



Consumer Finance Monthly Litigation Update September 2007

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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.

SUPREME COURT DECISIONS

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

1ST CIRCUIT DECISIONS

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

2ND CIRCUIT DECISIONS

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

Fontana v. C. Barry & Associates, L.L.C., 2007 WL 2580490 (W.D.N.Y. Sept. 4, 2007)

After the defendant debt collector purchased the plaintiff's debt from a creditor, the defendant sent the plaintiff several letters including one, sent also to her father and brother, which threatened a lawsuit. Unbeknownst to the defendant, the plaintiff had already satisfied the debt a year earlier. The plaintiff then brought suit alleging the defendant violated several provisions of the Fair Debt Collection Practices Act (FDCPA). A default judgment was issued against the defendant and this action was brought for statutory damages, actual damages related to emotional distress, and reasonable attorney's fees in the amount of \$5,947. First, the court awarded \$250 in statutory damages stating that there was no basis to infer that the violation was intentional or frequent and persistent and therefore the possible \$1,000 award was not necessary. Second, the court held that although the plaintiff may have suffered brief embarrassment and familial discord, the emotions were clearly short-lived and caused no long-term distress to the plaintiff; therefore, the court awarded no actual damages. Finally, the court awarded attorney's fees, but citing average rates in the area, reduced the hourly rates from \$260/hour for the lead counsel to \$200/hour, and \$225/hour for assistant counsel to \$150/hour. The court found the paralegal rate of \$50/hour was reasonable. Therefore, the court determined that total attorney's fees should be in the amount of \$4,360.

TRUTH-IN-LENDING ACT (STATUTE OF LIMITATIONS & EQUITABLE TOLLING)

McAnaney v. Astoria Fin. Corp., 2007 WL 2702348 (E.D.N.Y. Sept. 21, 2007)

Plaintiffs all had mortgages that were serviced by the defendant financial corporation. All of the plaintiffs received notices that in order to pay off their loans they were required to pay fees including: an attorney document preparation fee, facsimile fees and recording fees. The plaintiffs brought suit on behalf of themselves and all others similarly situated alleging that the defendants violated certain provisions of the federal Truth-in-Lending Act (TILA). The plaintiff argued that because the fees were not disclosed in their original agreements, the defendants violated disclosure provisions of TILA. The defendants asserted that the plaintiffs' claims were not timely and were brought in violation of the one year statute of limitations set forth under TILA. The parties submitted joint motions for summary judgment. First, the court concluded that because the plaintiffs' claims were not brought within one year of the time their agreements were signed, they were in violation of the TILA statute of limitations. The court stated that for the purposes of TILA, the statute of limitations began running on the "date of the occurrence" and not on the date of discovery. The court stated that the date of the discovery rule only applies to closed-end credit transactions. The court also concluded that because the plaintiffs could not

prove that the defendants fraudulently concealed their TILA violations, that the plaintiffs could not assert that their claims were still fresh because of equitable tolling. The court held that the equitable tolling argument failed for five reasons. First, the court held that the request for undisclosed fees in the payoff letters did not constitute fraudulent concealment. Second, the court stated that just because the defendant told the court that it had refunded some of the fees does not mean that it was fraudulently concealing its violations. Third, the court stated that the fact that the defendant actually did refund some of the fees does not constitute a fraudulent concealment. Fourth, even if the defendant's statements made after the one year period did constitute fraudulent concealment, they were made after the one year period and therefore could not extend the statute of limitations. Finally, even if the TILA limitations could be equitably tolled, they would apply only to the damage claims brought by the plaintiffs and not to the injunctive and equitable claims. The court stated that none of the remaining plaintiffs had fresh claims and therefore granted the defendant's motion for summary judgment on the statute of limitations grounds and dismissed the plaintiffs' claims without prejudice in order for new plaintiffs with fresh claims to be added.

FAIR DEBT COLLECTION PRACTICES ACT (THREAT AND FALSE REPRESENTATION)

Fainbrun v. Southwest Credit Systems, L.P., 2007 WL 2800386 (E.D.N.Y. Sept. 25, 2007)

Defendant debt collector sent a letter to the debtor plaintiff who had defaulted on her cell phone account. The letter stated that "[l]ate payments, missed payments, or other defaults may be reflected on your credit report." The plaintiff alleged that this sentence violated 15 U.S.C. § 1692(e) of the Fair Debt Collection Practices Act (FDCPA) which prohibits debt collectors from using any "false, deceptive, or misleading representation or means in connection with the collection of any debt." The plaintiff filed a motion for summary judgment and a separate motion for class certification. The court held that because the defendant had no intention or ability to report late or missed payments or any additional default to the credit bureaus, the letter was a threat and a false representation. While the defendant did regularly report the then-current balance, once the default was reported to a credit reporting agency (CRA), no additional damage could be done to the plaintiff's account. The court also granted the plaintiff's motion for class certification. After the defendant's challenge, the court stated that the class was adequately defined and allowed a class definition that stated: "the Class consists of all persons whom defendant's records reflect resided in the United States, and who were sent a collection letter (a) bearing the defendant's letterhead in substantially the same form as the letter sent to the plaintiff . . .; (b) the collection letter was sent to a consumer seeking payment of an alleged debt; and (c) the collection letter was not returned by the postal service as undelivered; (d) and that the letter contained violations of [Section 1692(e)]." The court granted the plaintiff's summary judgment and class certification motions.

