

monthly litigation update

MAY 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:



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

SUPREME COURT DECISIONS

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

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1ST CIRCUIT DECISIONS



FAIR DEBT COLLECTION PRACTICES ACT (STATUTE OF LIMITATIONS)
Crooker v. Wachovia Bank, N.A., 2008 WL 2066943 (D. Mass. May 14, 2008)

Plaintiff borrowed money from the defendant bank in order to finance a laser vision correction procedure in 2001. After trying to collect the debt for two years, the defendant closed the plaintiff's account in 2003 and then sold his debt to a collection agency in July of 2006. The plaintiff alleged that the defendant violated the Fair Debt Collection Practices Act (FDCPA) by sending demand letters to members of his family; placing collection calls to family members; and threatening legal action. The defendant filed a motion for summary judgment, arguing that the plaintiff had failed to bring his claim within the one-year statute of limitations mandated by the FDCPA. The court agreed, holding that if the plaintiff had a viable claim against the bank, it expired in July of 2007, one year after the defendant sold his account, and six months before the plaintiff brought the complaint. Accordingly, the court granted the defendant's motion for summary judgment.

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2ND CIRCUIT DECISIONS



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

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3RD CIRCUIT DECISIONS



FAIR DEBT COLLECTION PRACTICES ACT (INADEQUATE NOTICE)
Galuska v. Collectors Training Institute of Ill., Inc., 2008 WL 2050809 (M.D. Pa. May 13, 2008)

Defendant debt collector attempted to collect on an outstanding debt owed by the plaintiff. The defendant sent the plaintiff a letter requesting payment and informing the plaintiff of his rights under the Fair Debt Collection Practices Act (FDCPA). The letter did not copy the exact wording of the FDCPA, and specifically, after informing the plaintiff that his debt would be assumed valid if he did not respond in writing, left out that the debt would only be assumed valid “by the debt collector.” The plaintiff filed suit, alleging that the defendant violated the FDCPA by leaving out these words. The defendant filed a motion to dismiss. The plaintiff argued that by leaving out the words “by the debt collector,” the least sophisticated consumer would be confused as to who was assuming that his debt would be valid. The defendant argued that its failure to include the words “by the debt collector” did not render the notice ambiguous. The court rejected the defendant’s argument. Citing the District Court for the Eastern District of Pennsylvania in *Smith v. Hecker*, 2005 WL 894812 (E.D. Pa. 2005), the court held that the failure to include the words “by the debt collector” may be deceptive to the least sophisticated debtor when considering the letter as a whole. Therefore, the court held that an allegation of the phrase’s absence was sufficient to survive the standard for a motion to dismiss. Accordingly, the court denied the defendant’s motion to dismiss.

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4TH CIRCUIT DECISIONS



FAIR CREDIT REPORTING ACT (FURNISHER LIABILITY & PUNITIVE DAMAGES)
Saunders v. BranchBanking And Trust Co. of Va., 2008 WL 2042620 (4th Cir. May 14, 2008)

Plaintiff purchased an automobile from a dealership that assigned the plaintiff’s loan on the car to the defendant bank. When the plaintiff failed to receive a payment book in the mail, he contacted the defendants who informed him several times that he owed nothing on any loan. Six months later, the defendants sent the plaintiff a letter that informed him his account was seriously delinquent and accelerated his payments. While the plaintiff agreed to pay his payments on the loan, he refused to pay any late fees or delinquency charges. The bank refused to accept the plaintiff’s offer and repossessed the plaintiff’s new car, informing him that he could only redeem it upon paying the entire amount due, including principal, interest, late fees and “repossession expense.” The defendant then reported the repossession to the three credit reporting agencies (CRAs), causing a serious decline in the plaintiff’s credit score. After receiving notices of dispute from the CRAs, the defendant then refused to register the plaintiff’s loan as “in dispute” with the CRAs. The plaintiff brought suit, alleging various violations of the Fair Credit Reporting Act (FCRA). In district court, a jury found in favor of the plaintiff, awarding him \$1,000 in statutory damages and \$80,000 in punitive damages. The defendant appealed, arguing that the district court erred in denying its motion for summary judgment and that the punitive damage award violated the due process clause of the Constitution. The defendant first argued that its response to the CRAs dispute verification form simply reflected the plaintiff’s delinquency on his account. The court disagreed, holding that a jury could reasonably conclude that the defendant’s decision to report the debt without any mention of a dispute was misleading and could be expected to have an adverse effect. The defendant then stated that even if it violated its duties as a furnisher of

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information, the plaintiff had failed to present evidence sufficient to establish a willful violation of the FCRA. The court also disagreed, stating that the plaintiff provided significant evidence of intent on the part of the defendant. The plaintiff had submitted the defendant's records, the defendant's reports to the CRAs, and testimony by the defendant's officers that they intended to report the information without mentioning the dispute. The defendant then argued that the plaintiff's dispute of the debt lacked merit, and therefore, the defendant had no obligation to report the dispute. The court concluded that a reasonable jury could have concluded that the plaintiff could make a good faith argument that he was not responsible for paying on the loan after repeated errors by the defendant. Accordingly, the court affirmed the district court's ruling that denied the defendant's motion for summary judgment. Finally, the defendant argued that the \$80,000 punitive damage award violated the due process clause of the Constitution. After considering the punitive damage guideposts set by the U.S. Supreme Court in *BMW v. Gore*, 517 U.S. 559, 568, the court concluded that the defendant's conduct was sufficiently blameworthy to warrant a punitive damages award in the amount of \$80,000, and that such an award was not grossly excessive or arbitrary. Accordingly, the court affirmed the judgment of the district court.

