

monthly litigation update

OCTOBER 2008

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



John R. Chiles
 Phone: (205) 458-5464
 E-Mail: jchiles@burr.com

John is a partner in Burr & Forman's Financial Services Practice Group and is licensed to practice law in Alabama, Florida, Kentucky, Mississippi, Tennessee, Texas and West Virginia.



Alan D. Leeth
 Phone: (205) 458-5499
 E-Mail: aleeth@burr.com

Alan is a partner in Burr & Forman's Financial Services Practice Group and is licensed to practice law in Alabama, California, Tennessee and the District of Columbia.



R. Frank Springfield
 Phone: (205) 458-5187
 E-Mail: fspringf@burr.com

Frank is a partner in Burr & Forman's Financial Services Practice Group and is licensed to practice law in Alabama, Florida, Mississippi and Tennessee.



Zachary D. Miller
 Phone: (205) 458-5250
 E-Mail: zachary.miller@burr.com

Zach is an associate in Burr & Forman's Financial Services Practice Group and is licensed to practice law in Alabama.

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

SUPREME COURT DECISIONS

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

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1ST CIRCUIT DECISIONS



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

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2ND CIRCUIT DECISIONS



FEDERAL ARBITRATION ACT (EQUITABLE ESTOPPEL)

Ross v. American Express Co., 2008 WL 4630314 (2nd Cir. Oct. 21, 2008)

The plaintiffs obtained credit card accounts which included arbitration clauses in their cardholder agreements. The plaintiffs brought suit under the Sherman Act, alleging that the defendant, a non-party to the cardholder agreements, colluded with their credit card lenders in

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fixing fees for transactions involving foreign currency at a level well above that which would prevail in a competitive market and engaging in a concerted effort to conceal the allegedly inflated foreign currency transaction fees. The defendant moved to compel arbitration and the district court granted the defendant's motion, in part, holding that the plaintiffs could be compelled to arbitrate on the basis of equitable estoppel. The plaintiffs appealed the district court's holding and the defendant argued that its status as an alleged co-conspirator with parties to the arbitration agreement allowed it to avail itself of the compulsory arbitration clauses. The Second Circuit found that: (1) arbitration is a matter of contract; (2) the defendant had not entered into a contract with the plaintiffs; and (3) the district court had improperly extended the principle of compelling arbitration through equitable estoppel because such a claim requires a showing of a corporate relationship to a party to the contract containing an arbitration clause or that the party seeking arbitration be named in the contract. Accordingly, the Second Circuit Court of Appeals reversed, in part, the district court's ruling and remanded the case to the district court.

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3RD CIRCUIT DECISIONS



TRUTH-IN-LENDING ACT (STANDING)

Talley v. Deutsche Bank Trust Co., 2008 WL 4606302 (D.N.J. Oct. 15, 2008)

The plaintiff alleged that the defendant violated the Truth-in-Lending Act (TILA) and state law by allowing a mortgage to be obtained by the plaintiff's brother without the plaintiff's consent on property partially owned by the plaintiff. The defendant filed a motion to dismiss for failure to state a claim, arguing that the plaintiff lacked standing because she was not a borrower. The court found that the plaintiff was unable to bring suit under TILA because, by her own admission, she was not doing business with the defendant, and therefore, was not a borrower. The court granted the defendant's Motion to Dismiss.

TRUTH-IN-LENDING ACT (*ROOKER-FELDMAN* DOCTRINE & DAMAGES)

In re Dougal, 2008 WL 4735898 (Bankr. W.D. Pa. Oct. 29, 2008)

The plaintiffs defaulted on a mortgage loan. After foreclosure procedures were initiated in state court, the plaintiff's attorney entered into a stipulation in which an *in rem* judgment would be entered against the plaintiffs but held in escrow for roughly six months, during which time the plaintiffs would have the opportunity to reinstate or pay off the loan. The plaintiffs did not reinstate or pay off the loan. The mortgage company initiated foreclosure through the court and the plaintiffs filed a bankruptcy petition, preventing the sheriff's sale from going forward. The plaintiffs subsequently filed suit alleging, *inter alia*, that the defendant had violated the Truth-in-Lending Act (TILA) by failing to provide necessary disclosures in connection with their loan transaction. The plaintiffs sought rescission and damages. Additionally, the plaintiffs argued that their attorney had entered into the stipulation without their consent. The court found that a consent judgment to which the plaintiffs had not actually consented was voidable rather than void. The defendants argued in response that the state court foreclosure judgment barred a TILA claim pursuant to the *Rooker-Feldman* doctrine. The court agreed with the defendant, reasoning that the foreclosure could not be collaterally attacked in the bankruptcy court because the TILA rescission action was inextricably intertwined with the state court judgment of foreclosure. The court found that a claim for damages was available under TILA. However, the court found that damages were not available in this case because damages for failure to rescind were precluded under *Rooker-Feldman* and TILA did not permit an award of damages against an assignee for failure to honor a notice of rescission. The plaintiffs could not be awarded damages against the defendant because the defendant was assigned the mortgages. Accordingly, the court granted summary judgment in favor of the defendant on the plaintiff's TILA claim.