3RD CIRCUIT DECISIONS

FEDERAL TRADE COMMISSION ACT & FAIR DEBT COLLECTION PRACTICES ACT (DEBT OWNER APPLICABILITY)

Federal Trade Commission v. Check Investors, Inc., 2007 WL 2505589 (3rd Cir. Sept. 6, 2007)

Defendant would purchase large numbers of checks written on accounts with insufficient funds (NSF checks). The defendant would always purchase debts that had been purchased before and had not had funds recovered with previous collection efforts. The defendant believed that if a debt collection business collected only debts it actually owned it would not be subject to the Fair Debt Collection Practices Act (FDCPA). During collection attempts, the defendant's agents would often accuse debtors of being criminals or crooks, and threaten them with arrest and criminal or civil action. The Federal Trade Commission (FTC) filed suit against the defendant and was granted summary judgment on its claims in the district court. The defendant appealed to the Third Circuit Court of Appeals. The Third Circuit stated that the FDCPA was enacted to prohibit the type of tactics employed by the defendant to collect NSF checks. First, the court held that the NSF checks are debts under the FDCPA. The defendant had argued that because purposefully writing a bad check is a crime, it does not constitute a debt. The court rejected this reasoning, noting that not all individuals who write dishonored checks are criminal and tortious. Second, the court held that because a check written by a consumer in a transaction for goods or services evidences the drawer's obligation to pay and that obligation remains even if the check is dishonored, the payors of those checks are consumers within the meaning of the FDCPA. Third, the court held that the defendant was a debt collector because, while they did own the debts they were trying to collect, they purchased the NSF checks after they were in default. Additionally, the defendant collected the debts solely for collection purposes. Finally, the court upheld the district court's decision that the defendant violated the Federal Trade Commission Act (FTC Act). The court stated that because the defendant did not offer any compelling defense to the FTC Act claims, it would not consider the defendant's argument that the district court erred in finding that its practices were deceptive to the consumer. Therefore, the court affirmed the ruling of the district court and upheld the grant of summary judgment in favor of the plaintiff.

FAIR DEBT COLLECTION PRACTICES ACT (CREDITOR APPLICABILITY)

Schaffhauser v. Citibank (South Dakota) N.A., 2007 WL 2752141 (M.D. Pa. Sept. 19, 2007)

Plaintiffs owed debt to defendant credit card company. After the defendant attempted to collect the debt owed, the plaintiffs filed suit under the Fair Debt Collection Practices Act (FDCPA). The defendant argued that it was a creditor, not a debt collector, and therefore was not covered by the provisions of the FDCPA. The defendant filed a motion to dismiss for failure to state a claim upon which relief could be granted. The court held that because the defendant was attempting to collect its own debt, and not that of a third party, it could not be held liable under the FDCPA because it was a creditor. The court also held that even though the defendant used the name Citibank (South Dakota) N.A. to collect the debt, even the least sophisticated consumer would realize that this was the same company the plaintiffs had their credit card accounts with. The use of the same name "Citibank" makes this obvious. Therefore, the plaintiffs' claims were dismissed with prejudice.

4TH CIRCUIT DECISIONS

FAIR CREDIT REPORTING ACT (FIRM OFFER OF CREDIT)

Crossman v. Chase Bank USA, N.A., 2007 WL 2702699 (D.S.C. Sept. 12, 2007)

Plaintiff brought suit against defendant bank alleging that two solicitations received by the plaintiff were not firm offers of credit and, therefore, were violations of the Fair Credit Reporting Act (FCRA), specifically 15 U.S.C. § 1681(a). The letters did not provide many specific terms, but did state that the plaintiff could receive a loan of up to \$417,000 and \$100,000 with a minimum amount of \$15,000. The defendants filed a motion to dismiss claiming that the offers were firm offers of credit under the FCRA. The court concluded that the mailings were firm offers of credit. First, the letters made an offer that would be honored if the consumer meets other specific criteria. Second, the offers condition the credit upon the consumer's application, the verification of the consumer's information, and the furnishing of collateral. Additionally, because the letters provided each of the five disclosures required by the FCRA, the defendants did not violate the disclosure provision. The court also held that even though the letters did not disclose pricing information (i.e., the interest rate and repayment period), no cases have held that pricing information must be concrete to establish a firm offer. Finally, the court rejected the plaintiff's argument that the offer did not have sufficient value. The court stated that even though the Seventh Circuit has required a finding of sufficient value to make a firm offer of credit, it would not import such a requirement in the Fourth Circuit. The court concluded that if Congress desired to create more strict standards, they would have, and would not have left such a duty to the judiciary. The court stated that even if sufficient value was required, these offers would pass the test because they offer a substantial amount of credit, minimum loan amounts and the language in the solicitations is not contradictory. It also appears the defendants would offer the plaintiff a home mortgage if the plaintiff met the specific criteria. For all of the above reasons, the defendant's motion to dismiss was granted.

REAL ESTATE SETTLEMENT AND PROCEDURES ACT (TITLE INSURANCE REQUIREMENT)

Hopkins v. Horizon Mgmt. Services, Inc., 2007 WL 2745593 (D.S.C. Sept. 21, 2007)

Plaintiff entered into an agreement with the defendant as an agent of a bank to purchase a house. After the purchase, the plaintiff brought suit against the defendant alleging the defendant required the plaintiff, as a condition of selling the property, to purchase title insurance from a particular title company in violation of the Real Estate Settlement and Procedures Act (RESPA) 12 U.S.C. § 2608. The defendant filed a motion for summary judgment. The defendant argued that because it purchased the owner's title policy that the applicable provision of RESPA should be of no concern. The court agreed and stated that the only issue was then if the plaintiff indirectly purchased the owner's policy. The court stated that the only reasonable inference was that the defendant purchased the owner's policy. The court also stated that just because the defendant required the plaintiff to purchase title insurance, did not mean that the defendant was mandating who the insurance should be purchased from. The court held that there was no evidence that the plaintiff was forced to purchase title insurance from a specific dealer. The court also held that just because the defendant created an economic incentive for the plaintiff to purchase insurance from a certain company did not mean that she was required to purchase from

that company. Because the court found that the defendant did not force the plaintiff to hire certain agents, the court granted the defendant's motion for summary judgment.