FAIR CREDIT REPORTING ACT (STATUTE OF LIMITATIONS & LIABILITY FOR FURNISHERS OF INFORMATION)

Broccuto v. Experian Info. Solutions, Inc., 2008 WL 1969222 (E.D. Va. May 6, 2008)

Plaintiff alleged that she checked her credit report and found that there was an open, past due, account of which she had no previous knowledge. The defendant is a bank that extends credit to consumers through the website of a women's retail clothing store. The plaintiff maintained that she was a victim of identity theft and did not open an account with the defendant. The plaintiff alleged that the defendant violated various provisions of the Fair Credit Reporting Act (FCRA) by not properly investigating her claim after it was notified that she did not open the account; by failing to review all relevant information provided by the credit reporting agencies (CRAs); and by publishing her past due status to the CRAs without including a notation that the debt was disputed. The defendant filed a motion to dismiss. First, the defendant asserted that the claims against it should have been dismissed because they were barred by the two-year FCRA statute of limitations. The defendant argued that the plaintiff first learned of possible identity theft regarding her account in 2003 and that she did not file her complaint until December of 2007. The plaintiff argued that while this was true, the applicable time-period was when she discovered the FCRA violation by the defendant. The

plaintiff argued that she did not file her dispute with the CRAs until April of 2006. Therefore, the plaintiff argued, any violations of the FCRA committed by the defendant arising out of the April 2006 complaint would not be time-barred. The court agreed with the plaintiff, stating that each failure to conduct a reasonable investigation in response to a dispute is a separate FCRA violation subject to its own statute of limitations. The defendant then argued that the plaintiff's claim should be dismissed because she did not sufficiently plead violations of 15 U.S.C. §1681s-2-(b)(1)(C), which describes the liability for furnishers of information. The court found that the plaintiff had alleged that the defendant published inaccurate information and failed to conduct a reasonable investigation. Coupled with the facts presented in the complaint, the court held that the plaintiff had sufficiently stated a FCRA claim for which the court could provide relief. Accordingly, the court denied the defendant's motion to dismiss.

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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



FAIR DEBT COLLECTION PRACTICES ACT (ROOKER-FELDMAN DOCTRINE & RES JUDICATA)

Givens v. Homecomings Financial, 2008 WL 2121008 (6th Cir. May 20, 2008)

Plaintiff defaulted on a home mortgage loan that he had with the defendant bank. The defendant then foreclosed on his home, held a sheriff's sale and brought an eviction action in state court. The state court issued an order granting possession to the defendant and required the plaintiff to vacate the premises. After the plaintiff lost his appeal in state court, he brought the instant action in federal court against the defendant loan servicer, alleging violations of the Fair Debt Collection Practices Act (FDCPA) and other state laws. The plaintiff requested that the court grant a preliminary injunction enjoining the defendants from entering the property. The plaintiff filed a motion to dismiss. The district court dismissed the plaintiff's complaint, concluding that it lacked jurisdiction to hear the dispute under the Rooker-Feldman doctrine and, in the alternative, that the suit was barred by the doctrine of res judicata. The plaintiff appealed the ruling to the Sixth Circuit Court of Appeals. The court stated that because the plaintiff was effectively attempting to appeal from the state order granting possession to the defendant, his suit was properly dismissed under the Rooker-Feldman. The court held that the plaintiff's suit fit the narrow Rooker-Feldman doctrine because the plaintiff was complaining to a federal court about injuries suffered as a result of a state court judgment. The court then stated that the suit was also barred by the doctrine of res judicata. The courts stated that the plaintiff's arguments all amounted to arguing over the same premise: that the defendant bank was not entitled to possession of the property. The court held that the issue had already been decided by the state court and that federal court jurisdiction was improper. Accordingly, the court affirmed the district court's dismissal of the plaintiff's lawsuit.

FAIR DEBT COLLECTION PRACTICES ACT (MISTAKEN IDENTITY/BONA FIDE ERROR) Kujawa v. Palisades Collection, L.L.C., 2008 WL 1925063 (E.D. Mich. May 1, 2008)

Defendant debt collectors sent collection information to the plaintiff about debts in two separate accounts. The debts were actually owed by an individual that had the same name as the plaintiff, but a different social security number and address. On the first account, after the defendants had received a default judgment against the true debtor, they sent a Garnishment Release form to the plaintiff. The form had the true debtor's social security number, but contained the plaintiff's address. On the second account, the defendants had received a default judgment against the true debtor, but they registered a judgment lien against the plaintiff's property. The plaintiff brought suit against the defendants alleging that they had violated various provisions of the Fair Debt Collection Practices Act (FDCPA) and other state laws. The defendants filed a motion for summary judgment, arguing that they had never attempted to collect a debt from the plaintiff. The defendants argued that the plaintiff knew that the defendants were not attempting to collect on a debt owed by him. The court agreed with the defendants' argument. The court pointed to the plaintiff's affidavit, in which he acknowledged that the social security number listed on the Garnishment Release and the judgment lien was not his. The court then held that even if the plaintiff were not aware of the mistake, the bona fide error defense would certainly apply in the situation. The court stated that the aggravation suffered by the plaintiff over the incident did not make out a violation of the FDCPA. Accordingly, the court granted the defendants' motion for summary judgment and refused to exercise supplemental jurisdiction over the plaintiff's state law claims.

FAIR DEBT COLLECTION PRACTICES ACT (STATE COURT LAWSUIT) Rice v. Great Seneca Fin. Corp., 2008 WL 2169162 (S.D. Ohio May 21, 2008)

Defendant debt collector purchased the plaintiff's outstanding credit card debt. The debt collector then hired the defendant law firm to send a validation notice to the plaintiff and request payment of the debt. After receiving no response, the defendant law firm then filed a civil complaint against the plaintiff in state court seeking to recover the outstanding debt. After the plaintiff's debt was originally purchased, no additional fees or interest rate had been charged to her credit card. The state court complaint contained a paragraph that directed the reader to Exhibit A for a copy of the plaintiff's account information. Exhibit A listed the plaintiff's balance and on a piece of paper contained boxes for "credit limit," "credit