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4TH CIRCUIT DECISIONS



FAIR CREDIT REPORTING ACT, FAIR DEBT COLLECTION PRACTICES ACT, & REAL ESTATE SETTLEMENT PROCEDURES ACT (OFFER OF JUDGMENT, DAMAGES, & ATTORNEY'S FEES)

Serfass v. CIT Group/Consumer Finance, Inc., 2008 WL 4616763 (D.S.C. Oct. 16, 2008)

The plaintiffs filed suit against the defendant mortgage lender alleging various violations of state law, the Fair Credit Reporting Act, the Fair Debt Collection Practices Act and the Real Estate Settlement Procedures Act (RESPA). Summary judgment was granted for the defense on all claims with the exception of the RESPA claims, and the plaintiffs were given leave to move forward on their RESPA claim to the extent that they were able to show economic harm as a result of not receiving a written explanation of the amount due on their loan. After a bench trial, the court awarded the plaintiffs \$1,000.00 in statutory damages and found that the plaintiff could not prove actual damages. The plaintiffs filed a motion for reconsideration requesting that the court make findings of fact and conclusions of law with regard to the defendant's failure to protect their credit ratings and requesting attorney's fees and costs. The defendant opposed the motion for reconsideration, arguing that the plaintiffs had failed to show sufficient evidence of actual damages. The court found that the plaintiffs had suffered no actual economic damages because one of the plaintiffs had a prior bankruptcy on his credit report, had no credit cards, had refinanced his home successfully and would not have been able to do so again within the time his credit report was adversely affected. The court also held that there was insufficient evidence that the plaintiff would have been able to refinance his automobile. The defendant also argued that the request for attorney's fees was excessive. The court found that the attorney's rate of \$175.00 per hour was reasonable, but reduced the amount of hours worked because the time sheets were filled with unnecessary time. Much of the time was spent on secretarial tasks and the degree of success precluded the court against a larger number of hours being awarded

because only statutory damages were obtained and several Offers of Judgment were rejected. Finally, the defendant argued that the requested costs were precluded by their Offers of Judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. The court agreed, finding that the defendant had made three Offers, each of which exceeded the statutory damages eventually obtained. The court denied the plaintiffs' motion for reconsideration and granted in part the plaintiffs' motion for attorney fees and costs.

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5TH CIRCUIT DECISIONS



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

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6TH CIRCUIT DECISIONS



BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 & UNIFORM COMMERCIAL CODE (DEFINITION OF "PURCHASE MONEY SECURITY INTEREST")
In re Muldrew, 2008 WL 4458798 (E.D. Mich. Oct. 3, 2008)

The appellant traded in a car in which he had negative equity for the purchase of a new car, which was financed through a retail installment sales contract (the contract).

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The appellee was assigned the contract. The appellant later filed for bankruptcy listing, *inter alia*, the appellee as a creditor with a crammed-down market value listed for the car. The appellee objected to the cramming down of its purchase money security interest (PMSI) and filed a proof of claim which included the negative equity included in the contract. The bankruptcy court bifurcated the appellee's claim, ruling that the appellee did not have a PMSI in the car which included the negative equity. On appeal, the appellee argued that the claim could not be bifurcated because such a bifurcation is contrary to the plain language and the legislative history of Section 1325(a)(*) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) which prohibits cramdown of any claim within its scope. Further, the appellee argued that the Truth-in-Lending Act (TILA) requires car dealers to include negative equity into the total sales price of a new vehicle. The appellant argued that Section 1325 "hanging paragraph" applies only when a creditor holds a PMSI in the entire debt, that the negative equity constituted "antecedent debt" and that including negative equity was bad public policy because it would encourage a debtor with negative equity to roll that negative equity into financing another vehicle and protects the lender at the expense of other creditors. The court found: (1) a majority had emerged holding that negative equity was to be included in a PMSI; and (2) the new car financing was a package, all of which qualifies for PMSI status under the language of the Bankruptcy Code, the Truth-in-Lending Act (TILA), Article 9 of the Uniform Commercial Code and the Motor Vehicle Sales Financing Act. Reasoning that "a closer nexus to the collateral can hardly be imagined," the court held that the appellee had a PMSI in the total outstanding balance and reversed and remanded the decision of the bankruptcy court.

FAIR DEBT COLLECTION PRACTICES ACT (ATTORNEY'S FEES)

Kelly v. Montgomery Lynch & Assocs., Inc., 2008 WL 4560744 (N.D. Ohio Oct. 8, 2008)

The plaintiff reached a settlement related to claims under the Fair Debt Collection Practices Act (FDCPA) and moved for attorney fees and costs. The plaintiff's attorney claimed rates of \$300.00 per hour for the senior attorney, \$200.00 per hour for an associate's work, and \$450.00 per hour for out-of-forum counsel. The defendant objected, arguing that the requested amount of attorney's fees be reduced because out-of-forum counsel's hours were excessive and unreasonable, the plaintiff's attorneys charged unreasonably high hourly rates and an award of \$123,780.00 in attorney's fees for a \$5,200.00 settlement agreement was excessive. After the defendant's attorneys attempted to introduce evidence of their hourly rates for comparison, the plaintiff argued that the defense attorneys' hourly rates were irrelevant because a plaintiff's attorney is

only paid contingent on success while defense attorneys can rely on a steady stream of business. The plaintiff also argued that the militant defense of the defendant required a great number of hours and skill to defeat, that the hourly rates had been found reasonable by other courts and that the Ohio State Billing Rate Survey was not applicable because it did not account for the skill level required to litigate this case and did not conform to precedent in the Sixth Circuit allowing for fees of up to \$500.00 per hour. The court found: (1) the defendant and the plaintiff spent roughly the same number of hours on the case, disproving the defendant's claim of excessive hours; (2) the \$300.00 hourly rate for the senior partner was reasonable in light of his experience handling consumer class actions; (3) the \$450.00 hourly rate for out-of-forum counsel was unreasonable and should be reduced to the \$300.00 local rate because there was nothing showing that it was necessary to engage out-of-forum counsel; and (4) a plaintiff attorney's hourly rates need not be in line with defense counsel's rates because of the differing methods by which they are paid. Accordingly, the court granted the motion for attorney's fees and costs as modified.

