

**MORTGAGE BANKERS
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**REGULATORY COMPLIANCE
CONFERENCE**

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LITIGATION UPDATE

By

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I. SUMMARY OF MAJOR TOPICS

- A. FCRA Litigation
- B. Ameriquest Settlement
- C. Predatory Lending & Servicing
- D. RESPA Litigation
- E. Madison County, Illinois
- F. Title/Captive Reinsurance
- G. TILA Developments
- H. Preemption Developments
- I. Wage and Hour Litigation
- J. Class Action Developments
- K. ECOA Developments
- L. HOEPA Developments
- M. State Law Developments
- N. Future Litigation

II. FCRA LITIGATION

A. Explosion of Firm Offer Class Actions

1. Over 190 cases have been filed across the country.
 - a. 154 in the Seventh Circuit.
 - b. 89 cases in the Northern District of Illinois.
2. Complaints commonly allege only claims for willful violations
 - a. For negligent violations, the FCRA allows recovery limited to actual damages, plus attorney fees. 15 U.S.C. § 1681o(a).
 - b. For willful violations, a plaintiff may elect to recover actual damages *or* statutory damages of \$100 to \$1,000, plus attorney fees and possibly punitive damages. 15 U.S.C. § 1681n(a).
 - c. Unlike other consumer protection statutes (e.g., TILA), there is no cap on the statutory damages recoverable in a class action.
3. Willful violation claims pled to avoid class certification problems inherent in having to prove actual damages on behalf of class members.
4. Depending on plaintiffs' counsel involved, and venue, complaints seek certification of either nationwide or regional classes, e.g., Illinois residents only.

B. Firm Offer Statutory Requirements

1. Under the FCRA, credit reports may be used only for specific, authorized purposes, generally in transactions initiated by the consumer whose report is used. 15 U.S.C. § 1681b(a). "Prescreened lists" are an exception. 15 U.S.C. § 1681b(c)(1)(B)(i).
2. A "prescreened list" is a list of names and addresses of consumers meeting specified credit and other criteria. Credit bureaus compile these lists for creditors and insurer, using criteria supplied by the creditor or insurer (e.g., FICO score

ranges), by accessing information from the consumers' credit reports. As a result, the creditor or insurer is treated, for FCRA purposes, as having used the credit report of each consumer on the list.

3. "Prescreened lists" may be used only to extend "firm offers of credit or insurance." 15 U.S.C. § 1681b(c)(1)(B)(i). Congress and the FRB have determined that the benefits of the "firm offer" outweigh any privacy concerns arising from compilation and use of credit information to formulate the "prescreened list." S. Rep. No. 103-209, 13-14 (1993).
4. A "firm offer of credit" is defined to mean "any offer of credit . . . that will be honored if the consumer . . . [meets] the specific criteria used to select the consumer for the offer." The definition further provides that a "firm offer credit" may be subject to three additional conditions:
 - a. The consumer completing an application.
 - b. Verification that the consumer continues to meet the credit criteria used to prescreen the consumer.
 - c. The consumer furnishing any collateral required.

15 U.S.C. § 1681a(l)(1)-(3).

5. On written communications about firm offers, a creditor must clearly and conspicuously disclose on that credit report information was used to extend the offer and that the consumer can bar use of his or her credit report in the future by a specified means. 15 U.S.C. § 1681m(d); 16 C.F.R. § 642.3.

C. **Must a Firm Offer Have a Minimum Value?**

1. Early district court cases interpreted the FCRA's definition literally: any offer that the creditor would, in fact, honor was a "firm offer" even if it was for *de minimis* amount, and without regard to whether a consumer would accept it. *See, e.g., Tucker v. Olympia Dodge of Countryside, Inc.*, 2003 U.S. Dist. LEXIS 9201 (N.D. Ill. 2003); *Tucker v. New Rogers Pontiac, Inc.*, 2003 U.S. Dist. LEXIS 13429 (N.D. Ill. 2003); *Sampson v. Western Sierra Acceptance Corp.*, 2003 U.S. Dist. LEXIS 13429 (N.D. Ill. 2003); *Kennedy v. Chase Manhattan Bank*, 369 F.3d 833 (5th Cir. 2004); *but see Putkowski v. Irwin Home Equity Corp.*,

2006 WL 741387, at *6 (N.D. Cal. 2006) (post-*Cole* decision rejecting value requirement).

2. *Cole v. U.S. Capital, Inc.*, 389 F.3d 719 (7th Cir. 2004). The Seventh Circuit reviewed a mailer which it found described an uncertain offer of at best \$300 good only toward the purchase of a new car. In that specific context, the court held that to avoid being a “sham” the “firm offer” “must have sufficient value for the consumer to justify the absence of the statutory protection of his privacy.” *Id.* at 726.
 - a. The panel found that failing to imply within the FCRA “the concept of value to the consumer upsets the balance Congress carefully struck between a consumer’s interest in privacy and the benefit of a firm offer of credit for all those chosen through the pre-screening process.” *Id.* at 726-27.
 - b. The relatively small amount of the guaranteed credit together with the requirement that it be used to buy a car raised a question of fact as to whether the offer had value to the consumer, and prevented an immediate dismissal of the complaint. *Id.* at 728.
 - c. *Cole* did not analyze whether an offer had sufficient value based on the initial mailer attached to the complaint, even though that mailer omitted material terms. Instead, the question of whether the offer had sufficient value was remanded to the district court. *Id.* (“missing terms render it *impossible for a court to determine from the pleadings* whether the offer has value.”) (emphasis added).
 - d. In remanding, the Seventh Circuit provided the following guidance: “a court must consider the *entire* offer and the effect of *all* material conditions that comprise the credit product in question. If, after examining the entire context, the court determines that the ‘offer’ was a guise for solicitation rather than a legitimate credit product, the communication cannot be considered a firm offer of credit.” *Id.*
 - e. The noted that important factors to be considered include the amount of credit offered, interest rate

charged, method of computing interest, term of the loan and other material terms and conditions of the loan. *Id.*

3. The Seventh Circuit appeared to reinforce the fact-bound holding of *Cole* in *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006).
 - a. “*Cole’s* objective was to separate *bona fide* offers of credit from advertisements for products and services” *GMAC*, 434 F.3d at 955-56.
 - b. “We held in *Cole* that a sham offer used to pitch a product rather than extend credit does not meet the statutory definition. A business that obtains consumer credit information and then offers a \$1 loan (at 100% daily interest) toward the purchase of a car has not made a “firm offer of *credit*” but has instead used credit histories to identify potential auto buyers. That objective is not allowed under the Fair Credit Reporting Act, we concluded in *Cole*.” *Id.* at 955.
 - c. *See Bonner v. CorTrust Bank, N.A.*, 2006 U.S. Dist. LEXIS 47410 (N.D. Ind. July 12, 2006) (granting defendant’s motion for judgment on the pleadings).
 - (i) “The offer has some value, and it is not a solicitation, as in *Cole*, to buy some other product. It is therefore a firm offer of credit under the FCRA.” *Id.* at *19.
 - d. *cf. Hernandez v. Chase Bank, USA, N.A.*, 429 F. Supp. 2d 983 (N.D. Ill. 2006) (holding that *Cole’s* value test applied even where no product solicitation was involved).
4. *Cole’s* interpretation of the FCRA’s firm offer definition to impliedly require a minimum value has been rejected outside Seventh Circuit.
 - a. *Putkowski v. Irwin Home Equity Corp.*, 2006 WL 741387, at *6 (N.D. Cal. 2006), dismissed firm offer complaint where HELOC offer stated a range of interest rates (from 5.6% to 16.9%) and of loan amounts (from \$15,000 to \$300,000) but also stated the term of the

loan, the maximum interest rate, the applicable fees, the amortization and collateral requirements, the payment options, the insurance requirements, and the underwriting standards. Court rejected the idea that *Cole's* valuation test was required by the language of the FCRA. Court further found that "nothing in the FCRA [prohibits] a potential lender from indicating that a responding recipient may later obtain more favorable terms than the minimum terms presented in the mailer." *Id.*

b. On appeal to the Ninth Circuit.

D. What Terms Must Be Stated in a Firm Offer mailer?

1. The statutory definition of "firm offer" says nothing about disclosing all material terms of the offer in the initial flyer sent to those on the pre-screened list.
 - a. The statutory "firm offer" definition does provide that the offer must disclose to the consumer whether any collateral is required. 15 U.S.C. § 1681a(l)(3)(B). See *Tucker v. Olympia Dodge of Countryside, Inc.*, 2003 WL 21230604, at *3 (N.D. Ill. 2003) ("[T]he only term that must be disclosed along with a 'firm offer of credit' is a creditor's demand for collateral.") (predates *Cole*). Elsewhere, the FCRA also provides that if a creditor conditions its firm offer, then in "each written solicitation" to a consumer regarding the "transaction," the creditor must disclose the fact of post-screening conditions and criteria. 15 U.S.C. § 1681m(d)(1)(C). These provisions would be superfluous if the offer had to disclose all material and final terms of a loan in the initial mailer anyway. Moreover, a creditor's right to condition firm offers on the receipt of a loan application would be especially meaningless as final terms for certain loans cannot be determined until key information not available through prescreening is directly obtained from a consumer after she responds to the initial mailer.
 - b. Must Firm Offers Be in Writing? The Federal Reserve Board has indicated that the FCRA permits a creditor to present a "firm offer of credit" entirely by

telephone. See Fed. Reserve Bd., Report to the Congress on Further Restrictions on Unsolicited Written Offers of Credit and Insurance, at 7 (Dec. 2004), *publicly available* at <http://www.federalreserve.gov/boarddocs/rptcongress/UnsolicitedCreditOffers2004.pdf>.

- c. Pricing After Contact with the Consumer: The Federal Reserve Board report indicates that “[p]rescreened solicitations for insurance generally do not contain complete pricing information tailored to a consumer because it is difficult to set the price of insurance solely based on information in CRA files. . . . The insurance company must obtain [information about the property or life to be insured] through some sort of further contact with the recipient of a prescreened solicitation before the underlying insurance price can be specified completely.” FRB Report, at 30. Since the FCRA contains only one definition of “firm offer,” applicable alike to offers of credit and to offers of insurance, a creditor should be able to make a “firm offer” without stating full pricing information in the mailer, if an insurer can do so.
- d. FCRA comprises only a single subchapter in the Consumer Credit Protection Act. The first subchapter in the Act, entitled “Consumer Credit Cost Disclosure,” is commonly known as the Truth In Lending Act, or TILA. 15 U.S.C. § 1601 *et seq.* As its subchapter name implies, it is in TILA that Congress has specified what, how and when consumer credit terms and their attendant costs must be disclosed in connection with applications for and solicitations to extend credit.
- e. *Cole* did not decide the value question on basis of mailer before it, but instead remanded question of sufficient value to district court. 389 F.3d at 722, 728.

2. Nevertheless, several decisions within the Seventh Circuit after *Cole* and *GMAC* appear to equate the initial mailer with the “firm offer,” and to limit the FCRA compliance inquiry to the contents of an the initial mailer, mistakenly relying on “four corners” language from *GMAC*.
 - a. *Kudlicki v. Farragut Fin. Corp.*, No. 05 C 2459 slip op. at 1 (N.D. Ill. Jan. 20, 2006). Characterizing as “a position with doubtful merit” defendant’s argument that “circumstances outside the contents of the mailer are relevant to a determination of whether defendant has extended a ‘firm offer of credit.’”
 - b. *Murray v. Finance America, LLC*, No. 05 C 1255 No. 05 C 1255, 2006 U.S. Dist. LEXIS 15850 (N.D. Ill. April 4, 2006). Mailer stating no terms was not “firm offer.” Lender’s “argument that circumstances outside of the letters make the letters ‘firm offers of credit’ does not save the day because the Seventh Circuit instructs that courts ‘need only determine whether the four corners of the offer satisfy the statutory definition.’”
 - c. *Murray v. Sunrise Chevrolet, Inc.*, 2006 U.S. Dist. LEXIS 55336 (N.D. Ill. July 31, 2006). Interpreting “four corners” literally as indicating that the court looks only to see if all material terms are disclosed in the initial mailer.
3. These decisions ignore:
 - a. The plain language of the FCRA;
 - b. The role of TILA in regulating the timing, manner and content of communications about credit costs to consumers;
 - c. *Cole’s* holding; and
 - d. The meaning of *GMAC’s* “four corners” language.
 - (i) The question whether all the terms of a “firm offer of credit” must be included in the mailer was never presented in *GMAC*. Instead, in opposition to class certification the defendant argued that the value of the offered credit

product had to be judged subjectively from the standpoint of each consumer. The Seventh Circuit rejected that argument, holding: “We do not read *Cole*, however, to require a consumer-by-consumer evaluation. An offer has value to “the consumer” if it is useful to the *normal* consumer.” *GMAC*, 434 F.3d at 955-56 (internal citation omitted) (emphases and alterations in original).