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available,” “previous balance,” and “payments and credits.” Each of these boxes remained empty or had a zero in them. The plaintiff filed suit in federal court alleging that the exhibit violated various provisions of the Fair Debt Collection Practices Act (FDCPA) and other state laws. The defendants then filed a Notice of Claim of Unconstitutional Federal Statute, arguing that 1) the First Amendment precludes the imposition of strict liability under the FDCPA for content of a civil suit; and 2) applying the FDCPA to certain pleadings and affidavits filed in state court renders the FDCPA unconstitutionally vague and overbroad, violates substantive due process, and exceeds Congress’ authority under the Commerce Clause of Article I of the U.S. Constitution. The defendants also filed motions for summary judgment. The plaintiff first alleged that the statement in the complaint that stated that a copy of the plaintiff’s account was attached was false and violated 15 U.S.C. § 1692e of the FDCPA. The plaintiff argued that because the exhibit only contained the amount due, and not all of the information on the plaintiff’s actual account, it was false. The court disagreed, holding that the defendants had presented evidence that they did have a valid claim against the plaintiff and that the exhibit was merely a record generated by the defendant that accurately reflected the terms of the account. Accordingly, the court found that the defendants’ statement regarding an account did not violate Section 1692e. The plaintiff then argued that the defendants violated Section 1692e by generating an account statement in such a manner that it was misleading. The plaintiff argued that a least sophisticated consumer could be fooled into thinking that the exhibit was generated by the issuer of the original card and also thinking that the defendant actually had an account in its files and that the page attached was just the final page of the actual account. The court again disagreed with the plaintiff, holding that it was obvious that the account had been assigned and that the statement was generated by the defendants to collect on the amount owed. The court also stated that there was no information in the complaint to make a consumer think that the exhibit was the last page of a detailed account possessed by the defendants. Finally, the court stated that even if the plaintiff had demonstrated that genuine issues of fact existed, that the defendants were entitled to the bona fide error defense. Accordingly, the court rejected all of the plaintiff’s claims as a matter of law. Because the court held that the defendants had not violated the FDCPA, it found it unnecessary to address the defendants’ arguments with respect to the constitutionality of the FDCPA.

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7TH CIRCUIT DECISIONS



FAIR DEBT COLLECTION PRACTICES ACT
(ROOKER-FELDMAN DOCTRINE, RES
JUDICATA & CLASS ACTION WAIVER)
Buford v. Palisades Collection, L.L.C., 2008 WL 2009885
(N.D. Ill. May 9, 2008)

Plaintiffs filed a class action lawsuit against the defendant debt collector, alleging that the defendant filed state court lawsuits to recover cellular phone debts that were over two years old and that violated the applicable state statute of limitations. Two of the plaintiffs had their state court judgments vacated, and the other two plaintiffs had judgments that remained in effect. The plaintiffs argued that the defendant was in the business of purchasing time-barred consumer debts and illegally enforcing those debts against consumers. The plaintiffs alleged that these acts violated several provisions of the Fair Debt Collection Practices Act (FDCPA). The defendant filed a motion to dismiss. The defendant first argued that the court lacked jurisdiction over the claims of the two plaintiffs who still had valid judgments in state court. The defendant argued that the Rooker-Feldman doctrine prohibited the federal court from overturning the decision of a state court. The court rejected this argument, stating that the plaintiff’s FDCPA claims were independent of and complete from their state court judgments. Because the statute of limitations for the state court debt collection claims ran out before the defendant filed its complaint, the FDCPA violations actually predated the state claims. Therefore, the court stated that the plaintiffs were not simply asking the court to review the default judgments against them, but were alleging separate injuries under the FDCPA. The defendant then argued that even if the court did have proper jurisdiction, that the plaintiff’s claims were barred because of res judicata. The defendant argued that the state court debt collection and federal FDCPA claims arose out of a single group of operative facts, and therefore, amounted to an identity of causes of action, which would

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allow claim preclusion. The court disagreed with the defendant, holding that while the debt collection suits arose out of their cellular telephone use, the FDCPA claims arose out of the debt collection process. Therefore, the court held that the sets of facts underlying the state and federal cases did not comprise the same cause of action and the plaintiffs' claims were not barred by res judicata. Finally, the defendant argued that the plaintiffs waived their rights to pursue any claims on a class basis. The defendant argued that at the time the plaintiffs had opened their wireless accounts, they received Welcome Guides, which included a provision purporting to waive the customer's right to pursue class actions. The court held that while a contract generally binds not only its signatories, but also its assignees or purchasers, it was not clear whether the class action waiver provisions in the welcome guide were included in the phone carrier's assignment of the contract to the defendant. The court found that the defendant had not shown that it acquired all rights that the phone carrier had obtained through the Welcome Guides. Therefore, the plaintiffs were not bound by the class action waivers. Accordingly, the court denied the defendant's motion to dismiss.

**FAIR DEBT COLLECTION PRACTICES ACT
(PLEADING WITH PARTICULARITY)**

Konewko v. Dickler, Kahn, Sloikowski & Zavell, Ltd., 2008 WL 2061551 (N.D. Ill. May 14, 2008)

Plaintiff filed suit against the defendant alleging a violation of the Fair Debt Collection Practices Act (FDCPA). After the plaintiff filed a motion to strike, the court granted the defendant leave to file an amended affirmative defense attempting to assert a "bona fide error" defense. The court held that even under the liberal pleading standard, the defendant had failed to state the circumstances of the "bona fide error" with particularity. The court stated that the defendant was responsible for providing the court with the "who, what, when, where, and how of the mistake." Additionally, the court stated that the defendant was responsible for providing "the first paragraph of any newspaper story" setting forth with particularity the defendant's version of the circumstances supporting the defense. Accordingly, the court granted the plaintiff's motion to strike without prejudice and allowed the defendant to file a second amended affirmative defense.