FAIR DEBT COLLECTION PRACTICES ACT (DEFINITION OF "MEANINGFUL ATTORNEY INVOLVEMENT")

Liang v. Mary Jane M. Elliot, P.C., 2008 WL 4539520 (E.D. Mich. Oct. 8, 2008)

The plaintiff defaulted on a credit card account. The bank retained the defendant to collect the debt. The defendant sent the plaintiff a dunning letter on the law firm's letterhead with "Notice of Amount" on the upper right-hand corner of the letter. The plaintiff sought verification of the debt, which was provided. Subsequently, the plaintiff brought suit alleging that the dunning letter sent him falsely implied that it was from an attorney when, in fact, no attorney had reviewed the letter. The plaintiff relied on *Kistner v. The Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433 (6th Cir. 2008), which found a genuine issue of material fact had been created when an attorney admitted that he had not reviewed the plaintiff's file, did not determine whether particular letters should be sent, and did not know the identities of the people to whom the letters were sent. The court distinguished *Kistner*, however, on the grounds that there was evidence in this case that the defendant's attorneys had played a role in the debt collection process. The court found that there was evidence in the record showing that: (1) the defendant's lawyers reviewed the debtor's information to confirm that the debt is valid prior to sending an initial collection letter; (2) the defendant's lawyers, or a claims specialist working under the direct supervision of an attorney, reviewed all of the debtor's accounts for any apparent problems, conflicting information, errors, or omissions; (3) the

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defendant sent an initial letter based on a template written by a lawyer; and (4) a lawyer personally reviewed a large percentage of the initial collection letters that the defendant sent to debtors. The court also held that law firms comply with the FDCPA, even when they delegate part of the review process, as long as the ultimate decision of whether to send a letter is made by an attorney. The plaintiff also argued that the sheer volume of cases the defendant was working on tended to suggest that the defendant's lawyer did not review the debtor's file before a collection letter was sent out. The court found that this argument did nothing more than establish metaphysical doubt as to whether certain testimony was untrue and was insufficient to create a genuine issue of material fact. Because no genuine issue had been raised, the court held that the defendant's letter did not falsely imply that it was from an attorney. Accordingly, the court granted the defendant's motion for summary judgment.

FAIR DEBT COLLECTION PRACTICES ACT & EQUAL CREDIT OPPORTUNITY ACT (PREEMPTION, DEFINITION OF DEBT COLLECTOR, & NECESSARY PLEADINGS)

Tocco v. Aurora Loan Servs., LLC, 2008 WL 4683435 (E.D. Mich. Oct. 22, 2008)

The plaintiff's mortgage was purchased by the defendant. The plaintiff filed suit, alleging that the defendant's purchase and servicing of the loan violated the Fair Debt Collection Practices Act (FDCPA), the Equal Credit Opportunity Act (ECOA) and various state laws by charging usurious rates of interest on the loan, not disclosing that it was not authorized to do business in Michigan and discriminating on a factor covered under the ECOA. The defendant moved to dismiss or, in the alternative, for summary judgment. The court found that the plaintiff's state law usury claim was preempted by federal law regulating the amount of interest that may be charged on a mortgage loan. The court then found that the FDCPA was not applicable in this case because the defendant was not attempting to collect a debt for another. Therefore, the defendant did not fall within the definition of a debt collector under the FDCPA. Finally, the court found that the plaintiff had failed to allege that he was discriminated against based on a factor prohibited under the ECOA. Accordingly, the court granted the defendant's motion for summary judgment.

FAIR DEBT COLLECTION PRACTICES ACT (DAMAGES)

Royster v. Pacific Creditors, Assoc., 2008 WL 4693411 (S.D. Ohio Oct. 23, 2008)

The plaintiff alleged that the defendant violated the Fair Debt Collection Practices Act (FDCPA) by placing a derogatory mark on her credit report. The plaintiff

reached a settlement agreement with the defendant in which the plaintiff agreed to voluntarily dismiss her claim in exchange for removal of the disparaging remark concerning her credit and payment of her court costs. The defendant did not remove the derogatory mark and the plaintiff filed a motion for default judgment, to which the defendant did not respond. The court granted the motion for default judgment and held a damages hearing. After the damages hearing, the court found: (1) the plaintiff could recover \$1,000.00 in statutory damages because the FDCPA provides a maximum of \$1,000.00 per proceeding rather than per violation; (2) the plaintiff had successfully pleaded that she had received an interest rate of 8.75% on a \$100,000 / thirty-year mortgage loan rather than the 6.25% interest rate she would have received with the mark removed, costing the plaintiff \$60,500.60 in additional interest; (3) the plaintiff had successfully pleaded pain and suffering damages in the amount of \$1,000.00; and (4) the plaintiff had not provided sufficient evidence to support a claim of actual damages for a 200-mile commute. Accordingly, the court held that the plaintiff's motion for default judgment be granted and that default judgment be entered against the defendant and in favor of the plaintiff in the amount of \$61,500.50 plus costs.

7TH CIRCUIT DECISIONS



TRUTH-IN-LENDING ACT (INDEMNIFICATION & CONTRIBUTION)

In re Ameriquest Mortgage Co. Mortgage Lending Practices Litigation, 2008 WL 4594834 (N.D. Ill. Oct. 14, 2008)

The defendant was sued by the plaintiffs for, *inter alia*, failing to provide mandatory disclosures required by the Truth-in-Lending Act (TILA). The defendant claimed that the third-party defendants contracted with the defendant to provide the required disclosures and brought suit for negligence under TILA, indemnification and contribution for any violations of TILA, and other state law claims. The third-party defendants moved for dismissal, arguing

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that they had no duty to act under TILA because TILA burdens only creditors and that the defendant had no right to indemnification or contribution under federal law. The court found: (1) that the third-party defendants were not creditors and thus had no duty under TILA to offer disclosures; (2) that TILA did not authorize the defendant to seek indemnification or contribution from the third-party defendants; and (3) that federal common law does not allow a claim for equitable indemnity or contribution for alleged TILA violations because TILA and its regulations were designed to protect consumers rather than creditors. Accordingly, the court dismissed the defendant's claims for negligence, indemnity and contribution.