- (ii) The court later restated this objective, rather than subjective, standard: “To decide whether [defendant] has adhered to the statute, a court need only determine whether *the four corners of the offer* satisfy the statutory definition (as elaborated in *Cole*), and whether the terms are honored when consumers accept.” *Id.* at 956 (emphasis added). In other words, it is the credit offered, not the borrower’s reaction to the mailer, that is the object of the *Cole* value analysis.
- (iii) *GMAC* reaffirmed *Cole*’s instruction that a court must consider the *entire* offer and the effect of “*all* the material conditions that comprise the credit product in question.” *Id.*

4. Other courts disagree that the FCRA requires the compliance analysis to turn on the contents of the initial mailer alone.

a. *Soroka v. Homeowners Loan Corp.*, 2006 U.S. Dist. LEXIS 38847 (M.D. Fla. June 12, 2006) (granting defendant’s motion to dismiss).

- (i) Rather than focusing on the information disclosed in the initial contact with the consumer, the *Soroka* court pointed out, “the definition of ‘firm offer of credit’ within the FCRA *contemplates an ongoing process of exchange of information and verification.*” 2006 U.S. Dist. LEXIS 38847, at *14 (emphasis added).

- (ii) It found that a mailer whose missing terms were conditioned on factors – the submission of application information and the right to verify that the consumer’s credit still met the preselected criteria – which “parallel” the FCRA’s statutory conditions, could not be the basis for a violation of the FCRA. *Id.*, at *13.
 - (iii) Court specifically “concluded that the later supplementation of material terms is permissible” under the FCRA. *Id.*, at *14. This is consistent with the Fifth Circuit, which examined the term “firm offer of credit” and agreed that it “really means a firm offer if you meet certain criteria” based on a review of information obtained after “the consumer responds.” *Kennedy v. Chase Manhattan Bank USA, NA*, 369 F.3d 833, 841 (5th Cir.), *cert. denied*, 543 U.S. 995 (2004) (internal quotation marks omitted).
 - (iv) The omission of terms from the mailer, the court held, “does not mean that the offer is without value; it means only that more information must be provided before a consumer can evaluate with certainty how much value the offer has.” *Id.*, at *10. Given that the mailer invited the consumer to call the lender or visit the lender’s website to follow up, the court found that “the material terms were ascertainable with minimal effort.” *Id.*, at *13. Such an offer could not be characterized as a “sham,” according to the court, which then dismissed the complaint. *Id.*
- b. *Hernandez v. Chase Bank, USA, N.A.*, 429 F. Supp. 2d 983 (N.D. Ill. 2006) (“defendants may be correct that the criteria used to determine the specifics of the offer need not be disclosed on the face of the mailer”).

E. **Willfulness Under the FCRA**

1. Circuits Split on Standard for Willfulness.

a. Sixth, Seventh and Eighth Circuits require proof on an intentional act which defendant knows to violate the FCRA.

(i) *Phillips v. Grendahl*, 312 F.3d 357, 370 (8th Cir. 2002) (“Willful noncompliance under section 1681n requires knowing and intentional commission of an act the defendant knows to violate the law”).

(ii) *Wantz v. Experian Info.Solutions*, 386 F.3d 829, 834 (7th Cir. 2004) (quoting Phillips, and holding: “To act willfully, a defendant must knowingly and intentionally violate the [FCRA], and it ‘must also be conscious that [its] act impinges on the rights of others.’”).

(iii) *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998) (actual belief of legality sufficient to defeat willfulness liability under FCRA).

b. Third and Ninth Circuits allow finding of willful liability where defendant has exhibited "reckless disregard" for whether an act violates the FCRA.

(i) *Cushman v. Trans Union Corp.*, 115 F.3d 220, 227 (3d Cir. 1997) (willful means “either knowing that [a] policy [is] in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy contravened those rights.”).

(ii) *Reynolds v. Hartford Financial Services Group, Inc.*, 426 F.3d 1020, 1037 (9th Cir. 2005) (adopting *Cushman* standard).

(a) A company will not have acted in reckless disregard of a consumer’s rights if it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct

legal meaning of the statute and has thereby come to a tenable, albeit erroneous, interpretation of the statute. 435 F.3d at 1099.

- (b) Neither a deliberate failure to determine the extent of its obligations nor reliance on “creative lawyering that provides indefensible answers” will ordinarily be sufficient to avoid a conclusion that a company acted with willful disregard of FCRA’s requirements. Reliance on such implausible interpretations may constitute reckless disregard for the law and therefore amount to a willful violation of the law. *Id.*
- (c) Where at least some of the interpretations are implausible, consultation with attorneys may provide evidence of lack of willfulness, but is not dispositive. Whether or not there is willful disregard in a particular case may depend in part on the obviousness or unreasonableness of the erroneous interpretation. In some cases, it may also depend in part on the specific evidence as to how the company’s decision was reached, including the testimony of the company’s executives and counsel. *Id.*
- (d) Note: The opinion at 435 F.3d 1081 was the Ninth Circuit’s third in the same case. In the prior opinions, the majority had concluded as a matter of law that the defendants’ violations were “willful.” Both of those iterations had provoked requests for *en banc* review, support by amici submissions. In the final opinion, the Ninth Circuit remanded the case to the district court for further evidentiary development.

- c. Petition for *certiorari* pending in *Reynolds*, based in part on circuit split over meaning of willfulness under the FCRA.
2. Courts have recognized that willfulness is a fact-intensive issue that requires more than a showing that the defendant violated the FCRA.
 - a. *Murray v. New Cingular Wireless*, No. 04 C 7666 (N.D. Ill. May 22, 2006).
 - (i) Although court found Cingular's mailer violated the FCRA' "clear and conspicuous" disclosure requirement, court entered summary judgment for Cingular because plaintiff presented no evidence that Cingular knowingly and intentionally violated the statute.
 - (ii) Court noted that defendant did not act in the face of any clear notice that "its actions might be wrongful." Court underscored that the FCRA did not provide specific guidelines for compliance and that the *Cole* decision's guidance was "fluid" rather than a bright line test.
 - b. *Murray v. Finance America, LLC*, No. 05 C 1255, No. 05 C 1255, 2006 U.S. Dist. LEXIS 15850 (N.D. Ill. Apr. 4, 2006).
 - (i) Even though court held that mailer which failed to disclose terms of the offer violated the FCRA, plaintiff was not entitled to summary judgment on willfulness-on that basis alone.
 - (ii) Court found issue of fact existed n light of evidence that the mailer had been reviewed and approved by the lender's marketing director, in-house counsel, chief operating officer, as well as a third-party vendor and the credit reporting agency.

F. **Class Certification of Firm Offer Claims**

1. The Seventh Circuit rejected many arguments against class certification in *GMAC*, 434 F.3d 948. The Court of Appeals held:
 - a. Class certification should not be denied just to avoid imposing “ruinous” statutory damages. “[I]t is not appropriate to use procedural devices to undermine laws of which a judge disapproves. . . . An award that would be unconstitutionally excessive may be reduced, but constitutional limits are best applied after a class has been certified. Then a judge may evaluate the defendant’s overall conduct and control its total exposure. Reducing recoveries by forcing everyone to litigate independently – so that constitutional bounds are not tested, because the statute cannot be enforced by more than a handful of victims – has little to recommend it.” *Id.* at 953; accord *Ashby v. Farmers Ins. Co.*, 2004 WL 2359968, at *8 (D. Or. 2004); see contra *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 234-35 (9th Cir. 1974); *Wilcox v. Commerce Bank*, 474 F.2d 336, 341-47 (10th Cir. 1973); *Ratner v. Chem. Bank New York Trust Co.*, 54 F.R.D. 412, 414-16 (S.D.N.Y. 1972).
 - b. *Cole*’s value requirement is measured objectively by its usefulness to the reasonable consumer, and so does not require individualized inquiries into whether each class member found the offer valuable. “Nothing in *Cole* requires an offer’s value to be assessed *ex post*, and recipient by recipient. To decide whether [the creditor] has adhered to the statute, a court need only determine whether the four corners of the offer satisfy the statutory definition (as elaborated in *Cole*), and whether the terms are honored when consumers accept. These questions readily may be resolved for a class as a whole.” *Murray v. GMAC Mortgage Corp.*, 434 F.3d at 956.
2. Both before and after *GMAC*, courts elsewhere have rejected the notion that claims for willful FCRA violations are properly certified.

- a. *Preston v. Mortgage Guar. Ins. Co.*, No. 5:03-cv-111, 2004 U.S. Dist. LEXIS 28914, at *12 (M.D. Fla. June 22, 2004) (Hodges, J.) (denying certification of FCRA class action on predominance grounds where plaintiff sought to elect statutory damages on behalf of all class members. Court noted that, at a minimum, due process required consideration of actual damages suffered by each class member in order to set statutory damage within the \$100 to \$1,000 range).
 - b. *Glatt v. PMI Group, Inc.*, No. 2:03-cv-326, 2004 U.S. Dist. LEXIS 28927, at *15-17 (M.D. Fla. Sept. 7, 2004) (Steele, J.) (plaintiffs could not adequately represent the class by electing under a willful violation claim to forgo the actual damages recovery on behalf of the entire class in favor of statutory damages because such an election created an inherent conflict between the named plaintiffs (who alleged no actual injury) and the putative class members).
 - c. *Dutta v. Safeco Ins. Co.*, No. CV 04-1327, slip op. at 6 (C.D. Cal. Feb. 28, 2006) (Carney, J.) (Even after *GMAC*, the court refused to certify class where plaintiff in FCRA action sought only statutory damages, because such election “may adversely impact” putative members with actual damages greater than the statutory maximum).
3. Numerous state-wide firm offer classes certified within the Seventh Circuit:
- a. *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006).
 - b. *Kudlicki v. Farragut Fin. Corp.*, No. 05-C-2459 (N.D. Ill. Sept. 29, 2005) (Lindberg, J.).
 - c. *Murray v. New Cingular Wireless Servs., Inc.*, 232 F.R.D. 295 (N.D. Ill. Nov. 17, 2005) (Castillo, J.).
 - d. *Murray v. Cingular Wireless II, Inc.*, No. 05 C 1334 (N.D. Ill. Dec. 22, 2005) (Manning, J.).
 - e. *Tremble v. Ocean Bank*, No. 05-C-2624 (N.D. Ill. Mar. 21, 2006) (St. Eve, J.).

- f. *Murray v. Sunrise Chevrolet, Inc.*, No. 04-C-7668, No. 04 C 7668 (N.D. Ill. Mar. 30, 2006) (Coar, J.).
- 4. Cost of Class Notice. FCRA actions seek damages and therefore are certified under Fed. R. Civ. P. 23(b)(3). Class notice is mandatory in (b)(3) class actions. Fed. R. Civ. P. 23(c)(2)(B).

G. Firm Offer Class Settlements.

- 1. Seventh Circuit also opined in dictum about class settlements in *GMAC*, 434 F.3d at 952.
 - a. Edelman had agreed to a \$950,000 settlement, the individual plaintiffs to receive a \$3,000 incentive payment, Edelman to take his attorney fees from the settlement fund, the remainder to be distributed to those of the 1.2 million class members who filed claims. *Id.*
 - b. Judge Easterbrook commented: “The payment of \$3,000 to [the named plaintiff] is three times the statutory maximum, while others don’t get even the \$100 that the Act specifies as the minimum. . . . Such a settlement is untenable. We don’t mean by this that all class members must receive \$100 . . . [b]ut if the reason other class members get relief worth about 1% of the minimum statutory award is that the suit has only a 1% chance of success, then how could Murray personally accept 300% of the statutory maximum? And, if the chance of success really is only 1%, shouldn’t the suit be dismissed as frivolous and no one receive a penny? If, however, the chance of success is materially greater than 1%, as the proposed payment to Murray implies, then the failure to afford effectual relief to any other class member makes the deal look like a sellout.” *Id.*
- 2. *IndyMac* Settlement.
 - a. In *Murray v. IndyMac Bank*, a 16 million member class was settled for \$1.6 million, \$330,000 of which was to be paid to Edelman in attorney fees, the rest distributed to class members who submitted a valid

claim form. Class notice had been sent by mail to the recipients of only the most recent mailer, with the remaining class members receiving publication notice.