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8TH CIRCUIT DECISIONS



**FAIR DEBT COLLECTION PRACTICES ACT
(DEFINITION OF DEBT COLLECTOR &
CONTRADICTION NOTICE)**

Owens v. Hellmuth & Johnson, PLLC, 2008 WL 1944631 (D. Minn. May 1, 2008)

Plaintiffs became delinquent on dues owed to their homeowners' association that managed the development in which their townhome was located. The homeowners' association hired the defendant law firm to collect the outstanding debt. The defendant sent the plaintiffs a letter that included the required Fair Debt Collection Practices Act (FDCPA) notice, which informed the plaintiff that it had thirty days from the receipt of the letter to dispute the debt. The same letter also informed the plaintiffs that they only had thirty days from the date of the letter to pay the debt, or else their entire annual association assessment would become immediately due and payable. The plaintiffs brought suit against the defendant, alleging that the letter violated the FDCPA because the demand for payment within thirty days of the date of the letter overshadowed and contradicted the plaintiffs' rights under the FDCPA. The defendant filed a motion to dismiss, while the plaintiffs filed a motion for summary judgment. The defendant first argued that it was not a debt collector under the definition of the FDCPA because the debt at issue created a lien upon the plaintiffs' townhome. The defendant argued that because the letter was only an enforcement of a lien, it was an enforcement of a security interest, which does not subject it to FDCPA liability. The court rejected this argument. The court stated that the letter sent to the plaintiffs was merely an attempt to collect delinquent dues and that the letter made no mention of a right to foreclose a lien. Citing various other judicial decisions, the court concluded that the letter sent to the plaintiffs did overshadow and contradict the required FDCPA notice provision. The court stated that because the letter was received several days after it was sent, the

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defendant effectively shortened the allowable time that the plaintiffs had to dispute the debt. The court held that the juxtaposition of two inconsistent statements in the letter – the demand for payment within 30 days from the date of the letter on one hand, and the validation notice informing the plaintiffs of the right to dispute the debt within 30 days of the receipt of the letter on the other hand – ran afoul of 15 U.S.C. § 1692g of the FDCPA. The defendant then argued that a dunning letter could create a demand for immediate payment while also informing the debtor of his rights under the FDCPA. While the court did agree with this point, it held that the demand must not overshadow or contradict the validation notice. The court stated that if a debt collector did want to demand immediate payment, an explanation was necessary informing the plaintiffs that the demand did not override the consumer's rights under Section 1692g to seek validation of the debt. Accordingly, the court found that the letter violated the FDCPA as a matter of law, denied the defendant's motion to dismiss and granted the plaintiffs' motion for summary judgment.

**FAIR DEBT COLLECTION PRACTICES ACT
(DISCLOSURE OF IDENTITY & THREAT OF
LEGAL ACTION)**

Baker v. Allstate Financial Services, Inc., 2008 WL 2042622 (D. Minn. May 13, 2008)

Plaintiff owed a consumer debt that was transferred to the defendant debt collector for collection. The defendant left five voicemail messages on the plaintiff's answering machine during March and April of 2007. Each of the phone messages, except for one, was left by an individual who stated that they worked for the defendant and were calling regarding an urgent matter that was in some way time sensitive. None of the calls stated what the actual nature of the caller's business was. The plaintiff alleged that the voicemails were misleading, abusive and deceptive, and brought a purported class action lawsuit against the defendant under the Fair Debt Collection Practices Act (FDCPA). The defendant filed a motion to dismiss, arguing that the voicemails contained proper FDCPA disclosures and did not use misleading or abusive language. The court disagreed, holding that prior precedent requires each voicemail disclose the caller's name, the debt collection company's name, and the nature of the debt collector's business. The defendant argued that the plaintiff was previously alerted to the nature of the defendant's business from a prior debt collection letter sent to him and that it could not identify the nature of its business in a voicemail message due to third party disclosure concerns under the FDCPA. The court rejected this argument, holding that it was not a cognizable argument on a motion to dismiss. The court stated that because the letter previously sent to the plaintiff was not addressed by the pleadings, it could not be used in a motion to dismiss. Additionally, the court held that the

argument that the defendant could not disclose the nature of its business in a voicemail message due to privacy concerns was unavailing at the early stage of the proceedings. Accordingly, the court held that the defendant's arguments were insufficient to warrant dismissal of the plaintiff's 15 U.S.C. § 1692d(6) claim. The plaintiff also alleged that the defendant violated Section 1692d by stating in two messages that the defendant was calling regarding a "matter pending in Minnesota," which falsely implied that there was a legal case pending against him in Minnesota. The court agreed with the plaintiff that a least sophisticated consumer could understand the defendant's language to indicate that there had been a lawsuit filed against the defendant in Minnesota. The court did not allow a claim, however, for one of the voicemails that only stated that the plaintiff's "case," was "urgent" and "time sensitive." The court stated that those words were not unique to the legal field and found no cases that stated such language constituted harassment. The plaintiff then alleged that the voicemails violated Sections 1692e and e(2) because they were false, deceptive and misleading. The plaintiff claimed that the voicemails contained false threats of legal action. The court stated that, as previously discussed, several voicemails could be seen as constituting threats of legal action when discussing the "matter pending in Minnesota," and therefore, could violate Section 1692e. Finally, the court dismissed the plaintiff's Section 1692f claims, stating that the allegations in that claim were mirrored by others in separate claims. The court stated that Section 1692f was created as a catchall provision and was not meant to address allegations of improper disclosures and false threats of legal action because they were covered by other provisions. Therefore, the court granted in part and denied in part the defendant's motion to dismiss.