FAIR CREDIT REPORTING ACT (CLASS CERTIFICATION)

Gillespie v. Equifax Information Servs., LLC, 2008 WL 4614327 (N.D. Ill. Oct. 15, 2008)

The plaintiffs defaulted on their credit card accounts. The accounts were sold to a collection agency. Some time later, the plaintiffs requested the contents of their credit files from the defendant credit reporting agency (CRA). The CRA listed the date of last activity but did not include the date of first delinquency. The plaintiffs filed suit, alleging that the CRA violated Section 1681g(a)(1) of the Fair Credit Reporting Act (FCRA) because the date of last activity did not clearly and accurately disclose all information in consumers' files. The plaintiffs subsequently moved for class certification as a Rule 23(b) (3) class consisting of all persons with a New Jersey or North Carolina address in their credit report with a collection account or delinquent account from the collection agency who had requested a file disclosure from January 10, 2003 until the present. The court first considered whether the proposed class met the Rule 23(a) requirements. The defendant opposed certification, arguing: (1) that the plaintiff's claims were not typical because proof of the CRA's failure to clearly and accurately disclose everything in their files interfered with their right to dispute inaccuracies and would not prove the claims of the rest of the class; (2) that the CRA had a unique defense to the named plaintiffs' claims in that each had lodged a dispute with the CRA regarding their accounts; and (3) that the plaintiffs were inadequate class representatives because they had disclaimed and abandoned the other, more substantial claims that proposed class members might have. The court found that the proposed class met the Rule 23(a) requirements because: (1) the plaintiffs' claims arose from the same standardized process as the claims of the other class members -- i.e. the CRA's use of the date of last activity in lieu of date of first delinquency; (2) the plaintiffs' disputes were irrelevant to the willful violation of Section 1681g(a) (1); and (3) the plaintiffs' choice to seek statutory damages

was reasonable in light of the difficulty of proving actual damages and the ability of class members to opt out of the action. The court next considered the Rule 23(b)(3) requirements. The defendant argued that the plaintiffs could not demonstrate predominance because class members would have to advance individualized proof about: (1) the request for a copy of a credit report; (2) the compliance with the request; (3) the date provided; (4) challenges to the credit report; (5) injury in fact; and (6) *res judicata*. The court rejected the defendant's argument concerning predominance, finding that the outcome of the suit would turn on common evidence regarding the CRA's file disclosure practice, the legality of that practice and whether the adoption of that practice amounted to a willful violation of the FCRA as defined in *Safeco Ins. Co. of Am. v. Burr*, 127 S.Ct. 2201 (2007). The defendant also argued that the plaintiffs could not show superiority because: (1) class treatment is inappropriate in suits involving statutes with fee-shifting provisions like the FCRA; (2) that the plaintiffs' claims would result in individualized defenses; (3) that the action would result in disproportionate damages; and (4) that the plaintiff had failed to demonstrate that the class action was manageable because they had not set forth an acceptable trial plan. The court rejected the defendant's arguments, finding: (1) Congress had not chosen to preclude class actions under the FCRA; (2) defenses would be common to all class members; (3) the substantial nature of possible statutory damages was not a reason to reject class certification; and (4) that the Seventh Circuit did not require a trial plan for motions for class certification. Finally, the defendant argued that the proposed class lacked "standing" because the plaintiffs could not maintain a willfulness claim under *Safeco*. The court found that the objection had nothing to do with standing and rejected the defendant's argument. Accordingly, the court granted the plaintiffs' motion for class certification.

FAIR DEBT COLLECTION PRACTICES ACT (FALSE REPRESENTATIONS & FAILURE TO INVESTIGATE)

Gros v. Midland Credit Management, Inc., 2008 WL 4671717 (N.D. Ill. Oct. 20, 2008)

The plaintiff leased a car from the defendant credit corporation and later entered into an extension of the lease. The plaintiff subsequently filed suit against the auto manufacturer and won a judgment that the credit company had no right to additional funds from the plaintiff. The defendant debt collector then purchased the non-existent debt and sought to collect through letters and phone calls, with only the initial letter coming within the thirty-day validation period. The plaintiff did not contest the debt within thirty days. The plaintiff alleged that the defendant's communications violated Sections 1692e(2)

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(A), 1692e(4) and 1692f of the Fair Debt Collection Practices Act (FDCPA) by falsely representing that the debt was owed, that the language in the defendant's early communications was misleading on its face and failing to investigate the plaintiff's claim that he was not indebted. The defendant moved for summary judgment. The court found: (1) that the plaintiff had not provided necessary extrinsic evidence suggesting the early communications would be confusing or misleading to an unsophisticated debtor; (2) that the plaintiff had not disputed the debt within thirty days, and therefore, that the defendant was entitled to assume the debt was valid; (3) that the plaintiff had not provided evidence that the defendant had represented or implied that nonpayment of the debt would result in the plaintiff's arrest or imprisonment or the seizure, garnishment, attachment or sale of any of the plaintiff's property or wages; (4) that the plaintiff had failed to provide extrinsic evidence regarding unfair or unconscionable means of debt collection related to a failure to investigate; and (5) that the plaintiff had not argued that the defendant's collection efforts were unfair as a matter of law. Accordingly, the court granted the defendant's motion for summary judgment.