- b. Although the district court had granted final approval of the settlement, it later vacated that judgment when proposed interveners (represented by competing plaintiffs' counsel) objected to the failure to send notice by mail to each class member. *Murray v. IndyMac Bank*, No. 1:04-CIV-07669 (N.D. Ill. Feb. 28, 2006) (order granting relief from judgment).
 - c. After the settlement fell through, the parties litigated the permissibility of certifying a significantly reduced class of approximately 18,000 consumers.. On August 7, 2006, Judge Der-Yeghiayan certified that class.
3. No Major Settlements. Only small companies, small classes have settled.

H. **Clear, Conspicuous Disclosure Claims**

1. *Cole v. U.S. Capital, Inc.*, 389 F.3d 730-31:
 - a. Acknowledged there was then little guidance as to what would comply with 15 U.S.C. § 1681m(d)'s requirement of "clear and conspicuous" disclosures about use of credit reports and the consumer's opt-out option, but held that the disclosures must be distinguished in some way (different type, color, etc.) so that a reasonable consumer's attention will be drawn to them *Id.* at 730-31.
 - b. Small type on the back of the mailer in the midst of a paragraph of type about other matters did not suffice. *Id.* at 731.
2. Effective August 2005, the FTC has issued clarifying regulation as to what is required and provided safe harbor standard forms. 16 C.F.R. § 642.3; 70 Fed. Reg. 5034, 5035 (Jan. 31, 2005).
3. No Private Right of Action: The FACT Act ("FACTA") has eliminated the right to sue over violations of section 1681m,

including alleged failures to provide sufficiently clear and conspicuous disclosures of the prescreen opt-out right.

- a. Effective December 1, 2004, FACTA added 15 U.S.C. § 1681m(h)(8), which provides that the FCRA's civil remedies sections (15 U.S.C. §§ 1681n, 1681o) do not apply to a person's failure to comply "with this section," and that the section shall instead be enforced solely by federal administrative agencies.
- b. Decisions have since almost uniformly held that FACTA eliminated the right to bring private civil actions for failure to give the "clear and conspicuous" disclosures required by section 1681m(d), as to transactions occurring after Dec. 1, 2004. E.g., *Putkowski v. Irwin Home Equity Corp.*, 2006 WL 741387, at *7 (N.D. Cal. 2006); *White v. E-Loan, Inc.*, 409 F. Supp. 2d 1183, 1184-87 (N.D. Cal. 2006); *Murray v. Cross Country Bank*, 399 F. Supp. 2d 843, 844 (N.D. Ill. 2005); *Murray v. Household Bank*, 386 F. Supp. 2d 993, 996-99 (N.D. Ill. 2005).
- c. In dictum the Seventh Circuit has suggested that FACTA did not bar actions based on offers mailed sent before the section's effective date of Dec. 1, 2004. *Murray v. GMAC Mortgage Corp.*, 434 F.3d at 951; see also, *Fisher v. Finance America, LLC*, No. SACV 05-0888 (C.D. Cal. Jan. 24, 2006) (following GMAC dictum and Ninth Circuit case law to hold that right to sue exists for an alleged disclosure violation predating effective date, because to hold otherwise would create impermissible retroactive effects); *Phillips v. New Century Fin. Corp.*, 2006 WL 517653, at *5-7 (C.D. Cal. Mar. 1, 2006) (same).
- d. But in *Killingsworth v. Household Bank (SB) N.A.*, 2006 U.S. Dist. LEXIS 4050 (N.D. Ill. Jan. 31, 2006) and slip op. at 2 (N.D. Ill. Feb. 28, 2006) (denying reconsideration) the court found that GMAC's statements about the application of FACTA were dictum. Court further held that, even though the alleged disclosure violation predated FACTA's effective date, dismissing complaint filed after such

date is applying FACTA prospectively, and not retroactively.

- e. In *Crowder v. PMI Mortgage Insurance Co.*, No. 2:06cv0114 (M.D. Ala. May 26, 2006), the court relied on a savings clause in the FACTA amendment (a provision not considered by most prior decisions in this area) wherein Congress signaled its intent to preserve prior FCRA provisions bearing on liability as of the date of FACTA's amendment – December 1, 2003. The court reasoned, “[g]iving Congress the benefit of any doubt about its ability to distinguish the date of enactment from the effective date, the logical inference to be drawn is that Congress intended to bar private civil actions filed *after* the relevant effective date (1 December 2004) when the conduct occurred *after 3 December 2003.*” *Id.* at 8.

I. Pending Firm Offer Appeals

- 1. *Perry v. First National Bank* (7th Cir.): Complaint only asserted disclosure violation under 15 U.S.C. § 1681m. District court ruled no private right of action for disclosure claim and then denied leave for the plaintiff to amend complaint to add new claim of no firm offer.
 - a. Issues on appeal:
 - (i) Whether FACTA eliminated a private right of action for alleged violations of section 1681m; and
 - (ii) Whether the firm offer claim was futile because the disputed mailer contained terms indicating that it met the *Cole* value test.
 - b. Other issues *Perry* might decide:
 - (i) Whether all material terms of a firm offer must be stated in initial mailer; and
 - (ii) Whether *Cole* is limited to facts where the firm offer was made in connection with the sale of some other product, *e.g.*, automobiles.

2. *Killingsworth v. Household Bank* (7th Cir.): Complaint only asserted disclosure violation under 15 U.S.C. § 1681m. District court ruled no private right of action and that applying FACTA to disclosure claim predating effective date, but asserted in complaint filed after such date, is applying FACTA prospectively, and not retroactively. Issues on appeal include whether applying FACTA here creates impermissible retroactive effects. Other issues on appeal may include whether private right of action exists for alleged violation of section 1681m.
3. *Putkowski v. Irwin Mortgage Corp.* (9th Cir.). District Court dismissed typical challenge, rejecting argument that change in terms notice in mailer voided firm offer. Moreover, after carefully reviewing the statute, court concluded that “[t]he text of the FCRA does not support plaintiffs’ suggestion that a firm offer of credit cannot contain a range of credit or interest rates, or that it must be of sufficient ‘value’ when judged by a later arbiter, as suggested by the Seventh Circuit in *Cole*.”
 - a. Issue on appeal is whether *Cole*’s analysis, which implied the term “value” within the FCRA’s definition of firm offer of credit, will be followed elsewhere and applied to pure offers of credit.
 - b. Schedule: Plaintiffs filed opening brief August 6, 2006 (no supporting amicus briefs followed. Irwin’s answering brief is due Sept. 11, 2006. Industry amicus support is expected. Plaintiffs reply brief is due by end of September. Argument will likely occur in early 2007, and a decision will likely take another 3-6 months, maybe more.

J. **Statute of Limitations:** The FACTA lengthened the FCRA’s statute of limitations *from* two years from the date of violation with no delayed discovery tolling, *TRW Inc. v. Andrews*, 534 U.S. 19 (2001), to two years from the date of discovery or five years from the date of the violation. 15 U.S.C. § 1681p.

K. The Expansion of Adverse Action Litigation

1. The Rise of the “Catch-all” Definition
 - a. Because the FCRA applies separate definitions of Adverse Action keyed to the type of transaction for which a consumer report is used, the lending industry has looked to section 603(k)(1)(A) for the definition of Adverse Action in credit transactions.
 - b. FCRA Credit Definition Borrows from ECOA
 - (i) Section 603(k)(1)(A) states that “[t]he term ‘adverse action’ has the same meaning as in section 701(d)(6) of the Equal Credit Opportunity Act.” 15 U.S.C. § 1681a(k)(1)(A).
 - (ii) Adverse Action under the ECOA “means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested.” 15 U.S.C. § 1691(d)(6).
 - (iii) Regulation B further refines and narrows Adverse Action in credit transactions to mean “a refusal to grant credit in substantially the amount or on substantially the terms requested in an application unless the creditor makes a counteroffer (to grant credit in a different amount or on other terms) and the applicant uses or expressly accepts the credit offered.” 12 C.F.R. § 202.2(c).
 - (iv) Key Elements:
 - (a) Conduct taken in response to an application;
 - (b) Either denial/revocation of credit on terms requested; and
 - (c) Borrower does not accept credit. If he/she accepts, the counteroffer

exception applies, and no Adverse Action occurs.

c. *Treadway v. Gateway Chevrolet Changes the Rules*

- (i) The FCRA was amended in 1996 to add a broader “catch-all” definition of Adverse Action, which means “an action or determination that is . . . made in connection with an application that was made by, or a transaction that was initiated by, any consumer” and that is “adverse to the interests of the consumer.” 15 U.S.C. § 1681a(k)(1)(B)(iv)(I)-(II).
- (ii) Although the lending industry had reasonably believed that the broader catch-all definition did not apply to credit transactions, *Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971 (7th Cir. 2004), has changed that dramatically.
 - (a) The Seventh Circuit *sua sponte* found that the catch-all definition would apply, despite the undisputed nature of the transaction as dealing with an application for credit.
 - (b) *Gateway* announced that “[t]he FCRA defines ‘Adverse Action’ more broadly than does the ECOA” because it “starts with the ECOA definition but also includes a ‘catch-all’ phrase.”
 - (1) The Seventh Circuit repeatedly brushed aside defenses under the credit definition for Adverse Action, pointing to the lack of similar limitations in the catch-all definition.
 - (2) Following the Seventh Circuit’s opinion, the parties settled.

d. *Gateway* Has Spawned Even More Troubling Decisions

- (i) *Crane v. American Home Mortgage Corp.*, 2004 U.S. Dist. LEXIS 12770 (E.D. Pa. 2004): Plaintiff alleges that prequalification for a home loan was not provided at lender's most favorable rates because of information in plaintiff's credit report. The court rejected lender's defense that because plaintiff never applied, no Adverse Action occurred. Instead, the court found that the "catch-all" applied and contained no application limitation. The court noted that while the definition of Adverse Action for credit transactions found in ECOA was limited to conduct taken in response to applications, "Congress intended to define 'Adverse Action' in the FCRA more broadly than in the ECOA." This case settled after plaintiff missed the deadline to file for class certification.
- (ii) *Barnes v. DiTech.com*, 2005 WL 913090 (E.D. Pa. 2005): Following *Crane*, lender took adverse action by offering plaintiff home equity loan at a less favorable interest rate based on his credit score.
- (iii) *Thomas v. Cendant Mortgage*, 2004 WL 2600772 (E.D. Pa. 2004): Plaintiff applied for VA loan. He did not qualify for that loan, but Cendant offered to try to find him another loan based on a more complete credit report. Ultimately, it denied him another loan and sent him an Adverse Action Notice then. Question was whether Cendant should have sent adverse action letter after earlier turndown for VA loan. Cites and follows *Gateway* on application of catch-all provision to credit transactions.
- (iv) *Karwo v. CitiMortgage, Inc.*, 2004 WL 2033445 (N.D. Ill. 2004) (order denying motion to dismiss); 2005 WL 67640 (N.D. Ill. 2005) (order denying motion to reconsider): Plaintiff applied for, and received, a home loan

conditioned upon private mortgage insurance. PMI was offered, but not at lowest rate. Although neither party had raised the catch-all definition, the court denied CitiMortgage's motion to dismiss, relying on *Gateway* to hold that the catch-all provision applied to Adverse Action claims, even in the insurance context. CitiMortgage moved for reconsideration, arguing that the catch-all provision does not apply. In response, the court appeared to back away from reliance on the catch-all, but nevertheless found that plaintiff had stated a claim under the insurance prong of the FCRA.

- e. *Gateway* and Progeny Were Wrongly Decided
 - (i) Eviscerates the transaction-specific definitions of Adverse Action for credit transactions, insurance transactions, employment decisions, and government benefits in favor of the catch-all definition.
 - (ii) Contrary to guidance from Federal Trade Commission:
 - (a) The 2001 FTC staff letter from Laura D. Berger to Elias Latour looked exclusively to the credit definition in addressing whether a company is required to provide a FCRA Adverse Action notice when it approves an application for credit at the highest rates offered.
 - (b) The FTC chairman testified on July 9, 2003, that "[c]urrently, the definition of 'Adverse Action' for credit transactions is imported into the FCRA from the [ECOA]."
 - (iii) Contrary to the recent Fair and Accurate Credit Transactions Act (FACTA) amendments: Because FACTA provides Adverse Action notices for risk-based pricing, this would be

unnecessary if the catch-all definition already applied to credit transactions.

