the defendant retail store alleging that the defendant provided the plaintiff with a receipt containing the expiration date of her credit card in violation of the Fair and Accurate Credit Transactions Act of 2003 (FACTA), a subset of the Fair Credit Reporting Act (FCRA). The plaintiff moved for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure. The plaintiff sought to define her class as: “all persons in Illinois to whom [the defendant] provided an electronically printed receipt at the point of sale or transaction, in a transaction occurring after December 4, 2006, which receipt displays either (a) more than the last five digits of the person’s credit card or debit number, and/or (b) the expiration date of the person’s credit or debit card.” The court first stated that the plaintiff met the required conditions under Rule 23(a). The defendant argued that the plaintiff did not satisfy the adequacy requirement of Rule 23 because she sought to represent a class that potentially included members who suffered actual damages, whereas the plaintiff only sought statutory damages. The court held that because actual damages were likely minimal in a FCRA case and because class members with actual damages claims could opt out, that the plaintiff was an adequate class representative. After briefly stating that the plaintiff satisfied Rule 23(b)(3), the court granted the plaintiff’s motion for class certification.

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

Redmon v. Uncle Julio’s of Illinois, Inc., 2008 WL 656075  
(N.D. Ill. Mar. 7, 2008)

The plaintiff visited the defendant’s restaurant and upon completion of the service received a computer generated credit card receipt containing his credit card’s expiration date. The plaintiff brought suit, alleging that the defendant violated the Fair and Accurate Credit Transactions Act of 2003 (FACTA), a subset of the Fair Credit Reporting Act (FCRA). The plaintiff then filed a motion for class certification seeking to certify a class that consisted of: “All consumers in Illinois to whom [the defendant] provided an electronically printed receipt at the point of sale or transaction, in a transaction occurring after December 4, 2006, which receipt displays either (a) more than the last five digits of the person’s credit card or debit card number, and/or (b) the expiration date of the person’s credit or debit card.” The court first stated that with a potential 55,283 class members, the plaintiff satisfied the requirements of numerosity, commonality, typicality and adequacy presented by Rule 23(a) of the Federal Rules of Civil Procedure. Next the court held that the plaintiff met the predominance and superiority requirements of Rule 23 (b)(3). The court rejected arguments by the defendant that the class was too large to be manageable and that the size of the potential statutory damage award would lead to a blackmail settlement. The court also stated that concerns about the disparity between the actual damages incurred by the plaintiffs and the potential damage award were not appropriate before certification of the class. Finally, the court rejected the defendant’s argument that a class action was not appropriate because after notice of the violation it immediately remedied its alleged violation of the FACTA. The court stated that the FACTA does not provide an exception for after-the-fact compliance. Accordingly, the court granted the plaintiff’s motion for class certification.

FAIR DEBT COLLECTION PRACTICES ACT  
(OFFER OF JUDGMENT)

Giblin v. Revenue Production Management, Inc., 2008  
WL 780627 (N.D. Ill. Mar. 24, 2008)

Plaintiffs owed a debt for medical services to a hospital. The defendant debt collector then acquired the debt from the hospital and made attempts to collect from the plaintiffs. The defendant sent two identical collection letters to the plaintiffs, one month apart, which both stated that the plaintiffs had thirty days to dispute the debt or to request verification. The plaintiffs brought suit alleging that by sending the second letter after the original thirty days had passed, the defendant had violated various provisions of the Fair Debt Collection Practices Act

*(Continued on page 11)*

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



### FAIR DEBT COLLECTION PRACTICES ACT (NOTICE OF DISPUTE, THREAT OF LAWSUIT & INTEREST CALCULATIONS)

Wilhelm v. Credico, Inc., 2008 WL 553207 (8th Cir. Mar. 3, 2008)