5TH CIRCUIT DECISIONS

FAIR CREDIT REPORTING ACT (FIRM OFFER OF CREDIT)

Villagran v. Freeway Ford, LTD, 2007 WL 2688432 (S.D. Tex. Sept. 10, 2007)

The plaintiff received a pre-screened solicitation from the defendant car dealership which informed her that she was pre-approved for \$27,525 toward the purchase of her next car or truck. The letter informed her that her credit report had been accessed and that she still needed to meet the remaining criteria to be approved for the loan. The plaintiff filed an action on behalf of herself, and other similarly situated individuals, under the Fair Credit Reporting Act (FCRA) alleging that the defendant accessed her credit report without a permissible purpose because the offer was not a firm offer of credit under the FCRA. Both parties moved for summary judgment. The court refused to follow the principle set by the Seventh Circuit requiring the offer have sufficient value to the consumer. Instead, the court followed Fifth Circuit case law which only requires a showing that the defendant would have honored the offer if the consumer met the required criteria. The court held that the plaintiff failed to present sufficient evidence that the defendant would not have honored the offer if it had been accepted. Therefore, the court granted the defendant's motion for summary judgment.

FEDERAL ARBITRATION ACT (NON-SIGNATORY APPLICABILITY)

Barbosa v. Coldwell Banker Real Estate Corp., 2007 WL 2783338 (N.D. Miss. Sept. 21, 2007)

Plaintiffs brought suit alleging various federal criminal violations, including Racketeer Influenced and Corrupt Organization Act (RICO) claims, against defendants. While all of the plaintiffs signed an Arbitration Agreement with the main defendant (a bank), the remaining defendants sought to have their claims submitted to arbitration because they all related to the Agreement the plaintiffs signed with the bank. The defendants filed a motion to compel arbitration, or in the alternative, to stay litigation pending conclusion of arbitration proceedings. The court stated that in Mississippi there are two ways that non-signatory defendants can compel arbitration; each consists of an equitable estoppel argument. First, equitable estoppel applies when the signatory to an arbitration agreement must rely on terms of the written agreement when asserting its claims against the non-signatory. Second, equitable estoppel applies when the signatory to the contract containing the arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract. The court held that in the current situation, both tests would allow the non-signatories to compel arbitration. Because the RICO claim necessitates that the defendants participated in an enterprise of racketeering activity, their conduct relates back to the matters stipulated to in the Arbitration Agreement. Because the court concluded that all the plaintiffs' claims should be compelled to arbitration, the action was dismissed without prejudice.

6TH CIRCUIT DECISIONS

FAIR DEBT COLLECTION PRACTICES ACT (ADEQUACY OF NOTICE)

Federal Home Loan Mortg. Corp. v. Lamar, 2007 WL 2768305 (6th Cir. Sept. 25, 2007)

Defendant mortgage corporation contacted defendant law firm to begin mortgage foreclosure proceedings against the plaintiff debtor. The law firm sent the plaintiff a state court complaint that also included the notice to the plaintiff advising her of her rights under the Fair Debt Collection Practices Act (FDCPA). The law firm also accidentally served the plaintiff twice, once through certified mail, and another time through a personal service company. The plaintiff brought suit against the defendants alleging violations of the FDCPA and certain state consumer protection laws. After the district court granted summary judgment in favor of the defendants, the plaintiff appealed to the Sixth Circuit. First, the court held that the law firm did not violate the FDCPA by combining the complaint and the FDCPA notice into the same document. The court stated that the least sophisticated consumer would be able to differentiate between the time for response (twenty days), and the time allowed for dispute of the debt (thirty days). The court also held that the complaint did not overshadow the notice of rights and did not violate the FDCPA. Additionally, the court held that when the law firm accidentally served notice twice on the plaintiff, it did not violate the FDCPA. At the very least, the plaintiff had a duty to clarify what she received if she was confused. The court also rejected the plaintiff's arguments that minor errors in the complaint violated the FDCPA. The complaint stated that the plaintiff had rights "under state law," instead of "under federal law," and indicated the wrong paragraph that would contain the plaintiff's name if she had the right to question the debt. The court held that the least sophisticated consumer reading the document would understand that she had a right to challenge the validity of the debt. Finally, the court rejected the plaintiff's contention that the defendant law firm's letter was false, deceptive or misleading. The court held that there is no way that the notice could be reasonably read to have two or more different meanings. The court affirmed the district court's ruling and refused to discuss the defendants' bona fide error defense because the defendants did not violate the FDCPA.

FAIR DEBT COLLECTION PRACTICES ACT (CLASS CERTIFICATION)

Tedrow v. Cowles, 2007 WL 2688276 (S.D. Ohio Sept. 12, 2007)

Defendant attorney brought collection actions for medical services on behalf of his client, a hospital. The plaintiffs brought this action on behalf of themselves and other similarly situated persons under the Fair Debt Collection Practices Act (FDCPA), alleging that the defendant violated the act when he brought the claims in state courts located in forums where the plaintiffs did not reside and did not sign a contract for services. First, the court allowed the plaintiffs to submit a declaration that showed all of the lawsuits filed against the plaintiffs in the wrong venue for the purposes of determining class certification. Second, the court approved the class, holding that it met the numerosity, commonality, typicality and adequacy requirements. The court also held that certification was appropriate under Federal Rule of Civil Procedure 23(b)(3) because common questions predominate and class action resolution is superior to individual causes of action. The certified class consisted of individuals who were seeking statutory and actual relief and declaratory and injunctive relief under 15 U.S.C. § 1692k(a) and 1692a(e). The class was

defined as all persons sued by the defendant who did not receive their medical services in the county in which they were sued and did not reside in the county in which they were sued.