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

Young v. Diversified Consultants, Inc., 2008 WL 2131176 (D. Minn. May 21, 2008)

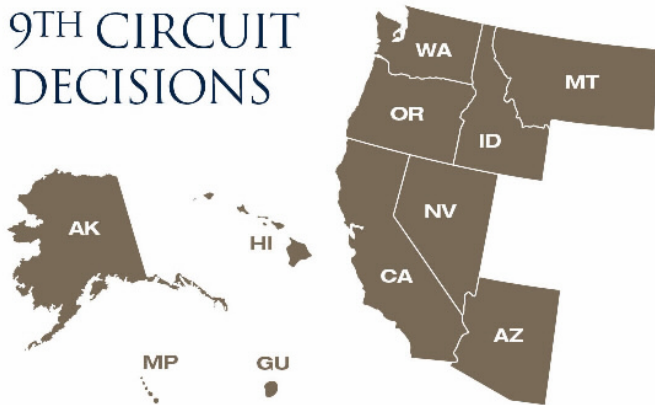
Plaintiff brought suit against the defendant alleging various violations of the Fair Debt Collection Practices Act (FDCPA). The defendant served the plaintiff with an offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure for \$1,500.00 plus reasonable attorney's fees and costs. The parties were unable to agree on attorney's fees and the plaintiff brought a motion for attorney's fees and costs. The plaintiff's attorneys each originally requested an hourly rate of \$400.00/hour, with \$110.00/hour requested for the services of their paralegal. In a subsequent letter to the court, the counselors reduced the request to \$325.00/hour for the senior attorney and \$300.00/hour for the junior attorney. The plaintiff cited Olson v. Messerli & Kramer, P.A., 2008 WL 1699605 (D.

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Minn. Apr. 9, 2008) as a persuasive case in which the same attorneys were awarded fees of \$325 and \$300/hour. The court agreed, stating that Olson was also a “relatively straightforward individual FDCPA case” and was similar to the instant case. The court found the newly requested hourly rates reasonable. The plaintiff then stated that the lead attorney expended 7.10 hours on the litigation, the junior attorney 6.02 hours and the paralegal 9.74 hours. The defendant argued that any time billed on the case after submission of the offer of judgment should be deducted from the total amount. The court agreed, reducing the lead attorney’s hours by 2.4, the junior attorney’s hours by .54 and the paralegal’s time by .77 hours. The court then reduced the plaintiff counsel’s time for “file review.” The court first stated that the term “file review” was too vague to be billed to the defendants. The plaintiff’s counsel also billed for a phone conversation that they stated took place between the two parties’ attorneys. When the defendant’s counsel produced evidence that the phone conversation did not take place, the court also reduced time for that billing. Therefore, the court reduced the plaintiff’s hours, but allowed the plaintiff to recover for \$3,705.20 in attorney’s fees and \$524.35 in costs.

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9TH CIRCUIT DECISIONS



FAIR DEBT COLLECTION PRACTICES ACT (STATUTE OF LIMITATIONS, IDENTIFICATION OF ORIGINAL CREDITOR & STATE COURT LAWSUIT)
Mulinix v. Unifund CCR Partners, 2008 WL 2001747 (S.D. Cal. May 5, 2008)

The defendant attempted to collect an outstanding debt owed by the plaintiff. The plaintiff filed suit against the defendant, alleging that through three of the defendant’s actions it violated the Fair Debt Collection Practices Act (FDCPA). First, the plaintiff alleged that the defendant misrepresented a debt and harassed the plaintiff through a

demand letter it sent to the plaintiff. The defendant moved to dismiss this claim, arguing that it was barred by the FDCPA one-year statute of limitations. The defendant had sent the letter in June of 2006 and the plaintiff did not file his suit until August of 2007. Accordingly, the court held that the letter could not form a basis for a claimed violation of the FDCPA because it was time-barred. The plaintiff then alleged that the defendant sent the plaintiff a validation letter, which falsely identified the original creditor. The original creditor in the validation letter was listed as the defendant, with the words “Assignee of Navy – Defending Democrac [sic].” The defendant argued that the inclusion of the Navy reference was only as a result of the slogan that the plaintiff had requested to be put on his credit card. The plaintiff challenged this logic. The court held that issues of fact remained as to the falsity of the name of the original creditor and declined to dismiss the second claim. Third, the plaintiff alleged that the defendant filed a collection lawsuit despite the plaintiff’s repeated attempts to communicate that he did not owe the debt, failed to comply with discovery requests, and then continued the lawsuit in the face of repeated demands that the lawsuit be dismissed. The plaintiff argued that the defendant only dismissed the lawsuit mere hours before the state court case was scheduled for trial. The court held that if the facts asserted by the plaintiff were true, then they could support a finding that the FDCPA was violated. Accordingly, the court denied the defendant’s motion for judgment on the pleadings.

EQUAL CREDIT OPPORTUNITY ACT & FAIR HOUSING ACT (DISPARATE IMPACT)
Ramirez v. GreenPoint Mortg. Funding, Inc., 2008 WL 2051018 (N.D. Cal. May 13, 2008)

Plaintiffs brought a class action lawsuit against the defendant, alleging various violations of the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act (FHA). The plaintiff class was defined as “all minority consumers who obtained a . . . home mortgage loan [from the defendant] . . . and who were subject to [the defendant’s] Discretionary Pricing Policy pursuant to which they paid discretionary points, fees or interest rate mark-ups in connection with their loan.” The court defined the term “minority” to include only black and Hispanic consumers. The plaintiffs argued that the defendant’s procedure of allowing brokers to deviate from a subjective loan process and impose additional subjective risk-related charges had an adverse disparate impact on minority borrowers and violated the ECOA and the FHA. The defendant filed a motion to dismiss, arguing that the FHA and the ECOA do not allow disparate impact claims. The court rejected the defendant’s argument that the U.S. Supreme Court’s decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005) prohibited disparate impact claims under

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the FHA and the ECOA. The court held that Smith does not require that a statute contain “effects” language in order to authorize disparate impact claims. The court then rejected the defendant’s argument that by attacking the cumulative effects of a subjective pricing policy by thousands of independent brokers that the plaintiffs had failed to identify a specific policy or practice that is discriminatory. The court held that the plaintiffs had singled out a subjective portion of a lending policy that allegedly relied on both subjective and objective criteria, and that they needed to do no more to meet the “specific policy or practice” requirement for stating a disparate impact claim. Therefore, the court denied the defendant’s motion to dismiss the plaintiffs’ claim.