Plaintiff's credit card debt was assigned to the defendant debt collector from a previous debt collection agency. The defendant sent the plaintiff a "Notice of Lawsuit" letter threatening to sue the plaintiff unless he paid the amount specified. The defendant mistakenly included in the amount owed a charge of interest on previous interest, an action that is prohibited by state law. The plaintiff disputed the debt and demanded verification. The defendant recognized its own error and did not bring a lawsuit. The plaintiff, on behalf of himself and others similarly situated, brought suit against the defendant alleging various violations of the Fair Debt Collection Practices Act (FDCPA). The district court granted the defendant's motion for summary judgment. The plaintiff then appealed the ruling to the Eighth Circuit Court of Appeals. The plaintiff first asserted that the defendant violated 15 U.S.C. § 1692e(8) of the FDCPA by failing to report his debt as "disputed" to a previous debt collector. The court held that there was no affirmative duty under § 1692e(8) for a debt collector to report a debt as disputed. The duty would only arise if the defendant would have voluntarily communicated any credit information, which the defendant did not. Therefore, the court affirmed the lower court's ruling as to the § 1692e(8) claim. Second, the plaintiff argued that the defendant violated § 1692e(5) by threatening to take action that could not legally be taken. The plaintiff argued that the defendant had failed to sue 101 of the 151 residents of the state who had received the letter in a 19-month period, therefore demonstrating the defendant's lack of intent to take legal action. The court stated that while the defendant would likely be allowed to

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(FDCPA). The defendant then made an Offer of Judgment, pursuant to Rule 68 of the Federal Rules of Civil Procedure, in the amount of \$10,000 plus attorney's fees and costs. Five days later, the plaintiffs filed a motion for class certification and requested that the Offer of Judgment be set aside. The defendant argued that because, at most, the plaintiffs could only receive \$1,000 in statutory damages, the offer made their case moot. After reviewing the law in several circuits, the court followed the rule set forth in *Asch v. Teller, Levit & Silvertrust, P.C.*, 200 F.R.D. 399 (N.D.Ill. 2000), that allowed a plaintiff to move for class certification within ten days after receipt of an offer of judgment. The court stated that allowing the plaintiffs to have a retaliatory strike to the offer of judgment adds an appropriate degree of symmetry to the asymmetrical bite of Rule 68. The court also stated that the rule had the additional salutary effect of taking away the incentive for a defendant to make a Rule 68 offer before either party had a reasonable opportunity to evaluate the case. Accordingly, the court ruled that the plaintiff's motion to strike the Offer of Judgment was moot, because the plaintiff's motion for class certification invalidated the offer.

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

Ramirez v. Palisades Collection L.L.C., 2008 WL 835694 (N.D. Ill. Mar. 28, 2008)

Plaintiff brought suit on behalf of herself, and others similarly situated, alleging that the defendant debt collector violated various provisions of the Fair Debt Collection Practices Act (FDCPA) by suing Illinois debtors on time-barred debts. The plaintiff argued that in Illinois, an entity bringing an action for breach of a written contract must attach the contract to the complaint; if there is no attached contract, the contract is considered unwritten. The plaintiff alleged that the defendant regularly brings time-barred suits for unwritten contracts hoping for default judgments against the debtors. The plaintiff filed a motion for class certification. The plaintiff sought to define the class as: "(a) all individuals with Illinois addresses, (b) against whom [the defendant] filed suit on a credit card debt originated by [a bank], (c) where both the date of the charge-off and the date of last payment . . . were more than five years prior to the date of filing . . ." The defendant argued that the class definition was inadequate. The court first ruled that the class definition was adequate and written with the required specificity. The court then stated that the plaintiff satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure and qualified under Rule 23(b)(3). The court held that the defendant's arguments that a damages cap favored individual actions and that the class action would require specific individualized inquiries were insufficient and granted the plaintiff's motion for class certification.