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8TH CIRCUIT DECISIONS



FAIR DEBT COLLECTION PRACTICES ACT & FAIR CREDIT REPORTING ACT (STATUTE OF LIMITATIONS & NECESSARY PLEADINGS)

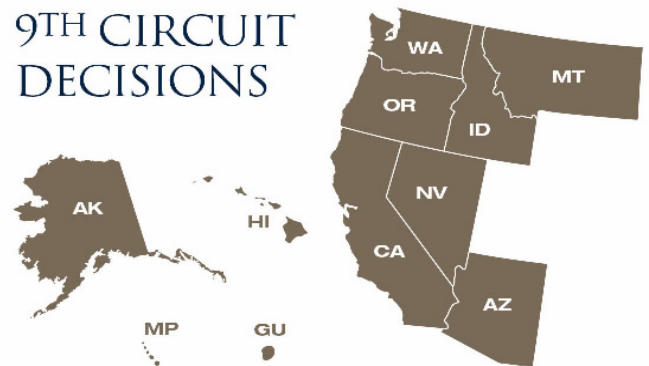
Burgi v. Gurstel Law Firm, PA, 2008 WL 4634984 (D. Minn. Oct. 17, 2008)

The plaintiffs defaulted on a credit card account. The defendant was hired to collect the debt and sought to do so through letters and telephone calls. The plaintiffs filed suit, alleging violations of the Fair Debt Collection Practices Act (FDCPA), the Fair Credit Reporting Act (FCRA) and various state laws by failing to verify their debt upon request, failing to advise third-party credit reporting agencies (CRAs) that the debt was disputed and improperly prosecuting the collection action

misrepresenting the true owner of the debt. The defendant moved to dismiss for failure to state a claim. The court found that the FDCPA claims were time-barred by the one-year statute of limitations. Additionally, the court found that the plaintiffs had not provided any support for the claim that the defendant misrepresented the owner of the debt. The complaint mentioned the FCRA only in passing. In analyzing the FCRA claim, the court found that the claim was meritless because Section 1681s-2(b) applies only after a dispute is reported to a third-party CRA and the CRA has advised the creditor of the dispute. Accordingly, the court dismissed the plaintiffs' federal causes of action and declined to exercise supplementary judgment on the state law claims.

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9TH CIRCUIT DECISIONS



THE BANKRUPTCY CODE (DISCHARGE & NOTICE)

Espinosa v. United States Aid Funds, 2008 WL 4426634 (9th Cir. Oct. 2, 2008)

The debtor filed for bankruptcy protection under Chapter 13, proposing repayment of \$13,500.00 in student loans to the defendant. The defendant was notified and filed a proof of claim in the amount of \$17,832.15. The bankruptcy court confirmed the plan, which the debtor completed. The debt was discharged, but the creditor subsequently intercepted the debtor's income tax refund to satisfy the unpaid portion of the student loan. The debtor petitioned the court for an order holding the creditor in contempt for violating the discharge injunction. The creditor cross-moved for relief from the bankruptcy court's order confirming the plan on the grounds that the order had been in violation of the creditor's rights under the Bankruptcy Code and Rules requiring student loans to be discharged only if there was a showing of an "undue hardship" in an adversary proceeding. The bankruptcy court rejected the creditor's argument, but the district court reversed in favor of the creditor. The Ninth Circuit Court of Appeals reversed the district court and remanded to the bankruptcy court for reinstatement of the order

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enforcing the discharge injunction and for a determination whether the creditor acted willfully in violating the injunction under the standard set in *In re ZiLOG, Inc.*, 450 F.3d 996 (9th Cir. 2006). In doing so, the Ninth Circuit overruled *In re Repp*, 307 B.R. 144 (B.A.P. 9th Cir. 2004); *In re Ransom*, 336 B.R. 790 (B.A.P. 9th Cir. 2005); *In re Brawders*, 325 B.R. 405 (B.A.P. 9th Cir. 2005); *In re Patton*, 261 B.R. 44 (Bankr. E.D. Wash. 2001) and *In re Webber*, 251 B.R. 554 (Bankr. D. Ariz. 2000). The Ninth Circuit reasoned that: (1) a discharge is a final judgment and “cannot be set aside or ignored because a party suddenly claims, years later, that the trial court committed an error;” (2) the creditor had every opportunity to object to or appeal the decision of the bankruptcy court and did not do so after receiving actual notice of the Chapter 13 petition, choosing to accept the payments from the debtor during the plan’s life and then acting afterwards “as if the whole thing never happened;” (3) the creditor had received notice from the bankruptcy court and was thus put on constructive or inquiry notice that its claims might be affected; and (4) bankruptcy proceedings did not result in heightened notice requirements both because Congress had not legislated such a requirement and because Congress should not do so.

FAIR DEBT COLLECTION PRACTICES ACT (NOTICE)

Boyle v. Arrow Fin. Servs., L.L.C., 2008 WL 4447727 (N.D. Cal. Oct. 2, 2008)

The plaintiff defaulted on a credit card. The bank sold her account to the defendant debt collector. After sending three collection letters, the account was transferred to the defendant law firm. The defendant law firm sent a collection letter that included a notice that a negative mark might be placed on the plaintiff’s credit report. The plaintiff subsequently brought suit under the Fair Debt Collection Practices Act (FDCPA) alleging that the law firm falsely implied that it was required to submit a negative credit report, that the law firm falsely stated that it was required to send the notice and that the law firm’s notice amounted to coercion, an abusive practice. The defendant moved to dismiss. The court first found that the notice did not imply that the law firm was required to file a negative credit report because the notice “simply says that a negative credit report *may* be submitted.” Second, the court found that the defendant had not falsely stated that it was required to send notice because a creditor might well be required to give notice even if another creditor had provided notice and because the FDCPA does not prohibit a creditor from sending additional notices. Finally, the court found that the notice was not coercive because it was unlike threats of violence, unreasonable communications, and misinterpretations of consumer’s legal rights that Congress had intended to stop through the FDCPA. The court also found that the state law claim

was based on the same essential misreading of the notice. Accordingly, the court dismissed the plaintiff’s claims with prejudice.