TRUTH-IN-LENDING ACT (STATUTE OF LIMITATIONS)

Gates v. Ohio Savings Bank Ass'n, 2007 WL 2713897 (N.D. Ohio Sept. 17, 2007)

Plaintiffs obtained an adjustable rate mortgage with defendant lender in 1982. Several times between 1982 and 2006, the plaintiffs had attempted to get more information from the lender regarding how their interest rate was calculated. The plaintiffs had even contacted an attorney in 1993 to discuss filing a claim, none was ever filed. In 2006, the plaintiffs brought this action alleging that the defendant's calculation of the plaintiffs' interest rate was inconsistent with the terms of the Note, and therefore was in violation of the Truth-in-Lending Act (TILA). The defendant filed a motion for summary judgment arguing that TILA's one year statute of limitations was violated. The court first held that the plaintiffs' claims were barred because TILA requires a suit to be filed within one year of the parties entering into their loan transaction agreement. Therefore, absent equitable tolling, the plaintiffs were 23 years late in filing a claim. The court also held that the plaintiffs could not claim that equitable tolling applied in their case. Because the plaintiffs did not allege that there was a fraudulent concealment until 1993, 11 years after the agreement was signed, and because they had received constant updates regarding their interest rate, the court held that equitable tolling was inappropriate. The court granted the defendant's motion for summary judgment. The court then refused to retain jurisdiction over the plaintiffs' state law claims because after the TILA claim was dismissed, the other claims remained only on supplemental jurisdiction. The court remanded the plaintiffs' remaining claims to state court.

FEDERAL ARBITRATION ACT (APPLICABILITY AND CLASS ACTION WAIVER)

Howard v. Wells Fargo Minnesota, NA, 2007 WL 2778664 (N.D. Ohio Sept. 21, 2007)

Plaintiff entered into a mortgage agreement with defendant bank. Both parties signed an Arbitration Agreement which mandated arbitration of certain claims. The Agreement also provided that the plaintiff would be prohibited from bringing a class action claim. When the defendant failed to record a satisfaction of mortgage with the county recorder of the plaintiff's county within ninety days of the date the mortgage was paid in full, the plaintiff brought this lawsuit in Ohio state court. The defendant removed to federal court and filed a motion to stay proceedings and to dismiss the class action claims based on the operation of the Arbitration Agreement. The plaintiff argued that the Arbitration Agreement should not control the dispute because the claim arose after she had paid off the mortgage. The court rejected this argument holding that the defendant had specifically contracted for post-termination arbitration of disputes. The plaintiff also argued that the recording of a mortgage satisfaction is not an integral part of the lending process and therefore does not arise out of the Agreement. The court held that the claim could not be brought without a reference to the loan, and *but for* the loan, there would be no obligation placed on the bank to record a satisfaction. The court also stated that it would be unjust to require every potential claim be listed out in an Arbitration Agreement, and the fact that the defendant stated the Agreement would cover "federal or state consumer protection statutes or regulations" was enough to bring this claim to arbitration under the Agreement. Finally, the court held that class action waiver in the Arbitration Agreement was not unconscionable and was

enforceable. The court stated that unequal bargaining power does not alone establish unconscionability. It also stated that the plaintiff is not deprived of her remedies, she is only limited to the forum in which she may establish her right to relief. Therefore, the court granted the defendant's motion to stay court proceedings and dismissed the plaintiff's class action claims.

7TH CIRCUIT DECISIONS

FAIR DEBT COLLECTION PRACTICES ACT & FAIR CREDIT REPORTING ACT (PERMISSIBLE PURPOSE)

Miller v. Wolpoff & Abramson, L.L.P., 2007 WL 2694607 (N.D. Ind. Sept. 7, 2007)

Defendant debt collector sent the plaintiff letters and accessed his credit report in an attempt to collect a debt. At the same time, another debt collector had instituted a state court action against the plaintiff in an attempt to collect the same debt. The plaintiff brought suit under the Fair Debt Collection Practices Act (FDCPA) and the Fair Credit Reporting Act (FCRA) alleging that the defendants were acting as debt collectors and did not have a right to take collection action. The defendants filed a motion for summary judgment. First, the court granted the defendants' motion for summary judgment in regard to the FDCPA claims. The plaintiff had claimed that the defendants violated §1692e when they falsely represented that they owned the debt. However, because the plaintiff did not present any evidence that the defendants did not own the debt, and because the defendants actually presented undisputed evidence that affirmatively showed they did own the debt, the defendants were granted summary judgment as to the FDCPA claims. The court also granted the defendants' motion for summary judgment as to the claims under the FCRA. The court stated that a person is allowed to access a credit report to collect on the account of a customer, and that is exactly what happened; therefore, the defendants could not be liable under the FCRA because it had a permissible purpose for accessing the account. Therefore, the defendants' motion for summary judgment was granted.

FAIR CREDIT REPORTING ACT (WILLFUL VIOLATION)

Murray v. Indymac Bank, F.S.B., 2007 WL 2741650 (N.D. Ill. Sept. 13, 2007)

Plaintiff brought suit against the defendant bank on behalf of himself and other similarly situated persons. Plaintiff had received a solicitation from the defendant in the mail. In a previous ruling, the court had granted the plaintiff's motions for summary judgment, holding that the solicitations were not firm offers of credit and violated the clear and conspicuous disclosure requirements of the Fair Credit Reporting Act (FCRA). After the court was informed of the upcoming United States Supreme Court decision in *Safeco Ins. Co. of Am. v. Burr*, it decided to wait to rule on the issue of the willfulness of the defendant's violation. The parties then filed joint motions for summary judgment on the issue of the defendant's willfulness. The court first observed that under the ruling in *Safeco* a plaintiff could establish a willful violation if it could prove that the defendant showed a "reckless disregard of statutory duty." The court then held that because the defendants had a compliance department that had made attempts to understand the law and the interpretation that the defendant had about the law was reasonable, and because the defendant had made attempts to pre-screen applicants before it sent solicitations, the plaintiff could not show that the defendant ignored an unjustifiably high risk of harm that was known or

reasonably should have been known. The court concluded that no reasonable trier of fact could conclude that the defendant knowingly or recklessly violated the FCRA; therefore, the court granted summary judgment in favor of the defendant.