FAIR CREDIT REPORTING ACT (BUSINESS PURPOSES & PUNITIVE DAMAGES)
Johnson v. Wells Fargo Home Mortgage, Inc., 2008 WL 2074001 (D. Nev. May 14, 2008)

The defendant bank serviced ten of the plaintiff’s home mortgage loans. The plaintiff alleged that the defendant negligently misapplied payments to other loans and because of confusion on the part of the defendant, mistakenly foreclosed on two of the plaintiff’s loans. The plaintiff then alleged that the defendant reported this information to several credit reporting agencies (CRAs). This caused the plaintiff to suffer over thirty million dollars in damages because he was precluded from acquiring mortgage loans and refinancing existing loans. Additionally, the plaintiff argued that he was forced to pay higher interest rates on various other mortgages and lines of credit because of his damaged credit. The plaintiff filed suit against the defendant, alleging various willful violations of the Fair Credit Reporting Act (FCRA). The defendant filed a motion for summary judgment, arguing that the plaintiff’s damages were not recoverable under the FCRA. The defendant argued that the plaintiff’s alleged damages resulted from the use of credit reports in connection with his business or commercial transactions, which are not consumer reports subject to the FCRA. The plaintiff countered, arguing that regardless of whether the reports were “consumer reports,” his damages were still recoverable under the FCRA simply because the defendant failed to comply with the requirements set forth under the FCRA. The court disagreed, stating that losses resulting from the use of a credit report solely for a business or commercial transaction are not recoverable under the FCRA. The court stated that without a credit report, there is not a causal connection between the plaintiff’s alleged damages and the defendant’s violation of the FCRA. The court then stated that in order for a credit report to be subject to the requirements of the FCRA, it must be a consumer report. The court discussed each of the plaintiff’s damages, determined that for the losses related to business activities the plaintiff was unable to recover

and granted the defendant’s motion for summary judgment. However, for losses related to his personal residence, personal stock investments, personal credit cards and personal lines of credit, the court denied the defendant’s motion for summary judgment to allow the plaintiff to prove, at later stages of the proceedings, that those losses came from personal uses of his credit report. Finally, the court allowed the plaintiff’s claim for punitive damages to continue because the plaintiff had presented evidence that the defendant acknowledged it had misapplied the plaintiff’s loan payment to another account and then willfully refused to correct its own error. Therefore, the court denied the defendant’s motion for summary judgment as to the plaintiff’s claimed punitive damages.

TELECOMMUNICATIONS CONSUMER PROTECTION ACT (CONSENT FOR COLLECTION CALLS TO CELLULAR PHONES)
Leckler v. Cashcall, Inc., 2008 WL 2123307 (N.D. Cal. May 20, 2008)

Plaintiff obtained a personal loan from the defendant in December of 2005 for \$2,575. When applying for the loan, the plaintiff gave the defendant various information, including her cell phone number. The Truth-in-Lending Act (TILA) disclosures indicated that the annual percentage rate on the loan was 89.91%. After the loan became delinquent, the defendant began collection activities against the plaintiff. These activities included placing calls to the plaintiff’s cellular phone using prerecorded messages and an automatic telephone dialing system. The calls used minutes from the plaintiff’s cellular phone plan. The plaintiff brought suit on behalf of herself, and others similarly situated, alleging that the defendant violated various provisions of the Telecommunications Consumer Protection Act (TCPA) by placing calls to the plaintiff’s cell phone using an autodialer and prerecorded messages without her consent. Both parties filed motions for summary judgment. The TCPA provides that it is unlawful for any person, without prior express consent, to make any call using an automated telephone dialing system to any telephone number assigned to a cellular telephone service. Both parties agreed that the question of liability under the TCPA hinged on the propriety of a ruling by the Federal Communications Commission (FCC), which clarified that autodialed and prerecorded message calls to wireless numbers provided by the called party in connection with an existing debt are permissible under the TCPA because they fall under the exception for calls made with the prior express consent of the called party. The court found that the FCC’s construction of “prior express consent,” as it is written in the TCPA was “manifestly contrary to the statute” and unreasonable because it amended the TCPA

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to provide an exception for “prior express or implied consent and “[flew] in the face of Congress’ intent.” The court disregarded the interpretation of the agency, saying that no deference is due to agency interpretations at odds with the plain language of the statute itself. Accordingly, the court granted the plaintiff’s motion for summary judgment.

FAIR CREDIT REPORTING ACT (PERMISSIBLE PURPOSE/MOTION TO STRIKE EXPERT WITNESS)

Benjamin v. Coker, 2008 WL 2163911 (D. Ariz. May 22, 2008)

Defendant, an attorney who regularly reports trade line information to credit reporting agencies (CRAs), obtained the plaintiff’s credit report and provided it to the defendant private investigator. The plaintiff brought suit against both defendants alleging that they violated the Fair Credit Reporting Act (FCRA) and other state consumer protection laws by accessing his credit report without a permissible purpose. The defendant moved for summary judgment and sought to strike the testimony of an expert because the plaintiff had failed to disclose him as an expert witness, pursuant to Rule 26(a)(2) of the Federal Rules of Civil Procedure. The court held that because the plaintiff had admitted to the court that it had failed to disclose the use of the expert witness and failed to provide an adequate excuse for its failure, any work done by the witness could not be considered in deciding the defendant’s motion for summary judgment. The court then stated that because the expert witness provided the only testimony to support the plaintiff’s contention that the defendant violated the FCRA, the plaintiff did not present adequate evidence to support a denial of summary judgment. Accordingly, the court granted the defendant’s motion for summary judgment as to the FCRA claims.