TRUTH-IN-LENDING ACT & REAL ESTATE SETTLEMENT PROCEDURES ACT (DEFINITION OF A “CREDITOR”)

Pettie v. Saxon Mortgage. Servs., 2008 WL 4542419 (W.D. Wash. Oct. 8, 2008)

The plaintiffs refinanced their existing debt with a loan from the defendant home loan corporation. The defendant mortgage servicing corporation serviced their loan. The plaintiffs filed suit for rescission of their loan and damages under the Truth-in-Lending Act (TILA), alleging that the defendants failed to provide documents and disclosures required by TILA. The defendant mortgage servicing corporation moved for summary judgment or a more definite statement, arguing that TILA does not provide a cause of action against a servicer of a loan. The plaintiffs responded by asserting a new claim under the Real Estate Settlement Procedures Act (RESPA). The court found that, by the plaintiffs’ own admission, the defendant mortgage servicing corporation was not a creditor and was thus not liable under TILA. The court then found that the plaintiffs should be allowed to amend their complaint to add a RESPA claim because allowing the plaintiffs to amend their complaint would not, in this case, cause any prejudice, create undue delay, be futile, or allow an amendment in bad faith. Accordingly, the court granted the plaintiffs leave to amend their complaint to add a RESPA claim and granted the defendant’s motion for summary judgment on its TILA claim.

REAL ESTATE SETTLEMENT PROCEDURES ACT (FEE-SPLITTING)

Kingsberry v. Chicago Title Insurance Co., 2008 WL 4566688 (W.D. Wash. Oct. 10, 2008)

The plaintiff obtained a mortgage loan on his home and was required to purchase a lender title policy. Subsequently, the plaintiff refinanced the home and was again required to purchase a lender title policy. The plaintiff paid a \$705.00 premium for the policy. The plaintiff then brought suit under the Real Estate Settlement Procedures Act (RESPA) and Washington state law, alleging that the defendant was obligated to sell the insurance at a 50% discount and that the fee was split between the defendant and the title agent who issued the policy. The defendant moved for judgment on the pleadings, arguing that the alleged overcharge did not constitute a violation of RESPA because, by the plaintiff’s own admission, the defendant and its title agent both actually performed services in connection with the issued

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title policy. The plaintiff argued that the court should rely on regulations and interpretive statements issued by HUD supporting the position that excessive fees resulted in being charged for services not actually furnished or performed. The court held that it would not give deference to the HUD interpretive policy statement because Congress had clearly spoken in Section 8(b) to the issue of overcharges and that “nothing in RESPA creates a scheme of permissible settlement fees or a regulatory system to enforce such a fee.” The court found that Congress had considered and rejected a system of price controls for fees, and that Congress had sought HUD input on the advisability of legislation but had chosen not to enact HUD’s views. Accordingly, the court granted the defendant’s motion to dismiss for failure to state a claim and the plaintiff’s claim under RESPA was dismissed.

TRUTH-IN-LENDING ACT & FAIR DEBT COLLECTION PRACTICES ACT (TEMPORARY RESTRAINING ORDER)

Carroll v. Fremont Investment & Loan Co., 2008 WL 4748177 (S.D. Cal. Oct. 24, 2008)

The plaintiff defaulted on his mortgage loan. The plaintiff moved for a temporary restraining order to enjoin the defendants from proceeding with the non-judicial foreclosure of his home. The plaintiff alleged that the defendants violated the Truth-in-Lending Act (TILA), the Fair Debt Collection Practices Act (FDCPA), and other state laws by failing to produce the original note proving that they were entitled to foreclose and by failing to comply with certain material disclosures and provide required documents including the failure to provide two notices of the plaintiffs right to rescind the loan. The court found that: (1) the failure to produce the original note did not establish a likelihood of success on any of the plaintiff’s claims; (2) Federal Rule of Evidence 1003 allowed for admission of a duplicate in cases in which the content of the note is unchallenged; (3) other possible improper disclosure claims were likely time-barred by the one-year statute of limitations; and (4) even cases concerning significant irreparable harm required a showing of the likelihood of success on the merits, something which the plaintiff had been unable to do. The court also noted that because the plaintiff had not contacted or served two of the three defendants, it was reluctant to grant true *ex parte* relief. Accordingly, the court denied the plaintiff’s motion for a temporary restraining order.

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10TH CIRCUIT DECISIONS



TRUTH-IN-LENDING ACT (STATUTE OF LIMITATIONS)

Heil v. Wells Fargo Bank, N.A., 2008 WL 4516685 (10th Cir. Oct. 9, 2008)

The plaintiffs appealed the ruling of the district court granting summary judgment to the defendant on the plaintiffs’ Truth-in-Lending Act (TILA) claim and dismissal of their state-law claims. The plaintiffs had alleged that the defendant violated TILA by improperly paying property taxes, failing to apply a payment and charging improper fees. The defendant argued that the plaintiffs’ claims were barred by TILA’s one-year statute of limitations and the district court agreed, dismissing the TILA claims and refusing to exercise supplemental jurisdiction. The plaintiffs appealed, alleging that the district court had construed their claims too narrowly by not recognizing recurring billing of improper fees as a continuing TILA violation. They also contended that they were entitled to equitable tolling and that the district court abused its discretion in refusing to exercise its supplemental jurisdiction. The Tenth Circuit Court of Appeals affirmed the ruling of the district court, finding: (1) that the plaintiffs’ claims were time barred because repeating an error did not constitute a continuing TILA violation; (2) that the plaintiffs had not met their burden of proof for equitable tolling because they had not shown that they had diligently pursued claims and that the failure to file had been caused by an extraordinary circumstances outside of their control; and, (3) that the plaintiffs had not given any reason explaining why their state law claims required interpretation of TILA, or otherwise required the district court to retain jurisdiction.