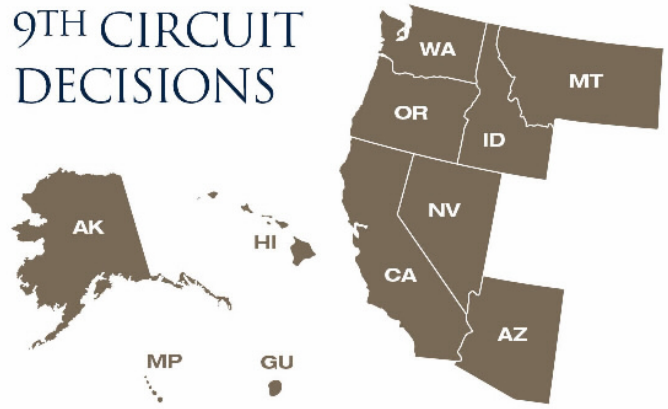
refuse to continue to take action if a debt is disputed, as it was in the instant case, the real problem was that the defendant failed to present evidence that it sent the plaintiff a notice of his right to dispute the debt before it sent the “Notice of Lawsuit” letter. Because there was no evidence of the previous letter, and the “Notice of Lawsuit” letter did not inform the plaintiff that legal activities would cease upon a timely dispute of the debt, the court held that the letter appeared to be an action that could not legally be taken within the meaning of § 1692e(5). Therefore, the court reversed the district court’s grant of summary judgment as to the § 1692e(5) claim. Finally, the plaintiff argued that the defendant violated the FDCPA by attempting to collect a debt computed in violation of a state statute which prohibited contracts that provide for the payment of interest on interest overdue. The district court dismissed the claim stating that there was sufficient evidence that the violation was the result of a bona fide error made by the defendant. The Eighth Circuit held that because the defendant presented evidence that the violation was caused by the error of an employee, and because the defendant did have procedures in place for avoiding such a violation, that a reasonable jury could only conclude that the defendant’s violation was a bona fide error. Therefore, the court affirmed the district court’s grant of summary judgment as to the interest-on-interest claim.

FAIR DEBT COLLECTION PRACTICES ACT  
(UNAUTHORIZED PRACTICE OF LAW)  
Lavander v. Wolpoff & Abramson, L.L.P., 2008 WL 695399 (W.D. Mo. Mar. 12, 2008)

Plaintiffs had entered into credit agreements with a bank and defaulted on their debt. The bank hired the defendant debt collection law firm to handle the collection of the debt. The plaintiffs filed a class action lawsuit, alleging that the defendant violated certain provisions of the Fair Debt Collection Practices Act (FDCPA) by engaging in the unauthorized practice of law. The defendant filed a motion to dismiss. The plaintiffs argued that the defendant violated the FDCPA by engaging in illegal collection practices, including demanding reimbursement for legal fees that were rendered by persons not authorized to render legal fees. The court disagreed with the plaintiffs, holding that claims alleging an unauthorized practice of law are not cognizable under the FDCPA. Finally, the court stated that it was barred by the Rooker-Feldman Doctrine from addressing the legality of an arbitration proceeding when the validity of the arbitrator’s determination was being heard in a state court. Accordingly, the court granted the defendant’s motion to dismiss.

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## 9TH CIRCUIT DECISIONS



FAIR DEBT COLLECTION PRACTICES ACT  
(ATTORNEY’S FEES)  
Patyk v. Certegy Payment Recovery Services, Inc., 2008 WL 755850 (S.D. Cal. Mar. 19, 2008)

Plaintiff brought suit against the defendant for violations of the Fair Debt Collection Practices Act (FDCPA). The defendant filed an Offer of Judgment that was accepted by the plaintiff for \$2,001.00 plus reasonable attorney’s fees. The plaintiff then filed a motion for attorney’s fees in the amount of \$14,287.50 for 38.1 hours of work at \$375.00/hour. The defendant argued that the amount requested was unreasonable, stating that the hours were excessive and the rate was higher than the local standard. Citing a recent case in the same district, the court held that \$295.00/hour was reasonable in light of the attorney’s experience in consumer debt collection cases. The court then stated that while most of the hours billed were reasonable, the plaintiff could not recover for attorney’s fees related to the motion for attorney’s fees. Therefore, the court allowed the plaintiff to recover fees for 28.6 hours of billed work. Accordingly, the court granted the plaintiff’s motion for attorney’s fees and awarded \$8,437.00.