TRUTH-IN-LENDING ACT (REQUIRED DISCLOSURES & PREEMPTION)

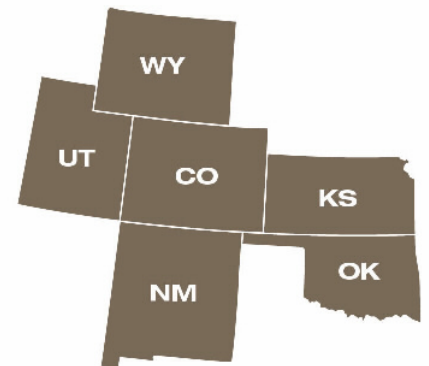
Kajitani v. Downey Savings and Loan Ass’n, F.A., 2008 WL 2164660 (D. Haw. May 22, 2008)

Plaintiffs refinanced their home mortgage loan with the defendant in August of 2006. The plaintiffs alleged that the defendant severely misled them about several terms of the loan, including the interest rate. The plaintiffs also alleged that the defendant failed to provide them with several loan documents at closing, including their necessary disclosures under the Truth-in-Lending Act (TILA). In July of 2007, the plaintiffs filed suit against the defendant, alleging various violations of the TILA and other state laws. The plaintiffs also requested rescission of their loan. The defendant filed a motion for summary judgment. The defendant first argued that the plaintiffs had failed to rebut the presumption of delivery created by

their signing acknowledgements of receipt of the necessary disclosures. The court disagreed, stating that if the plaintiffs’ own denials of receipt were not enough, that the plaintiffs had presented strong testimony by the notary public that oversaw the transaction that the defendant had only brought one set of documents to the closing and she did not have a recollection of the plaintiffs being given disclosures to take home. The defendant then argued that the plaintiffs’ state law claims should be dismissed because they were preempted by the plaintiffs’ TILA claims. While the court agreed with the defendant to an extent, it did state that any of the plaintiffs’ claims that were based upon oral misrepresentations could not be preempted by federal law. The court held that oral misrepresentations do not fall under the realm of TILA, and therefore, a state action would complement, rather than substitute, for the federal regulatory scheme. Accordingly, the court granted the defendant’s motion for summary judgment in part and denied it in part.

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10TH CIRCUIT DECISIONS



FAIR DEBT COLLECTION PRACTICES ACT (STATUTE OF LIMITATIONS, CREDITOR APPLICABILITY & ABUSIVE DEBT COLLECTION PRACTICES)

Maxwell v. Barney, 2008 WL 1981666 (D. Utah May 2, 2008)

The plaintiff never paid the defendant ambulance corporation for services rendered after she was raped. After attempting to collect the debt for several months, the defendant turned collection over to the defendant debt collector. After attempting to collect the debt for five years, the defendant debt collector sent the plaintiff a written demand for payment. The plaintiff requested validation of the debt. The debt collector sent her a copy of the ambulance ticket that included a brief statement

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regarding the plaintiff's rape, which was the reason for the trip. Upon receiving the ambulance ticket, the plaintiff claimed that she suffered severe emotional distress. The defendant debt collector then filed suit against the plaintiff to collect on the debt. The defendant attorney attached a copy of the ambulance ticket to the complaint. The plaintiff filed suit against the defendant, alleging violations of the Fair Debt Collection Practices Act (FDCPA) and other state laws. The defendant filed a motion to dismiss the FDCPA claim, alleging that the plaintiff's suit was barred by the FDCPA's one-year statute of limitations. The defendant mailed the letter containing the ambulance ticket on September 29, 2005 and the plaintiff filed her complaint on October 2, 2006. The court stated that the issue hinged on whether the statute began to run when the letter was sent, or when the letter was received. The court held that the traditional discovery rule is that a federal statute of limitations does not begin to run until the plaintiff knows or has reason to know of the existence and cause of an injury. The court stated that this could not have occurred until the plaintiff received her letter; therefore, her claim was timely brought. The defendant ambulance service next argued that it was not a debt collector under the meaning of the FDCPA, and therefore, could not be found liable under the Act. The court held that because the defendant ambulance service was not in the practice of collecting debts and did not use another name to collect its own debt, it was not liable under the FDCPA and the plaintiff could not state a claim against that particular defendant under the Act. The court then stated that even if the defendant ambulance service could be construed as a debt collector, the plaintiff had not alleged sufficient facts to support a claim of relief. The plaintiff first alleged that the defendant engaged in harassment or abuse in sending her the ambulance ticket to verify her debt. The court held that the plaintiff had requested the verification herself, and providing a receipt for services rendered did not rise to the level of the harassing, oppressive or abusive acts that are prohibited by 15 U.S.C. § 1692d. The plaintiff also alleged that the defendant had violated Section 1692f by engaging in unfair or unconscionable means of collecting a debt. The court held that none of the defendant's actions, including disclosing the ambulance ticket, resembled the prohibited acts enumerated in Section 1692f. Therefore, the court dismissed the plaintiff's claims against the defendant.

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11TH CIRCUIT DECISIONS



TRUTH-IN-LENDING ACT & HOME OWNERSHIP AND EQUITY PROTECTION ACT (JUDICIAL ESTOPPEL)

Ajaka v. Residential Funding Corp., 2008 WL 2079103 (11th Cir. May 19, 2008)

Plaintiff filed suit against the defendant, alleging various violations of the Truth-in-Lending Act (TILA) and the Home Ownership and Equity Protection Act (HOEPA). After a bench trial, the district court found that the plaintiff's claims were barred by the doctrine of judicial estoppel because he failed to reveal the claims to the bankruptcy court in his Chapter 13 wage earner case with the intent to conceal them from the court, in order to gain an unfair advantage over his creditors. The plaintiff appealed the decision to the Eleventh Circuit Court of Appeals. The court agreed with the district court, holding that it was enough that the district court found that the plaintiff had knowledge of his TILA claims well before he revealed them to the bankruptcy court and that he had affirmatively intended to conceal the claims in his bankruptcy proceeding. Accordingly, the court affirmed the district court's judgment rejecting the plaintiff's TILA and HOEPA claims.