- (iv) Wrong legislative history: The courts applying the catch-all definition relied extensively on the legislative history for a proposed amendment which defined “Adverse Action” more broadly than the definition ultimately enacted. *Crane*, 2004 U.S. Dist. LEXIS 12770, at *6. Correct legislative history further weakens application of catch-all to credit transactions.

2. Troublesome Decision by Ninth Circuit Threatens to Expand Scope and Burdens of Adverse Action Obligations

- a. *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081 (9th Cir. 2006). The heart of the adverse action issue turned on whether the setting of an initial rate could be considered an “increase in any charge” as required under the adverse action definition applicable to insurance transactions. 15 U.S.C. § 1681a(k)(1)(B)(i). The district court agreed with the insurers that the plain meaning of that phrase presupposed a rate change, and found that it could not apply to the initial premium.
- b. Adverse Action:
 - (i) The Ninth Circuit reversed the district court and concluded that the setting of an initial insurance rate could just as easily constitute adverse action as a subsequent rate change to an existing policy.
 - (ii) The court also held that denying insurance to an individual as to whom the credit reporting agency has said it did not have sufficient information to produce a score (a “no hit”) also qualifies as adverse action. They reached that conclusion despite the statutory language limiting adverse action to the use of “information contained in a consumer [credit] report.”

- c. Joint and Several Liability:
 - (i) Different affiliated entities allegedly pulled the credit report, priced the insurance, and issued the policy.
 - (ii) The court held as a matter of law that all affiliated entities involved with the consumer could be held liable for failing to send an Adverse Action Notice. On a positive note, in response to the claim that joint and several liability would provoke multiple and confusing notices to the consumer, the court clarified that only one Adverse Action Notice had to be issued in order to discharge the FCRA notice obligation of all responsible companies.
- d. Adequacy of Adverse Action Notices:
 - (i) The court added new requirements for the content of an Adverse Action Notice to be deemed adequate.
 - (ii) The court stated that the Adverse Action Notice must not only communicate to the consumer that adverse action was taken, but also “describe the action” and “specify the effect of the action upon the consumer.” 435 F.3d at 1094-95.
 - (iii) Unclear what a user of credit reports must actually state based on the court’s wording, particularly with respect to the effect on the consumer.
- e. Willfulness:
 - (i) The court adopted the less strict standard for proving willful FCRA violations. It opted to follow the Third Circuit, which requires either a knowing violation of FCRA or a “reckless disregard” for whether a policy was violative of FCRA.

- (ii) A company will not have acted in reckless disregard of a consumer's rights if it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has thereby come to a tenable, albeit erroneous, interpretation of the statute. 435 F.3d at 1099.
- (iii) Neither a deliberate failure to determine the extent of its obligations nor reliance on "creative lawyering that provides indefensible answers" will ordinarily be sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirements. Reliance on such implausible interpretations may constitute reckless disregard for the law and therefore amount to a willful violation of the law. *Id.*
- (iv) Where at least some of the interpretations are implausible, consultation with attorneys may provide evidence of lack of willfulness, but is not dispositive. Whether or not there is willful disregard in a particular case may depend in part on the obviousness or unreasonableness of the erroneous interpretation. In some cases, it may also depend in part on the specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel. *Id.*
- (v) Note: The opinion at 435 F.3d 1081 was the Ninth Circuit's third in the same case. In the prior opinions, the majority had concluded as a matter of law that the defendants' violations were "willful." In the final opinion, the Ninth Circuit remanded the case to the district court for further evidentiary development.
- (vi) As mentioned above, Reynolds is the subject of a pending petition for certiorari.

L. MORTGAGE INSURANCE LITIGATION

1. Cluster of Cases:
 - a. *Preston v. MGIC* (M.D. Fla.)
 - b. *Glatt v. PMI Mortgage Ins. Co.* (M.D. Fla.)
 - c. *Price v. United Guaranty Residential Ins. Co.* (N.D. Tex.)
 - d. *Broessel v. Triad Guaranty Ins. Group* (W.D. Ky.)
 - e. *Whitfield v. Radian Guaranty Inc.* (E.D. Pa.)
 - f. *Portis v. G.E. Mortgage Ins. Corp.* (N.D. Ill.)
 - g. *Karwo v. CitiMortgage, Inc.* (N.D. Ill.)
 - h. *Hogan v. PMI Mortgage Ins. Co.* (N.D. Cal.)
2. Plaintiffs allege insurers charged them higher mortgage insurance premiums based on information contained in credit reports without providing Adverse Action notices
3. Initial cases brought claims against both MI companies and lenders under FCRA and state UDAP statute
 - a. Plaintiffs largely concede they have no claim if transactions are characterized as falling under FRCA's "credit" provisions instead of the "insurance" provisions.
 - b. Definition of Adverse Action in credit transactions provides a "counteroffer exception." More specifically, for credit transactions the FCRA was understood to borrow the Adverse Action definition found under the ECOA (*but see* discussion in section II.A above).
 - (i) ECOA defines Adverse Action to "mean[] a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested." 15 U.S.C. § 1691(d)(6).

- (ii) The Federal Reserve's regulations interpreting the ECOA definition further state:
- (iii) The term [adverse action] means . . . a refusal to grant credit in substantially the amount or on substantially the terms requested in an application unless the creditor makes a counteroffer (to grant credit in a different amount or on other terms) and the applicant uses or expressly accepts the credit offered. 12 C.F.R. § 202.2(c).

4. Dispositive Motions

a. *Preston v. MGIC*

- (i) MGIC moved to dismiss and argued that provision of mortgage insurance should be characterized as part of a "credit transaction," and that because plaintiffs accepted terms of credit offered, no "Adverse Action" occurred.
- (ii) MGIC also argued that even if analyzed under FCRA's "insurance" prong, the setting of an initial premium does not qualify as an "increase in charge" for insurance requiring Adverse Action notices.
- (iii) Lender argued that, if any party is responsible for Adverse Action notices, it is the MI company that priced the insurance based on credit report. MGIC responded that only the party with the contractual relationship with the borrower (*i.e.* the lender) would have the disclosure obligation.
- (iv) Court refused to dismiss, and suggested that the challenged action might properly be analyzed under FCRA as an "insurance transaction."

- b. *Glatt v. PMI*
 - (i) PMI moved to dismiss and argued that the disputed transaction should be considered a “credit transaction” for purposes of FCRA liability, and that the setting of an initial rate is not an “increase in charge” requiring Adverse Action notices under FCRA’s insurance provisions.
 - (ii) Court deferred decision on whether the transaction should be considered “credit” or “insurance,” finding the issue to be too factually intensive to decide at the outset of the case.
- c. *Broessel v. Triad*: Motion for summary judgment denied
- d. *Whitfield v. Radian*: Motion for summary judgment granted
- e. *Karwo v. CitiMortgage, GEMICO*.
 - (i) CitiMortgage moved to dismiss and argued that it could not have taken Adverse Action because only insurer, not lenders, can take Adverse Action under the FCRA with respect to insurance premiums.
 - (ii) CitiMortgage also argued that under the definition of Adverse Action applicable to insurance, charging more than the lowest premium available is not an Adverse Action.
 - (iii) Court denied the motion after *sua sponte* applying the “catch-all” definition of Adverse Action. Following a motion for reconsideration, the court clarified that it was allowing the claim to proceed under the FCRA’s insurance prong. (See discussion in section II.A.1.d(ii), above)

5. Key Appeal: *Whitfield v. Radian Guaranty Inc.*
 - a. Threshold issue is what definition of adverse action to employ (credit v. insurance)
 - b. Radian argues that the FCRA does not apply because mortgage insurance is a commercial transaction between lender and insurer, so Radian could not have taken adverse action “with respect to a consumer” within the meaning of 15 U.S.C. section 1681m(a).
 - c. FTC filed an amicus brief, urging reversal of grant of summary judgment for Radian, in which the FTC argues that:
 - (i) Pricing of mortgage insurance must be analyzed under insurance prong;
 - (ii) Increasing initial premium based on information derived from credit report (*i.e.*, FICO scores) constitutes adverse action; and
 - (iii) Radian’s permissible purpose for obtaining credit scores was to “underwrit[e] insurance involving a consumer” per 15 U.S.C. section 1681b(a)(3)(C), and so its actions were also “with respect to a consumer” for purposes of the FCRA’s adverse action provision.
 - d. MBA and MICA filed an amicus supporting affirmance of district court outcome, in which they argue that:
 - (i) Mortgage insurance is an integral part of credit transaction and should be analyzed under the FCRA’s definition of adverse action applicable to credit transactions; and
 - (ii) Treating mortgage insurance as part of credit is the only way in which it will be made subject to the risk-based notice under FACTA, and that notice will be far more meaningful to consumers and easier to administer for industry than adverse action notices.

- e. Radian appeal is fully briefed and awaiting oral argument
6. Cases Beginning to Settle: *Portis/Karwo v. GEMICO*
- a. Nationwide class of all persons who paid mortgage lender for a borrower-paid mortgage insurance policy issued under *GEMICO's* A Minus Program from January 15, 2002 to June 25, 2006.
 - b. Class members who return valid claim forms will get \$22.50 and a free copy of his or her credit report from Equifax
 - c. Plaintiffs' counsel to receive court-approved fees and costs not to exceed \$460,000
 - d. Consent Decree
 - (i) For three years after final approval of the settlement or until August 1, 2009 (whichever is earlier), *GEMICO* will provide adverse action notices.
 - (ii) *GEMICO* can apply to the court to amend the settlement for good cause or if changes in federal or state law are enacted that pertain to the FCRA, render compliance illegal or impracticable, or substantively alter *GEMICO's* obligations regarding adverse action notices.
 - (iii) If state or federal law pertaining to the FCRA or adverse action notices substantively alters the obligations of *GEMICO* from those contained in the Consent Order, *GEMICO* is not enjoined from conforming its practices accordingly.

III. AMERIQUEST SETTLEMENT

- A. Agreement with committee of state Attorneys General and financial regulators.
- B. Allocates \$295 million over the next year to compensate borrowers. Funds will be designated for borrowers who obtained loans from Ameriquest between January 1, 1999, and December 31, 2005. In addition, the company will provide \$30 million to reimburse the states for legal fees and other costs related to the states' inquiry.
- C. In addition to its financial commitment, the specific steps Ameriquest has agreed to take include:
 - 1. Ensuring that borrowers receive simple one-page form clearly describing all loan terms at least three days before closing.
 - 2. Centralizing appraisal process and instituting random selection of appraisers.
 - 3. Requiring sales associates to follow approved scripts to describe loan terms and conditions and ensure that competitive claims regarding interest rates are accurate.
 - 4. Implementing measures requiring customers to sign statement at closing certifying that information they provided to Ameriquest regarding their stated income is true and correct.
 - 5. Ensuring that Ameriquest will only refinance a non-prime loan if there is a benefit to the borrower.
 - 6. Using third-party closing agents to help prevent conflicts of interest.
- D. Ameriquest also implemented a series of policies and programs as part of its best practices efforts prior to the agreement. This agreement reaffirms those enhancements, including:
 - 1. Mystery shopper program, which company implemented in 2005: independently verifies that branch associates are adhering to company policies and procedures.

2. “Same Rate” or risk-based pricing policy that company established in 2003, which prices loans by a precise formula-driven model that uses objective measures of an individual’s creditworthiness.
3. Quality-based compensation system that company implemented in 2005: promotes fair treatment of customers by including customer satisfaction and loan quality measures in employee compensation equation.
4. Whistleblower program that company launched in 2004: encourages associates to report inappropriate conduct.
5. Spanish-language loan documents and “Spanish-certified” associates available in designated branches to assist Spanish-speaking consumers, continuing a program which has been in place since 2004. Company to also provide loan documents in any other language in which it advertises in the future.

IV. PREDATORY LENDING AND SERVICING

- A. “Predatory Lending” is a catch-all phrase used to describe a collection of abusive lending practices:
 1. Loan Flipping – making a subsequent loan to refinance the original loan which results in no economic net benefit to the borrower.
 2. Excessive Fees – the charging of fees that bear no reasonable relationship to the services actually provided.
 3. Packing – the selling of additional products in a loan agreement.
 4. Lending without regard to the borrower’s ability to repay.
 5. “Bait and switch.”
- B. New Twists on Predatory Lending.
 1. Mark-ups – *Claybrooks v. Primus Auto Fin. Servs., Inc.* – mark-ups as ECOA violations.
 2. YSP – Another Form of Mark-up?