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



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

Toney v. GMAC Mortgage Corp., 2008 WL 697367 (D. Colo. Mar. 12, 2008)

Plaintiffs brought suit against the defendant mortgage corporation alleging that the defendant violated the Fair Credit Reporting Act (FCRA) and other state laws when it failed to timely credit their mortgage payments, charged improper fees, failed to respond to requests for information, improperly foreclosed upon a loan, and improperly reported delinquencies to credit agencies. The defendant filed a motion for partial summary judgment seeking summary judgment on statute of limitations grounds with regard to the plaintiffs' FCRA claims. The defendant produced evidence that the plaintiffs were aware of potential FCRA violations from October 1, 2003 through September 22, 2004, but did file suit until September 26, 2006. The defendant argued that because the plaintiff waited more than two years after the last violation to bring the action, the suit was barred by FCRA's two year statute of limitations. The plaintiffs did not respond specifically to the statute of limitations argument, instead stating that they believed there were still genuine issues of material fact to discuss. The court held that the defendant had presented sufficient evidence to prove that the statute of limitations barred the claim and granted the defendant's motion for summary judgment on the FCRA claim.

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



### FAIR CREDIT REPORTING ACT (REASONABLENESS OF SETTLEMENT & ATTORNEY'S FEES)

Dikeman v. Progressive Express Ins. Co., 2008 WL 786618 (11th Cir. Mar. 26, 2008)

Plaintiffs brought a class action lawsuit against the defendant insurance company alleging that the company sent adverse action notices that did not comport with the guidelines of the Fair Credit Reporting Act (FCRA). The notices sent to the plaintiffs stated that the plaintiffs' consumer credit reports "may" have resulted, rather than actually resulted, in adverse insurance determinations. The district court approved a settlement that: (1) changed [the defendant's] adverse action policy; (2) gave a free copy of a consumer credit report and credit score to plaintiffs; (3) gave a free copy of a corrected credit report, if a class member found and corrected errors to its credit report; (4) gave a \$75-\$225 premium credit for former and current policyholders who could show that they would have received lower premiums but for the subsequently corrected errors in their consumer credit reports. The settlement also awarded class counsel \$3,000,000 in attorney's fees. Several class members objected to the settlement and filed an appeal to the Eleventh Circuit Court of Appeals. The objectors argued that the settlement did not provide each member with a specific amount of monetary relief within the statutory range allowed by the FCRA. Additionally, the objectors argued that the attorney's fees were too high for the low amount of damages awarded. The court first found that the damages awarded to the plaintiffs seemed reasonable in light of the willful nature of the defendant's conduct being seriously debatable. The court then found that the district court's award of attorney's fees in the amount of \$3,000,000 was not allowable. The only explanation provided by the district court was that the plaintiffs' counsel had spent years working on the case and the award of \$3,000,000 was "fair and reasonable." The Eleventh Circuit stated that on remand, the district court was

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required to explain the method it used to set the fees and make findings showing the factors and calculations used in setting the fee award. The court stated that the district court must apply the twelve factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 715 (5th Cir. 1974), to determine the appropriate statutory fee or the percentage to be utilized. Accordingly, the court affirmed the district court's ruling as to the validity of the settlement, but vacated the award of attorney's fees.

**FAIR CREDIT REPORTING ACT (FURNISHER LIABILITY & PREEMPTION)**

*Bosarge v. T-Mobile USA, Inc.*, 2008 WL 725017 (S.D. Ala. Mar. 17, 2008)

Plaintiff purchased a mobile phone plan from the defendant telephone company with an understanding that if he was not satisfied with reception within the first three days, he could return the phone. After the plaintiff returned the phone and settled his account, he continued to receive bills from the defendant telephone company. The company then transferred the plaintiff's "debt" to defendant debt collection company even though the plaintiff did not actually owe a debt. The defendants then reported the plaintiff's deficiency to several credit reporting agencies (CRAs). The plaintiff brought action alleging the defendants violated several provisions of the Fair Credit Reporting Act (FCRA) and other state laws. The defendants filed a motion for summary judgment. The plaintiff first alleged that the defendants violated certain provisions of the FCRA by reporting inaccurate information to a CRA. The court stated that a prerequisite for a claim against a furnisher of information under 15 U.S.C. § 1681s-2(b) is that the furnisher received notice from a CRA that the information was disputed. The court held that the plaintiff failed to present any evidence that the defendants were given notice of a dispute by a CRA, therefore the FCRA claim was dismissed. The plaintiff also asserted that the defendants were negligent and wanton in causing negative information to be reported on the plaintiff's consumer report. The defendant argued that the plaintiff's state law claims were preempted by the FCRA. The court held that FCRA's preemption provision specifically applies to two areas: (1) where state laws are inconsistent with the FCRA; and (2) where a state has imposed a requirement or prohibition on furnishers of information to CRAs. The court held that the instant action would fall under the second provision and holding a furnisher of information liable for damages would be inconsistent with the FCRA, which prohibits a private right of action under § 1681s-2 (a). Accordingly, the court granted the defendants' motions for summary judgment.