FAIR CREDIT REPORTING ACT (FIRM OFFER OF CREDIT)

Forrest v. JP Morgan Chase Bank, N.A., 2007 WL 2773518 (E.D. Wis. Sept. 21, 2007)

Defendant bank sent a solicitation to the plaintiff offering real-estate secured credit. The solicitation stated several terms of the offer including a maximum offer amount, minimum offer amount, potential interest rate and average line of credit secured. The offer indicated that it was contingent upon the plaintiff meeting unspecified criteria. The plaintiff sued defendant alleging a violation of the Fair Credit Reporting Act (FCRA) because the solicitation was not a firm offer of credit and the plaintiff's credit report was obtained without a permissible purpose. The defendant filed a motion to dismiss. First, the court reiterated the high standard of the Seventh Circuit which maintains that to be a firm offer of credit an offer must have "sufficient value for the consumer to justify the absence of the statutory protection of his privacy." The court held that the solicitation was a firm offer for three reasons. First, it appeared that the defendant's offer would have been honored. Second, because the offer contained a minimum loan amount, gave an approximate range for interest rates, and included information about how the consumer could obtain additional information about the terms of the loan, the court held that material terms were disclosed. Third, the court held that the \$15,000 to \$350,000 being offered for the loan was of sufficient value. Therefore, the court granted the defendant's motion to dismiss.

FAIR DEBT COLLECTION PRACTICES ACT (FALSE STATEMENT CONCERNING AMOUNT OF DEBT OWED)

Humes v. Blatt, Hasenmiller, Liebsker & Moore, LLC, 2007 WL 2793398 (S.D. Ind. Sept. 26, 2007)

Defendant debt collector sent the plaintiff a letter advising him that it was trying to collect a debt. In the letter the principle amount was listed as \$4747.08 and the interest amount was listed as \$0. The plaintiff filed suit against the defendant alleging that the defendant's letter contained a false statement and was in violation of the Fair Debt Collection Practices Act (FDCPA). The parties filed joint motions for summary judgment. The plaintiff argued that because the amount provided was not the amount he owed to his initial creditor, and it contained additional fees and charges added by the debt collector, it violated the FDCPA. The court disagreed. The court stated that what was important was the amount owed to the debt collector. Because the creditor is not liable under the FDCPA, it was immaterial what was the original amount owed by the plaintiff to the creditor. Only the amount past due and owed to the debt collector can be the "amount of debt" under 15 U.S.C. § 1692g of the FDCPA. The court granted the defendant's motion for summary judgment.

FAIR DEBT COLLECTION PRACTICES ACT (UNFAIR & UNCONSCIONABLE MEANS TO COLLECT, FALSE REPRESENTATION & INVALID NOTICE)

Day v. Check Brokerage Corp., 2007 WL 2800382 (N.D. Ill. Sept. 26, 2007)

Defendant debt collector contacted plaintiff debtor to collect on a debt the plaintiff owed after writing a bad check. The original check was written for the amount of \$20.40, and the defendant then charged two additional fees: one for \$25.00 and another for \$20.00. The plaintiff brought suit against the defendant arguing that the additional charges violated several provisions of the Fair Debt Collection Practices Act (FDCPA). Both parties moved for summary judgment. First, the court held that because Illinois law only allows for an additional charge of \$25.00 to be assessed to the plaintiff, without an additional notice served by certified mail, that the defendant violated 15 U.S.C. § 1692f by attempting to collect a payment not authorized by law. Second, the court held that the defendant did violate Section 1692e with respect to the fact that the defendant did misrepresent the amount of debt owed. However, the court declined to grant summary judgment in favor of the plaintiff in regard to the defendant's misrepresentation of the "legal status" of the debt. The court stated that the plaintiff failed to show how a misrepresentation of the amount led to a misrepresentation of the debt's legal status. Because the defendant never intended to sue the plaintiff, and also because, under Illinois law, the defendant did not have a right to sue the plaintiff until it was assigned the debt, the defendant violated the FDCPA by misleading the unsophisticated consumer into believing that they were threatening legal action that they were not going to take. The court also held that the defendant violated Sections 1692e and e(10) because it threatened to obtain "not less than \$100, and more than \$1500" from the plaintiff under Illinois law. Because the defendant did not follow all of the requirements of the Illinois law, it could not legally collect that money; therefore, it violated the statute by using a false representation in a means to collect a debt. The court also held that because the defendant included numbers for what legal action "could" cost the plaintiff, it was liable under Sections 1692(e) and e(10) because the numbers were not the actual amounts that would be owed. Even though the numbers were just estimations, they were still misleading. Finally, the court rejected the plaintiff's arguments that the defendant was liable under Section 1692g because the letter was confusing in the way it explained the plaintiff's rights under the mandatory notice. The court held that because the plaintiff presented no expert testimony or evidence on why the notice was confusing, he did not meet his prima facie burden. Therefore, the court granted the defendant's motion for summary judgment in part and denied in part, and granted the plaintiff's motion for summary judgment in part and denied in part.