FAIR DEBT COLLECTION PRACTICES ACT (DISCOVERY)

Hollis v. Stephen Bruce & Assocs., 2008 WL 4570490
(W.D. Okla. Oct. 8, 2008)

The plaintiff defaulted on a credit card account after repeatedly disputing information on his statements. The defendants brought suit in state court in an attempt to collect the debt, omitting any mention of the dispute. Subsequently, the plaintiff brought suit under the Fair Debt Collection Practices Act (FDCPA) alleging that failure to indicate a debt was disputed in a state court petition violated 15 U.S.C. § 1692e of the FDCPA. The defendants filed a motion for summary judgment. The court found that the plaintiff had not met his burden of coming forward with admissible evidence to establish a genuine issue of material fact because the only relevant evidence presented by the plaintiff was not submitted in initial disclosures and was not submitted as a supplement until after the discovery deadline. The court also noted that the evidence submitted late, a credit report, was easily accessible and that the plaintiff was therefore not substantially justified in failing to meet the deadline. Accordingly, the court granted the defendants' motion for summary judgment.

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11TH CIRCUIT DECISIONS



REAL ESTATE SETTLEMENT PROCEDURES ACT (TITLE INSURANCE OVERCHARGES)

Hazewood v. Found. Fin. Group, L.L.C., 2008 WL 4636483 (11th Cir. Oct. 20, 2008)

The plaintiff obtained a mortgage loan. In connection with the loan, one of the defendants issued the plaintiff a title insurance policy and charged the plaintiff a fee in excess of the amount allowed under Alabama law. The plaintiff brought suit, alleging violations of the Real Estate Settlement Procedures Act (RESPA). The district court dismissed the claims at issue, finding that RESPA provides a remedy “only when fees are charged in exchange for no services at all, not for mere overcharges or excessive fees.” The plaintiff appealed, arguing that: (1) dismissal was

erroneous because her complaint alleged that a portion of her premium was unearned; (2) dismissal was erroneous because it contains factual allegations that a portion of the title fees was unearned or not for services actually performed; (3) previous case law on the issue can be distinguished because the state law limitation on rates makes a division of the fees reasonable; and (4) the court should overrule, modify, or distinguish its decision in *Freedman v. Market Street Mortg. Corp.*, 520 F.3d 1289 (11th Cir. 2008) so that the plaintiff's claim could move forward under the authority of HUD's 2001 Statement of Policy, which would allow RESPA claims for unreasonable or excessive fees. First, the Eleventh Circuit rejected the plaintiff's first and second arguments, finding that where a plaintiff concedes that a service was actually performed in exchange for a settlement fee, she cannot avoid dismissal by claiming that a portion of the fee was unearned. Second, the Eleventh Circuit rejected the plaintiff's contention that the premium could be reasonably divided in this case because of state law, finding that Congress had not intended RESPA to serve as a price control and had not intended for RESPA to serve as an enforcement mechanism for state price controls. Finally, the Eleventh Circuit Court of Appeals rejected the plaintiff's request to modify or overrule *Friedman*, finding that the holding of a three-judge panel is the law of a circuit unless it is overruled or undermined to the point of abrogation by the *en banc* Eleventh Circuit or by the Supreme Court of the United States. Accordingly, the Eleventh Circuit Court of Appeals affirmed the decision of the district court.

FAIR DEBT COLLECTION PRACTICES ACT (ATTORNEY'S FEES)

Moton v. Nathan & Nathan, P.C., 2008 WL 4747423 (11th Cir. Oct. 28, 2008)

The plaintiff filed suit against the defendant under the Fair Debt Collection Practices Act (FDCPA), alleging that the defendant failed to provide a required disclosure stating that a formal statutory dispute must be in writing. On cross-motions for summary judgment, the district court found in the plaintiff's favor and awarded \$1,000.00 in statutory damages. The district court described the violation as *de minimus* and awarded \$500.00 as reasonable attorney's fees and costs. The plaintiff moved to alter or amend the judgment, attaching fee documentation and requesting 25.3 attorney hours at a rate of \$250.00 per hour for a total of \$6,325.00. The district court denied the motion. The plaintiff appealed, arguing that the district court had abused its discretion by awarding a flat \$500.00 fee and failing to use the “lodestar” formula. The Eleventh Circuit Court of Appeals agreed, finding that the district court had abused its discretion without performing a lodestar analysis, articulating what it deemed to be reasonable fees or reasonable hours for the

(Continued on page 11)

attorney's work on the case or explaining why the flat rate it awarded had deviated from the lodestar calculation. Accordingly, the Eleventh Circuit Court of Appeals vacated the order and remanded the case for calculation using the lodestar analysis.