3. Points as unfair or deceptive business practice if they do not reduce interest rate below rate otherwise available to the particular borrower or similar borrowers.
- C. Industry Challenges to Local Anti-Predatory Lending Ordinances.
1. *American Fin. Servs. Ass'n v. City of Oakland*, 34 Cal. 4th 1239, 23 Cal. Rptr. 3d 453, 104 P.3d 813 (2005).
 2. *American Fin. Servs. Ass'n v. Montgomery County, Md.* (Md. Cir. Ct. Mar. 7, 2006) (order granting preliminary injunction).
 3. *American Fin. Servs. Ass'n v. City of Toledo*, 161 Ohio App. 3d 477, 830 N.E.2d 1233 (Ohio Ct. App. 2005); *American Fin. Servs. Ass'n v. City of Cleveland*, 159 Ohio App. 3d 489, 824 N.E.2d 553 (Ohio App. 2004).
 4. *Mayor of City of New York v. Council of City of New York*, 4 Misc. 3d 151, 780 N.Y.S.2d 266 (N.Y. Sup. Ct. 2004).
- D. "Predatory Servicing," like predatory lending, is a catch-all phrase.
1. Predatory servicing cases often include one or more of the following types of allegations:
 - a. Imposing unwarranted and improper fees – often late fees when the loan was not late.
 - b. Failing to credit payments received in a timely fashion – allegedly so that late fees can be charged and borrowers placed in foreclosure.
 - c. Misapplying payments – allegedly for the benefit of the servicer.
 - d. Prematurely referring the account to foreclosure and collections – despite legal and accounting errors allegedly made by the servicer.
 - e. Failing to timely respond and communicate with customers.

- f. Finally, these practices are alleged to exist despite the servicer's advertising and information that generally trumpets how the servicer is responsive and customer-oriented.
2. See testimony of Maureen McGrath, National Advocacy Against Mortgage Servicing Fraud, before the House Subcom. on Capital Markets, Insurance & Gov't Sponsored Enterprises (June 14, 2004), *available at* <<http://financialservices.house.gov/media/pdf/061404mm.pdf>>.
 3. See <<http://www.lieffcabraser.com/loan-servicing.htm>> (publicizing complaint against Litton Loan Servicing).
- E. Soliciting for Plaintiffs.
1. Internet complaint sites feed potential plaintiffs to willing lawyers. See <<http://www.ripoffreport.com/reports/ripoff65970.htm>>, <http://www.consumeraffairs.com/finance/finance__companies.htm>, <<http://community.lawyers.com/messageboards/>>, <<http://www.lawyersandsettlements.com/>>, <<http://uspeakout.com/>>, <<http://www.edcombs.com/FSL5CS/Custom/TOCViolations.asp>>.
 2. Cooperation with state and federal regulatory agencies and prosecutors.
 - a. FBI, HUD Office of Inspector General, the FTC, state and local prosecutors cooperated in suing Fairbanks Capital Corporation in 2002-2003. (Settled \$55 million; see <<http://www.lieffcabraser.com/fairbanks.htm>>.) FTC action against Associates. (Settled FTC and follow-on class action, \$240 million; see <http://consumeraffairs.com/news02/iti_settles.html>, <www.ftc.gov/opa/2002/09/associates.htm>.) Suits against Household and Ameriquest by state attorneys general. (Household settled for \$484 million; see <<http://www.oag.state.tx.us/oagnews/release.php?id=158>>; Ameriquest settled for \$325

million; see <<http://www.oag.state.tx.us/consumer/lawsuits.php>>.)

- b. Regulators' and prosecutors' efforts spawn private litigation. *See, e.g., Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534 (7th Cir. 2003).
 - c. Agencies and prosecutors use administrative or investigative subpoenas to gather evidence that may later be made available to private plaintiffs.
3. ACORN; franchising and green-mail.
- F. Downsides of Predatory Servicing Litigation:
1. Expensive to defend.
 2. Negative publicity.
- G. Proactively Stemming the Litigation Tide.
1. Refer unsatisfied customers to supervisors.
 2. Monitor public complaint websites and offer to fix customers' complaints.
- H. Class certification may be difficult to obtain:
1. *Chase Manhattan Mortgage Corp. v. Porcher*, 898 So. 2d 153, 157-58 (Fla. Dist. Ct. App. 2005) (reversing class certification in putative nationwide class action charging Chase delayed posting payments to impose improper late fees; individual evidence would be required to prove that a class member's payment was or was not late).
 2. *Ploog v. HomeSide Lending*, 2001 WL 1155288 (N.D. Ill. 2001) (class certification denied because of individual questions on claim loan servicer violated 12 U.S.C. § 2605(d) by failing to respond in a timely manner to qualified written requests).
 3. Because standard mortgage and deed of trust forms choose the law of the state in which the property is located, all 50 states' laws will be implicated in most nationwide class actions, further complicating certification. *See Washington Mutual Bank v. Superior Court*, 24 Cal. 4th 906 (2001).

V. RESPA LITIGATION

A. RESPA: Third-Party Splits.

1. *Santiago v. GMAC Mortgage*, 417 F.3d 384 (3d Cir. 2005).
 - a. Agrees no claim under RESPA that fee is simply excessive.
 - b. Sides with Second Circuit in holding that mark-up of third-party charge where no or nominal services are performed can violate RESPA.

B. RESPA: Excessive Fee Claims.

1. *Sydler v. Bank of America*, 360 F. Supp. 2d 1302 (S.D. Fla. 2005) (Judge Gold).
2. *Friedman v. Market Street Mortgage* (S.D. Fla. 2005) (Judge King).

VI. MADISON COUNTY, ILLINOIS

A. Numerous Cases Pending.

B. Classes Certified.

- ### C. Important Illinois Supreme Court Decision on nationwide certification in *Price v. Phillip Morris* tobacco litigation, 2005 Ill. LEXIS 2071 (Ill. Dec, 15, 2005):
1. Madison County Circuit Court awarded the estimated 1.14 million members of the plaintiff class compensatory and punitive damages, attorney fees, and prejudgment interest totaling \$10.1 billion.
 2. Illinois Supreme Court reversed the judgment of the circuit court on the basis that this action is barred by section 10b(1) of the Consumer Fraud Act.

- D. Another key Illinois Supreme Court decision on nationwide class certification in *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 835 N.E.2d 801 (2005):
1. Reversed a \$1.05 billion verdict against State Farm. In an opinion authored by Chief Justice McMorrow with significance far beyond State Farm, court held that neither the nationwide breach of contract class nor the nationwide statutory fraud class had been properly certified.
 2. The court also reversed the trial court's verdict under Illinois's UDAP law, the Consumer Fraud and Deceptive Business Practices Act.

VII. TITLE/CAPTIVE REINSURANCE

- A. Settlements.
1. The Department of Housing and Urban Development on July 18 announced \$1.6 million in settlements under RESPA with a national mortgage lender and two major homebuilders who engaged in a business practice involving captive title reinsurance.
 - a. Agreements included a \$650,000 settlement with CitiMortgage, Inc., and its captive title reinsurance company Chesapeake Reinsurance; a \$675,000 settlement with M.D.C. Holdings, Inc., certain of its Richmond American Homes homebuilding subsidiaries and AHT Reinsurance; and a \$305,000 settlement with WL Homes dba John Laing Homes, a California and Colorado builder.
 - b. Companies came forward and cooperated with HUD in reaching settlements. In addition to settlement payments, companies agreed not to enter into any new captive title arrangements and to cease writing new captive title reinsurance business.

- c. These are HUD's first settlements in the nation involving the recipients of payments made by title companies to captive companies for reinsurance, as well as the first RESPA enforcement actions of 2006. Settlements come in the wake of recent settlements that states have obtained from title insurance companies who paid significant portions of the premiums they received to such captive companies.
 - 2. California / Insurance Commissioner Garamendi.
 - a. Fidelity National Financial agreed to refund \$7.7 million to customers and pay \$5.6 million in penalties and cost reimbursement.
 - b. First American Corp. agreed to a \$15 million refund and a \$5 million fine.
 - c. LandAmerica Financial Group Inc. will refund \$2.6 million and pay a \$1.9 million fine.
 - 3. Colorado.
 - a. Settlements with Fidelity and First American.
 - b. Cease-and-desist order issued to LandAmerica.
 - c. Erin Toll, deputy commissioner in charge of investigation, turned over files related to non-insurance carriers to Attorney General, who issued subpoenas.
 - d. Toll has also suggested she may look at related industries (e.g. mortgage insurance), but no action taken yet.
 - 4. Other states: Washington, Nevada, Florida, and New York.
- B. HUD investigations.

- C. OCC Bulletin 2005-27, issued August 4, 2005: Urges CEOs and compliance officers of all national banks, department and division heads, and all examining personnel to carefully review HUD's 1996 Policy Statement on Sham Controlled Business Arrangements and "ensure that the structure, operating agreement, and activities of these entities do not violate section 8 of RESPA."

VIII. TILA DEVELOPMENTS

- A. Decisions rejecting Ninth Circuit's holding in *King v. California*, 784 F.2d 910 (9th Cir. 1986).
 - 1. *Barrett v. JP Morgan Chase, N.A.*, 445 F.3d 874 (2006).
 - a. Although lower courts around the country have split on whether to follow *King*, before *Barrett*, there was no other published federal appellate opinion addressing the effect of a refinancing on a TILA rescission demand.
 - b. *Barrett* court concluded that a refinance does not bar a subsequent rescission "because nothing in the legislation or its implementing regulations says that the act of refinancing extinguishes a borrower's unexpired right to rescind a loan transaction and because the right to rescind a transaction under the Act not only gives consumers the right to release the security interest in their home but also gives them the right to recover certain fees incurred in the transaction."
 - 2. *Pacific Shore Funding v. Lozo*, 138 Cal. App. 4th 1342 (2006).
 - a. California Court of Appeal followed essentially the same reasoning as *Barrett* when rejecting *King*.
 - b. Provides a strong incentive to lenders to file suit for declaratory relief in federal court, where *King* still controls.
 - c. Gives borrowers an incentive to rush to state court with a non-removable unfair business practices (§ 17200) claim predicated on their alleged TILA rescission rights.

- B. *McKenna v. First Horizon Home Loan Corp.*, 429 F. Supp. 2d 291 (D. Mass. 2006), *appeal pending* (1st Cir., No. 06-8018).
1. First Horizon petitioning for review of class certification order issued by District of Massachusetts on March 31, 2006 that allows TILA rescission claims to go forward on a class basis, including loans that have been paid off or otherwise extinguished.
 2. TILA places limits on class action damages claims, but there are no such limits for the sums that must be refunded to borrowers on rescission. If rescission claims are allowed to be aggregated in a class action, mortgage industry could face huge potential losses.
 3. Industry groups participating as amici curiae urging the First Circuit to take up these issues argue that the mortgage industry could face “billions of dollars of potential liability if district courts are permitted to certify rescission classes, especially classes that include borrowers who have paid off their loans.”

IX. PREEMPTION DEVELOPMENTS

A. OTS Preemption:

1. *WFS Financial, Inc. v. Super. Ct. (de la Cruz)*, No. C051414, 2006 Cal. App. LEXIS 879 (June 15, 2006).
 - a. WFS originally sued a borrower after the proceeds from a sale of a repossessed car failed to cover the loan balance. The borrower asserted a class action cross-complaint alleging that the lender’s pre-sale notice failed to comply with disclosure requirements under California’s Rees-Levering Automobile Sales Finance Act (Cal. Civ. Code § 2983.2), and asserted an Unfair Competition Law (“UCL”) claim based on that violation. The plaintiff sought refunds to every borrower sued in a collection case by WFS for over four years.
 - b. The trial court denied WFS’s demurrer, which argued that the cross-complaint was preempted by federal law and OTS . A Third District panel, however, granted WFS’s writ petition in a thorough, published

27-page opinion issued June 15. The Court of Appeal ordered the trial court to dismiss – without leave to amend – the cross-claim.

c. The Court of Appeal found that the particular notice requirements imposed by the Rees-Levering Automobile Sales Finance Act do not apply to WFS because it operates exclusively under the preemptive federal regulations of the OTS. Citing U.S. Supreme Court authority, the court found that the OTS’s interpretation of its own regulation was definitive. This is the first California Court of Appeal decision to recognize this significant principle of regulatory construction in the context of banking preemption. In so doing, the court distinguished numerous troubling California appellate decisions addressing OTS preemption.

d. Petition for review pending.