8TH CIRCUIT DECISIONS

FAIR DEBT COLLECTION PRACTICES ACT (ENFORCEMENT OF A SECURITY INTEREST)

Chomilo v. Shapiro, Nordmeyer & Zielke, L.L.P., 2007 WL 2695795 (D. Minn. Sept. 12, 2007)

Plaintiff brought an action against the defendant law firm arguing that it violated several provisions of the Fair Debt Collection Practices Act (FDCPA) when it attempted to foreclose on her mortgage. The defendant moved for summary judgment arguing that it complied with Minnesota law and with the only FDCPA provision that was applicable. The main issue revolved around whether the defendant, who was trying to enforce a security interest, could be

considered a debt collector under the FDCPA. The court held that because Congress made a distinction between a debt collector and an enforcer of a security interest, an enforcer of a security interest, such as a law firm foreclosing on mortgages of real property, falls outside the ambit of the FDCPA except for compliance with the provisions of 15 U.S.C. § 1692(f). Also, the court said that because the plaintiff did not show that she relied upon the defendant's FDCPA disclaimers to her detriment, the defendant could not be estopped from arguing that it is not a debt collector within the definition of the FDCPA. Finally, the defendant did not violate Section 1692(f) because it was legally foreclosing on a security interest to which it had a right. Therefore, the defendant's motion for summary judgment was granted.

FAIR DEBT COLLECTION PRACTICES ACT (CIVIL PENALTIES & STATUTE OF LIMITATIONS)

Eaton v. Credit Bureau of Detroit Lakes, Inc., 2007 WL 2781844 (D.N.D. Sept. 21, 2007)

Defendant debt collector attempted to collect on delinquent accounts owed by the debtor plaintiff after the plaintiff had written bad checks. All of the amounts that the defendant attempted to collect had been increased to add civil penalties which were either three times the amount of the check or \$100, whichever was less. The plaintiff argued that the civil penalties were added before permission was granted by the court and in violation of the Fair Debt Collection Practices Act (FDCPA). The defendant argued that the civil penalties were added pursuant to state statute and that the one year statute of limitations in the FDCPA also applied. Both the plaintiff and the defendant filed joint motions for summary judgment. The court first held that because civil penalties in Minnesota and North Dakota can only be awarded after the completion of a civil action, accessing those penalties prior to a lawsuit is not allowed and violates the FDCPA provision outlawing an attempt to collect more from the debtor than is legally owed. However, the court also held that because the debt collector's mailing of each collection letter triggered the statute of limitations, only collections attempted on checks written within one year of the lawsuit were allowed. Therefore, the court granted summary judgment in favor of the plaintiff for the four checks written within one year of the statute of limitations, and granted summary judgment in favor of the defendant in regard to all older checks. The court also denied the defendant's request for attorney's fees because its actions did violate the FDCPA.

9TH CIRCUIT DECISIONS

FAIR CREDIT REPORTING ACT (PERMISSIBLE PURPOSE)

Pintos v. Pacific Creditors Ass'n, 2007 WL 2743502 (9th Cir. Sept. 21, 2007)

Plaintiff filed suit against defendants debt collector and credit reporting agency (CRA) for obtaining her credit report in violation of the Fair Credit Reporting Act (FCRA). The defendant debt collector had obtained her debt from a towing company that never received payment from the plaintiff. Both the debt collector and the CRA filed motions for summary judgment and argued that the debt collector obtained the debt for a permissible purpose, namely, the collection of a debt. The CRA also argued that it had fulfilled its obligations under 15 U.S.C. § 1681e which immunizes a CRA from violations so long as the agency takes certain steps. The plaintiff filed a cross-motion for partial summary judgment. The district court granted summary judgment in favor of the defendants and held that the debt collection was a permissible purpose.

The plaintiff appealed to the Ninth Circuit. The Ninth Circuit stated that the Fair and Accurate Credit Transactions Act of 2003 (FACTA) changed the understanding of what was a permissible purpose to access a credit report. The FACTA stated that if a credit report is accessed for purposes of debt collection, it must be related to a credit transaction. Because the plaintiff did not voluntarily seek credit, and her car was towed against her wishes, she never sought to have a credit transaction; therefore, when the debt collector obtained the plaintiff's credit report, it violated the FCRA. The court reiterated that after the FACTA was passed, debt collection will not always be a permissible purpose for obtaining a credit report. Therefore, the court reversed the district court's grant of summary judgment in favor of the defendants. The court also stated that the CRA could not claim immunization only because the debt collector had signed a "blanket certification" that it would only obtain credit reports for permissible purposes. The court stated that the CRA had an independent duty to verify a collection agency's certification that the credit report would be used for a permissible purpose, and it had to have a compelling reason to seal its business records. The court remanded the issue of the CRA's liability to the district court for further proceedings.

FAIR CREDIT REPORTING ACT (REASONABLE REINVESTIGATION)
Dennis v. BEH-1, LLC, 2007 WL 2769650 (9th Cir. Sept. 25, 2007)

Plaintiff was sued by his landlord for unlawful detainer. After a settlement between the parties was reached, the parties submitted a request for dismissal that was granted. The defendant credit reporting agency (CRA) inaccurately reported that a judgment was entered against the plaintiff. After the plaintiff disputed the information, the CRA contracted with a third party to investigate. The third party incorrectly advised the CRA that its information was correct. The plaintiff filed suit in district court alleging that the defendant violated the Fair Credit Reporting Act (FCRA) and certain state laws. The district court granted summary judgment in favor of the defendant on all claims and the plaintiff appealed. The Ninth Circuit reversed the decision of the district court for several reasons. First, the court held that because the state court case against the plaintiff was dismissed, there was no way that there could have been a judgment against him; therefore, the CRA's information was inaccurate. The court also stated that by showing he was declined for credit, was forced to pay a deposit to his landlord and suffered emotional distress damages, the plaintiff demonstrated that he had suffered actual damages. The court also held that the district court erred by holding that the defendant did not violate its duty to conduct a reasonable reinvestigation. The court held that the defendant could have caught its third party investigator's error if it had consulted with the civil register in the plaintiff's case. The court stated that no rational jury could find that the defendant was not negligent. It also stated that a reinvestigation that overlooks documents in the court file expressly stating that no adverse judgment was entered falls far short of the mandated FCRA standard. Therefore, the court granted summary judgment on its own motion to the plaintiff on his claim that the CRA negligently failed to conduct a reasonable investigation. The court remanded the case to the district court to determine damages and to award attorney's fees.