EQUAL CREDIT OPPORTUNITY ACT (EQUITABLE TOLLING)

Robinson v. Schafer, 2008 WL 1995354 (M.D. Ga. May 6, 2008)

The plaintiff, a female squash farmer, alleged that she was harassed during several controversial transactions with her local Farmer's Home Administration (FmHA). The plaintiff appealed many of the decisions of her local FmHA, and many of the decisions were ultimately reversed. The plaintiff filed suit against the United States Department of Agriculture (USDA), alleging that these transactions violated the Equal Credit Opportunity Act (ECOA). The defendant filed a motion to dismiss, arguing that the plaintiff's entire claim should be dismissed

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because the two-year statute of limitations for ECOA claims had run. While the plaintiff conceded that none of the controversial credit transactions occurred after October 1, 2005, two years before her lawsuit was filed, she argued that the doctrine of equitable tolling should be allowed to extend the life of her claims. The plaintiff argued that equitable tolling principles should apply because many of her multiple administrative claims against the USDA were ongoing and not disposed of by Final Agency Decision until August of 2007, just two months before she filed her complaint. The court disagreed with the plaintiff's reasoning, holding that equitable tolling principles are allowed when the plaintiff is unaware of the means by which she could seek legal redress. In the instant case, the court stated that the plaintiff was aware that the district courts were an outlet to seek redress of her claims of alleged ECOA violations. The court also stated that the plaintiff had failed to cite to any authority for the proposition that exhaustion of administrative remedies is a prerequisite to filing an action in the federal courts for a violation of the ECOA. The court held that the plaintiff could have brought her claim well before the final decisions within the USDA were made. Accordingly, the court refused to apply the extraordinary remedy of equitable tolling and granted the defendant's motion to dismiss.

**FAIR DEBT COLLECTION PRACTICES ACT
(ATTORNEY REVIEW & THREAT OF LEGAL
ACTION)**

Leblanc v. Unifund CCR Partners, G.P., 2008 WL 1994980 (M.D. Fla. May 8, 2008)

The defendant debt collector purchased a credit card debt that was owed by the plaintiff. The defendant then sent the plaintiff a letter requesting payment within 35 days, informing the plaintiff that a lawsuit might be filed against him in state court and informing him of his rights under the Fair Debt Collection Practices Act (FDCPA). The letter showed a balance that the plaintiff believed was too high, and using that as his only proof, he brought suit against the defendant alleging various violations of the FDCPA. Both parties filed cross motions for summary judgment. The defendant argued that absent some sort of proof or testimony that the balance was actually too high, the plaintiff did not assert a valid claim under 15 U.S.C. § 1692e(2)(A) of the FDCPA. The court agreed, stating that the plaintiff did not demonstrate by competent evidence that the information set forth in the demand letter was false or inaccurate in any way as it pertained to the character, amount or legal status of the debt. Therefore, the court granted the defendant's motion for summary judgment as to the plaintiff's claim under Section 1692e(2)(A). The plaintiff then alleged that the defendant violated Section 1692e(3) of the FDCPA by stating in a letter that the correspondence was from the defendant's "legal

department," when none of the employees in the department were actually attorneys. The court disagreed, stating that when the letter was read as a whole, there was no particular implication that the correspondence was actually reviewed by any individual attorney. The court stated that the statement that the letter came from the "legal department" would not deceive or mislead a least sophisticated consumer and granted the defendant's motion for summary judgment as to the Section 1692e(3) claim. The plaintiff next alleged that the defendant violated Section 1692e(5) because it threatened to take legal action that it could not legally take. The plaintiff alleged that because the defendant was not actually registered to collect debts in the state of Florida, it could not bring a lawsuit within the state. The court agreed with the plaintiff, stating that when a least sophisticated consumer would read the letter as a whole, it could be seen as threatening legal action. Because the defendant could not sue in Florida to collect on the debt, the defendant violated Section 1692e(5). Therefore, the court granted the plaintiff's motion for summary judgment in regard to Section 1692e(5).

**REAL ESTATE SETTLEMENT PROCEDURES
ACT (TIMELY PAYMENT FROM ESCROW)**
Marks v. Quicken Loans, Inc., 2008 WL 2156329 (S.D. Ala. May 9, 2008)

Plaintiffs obtained a mortgage loan through the defendant mortgage company. The plaintiffs paid the defendant the required amount necessary to cover the one-year premium on the required insurance policy. The defendant was required to remit the payment to the insurance company. The plaintiffs alleged that the defendant failed to remit payment to the insurance company despite having the funds in its possession. The insurance payment was due on March 31, 2007. The defendant assigned the plaintiff's loan on February 8, 2007 to a second defendant mortgage company. Neither the defendant, nor the second mortgage company, which purchased the loan, made the insurance payment. The failure to pay resulted in a lapse in the insurance policy and ensuing damage to the plaintiffs. The plaintiffs brought suit against the defendant alleging various violations of the Real Estate Settlement Procedures Act (RESPA) and other state laws as a result of the defendant's failure to remit the proper insurance payment. The defendant filed a motion to dismiss, arguing that it was not required to make the escrow payment to the insurance company prior to its transfer of mortgage servicing responsibilities to the second mortgage company. The plaintiffs argued that the defendant was required to remit payment to the insurance company upon receiving a bill from the company on January 25, 2007. The court stated that the issue revolved around when the bill "became due" under RESPA. The court held that the bill

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did not become due until the due date of March 31, 2007, prior to transferring of loan service responsibilities to the second mortgage company. Accordingly, the court held that the plaintiff's RESPA claims were barred and granted the defendant's motion to dismiss.

**FAIR DEBT COLLECTION PRACTICES ACT
(ADEQUACY OF NOTICE)**

Gaalswyk-Knetzke v. Receivable Mgmt. Svc. Corp., 2008 WL 2224833 (M.D. Fla. May 27, 2008)

Defendant sent the plaintiff a collection letter that contained the necessary Fair Debt Collection Practices Act (FDCPA) notices. The plaintiff alleged that the notices were overshadowed by the text of the letter requesting that immediate payment be made. The plaintiff filed suit, alleging that the defendant violated various provisions of the FDCPA and other state laws. The defendant filed a motion to dismiss, arguing that the shade of ink and poor quality of paper in a collection letter is insufficient to allege a claim for overshadowing or contradicting the validation notice required by the FDCPA. The court disagreed, holding that when considering shade of ink and quality of paper, it was inappropriate for the court to determine the issue at the dismissal stage. The court stated that the issue of adequate validation notice must be postponed for a later stage in the litigation pending examination of the document. Accordingly, the defendant's motion to dismiss was denied.

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