**FAIR CREDIT REPORTING ACT (PRIVATE RIGHT OF ACTION & STATUTE OF LIMITATIONS)**

*Blackwell v. Capital One Bank*, 2008 WL 793476 (S.D. Ga. Mar. 25, 2008)

Plaintiff was separated from her ex-husband when he opened a credit card account with the defendant bank under both of their names in 1998. The plaintiff argued that she was not made aware of any transactions or outstanding debt on the card until 2002. After not receiving payment on the account, the defendant "charged off" the account and reported the delinquency to the three credit reporting agencies (CRAs), thereby damaging the plaintiff's credit. The plaintiff twice disputed the debt with the CRAs. The defendant refused to reconsider the debt and stated that it believed its information was accurate. The plaintiff then filed suit alleging that the defendant violated several provisions of the Fair Credit Reporting Act (FCRA). The defendant filed a counterclaim against the plaintiff seeking payment of the outstanding debt. The court first dismissed the plaintiff's claim for failure to provide accurate information under 15 U.S.C. § 1681s-2(a) of the FCRA because there is not private right of action to enforce the duty. The defendant then argued that because the plaintiff filed her complaint more than two years after the defendant responded to her initial complaint, that her claims were time-barred by the two-year FCRA statute of limitations. The plaintiff argued that the statute of limitations had not run, because she submitted fresh complaints two years later concerning the defendant's refusal to reinvestigate the original credit report. The court disagreed with her argument, holding that allowing plaintiffs to litigate fresh complaints on old FCRA violations would enable consumers to indefinitely extend the limitations period by filing subsequent complaints. Therefore, the court granted the defendant's motion for summary judgment.

**FAIR DEBT COLLECTION PRACTICES ACT (STATE COURT ACTION & BONA FIDE ERROR)**

*Pescatrice v. Orovitz*, 2008 WL 795350 (S.D. Fla. Mar. 25, 2008)

Defendant law firm was hired to collect a credit card debt that was owed by the plaintiff. The plaintiff alleged that the defendant then attempted to file a time-barred lawsuit in state court to collect on the debt. The plaintiff also alleged that the defendant presented the plaintiff with a proposed Stipulation for Entry of Final Judgment Execution Withheld, which provided for an interest rate double that allowed by state law and waived statutory exemptions to garnishment. The plaintiff filed suit in federal court alleging that the defendant violated various

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provisions of the Fair Debt Collection Practices Act (FDCPA). The defendant filed a motion for summary judgment on the grounds that the state law claim was not time-barred under Virginia law, which has a statute of limitations of five years for a written contract. The plaintiff argued that Virginia's three-year statute of limitations should apply because the agreement was contained in an unwritten contract. The court stated that the issue in the case was not determined by which statute of limitations applied, but whether the defendant met the bona fide error defense. The court stated that if the defendant was wrong and did submit a time-barred claim, the defendant still properly researched the issue before filing suit and met the requirements of the bona fide error defense. Therefore, the court granted summary judgment for the defendant on the time-barred lawsuit claims. The plaintiff also alleged that the defendant violated the FDCPA by using a deceptive proposed stipulation in the underlying state court action. The defendant argued that the communication was a court related document, and was not covered under the FDCPA. The court rejected that argument and held that it was not possible to conclude as a matter of law that the stipulation was not deceptive. Therefore, the court denied both parties motions for summary judgment on the stipulation claims and stated that the issue was one of disputed fact meant for a jury.

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