**TRUTH-IN-LENDING ACT & REAL ESTATE SETTLEMENT AND PROCEDURES
ACT (NON-CREDITOR APPLICABILITY)**

Nevis v. Wells Fargo Bank, 2007 WL 2601213 (N.D. Cal. Sept. 6, 2007)

Plaintiff was contacted and offered a home loan by a lending company. After the plaintiff agreed to mortgage her house, the defendant title and escrow company closed the loan and acted in the capacity of the plaintiff's fiduciary for this purpose. After failing to meet her payments, the plaintiff brought several actions under the Truth-in-Lending Act (TILA), Real Estate Settlement and Procedures Act (RESPA), and other various state court statutes alleging, primarily, that the defendants took advantage of her being poor and elderly. The defendant title and escrow company filed this motion to dismiss all of the plaintiff's claims. First, the court dismissed the plaintiff's TILA claim because the title and escrow company was not a creditor as defined under TILA and Regulation Z and the plaintiff set forth no facts in her complaint that would bring the defendant within the statute. Second, because the plaintiff did not allege any facts that proved the defendant was responsible for making required disclosures, the court dismissed the claim against the defendant with leave to amend. The court also granted the defendant's motion to dismiss with regard to all other claims.

FEDERAL ARBITRATION ACT (ARBITRATION ENFORCEMENT)

Spencer v. Capital One Bank, 2007 WL 2700405 (D. Idaho Sept. 11, 2007)

Plaintiff and her husband paid premiums for a "Payment Protection Plan" that promised that the defendant credit card company would pay off the balance of her account if either her or her husband died. After her husband died, the defendant refused to pay. The plaintiff brought the claim in Idaho state court, despite the forum selection clause (mandating arbitration) and the choice of law provision (choosing Virginia law). The defendant removed the case to federal court and filed a motion to compel arbitration under the Federal Arbitration Act (FAA). The court first held that because Virginia law would refuse to enforce a forum-selection clause that contravened strong public policy of the state that the suit was filed, that Virginia would refuse to apply a forum-selection clause because of the strong public policy contravening forum-selection clauses in Idaho. The court rejected the defendant's contention that the agreement would not restrict the plaintiff's rights because it allows appeal under FAA rules. The court held that the FAA's rules regarding judicial review are extremely limited and would not pass muster under Idaho's laws which prohibit forum-selection. Therefore, the court denied the defendant's motion to compel arbitration.

TRUTH-IN-LENDING ACT (STANDING)

Amonette v. Indymac Bank, F.S.B., 2007 WL 2683633 (D. Haw. Sept. 12, 2007)

Plaintiff, as a trustee for her own revocable living trust, took out a mortgage loan against her house from the defendant. The plaintiff alleged that the defendant committed unfair and deceptive trade practice violations, and various other violations of the Truth-in-Lending Act (TILA). The plaintiff also alleged that the defendants failed to properly disclose certain terms or disclosed them in a misleading or confusing manner. The defendant filed a motion to dismiss, or in the alternative, a motion for summary judgment arguing that because the mortgage loan was made to the plaintiff's trust, the trust cannot bring TILA claims because TILA only applies to

individual consumers. While TILA does say that it does not apply to an organization (and defines "organization" to include trusts), TILA does not specifically state that a revocable trust is an organization. The court examined several other statutes and concluded that when considering TILA's purpose, the plaintiff is a natural person whose ownership interest would be subject to the security interest; therefore, she should have the right to rescind if the applicable TILA disclosure provisions are violated. The court also stated that not all trusts are necessarily organizations within the meaning of TILA. Therefore, the defendant's motion to dismiss and motion for summary judgment were denied.

FAIR DEBT COLLECTION PRACTICES ACT (ATTORNEY'S FEES)

Winn v. Unifund CCR Partners, 2007 WL 2709141 (D. Ariz. Sept. 14, 2007)

Defendant creditor brought a state court action against the plaintiff to recover a debt. The state court complaint alleged that the plaintiff owed the debt, plus court costs and attorney's fees. The plaintiff then filed the instant action in federal court stating that the state court complaint violated the Fair Debt Collection Practices Act (FDCPA) because it was false, deceptive, or misleading in violation of 15 U.S.C. § 1692e and was an unfair collection communication in an attempt to collect a debt in violation of § 1692(f). The court then granted the defendant's motion for a judgment on the pleadings. The defendant filed for attorney's fees and costs pursuant to § 1692k(a)(3) stating that the federal action was brought in bad faith and for the purpose of harassment. The court denied the motion for attorney's fees for several reasons. First, although no legal authority supported the plaintiff's claim, no binding authority had yet foreclosed the plaintiff's position; therefore, it could not be said that the plaintiff knew his claim was meritless. Second, although the plaintiff's attorney had filed five other actions against the defendant, without more, the court said it could not conclude that the filings were in bad faith and for the purpose of harassment. Finally, the court held that the plaintiff's unsuccessful procedural arguments regarding decisions made by the magistrate judge were only a small part of the plaintiff's overall objection and could not have significantly prolonged the litigation. Therefore, the defendant's motion for attorney's fees and costs was denied.