2. State law challenges to yield spread premiums dismissed: *Monroig v. Washington Mutual Bank*, 19 A.D.3d 563, 800 N.Y.S.2d 416 (N.Y. App. Div. 2005) (Homeowners Loan Act preempts state law claims against lender for paying broker a YSP); *Pearson v. Bank of America*; *Kleiman v. Washington Mutual Bank*.

3. State law challenges to processing of prepay penalty dismissed: *Zorfas v. CitiMortgage, Inc.* (San Francisco Superior Court, Mar. 3, 2005).

B. OCC Preemption: Continued momentum, with a hiccup.

1. Gift Card Litigation: *SPGGC, Inc. v. Ayotte*, 2006 DNH 89, 2006 U.S. Dist. LEXIS 52823 (D.N.H. Aug. 1, 2006). In a major victory for the banking industry, a federal district court in New Hampshire has rejected the state’s efforts to regulate the terms of stored-value gift cards issued by a national bank and federal savings association, but marketed and sold by a non-bank third party. According to the Court, a state’s attempt to impose restrictions upon a national banking product “stand[s] as an obstacle to the fulfillment of Congressional policies and goals embodied in federal banking laws and the

associated regulations implemented by both OTS and OCC” and is therefore preempted.

2. *Nat'l City Bank of Indiana v. Turnbaugh*, 2006 U.S. App. LEXIS 20538 (4th Cir. Aug. 10, 2006).
 - a. Affirms grant of summary judgment in favor of National City Bank of Indiana and its Maryland-chartered mortgage subsidiaries, National City Mortgage Co. and First Franklin Financial Corp., in a suit by Charles W. Turnbaugh, commissioner of financial regulation at the state Department of Labor, Licensing and Regulation. On appeal, 39 other states and the District of Columbia signed on as amici in support of Maryland's position.
 - b. Held Maryland cannot enforce a law that limits prepayment penalties on adjustable rate mortgages if the lender is an operating subsidiary of a national bank. National Banking Act and OCC regulations of the federal preempt the Maryland Mortgage Lender Law. “If state law applied to operating subsidiaries to a greater extent than it applied to their parent national banks, it would frustrate national banks’ right to conduct the ‘business of banking’ through operating subsidiaries.”
3. *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005). OCC’s operating subsidiary preemption regulations are valid and entitled to deference. However, they provide no basis for federal subject matter jurisdiction of challenge to state regulation; preemption defense must be presented in state court.
4. *Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d 949 (9th Cir. 2005). California corporate regulator’s authority to order operating subsidiaries of banks to conduct audits to determine whether California law was violated is preempted by National Bank Act and pertinent federal regulations. Federal regulations also field-preempt California’s licensing authority over such entities.
5. *Wachovia Bank, N.A. v. Watters*: The Supreme Court has granted *certiorari* in *Wachovia Bank, N.A. v. Watters*, 431 F.3d

556 (6th Cir. 2005). The Sixth Circuit ruled that state laws requiring an operating subsidiary of a national bank to pay licensing fees, file annual statements and submit to state supervision interfere with national bank powers to conduct the business of banking, since the OCC has concluded that national banks can conduct business through operating subsidiaries and that the same preemption principles apply to both the national bank and its operating subsidiary.

6. *Fuchs v. Wachovia Mortgage Corp.*, No. 17000-03, 2005 N.Y. Misc. LEXIS 2545 (N.Y. Sup. Ct. Nov. 15, 2005). Plaintiffs alleged that the mortgage lender's practice of charging for document preparation fees constituted the unlawful practice of law. The district court dismissed the claims, holding that state laws were preempted by the National Bank Act and OCC regulations.
7. HMDA Fight: *Office of Comptroller of the Currency v. Spitzer*, 396 F. Supp. 2d 383 (S.D.N.Y. 2005) (OCC preemption regulation is valid and precludes state attorney general from enforcing state's anti-discrimination law against national bank as *parens patriae*); *Clearing House Ass'n v. Spitzer*, 394 F. Supp. 2d 620 (S.D.N.Y. 2005) (same).
8. *But see Smith v. Wells Fargo Bank*, 135 Cal. App. 4th 1463, 38 Cal. Rptr. 3d 653 (2006) (OCC regulations do not preempt a UCL "unlawful" claim based on failure to make disclosures about account charges, as required by OCC regulations or based on breach of account holder agreement).
9. *See also Kroske v. U.S. Bank Corp.*, 432 F.3d 976 (9th Cir. 2005) (National Bank Act does not preempt Age Discrimination in Employment Act or analogous state law).

C. DIDMCA Preemption:

1. *Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d 949 (9th Cir. 2005).
2. *Sweeney v. Savings First Mortgage*, 388 Md. 319, 879 A.2d 1037 (2005) (DIDMCA preempts Maryland's Finder's Fee Law as finder's fees are "finance charges" for DIDMCA purposes; however, DIDMCA protects only the lender, not the loan broker, so plaintiff can enforce the Finder's Fee Law against the broker).

3. *McCarthy v. Option One Mortgage Corp.*, 362 F.3d 1008 (7th Cir. 2004) (DIDMCA preempts state law barring prepayment penalty; substantial compliance with OTS regulations suffices to invoke preemption).
4. *U.S. Bank v. Clark*, 216 Ill. 2d 334, 837 N.E.2d 74 (2005) – Illinois Interest Act Case: Homeowners argued that creditors had violated the Act by imposing fees in excess of three percent on loans with interest rates of greater than eight percent. The trial court dismissed the claims, ruling that they had been preempted by the DIDMCA, 12 U.S.C. § 1735f-7a. The Illinois Supreme Court agreed, overruling *Fidelity Financial Services, Inc. v. Hicks*, 214 Ill. App. 3d 398 (1991), to the extent its interpretation of the Illinois statute allowed for a contrary finding. Instead, the court found that the limitation in 815 Ill. Comp. Stat. Ann. 205/4.1a (2004) on lender charges was implicitly repealed by the state legislature’s 1981 amendment of 815 Ill. Comp. Stat. Ann. 205/4 (2004). Neither of the opt-out provisions in DIDMCA had been applied by the legislature as a 1992 amendment to § 4.1a which did not act to readopt or revive the preempted interest and points limitation.
5. *Quicken Loans, Inc. v. Wood*, 449 F.3d 944 (9th Cir. 2006). This case follows *Wells Fargo Bank v. Boutris*, 419 F.3d 949 (9th Cir. 2005), in holding that DIDMCA does not preempt California’s per diem interest statute (Civ. Code § 2948.5), which forbids a lender from charging interest for more than a day before the deed of trust is recorded. It goes a step further, holding that the Alternative Mortgage Transaction Parity Act, 12 U.S.C. §§ 3801-06, does not preempt the per diem interest statute either.
6. *Silvas v. E*Trade Mortg. Co.*, 421 F. Supp. 2d 1315 (S.D. Cal. 2006). This case held that OTS regulations preempt UCL claim based on TILA violation. The longer statute of limitations under the UCL is additional regulation that conflicts with OTS’s preemption of entire field of lending, including fees and advertising.

- D. OTS Preemption of Maryland County Local Ordinance.
1. OTS issued legal opinion on March 7, 2006, concluding that federal law preempts application to federal savings associations of recent amendments to the Code of Montgomery County, Maryland, addressing predatory lending.
 2. On the same day, Maryland state court issued a restraining order barring Montgomery County from enforcing its mortgage anti-discrimination measure. *American Fin. Servs. Ass'n v. Montgomery County*, No. 269105-V (Md. Cir. Ct. Mar. 7, 2006).
- E. California State Law Preemption of Local Ordinance. California's state anti-predatory lending statute, Fin. Code § 4970 *et seq.*, impliedly preempts the entire field of regulation of predatory practices in home loans, excluding all local governmental entities from adopting ordinances in that field. *See American Fin. Servs. Ass'n v. City of Oakland*, 34 Cal. 4th 1239, 23 Cal. Rptr. 3d 453, 104 P.3d 813 (2005).

X. WAGE AND HOUR LITIGATION

- A. Explosion of Fair Labor Standards Act claims on behalf of loan officers and others.
1. *Olivo v. GMAC Mortgage Corp.*, 374 F. Supp. 2d 545, 549-50 (E.D. Mich. 2004), holds that GMAC's loan officers are exempt from FLSA overtime pay requirements as "outside salesmen."
 2. *Belton v. Premium Mortgage, Inc.*, 2006 WL 561489 (W.D. Mo. 2006) (holding loan officers were not exempt as "outside salesmen").
 3. Dept. of Labor, Employment Standard Administration March 31, 2006 letter to National Association of Mortgage Brokers, interprets regulations to allow treatment of outside loan sales representatives as exempt outside salesmen.
 4. Settlements in wage & hour litigation involving loan/account personnel.

- a. *Butler v. Countrywide Home Loans, Inc.*, No. BC 268250 (California Superior Court, Los Angeles County).
 - b. *Cox v. Downey Sav. & Loan Ass'n*, No. BC 318964 (California Superior Court, Los Angeles County).
 - c. Bank of America settlement.
5. On May 31, 2006, the U.S. Dept. of Labor sent out a clarifying letter about loan officers wherein it stated that “employees of finance companies who obtain and solicit mortgages may be exempt outside sales employees if they are ‘customarily and regularly engaged away from their employer’s place of business in obtaining mortgages from brokers and individuals.’”
- B. Increased litigation under state wage and hour laws.
1. California’s Sue-Your-Boss Law. Cal. Lab. Code § 2698 *et seq.*
 2. State law exemptions may differ in scope and definition from FLSA exemptions. *See, e.g., Ramirez v. Yosemite Water Co., Inc.*, 20 Cal. 4th 785 (1999).
 3. State law may impose additional wage and hour requirements. *See, e.g.,* Cal. Lab. Code § 512; Cal. Code Regulations, tit. 8, § 11090(11), (12) (meal and rest breaks).
 4. Potential for corporate officers to be held personally liable under some state laws. *See, e.g.,* Cal. Lab. Code § 558.
- C. Joint FLSA/state law wage and hour cases pose unique class action problems.
1. The Portal-to-Portal Act amended the FLSA in 1947 to lessen employer liability by requiring, among other things, opt-in classes. Each plaintiff must affirmatively consent in writing to litigation on his or her behalf. 29 U.S.C. § 216(b).
 - a. FLSA class certification generally follows a two-step procedure. *See, e.g., Leuthold v. Destination America, Inc.*, 224 F.R.D. 462, 466 (N.D. Cal. 2004).

- b. First step: Early in litigation plaintiff moves for conditional certification and notice to class members of right and need to opt in. At this stage, the plaintiff need only make a minimal showing by allegation (and, perhaps, some evidence) that plaintiff and class members are “similarly situated” in being “victims of a single decision, policy or plan.” The burden is light, and typically the class is conditionally certified. *Leuthold*, 224 F.R.D. at 467; *Davis v. Novastar Mortgage, Inc.*, 408 F. Supp. 2d 811, 815 (W.D. Mo. 2005).
 - c. Second step: After discovery, the employer may move to decertify the class. At this stage, the court determines propriety and scope of class, considering (i) disparate factual and employment settings of individual employees, (ii) various defenses available to employer as to individual employees, and (iii) fairness and procedural considerations. *Leuthold*, 224 F.R.D. at 467.
 - d. Typically, the opt-in rate for FLSA actions is 15-30% of the certified class, although the rate may be higher in union-backed suits. See Matthew Lampe & E. Michael Rossman, *Procedural Approaches for Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action*, 20 Lab. Law. 311, 313 (2005).
2. State law claims are subject to normal opt-out class action procedure under Federal Rule of Civil Procedure 23(b)(3). Opt-out rates are typically low. Plaintiffs therefore often combine state law claims with FLSA claims to obtain the benefits of both: FLSA liquidated damages and attorney fees with an opt-out class for the state law claims.
 3. Employer counter-strategies begin with removal of the case to federal court, see *Breuer v. Jim’s Concrete of Brevard, Inc.*, 58 U.S. 691 (2003), followed by:
 - a. A motion to dismiss non-opt-in class members on the ground that the court lacks supplemental jurisdiction over them. See *Bartelson v. Winnebago Indus., Inc.*, 219 F.R.D. 629 (N.D. Iowa 2003). The downside to this strategy is that the dismissed employees may refile in state court.

- b. A motion to dismiss non-opt-in class members on the ground that the court should exercise its discretion to decline supplemental jurisdiction over them because state law claims predominate or there are other compelling reasons to decline jurisdiction. 28 U.S.C. § 1367(c); *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301 (3d Cir. 2003). Same downside: dismissed employees may refile in state court.