TRUTH-IN-LENDING ACT & DECLARATORY JUDGMENT ACT (INJUNCTIVE RELIEF)

Christ v. Beneficial Corp., 2008 WL 4716751 (11th Cir. Oct. 28, 2008)

The plaintiff received a consumer loan secured by certain household goods and a motor vehicle. The plaintiff was charged a \$14 non-filing insurance (NFI) premium, which was listed as a separate item under "Itemization of Amount Financed." The plaintiff alleged a violation of the Truth-in-Lending Act (TILA), arguing that the premium should have been disclosed in the "Finance Charge" column of the disclosure form rather than the "Amount Charged" column because the NFI premium was not for insurance and, alternatively, it was not for non-filing insurance. The case was transferred for consolidated pretrial proceedings with other similar cases, at which point a Rule 23(b)(2) injunctive relief class was certified and summary judgment was granted for the borrowers. After remand, the district court awarded injunctive relief, finding that TILA does not expressly preclude injunctive relief, and awarded \$22 million in restitution and disgorgement under the Declaratory Judgment Act (DJA). The defendants appealed. The Eleventh Circuit Court of Appeals found that: (1) TILA does not provide for injunctive relief and should not be construed to allow injunctive relief because when Congress has specified a comprehensive scheme of remedies, the doctrine of *expressio unis est exclusio alterius* applies; (2) certification of a Rule 23(b)(2) injunctive relief class is improper when injunctive relief is not available; and (3) the DJA is procedural only and does not create remedies that are otherwise unavailable unless doing so is necessary and proper, not the case here. Accordingly, the court vacated the district court's certification of the injunctive class, vacated the award of injunctive relief and "restitution or disgorgement" and remanded the case to the district court.

FAIR CREDIT REPORTING ACT & FAIR AND ACCURATE CREDIT TRANSACTIONS ACT (STATUTORY DAMAGES & PUNITIVE DAMAGES)

Smith v. Casino Ice Cream, LLC, 2008 WL 4541013 (S.D. Fla. Oct. 9, 2008)

The plaintiff alleged that the defendant violated the Fair and Accurate Credit Transactions Act (FACTA), a subset of the Fair Credit Reporting Act (FCRA), by printing the expiration date of her credit card on the receipt generated at the point of sale. The defendant filed a motion to

dismiss for failure to state a claim, grounded in a recent decision from the Northern District of Alabama, *Grimes v. Rave Motion Pictures Birmingham, L.L.C.*, 552 F. Supp. 2d 1302 (N.D. Ala. May 28, 2008), which struck down Section 1681(n)(a)(1) of FACTA as unconstitutional. The *Grimes* court found (1) that the statutory language of "not less than \$100 and not more than \$1,000" was unconstitutionally void for vagueness because it does not instruct the jury on the proper manner of determining a damage award; and (2) that the possibility of punitive damages violated the defendant's due process rights because it would punish the same conduct twice. This court rejected the reasoning in *Grimes*. First, the court found that it is the jury's role to determine a compensatory damages calculation that will make the plaintiff whole and that a reasonable jury could do so. Second, the court found that there was no violation of due process rights from the mere possibility of punitive damages because any such award would be reviewed for its accord with due process when the award was imposed. Accordingly, the court denied the defendant's motion to dismiss.

REAL ESTATE SETTLEMENT PROCEDURES ACT & TRUTH-IN-LENDING ACT (STANDING & STATUTE OF LIMITATIONS)

Bush v. Countrywide Home Loans, 2008 WL 4540450 (S.D. Fla. Oct. 9, 2008)

Taylor v. Countrywide Home Loans, 2008 WL 4541018 (S.D. Fla. Oct. 9, 2008)

The plaintiff filed suit alleging violations of the Real Estate Settlement Procedures Act (RESPA), the Truth-in-Lending Act (TILA) and various state laws. The plaintiff alleged that the defendants violated RESPA by failing to provide: (1) a good faith estimate within 3 days of her loan application; (2) a good faith estimate disclosing the Yield Spread Premium (YSP); and (3) notice of change of service upon assignment of the loan. The plaintiff sought damages, attorney's fees and costs under RESPA. The plaintiff alleged that the defendants violated TILA by failing to disclose: (1) the annual percentage rate for the loan; (2) the finance charges for the loan; (3) the amount financed; (4) the total payments; and (5) the payment schedule. The plaintiff also claimed that the defendants inflated her gross income to make her qualify for a bigger loan, failed to deliver a HUD settlement statement within 24 hours of closing and failed to disclose other expenses at the time of closing. The plaintiff sought rescission of her loan and damages under TILA. The defendant filed a motion to dismiss, and the plaintiff did not respond. The court found that the RESPA claim should be dismissed because there was no private civil action available for a violation of 12 U.S.C. § 2604(c) or any regulations related to it. The court dismissed the TILA claims, finding that rescission was not available under 15 U.S.C. § 1635(e)(1)

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for residential mortgages like the plaintiff's and that the plaintiff's claim for damages was time-barred because her claim was filed over one year after the date of closing. The court refused to exercise supplemental jurisdiction over the remaining state law claims, and the complaint was dismissed.

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

Parker v. Potter, 2008 WL 4683010 (M.D. Fla. Oct. 22, 2008)

The plaintiff was awarded a judgment entitling her to exercise her right of rescission against the defendant in her position as an assignee. The plaintiff subsequently moved to be awarded attorney's fees and costs pursuant to 15 U.S.C. § 1640(a)(3). The court held that because there was no evidence in the record establishing that the defendant was responsible for and had notice of the disclosure violations of the Truth-in-Lending Act (TILA) at the time of the assignment, the defendant was not liable for the plaintiff's attorney's fees and that a response from the defendant was not needed. Accordingly, the court denied the plaintiff's motion for attorney's fees and costs.

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ALABAMA · GEORGIA · MISSISSIPPI · TENNESSEE

Birmingham

420 North 20th Street
Suite 3400, Wachovia Tower
Birmingham, AL 35203
(205) 251-3000

Atlanta

171 Seventeenth Street, NW
Suite 1100
Atlanta, GA 30363
(404) 815-3000

Jackson

The Heritage Building
401 East Capitol Street, Suite 100
Jackson, MS 39201
(601) 355-3434

Mobile

41 West I-65
Service Road North
Suite 400
Mobile, AL 36608
(251) 344-5151

Montgomery

201 Monroe Street
Suite 1950, RSA Tower
Montgomery, AL 36104
(334) 241-7000

Nashville

700 Two American Center
3102 West End Avenue
Nashville, TN 37203
(615) 724-3200

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