FAIR DEBT COLLECTION PRACTICES ACT (IMPROPER VENUE & FALSE THREAT OF LEGAL ACTION)

Flores v. Quick Collect, Inc., 2007 WL 2769003 (D. Or. Sept. 18, 2007)

Plaintiff defaulted on a loan she owed to a credit union. After the credit union obtained a default judgment for the loan amount against the plaintiff, they sent the judgment to defendant debt collector for collection attempts. The defendant filed a motion in state court seeking an order for a debtor examination. The plaintiff filed this claim against the defendant asserting violations of the Fair Debt Collection Practices Act (FDCPA). The plaintiff claimed that the defendant filed suit in the wrong county, alleged that the original judgment was invalid, and argued that the defendant was guilty of issuing a false threat. Both the plaintiff and the defendant submitted motions for summary judgment. First, the court held that because neither the plaintiff nor defendant had submitted adequate evidence to determine in what county the original loan agreement had been signed, it was impossible to determine whether the defendant violated the venue provision in the FDCPA. Second, the court held that because the plaintiff was filing suit against the defendant debt collector for its own actions, the court did not have the authority to

overturn a state court ruling on the original debt. Finally, the court held that a threat of jail for failing to appear in court that was put into a letter to the plaintiff by the state court itself could not be considered an illegal threat within the meaning of the FDCPA. The court granted the defendant's motions for summary judgment in regards to the claims for a false threat, and denied the plaintiff's and defendant's motions for summary judgment with regards to the improper venue claim.

**FAIR DEBT COLLECTION PRACTICES ACT (MISREPRESENTATION,
CREDITOR'S NAME & THREAT OF LEGAL ACTION)**

Quicho v. Mann Bracken, LLC, 2007 WL 2782971 (N.D. Cal. Sept. 25, 2007)

Defendant debt collector sent a letter to the plaintiff debtor attempting to collect a debt. Plaintiff brought suit against the defendant alleging that the letter violated several provisions of the Fair Debt Collection Practices Act (FDCPA). The defendant filed a motion to dismiss. The court first held that because the letter identifies the defendant as "attorneys at law" and is signed only by the debt collector, it could be perceived as constituting the work of an attorney, especially because there was no disclaimer indicating otherwise. Therefore, the court held that the letter could be perceived as falsely representing that attorneys were directly or personally involved in reviewing the plaintiff's file. The court then held that because the original creditor's name was listed in the complaint, even though it stated that the creditor may be an assignee or predecessor in interest with the original creditor, the defendant did not violate 15 U.S.C. §§ 1692e, e(10), or 1692g by not stating the appropriate creditor's name. Finally, the court held that the defendants may have violated Section 1692e(5) by threatening a legal action that they were not legally able to take. The letter to the plaintiff states that the defendant could file an arbitration claim. The court ruled that for the purposes of the defendant's motion to dismiss only the threat was at issue, not if the defendant's actually violate the provision by being unable to file arbitration. Therefore, the court granted in part and denied in part the defendant's motion to dismiss.

10TH CIRCUIT DECISIONS

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

11TH CIRCUIT DECISIONS

**TRUTH-IN-LENDING ACT (CLASS CERTIFICATION & SETTLEMENT
AGREEMENT)**

Veal v. Crown Auto Dealerships, Inc., 2007 WL 2702338 (M.D. Fla. Sept. 14, 2007)

Plaintiff filed an action against the defendant car dealership alleging violations of the Truth-in-Lending Act (TILA) because of the defendant's practices with regard to its sale of a product called Trac Guard. After several years of litigation, the parties entered into a settlement agreement and moved for settlement class certification. The court certified three different classes. The first class consisted of plaintiffs that did not receive sufficient disclosure of Trac Guard and its price on their retail installment sales contract. Under the agreement, these plaintiffs were to receive a \$500 cash payment refunding the price of Trac Guard. The second class of plaintiffs encompassed those who did receive documents that adequately disclosed the price and who leased a vehicle from the defendant but whose transaction documents could not be

located. These plaintiffs were to receive a \$125 cash refund and a \$100 gift certificate for purchase of goods at the defendant's establishment. Finally, the third class consisted of plaintiffs whose buyer's orders disclosed both the Trac Guard and its price to such an extent that they do not fall under the requirements of the first class. These plaintiffs were to receive \$175 in cash and a \$100 gift certificate. The court concluded that the settlement was fair, adequate and reasonable, and that the parties settled only after lengthy, hard-fought, adversarial, arms-length negotiations. The court also held that notice to the class members was fair and complied with Federal Rule of Civil Procedure 23. Finally, after considering the submissions for attorney's fees and the reasonableness factors set out in *Hensley v. Eckerhart* the court held that the \$825,000 in attorney's fees was an appropriate award. Therefore, the settlement class was certified and the proposed settlement was approved.

TRUTH-IN-LENDING ACT (DEFINITION OF A CREDITOR)

Muro v. Hermanos Auto Wholesalers, Inc., 2007 WL 2729810 (S.D. Fla. Sept. 20, 2007)

Plaintiff purchased a vehicle from the defendant car dealership. The defendant provided the financing and tried to sell the loan to other companies. The defendant failed to do so, and upon the plaintiff's default, repossessed the plaintiff's vehicle. The plaintiff then sued claiming that the defendant did not follow the proper procedures listed in the Truth-in-Lending Act (TILA). The defendant admitted that it did not follow the proper procedures, but argued that because it was not a creditor, it was not responsible for following TILA. The plaintiff filed a motion for summary judgment. First, the defendant argued that it was not a creditor because the Agreement signed by the plaintiff stated that there was a lien belonging to another financing company. However, the court held that because the other financing company had not even been contacted, and the Agreement stated it would become valid once the plaintiff and defendant signed it, that the defendant was acting as a creditor under TILA. The defendant then argued that the TILA disclosure obligations did not arise because the Agreement was conditioned upon the acceptance of the contract by a lender. The court rejected this argument because TILA states that disclosures must be made before the consummation of the transaction. The plaintiff signed the document and took possession of the car; this indicated that there was a valid credit transaction. Because the court determined the defendant violated TILA, it ordered the payment of \$1000 in statutory damages. The court denied the plaintiff's motion for actual damages, stating that the plaintiff did not present sufficient evidence of causation. Therefore, the court granted the plaintiff's motion for summary judgment in part and denied in part.

No representation is made that the quality of legal services to be performed is greater than legal services performed by other lawyers.

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