- c. An opposition to Rule 23 class certification on the ground:
 - (i) Rule 23(a)'s numerosity requirement cannot be met since joinder of all class members is possible using the FLSA opt-in procedure. *See, e.g., Thiebes v. Wal-Mart Stores, Inc.*, 2002 WL 479840 (D. Or. 2002).

 - (ii) Rule 23(b)(3)'s superiority requirement cannot be met. Those employees who want to participate can do so by opting in. Class members may be confused by being asked to opt in and opt out at the same time. *Muecke v. A-Reliable Auto Parts & Wreckers, Inc.*, 2002 WL 1359411 (N.D. Ill. 2002); *Leuthold v. Destination America, Inc.*, 224 F.R.D. 462, 470 (N.D. Cal. 2004); *but see Breeden v. Benchmark Lending Group, Inc.*, 229 F.R.D. 623, 628-31 (N.D. Cal. 2005) (certifying Rule 23 class solely on issue of whether loan officers were properly classified as exempt employees).

 - (iii) If Rule 23 class certification is denied in the federal suit, does that ruling prevent class certification in a later-filed state-court, state-law-only claim on behalf of the same employee class? Surprisingly, the answer may be "yes." *See In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.*, 333 F.3d 763, 766-67 (7th Cir. 2003).

- D. A California wrinkle: Prosecution of FLSA violations as unfair business practices under California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code, § 17200.
1. The UCL prohibits “unlawful” business practices – i.e., any business practice that violates some other law, such as the FLSA.
 2. Advantages to UCL add-on claim:
 - a. Statute of Limitations.
 - (i) The FLSA provides for a two-year limitations period unless the violation is willful, in which case a three-year period applies. 29 U.S.C. § 255(a).
 - (ii) The UCL provides for a four-year limitations period. Cal. Bus. & Prof. Code § 17208.
 - (iii) *Bahramipour v. Citigroup Global Markets, Inc.*, 2006 WL 449132, at *3-4 (N.D. Cal. 2006), holds that FLSA does not preempt UCL add-on claim or its longer limitations period. *Accord Barnett v. Washington Mut. Bank*, 2004 WL 2011462 (N.D. Cal. 2004).
 - b. Opt-out Class.
 - (i) The FLSA allows only opt-in classes. 29 U.S.C. § 216(b).
 - (ii) A regular Rule 23 opt-out class may be certified for a UCL claim.
 - (iii) Cases holding that the FLSA does not bar opt-out class certification of UCL claims predicated on FLSA violations: *Harris v. Investor’s Business Daily, Inc.*, 138 Cal. App. 4th 29, 2006 Cal. App. LEXIS 447 (Mar. 29, 2006; No. B178428); *Bahramipour*, 2006 WL 449132, at *4-5; *Tomlinson v. IndyMac Bank, F.S.B.*, 359 F. Supp. 2d 898, 901 (C.D. Cal. 2005); *Barnett*, 2004 WL 2011462, at *6-7; *Kelly v. SBC, Inc.*, 1998 U.S. Dist. LEXIS 18643, at *38 (N.D. Cal. 1998).

(iv) Also, the California Supreme Court has granted review of *Mills v. Superior Court*, 135 Cal. App. 4th 1547 (2006), which had held that Labor Code section 226.7(b)'s imposition of liability for an additional hour's wages when the employer fails to allow mandated meal and rest time is a statutory penalty and so not enforceable through 17200 and not subject to additional penalties for delay in payment of wages. Briefing in *Mills* has been deferred pending a decision in *Murphy v. Kenneth Cole Productions, Inc.* on the related issue of whether the additional hour's wages is a "statutory penalty" for statute of limitations purposes.

3. Disadvantage of the UCL add-on claim: limited relief.
- a. In a private UCL action, the plaintiff may recover only an injunction and restitution of money "which may have been acquired by means of such unfair competition." Damages and penalties are not recoverable in a UCL action. Cal. Bus. & Prof. Code § 17203; *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003).
 - b. Restitution, however, allows the plaintiff to recover money in which he or she has a vested interest, even if the money was never in his or her possession. Earned but unpaid wages, in particular, can be the subject of restitution under this rationale. *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 178, 96 Cal. Rptr. 2d 518, 999 P.2d 706 (2000).
 - c. What sums are subject to restitution in a UCL add-on claim?
 - (i) Liquidated damages under the FLSA are not "penalties" but are not recoverable in a UCL add-on claim because they are awarded in addition to the amount of unpaid wages. *Tomlinson v. IndyMac Bank, F.S.B.*, 359 F. Supp. 2d 891, 897 (C.D. Cal. 2005).

- (ii) Waiting time penalties under California Labor Code section 203 are penalties and not recoverable in a UCL action. *Tomlinson*, 359 F. Supp. 2d at 895.
- (iii) Extra hour's wages, Cal. Lab. Code § 226.7, for violation of rest and meal break laws is earned wage and is recoverable in a UCL action. *Tomlinson*, 359 F. Supp. 2d at 896.

- 4. Is this a California-only wrinkle?
 - a. Other states' deceptive trade practice laws forbid "unfair" business practices. *E.g.*, Conn. Gen. Stat. Ann. § 42-110a, *et seq.*; Fla. Stat. Ann. § 501.201, *et seq.*; Mass. Gen. Law. Ann. ch. 93A.
 - b. Practices that violate laws other than the FTC Act have been held to be "unfair" practices prohibited by the FTC Act, 15 U.S.C. § 45(a). *See, e.g., F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986) (antitrust law violation).

XI. CLASS ACTION DEVELOPMENTS

- A. Supreme Court Clarifies Federal Jurisdiction in Class Actions. In an important ruling for defendants in class action cases, the United States Supreme Court has confirmed that so long as the claim of any named plaintiff in a class action case exceeds \$75,000, the case may be removed to federal court on diversity grounds, provided that no member of the class is a citizen of the same state as the defendant. The Court pointed out that the recently enacted Class Action Fairness Act had no bearing on its decision, since many proposed exercises of supplemental jurisdiction might not fall within the purview of the Act. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611 (2005).
- B. "Captive" Entities No Longer Permitted as Representatives. Following federal authorities, a California Court of Appeal recently held that plaintiff's counsel should be disqualified in a case where the class representative had significant economic ties to the firm. *Apple Computer v. Superior Court*, 126 Cal. App. 4th 1253 (2005).

- C. An inadequate class representative can obtain discovery to find a replacement, even prior to certification. An attorney recently brought a putative class action against Best Buy challenging its “restocking fee.” Following *Apple Computer, Inc. v. Superior Court*, 126 Cal. App. 4th 1253 (2005), the trial court found that the attorney could not be both the class counsel and the class representative. The court, however, granted the attorney’s request to conduct precertification discovery to find a replacement class representative. Defendant Best Buy was then ordered to send notice to the putative class members to “solicit” the replacement. *Best Buy Stores v. Superior Court*, 137 Cal. App. 4th 772 (2006).
- D. Class Action Fairness Act (“CAFA”).
1. What is CAFA?
 - a. Amends Existing Diversity Statute (28 U.S.C. § 1332).
 - b. Creates Special Removal Procedures for Class Actions (28 U.S.C. § 1453).
 - c. Adds Scrutiny of Coupon Settlements (28 U.S.C. § 1712).
 - d. Settlements Require Notice to Government Officials (28 U.S.C. § 1715).
 2. Federal Jurisdictional Requirements.
 - a. Basic Requirements for Class Actions.¹
 - (i) Amount in Controversy – \$5 million.
 - (a) Class actions are defined generally as cases that are proposed to be certified pursuant to Fed. R. Civ. P. 23 or an analogous state provision. CAFA also applies, with slightly different requirements, to “mass actions,” which would include cases such as nationwide mass tort claims that are not appropriate for traditional class certification.

(b) Under CAFA, the value of claims of putative class members may be aggregated to reach the threshold, but interest and costs do not count. 12 U.S.C. § 1332(c)(6). Courts have held that CAFA, by permitting aggregation of damages, also undermines the reasoning of case law prohibiting aggregation of attorneys' fees or valuation of injunctive relief from defendant's perspective. See *Berry v. Am. Express Publ'g*, 381 F. Supp. 2d 1118, 1123 (C.D. Cal. 2005) (injunction); *Yeroushalmi v. Blockbuster Inc.*, 2005 U.S. Dist. LEXIS 39331, at *16 (C.D. Cal. July 11, 2005) (fees).

(c) Courts are in conflict over who bears the burden of proof. Compare, e.g., *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005) (rejecting argument that CAFA places burden of proof on party seeking remand); *Adams v. Insurance Co. of N. Am.*, Civ. No. 2:05-2507, 2006 WL 897945 (S.D. W. Va. Mar. 30, 2006) (same), with *Berry v. American Express Publishing Corp.*, 381 F. Supp. 2d 1118 (C.D. Cal. 2005) (CAFA shifted traditional burden of proof); *Natale v. Pfizer, Inc.*, 379 F. Supp. 2d 161 (D. Mass.), affirmed on other grounds, 424 F.3d 43, 2005 U.S. App. LEXIS 19912 (1st Cir. Sept. 16, 2005) (same).

(ii) Minimal Diversity.

(a) Diversity for purposes of CAFA exists where any class member is a citizen of a different state from any defendant, or where the litigation involves claims between a foreign state or citizen of a foreign state, on the one hand, and a citizen of a U.S. state, on the other hand. See 28 U.S.C. § 1332(d)(2).

- (iii) Exceptions.
 - (a) CAFA includes exceptions to the basic jurisdictional rule designed to avoid allowing all local or predominantly in-state class actions into federal court.
 - (b) A federal court “*may . . . decline*” jurisdiction over cases in which more than one-third, but less than two-thirds, of the class are citizens of forum state and the primary defendants are citizens of the forum state.
 - (c) A federal court “*shall . . . decline*” jurisdiction over cases in which more than two-thirds of the class are citizens of forum state and either (i) one defendant is a citizen of the forum state against whom significant relief is sought, or (ii) the primary defendant is a citizen of the forum state.
- (iv) Removal Timing.
 - (a) 30-day limit applies.
 - (b) 1-year rule does not apply.
- (v) What cases may be removed to federal court under CAFA?
 - (a) CAFA applies to “any civil action commenced on or after the date of the enactment of this Act [Feb. 18, 2005].”
 - (b) Courts have largely settled the meaning of “commenced” as the date of commencement in *state* court. See *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 689 (9th Cir. 2005); *Natale v. Pfizer, Inc.*, 424 F.3d 43, 44 (1st Cir. 2005); *Plubell v. Merck & Co.*, 434 F.3d 1070, 1071-72 (8th Cir. 2006); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090 (10th Cir. 2005); *Knudsen v.*

Liberty Mut. Ins. Co., 411 F.3d 805 (7th Cir. 2005).

- (c) Courts have, however, held that even in a case that commenced in state court prior to February 18, 2005, a subsequently filed amended complaint that does not relate back for statute of limitation purposes might provide a basis for removal under CAFA. *Knudsen v. Liberty Mut. Ins. Co.*, 435 F.3d 755, 757 (7th Cir. 2006) (vacating remand order where removal was appropriate based on amended claims seeking relief for conduct not at issue in initial complaint).
- (d) In addition, complaints adding new defendants may reopen the window of removal for the entire case. *See Braud v. Transp. Serv. Co.*, No. 06-30088, 2006 U.S. App. LEXIS 8496 (5th Cir. Apr. 6, 2006).
- (e) A dramatic expansion of the class period may make the complaint removable where, under applicable law, the amendment would not relate back for limitations purposes. *Senterfitt v. SunTrust Mortgage, Inc.*, 385 F. Supp. 2d 1377 (S.D. Ga. 2005).
- (f) Some conflict exists over whether relation back should be determined by federal or state law. *Compare, e.g., Lee v. CitiMortgage, Inc.*, No. 4:05CV1216, 2005 U.S. Dist. LEXIS 22571, at *7 (E.D. Mo. Oct. 5, 2005) (relation back under Fed. R. Civ. P. 15), *with Schorsch*, 417 F.3d at 749 (relation back is to be decided under state law); *see also Schillinger*, 425 F.3d at 335 (deferring resolution of whether federal or state law should determine the type of commencement

that is necessary for federal removal under CAFA).

- (vi) Miscellaneous.
 - (a) Removing defendants do not need consent of all defendants.
 - (b) An in-state defendant may remove.
 - (c) Any ruling, including subject matter jurisdiction remands, “may” be reviewed on appeal.

3. Settlements.

a. Judicial Scrutiny of Coupon Settlements.

- (i) CAFA’s settlement provisions apply to class actions in federal court, regardless of whether removed based on CAFA. *See* 28 U.S.C. § 1711 (definitions of “proposed settlement” and “class action” under CAFA).
- (ii) If the proposed settlement provides for coupons to be given to class members, CAFA imposes several requirements in calculating the attorneys’ fees. If the attorneys’ fees are awarded on a contingent fee basis, the attorneys’ fees must be based on the value to class members of the coupons that are redeemed. 28 U.S.C. § 1712(a). The court may look to expert testimony on the value of the coupons. 28 U.S.C. § 1712(d). Otherwise, the attorneys’ fees must be based on the amount of time class counsel reasonably expended working on the action. 28 U.S.C. § 1712(b).
- (iii) If the proposed settlement provides for coupons in addition to equitable relief, the portion of the fees based on recovery of the coupons should be based on the value to the class members of those coupons, and the other portion of the fees should be based on reasonable time expended. 28 U.S.C. § 1712(c).

- (iv) The court can approve a settlement in which class members would be awarded coupons only after a hearing to determine whether, and a written finding that, the class settlement is fair, reasonable, and adequate. The court may require that a portion of the value of unclaimed coupons be given to charity or the government.
- b. Geographic Discrimination.
 - (i) The settlement may not provide greater sums to some class members over others solely on the basis that the former are located closer to the venue of the action, or on some other geographic basis.
- c. Notification of Government Officials, Regulators.
 - (i) Within 10 days after a proposed settlement agreement is filed with the court that would be binding on class members, a notice must be served upon any “appropriate Federal official” *and* “appropriate state official” for the state in which any class members reside. *See* 28 U.S.C. § 1715(b), (c).
 - (a) The appropriate Federal official is generally the Attorney General of the United States; however, in the case of financial institutions, the “appropriate” official would be the federal regulators with oversight responsibility for the defendant.
 - (b) The appropriate State official will generally be the regulator that has oversight responsibility of the defendant, or that licenses or authorizes the defendant to conduct business in the state.

- (ii) The notice to Federal and State officials must include:
 - (a) A copy of the complaint and amended complaints;
 - (b) Notice of any scheduled judicial hearing;
 - (c) Any proposed or final notification to class members of their right (or lack of right) to opt out and of the proposed settlement;
 - (d) Any proposed or final settlement binding on some or all class members;
 - (e) Any settlement or other agreement contemporaneously made between class counsel and defendant's counsel;
 - (f) Any final judgment or notice of dismissal;
 - (g) If feasible, the names of class members residing in the particular state and the estimated proportionate share of the claims of those class members to the entire settlement, or if not feasible, a reasonable estimate thereof; and
 - (h) Any written judicial opinion relating to the class notification, class settlement, contemporaneous settlement agreements, or final judgment or notice of dismissal. *See* 28 U.S.C. § 1715(b).
- (iii) Final approval of the settlement can only issue once 90 days have passed since these items are served. *See* 28 U.S.C. § 1715(d).

4. Implications.
 - a. In-state Defendants.
 - (i) More California clients sued in California? New York, Texas, Florida, etc.
 - b. Class Certification.
 - (i) Determination of primary defendants, “significant basis” test, and even class composition, could begin to intrude on merits and theories of case.

XII. ECOA DEVELOPMENTS

- A. HMDA Data.
- B. *Jones v. Wells Fargo*.
- C. Dealer Markup Disparate Impact Cases. *See Claybrooks v. Primus Auto. Fin. Servs., Inc.*, No. 3:02cv00382 (M.D. Tenn. Mar. 16, 2005). In these cases, plaintiffs contend that auto finance companies violated ECOA by allowing dealers to price their installment sales contracts at a “contract rate” summing the finance company’s objective risk-based “buy rate” plus a wholly “discretionary markup,” some or all of which was payable to the dealer. The discretionary markup, say plaintiffs, has a disparate impact on African Americans and other minorities who pay disproportionately more in markup than do non-minority customers of the finance companies.

XIII. HOEPA DEVELOPMENTS

- A. YSPs Are Not Fees for HOEPA Trigger. Several recent cases hold that yield spread premiums cannot be counted as “points and fees” for the purposes of triggering HOEPA disclosures. *See Mills v. Equicredit Corp.*, 344 F. Supp. 2d 1071 (E.D. Mich. 2004); *In re Mourer*, 309 B.R. 502 (W.D. Mich. 2004); *Bell v. Parkway Mortgage, Inc.*, 309 B.R. 139 (Bankr. E.D. Pa. 2004); *Nunn v. IMC Mortgage Co.*, 308 B.R. 150 (W.D.N.Y. 2004).

- B. YSPs Are Not Fees for the Purposes of California’s Predatory Lending Law (Fin. Code 4970). Following the reasoning of HOEPA cases, YSPs are not counted as “points and fees” for purposes of the coverage trigger of California’s anti-predatory lending statute. See *Wolski v. Fremont Inv. & Loan*, 127 Cal. App. 4th 347, 25 Cal. Rptr. 3d 500 (2005).
- C. Assignee Liability. The assignee of a HOEPA loan is subject to claims and defenses the borrower has against the assignor of the loan. 15 U.S.C. § 1641(d)(1). Since the assignee’s liability is strictly vicarious, however, the borrower’s settlement with the assignor releases the assignee from further affirmative liability, but not from the borrower’s rescission claim. For example, by accepting the loan originator’s F.R. Civ. P. 68 offer of judgment, the borrower released the loan’s assignee from liability for damages under HOEPA and TILA. See *Bynum v. Equitable Mortgage Group*, 2005 WL 818619 (D.D.C. 2005).
- D. HOEPA Claims Are Arbitrable. A borrower cannot escape the effect of an arbitration clause in the loan documents by claiming he or she rescinds the transaction based on the lender’s failure to make HOEPA-required disclosures. See *Anderson v. Delta Funding Corp.*, 316 F. Supp. 2d 554 (N.D. Ohio 2004).

XIV. STATE LAW DEVELOPMENTS

A. California.

- 1. Recent Developments in Bus. & Prof. Code Section 17200. There has been a flurry of activity in the appellate courts since the passage of Proposition 64 last November. Here is a summary of the four most notable recent decisions:
 - a. In *Californians for Disability Rights v. Merwyn’s LLC*, ___ Cal. 4th ___ (Jul. 24, 2006), the California Supreme Court held that Proposition 64 applies to pending cases. In other words, if an unaffected plaintiff filed the case before Prop. 64 passed, defendant can seek dismissal of the action based on lack of standing.

- b. In *Branick v. Downey Savings & Loan Assn.*, ___ Cal. 4th ___ (Jul. 24, 2006), the California Supreme Court held that, even though the trial court should dismiss pre-Prop. 64 cases brought by an unaffected plaintiff, it does have the discretion to first grant the plaintiff leave to amend to add an affected representative. Nothing in Prop. 64 alters normal rules regarding granting leave to amend and relation back of amended pleadings for statute of limitations purposes.
 - c. In *Pfizer, Inc. v. Superior Court*, ___ Cal. App. 4th ___ (Jul. 11, 2006), the Court of Appeal held that, in class actions brought under Bus. & Prof. Code section 17200: (1) all class members, not just the representative plaintiff, must have suffered “injury in fact”; (2) it is not enough for plaintiff to just argue that defendant’s conduct is “likely to deceive,” the plaintiff must establish actual deception; and (3) the named plaintiff him/herself (and thus all of the class members as well) must have actually relied on the alleged false or misleading representation.
 - d. In *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663 (Jan. 31, 2006), the Court of Appeal held that a restitution award under the UCL must be supported by evidence linking the wrongful conduct to the amount to be restored. In other words, a restitution award cannot just be based on a plaintiff’s counsel’s personal theories or speculation.
2. On July 19, 2006, the California Supreme Court denied (*en banc*) the industry’s request to review or de-publish the *Pacific Shore Funding v. Lozo*, 138 Cal. App. 4th 1342 (Apr. 27, 2006, B178694) decision. Accordingly, there is now a direct conflict in how California interprets a borrower’s right to rescind versus how the Ninth Circuit interprets the same (see *King v. State of California*, 784 F.2d 910 (9th Cir. 1986)). *King* holds that a borrower may not rescind a refinanced loan under the Truth-in-Lending Act; whereas, *Lozo* holds that a borrower may invoke TILA’s rescission remedy even after having refinanced the loan.
3. In *Dunbar v. Albertson’s, Inc.*, 2006 DAR 10569 (Aug. 14, 2006), the Court of Appeal held that the trial court did not abuse its

discretion in denying certification to a class of grocery managers claiming overtime pay and arguing that the defendant had misclassified them as exempt executive employees. Substantial evidence supported the trial court's finding that the tasks actually performed by a grocery manager varied substantially from store to store and week to week so that a finding that one manager worked more or less than 50% of the time on exempt tasks could not be extrapolated to another manager. Also, the defendant's conduct could not be proven wrongful without regard to its impact on particular workers – if a manager spent more than 50% of his time on exempt tasks, the uniform policy of treating all managers as exempt was not wrongful as to him. Hence, individual issues involved both liability and damages.

4. Do Businesses Need to Disclose Wholesale Prices? In *McCann v. Lucky Money, Inc.*, 129 Cal. App. 4th 1382 (2005), a plaintiff alleged that the defendant, a business engaged in the conversion of dollars into foreign currencies for transmittal abroad, violated the UCL by failing to disclose to the customer the actual rate of exchange, the commissions it receives, and the customer's net exchange. The Court of Appeal found that foreign funds transmitters do not violate either California Financial Code section 1815 or Business and Professions Code section 17200 by disclosing only their retail rate of exchange from dollars to foreign currency.
5. Out-of-State Businesses May Be Sued in California for Internet Advertising. The California Supreme Court has ruled that out-of-state entities may be subject to personal jurisdiction within the state because of Internet advertising aimed at California consumers. "By purposefully and successfully soliciting the business of California residents, defendants could reasonably anticipate being subject to litigation in California in the event their solicitations caused an injury to a California resident." *Snowney v. Harrah's Entertainment, Inc.*, 35 Cal. 4th 1054 (2005).
6. California Limits Punitive Damages (A Little). In *Simon v. San Paolo U.S. Holding Co., Inc.*, 35 Cal. 4th 1159 (2005), the court explained that in reviewing a punitive damage award to determine compliance with federal constitutional due process requirements, the appellate court reviews the award

de novo. Punitive damages need not be kept at a presumptively acceptable level of 4 times actual damages, but any significant departure above 9 times actual damages requires special explanation. If an appellate court finds that a punitive damage award is excessive, it should reduce the award to the highest constitutionally permissible number, and should not give plaintiff an opportunity to retry the issue instead. *Johnson v. Ford Motor Co.*, 35 Cal. 4th 1191 (2005).

7. California's Privacy Law Preempted. The Ninth Circuit found that the FCRA, as amended in 1996 and 2003, forbids states from enacting requirements or prohibitions concerning the exchange of information between affiliates. This decision holds that "information" for these purposes refers only to "information" that would otherwise constitute a credit report for FCRA purposes; namely, information bearing on a consumer's creditworthiness, credit standing, character, reputation, or mode of living which is to be used for purposes of determining eligibility for credit, insurance, or employment. To the extent California's Financial Information Privacy Act (Fin. Code §§ 4050-4060) regulates sharing of that type of information among affiliates, it is preempted. To the extent it regulates sharing of other types of information, it is not preempted. *American Bankers Ass'n v. Gould*, 412 F.3d 1081 (9th Cir. 2005).
8. Must Putative Class Members Be Given Opportunity to Assert Privacy Rights? The California Supreme Court has agreed to review an appellate court decision issued earlier this summer in *Pioneer Electronics (USA), Inc. v. Superior Court*, 128 Cal. App. 4th 246 (2005). That case involves a putative class action against a DVD manufacturer on a defective product theory. In discovery, plaintiffs sought the names and addresses of the other customers who had made complaints to Pioneer. The trial court ordered Pioneer to inform the complaining customers of the discovery request, and to give them the opportunity to opt out from having their information provided to plaintiffs. The Court of Appeal found the "opt-out" notice to the complaining customers was insufficient to protect their privacy rights.

XV. FUTURE LITIGATION

- A. Alternative Loan Products.
 - 1. Interest-Only Loans.
 - 2. Option ARMs.
 - 3. Reverse Mortgages.
 - 4. Pros Versus Cons.
 - 5. Key: Education and Disclosure?
- B. Foreign Language Lending.
 - 1. Disclosure / Documentation Requirements.
 - 2. Stiff Penalties.
 - 3. Potential Class Exposure?