

**Mortgage Bankers Association
Regulatory Compliance Conference**

LITIGATION UPDATE

**Washington, D.C.
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FCRA Litigation: Topics Covered

- Firm Offer Update
 - » Decision Trends
 - » Key Appeals
 - » Compliance Issues
- Mortgage Insurance Pricing

Why so much FCRA litigation?

- Federal Scheme
- Legal Uncertainty
- Potentially Enormous Exposure
 - » Willful violations = possibility of statutory damages of \$100 - \$1,000 per transaction
 - » Challenges to high volume transactions

When Will FCRA Litigation Cool Off?

1. Cap on Class Action Damages
2. Culture Shift on Value of "Privacy" Challenges
3. When New Willfulness Standard is Applied
 - Only Reasonably Likely Prospect

New FCRA Willfulness Standard

Previously, Circuits had Split:

6th, 7th, 8th:

Willful means defendant knew conduct violated the FCRA. Belief in its legality a defense.

3rd, 9th:

Reckless disregard for whether conduct violated the FCRA enough.

Reynolds : look at defendant's "good faith," "diligence" in seeking correct interpretation of FCRA.

Suspicious of "creative lawyering"

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Geico/Safeco Decided by Supreme Court

- MBA filed Amicus
- Decided June 4, 2007
- New standard for willful violations
- Critical, because courts only certify willful claims as FCRA class actions

Geico/Safeco Standard

- Threshold Question: Was defendant's FCRA interpretation, even if wrong, "objectively unreasonable"
- Look to see if issue clear from:
 1. Statutory language
 2. Court of appeals decisions
 3. Agency guidance

Geico/Safeco Standard

- Should Shut Down Firm Offer Cases
 - » Courts continue to divide even today
 - Even within the 7th Circuit
- Should Avoid Discovery on Compliance
 - » Supreme Court said defendant's behavior irrelevant, at least until the court finds its interpretation objectively unreasonable

Firm Offer Litigation

- Over 230 cases have been filed across the country
 - » 184 in the Seventh Circuit.
 - » 113 cases in the Northern District of Illinois.
- Pace of filings have slowed
 - » Some cases taking wait-and-see approach

Legal Uncertainty Remains

- Courts divide over:
 1. Must a “firm offer” have minimum value?
 2. Is *Cole* limited to product solicitations?
 3. Is the mailer the “offer”?
 4. How much information is enough
 - Too much?

Firm Offer Litigation Trends: Merits

- Outside Seventh Circuit:
 - » Decisions Generally Positive
 - » Some Courts Reject *Cole*
 - *Nasca v. Chase* (S.D.N.Y. Mar. 5, 2007)
 - » Several Others dismiss even applying a value standard
 - *Dixon v. Shamrock Financial* (D.Mass. April 20, 2007)

Firm Offer Litigation Trends: Merits

- Within the Seventh Circuit:
 - » Recent Decisions Very Mixed
 - » Several cases dismissed
 - › Heavily dependent on mailer's disclosures:
 - Rate, examples, or clear method for determining it
 - Minimum amount
 - Term

Firm Offer: Seventh Circuit Trends

- And terrible decisions persist:

Bonner v. New Century, (N.D. Ind., Mar. 9, 2007)

- “Four corners” means mailer is the offer
- Mailer fails *Cole* test because no final rate, term, amount provided
- Fact that consumer would have to apply first violates FCRA

“Value” for these courts means value of information in mailer, not underlying credit

Key Firm Offer Appeals

- **Seventh Circuit:**
 - » *Cavin v. Home Loan Ctr* (argument set for Oct. 24)
 - » *Murray v. HSBC Auto Finance, Inc.* (argument set for Nov. 1)
 - » *Bruce v. Keybank* (briefed this fall)
- **Ninth Circuit**
 - » *Putkowski v. Irwin Home Equity Corp.* (fully briefed)
- **First Circuit**
 - » *Dixon v. Shamrock Financial* (briefed this fall)

Seventh Circuit Appeals: *Murray v. HSBC*

- Lower court dismissed auto refinance case
 - » Held that the FCRA does not require rate, amount in mailer
- Issues on Appeal:
 1. Does the FCRA require terms of credit to be set in mailer
 2. Does *Safeco* require dismissal given that the district court already found defendant's interpretation of the FCRA reasonable.

Ninth Circuit Appeal: *Putkowski v. Irwin*

- **District court dismissed**
 - » Refused to follow *Cole* by implying a “value” element
 - » But carefully reviewed content of detailed home equity mailer
 - » Rejected argument that change in terms notice in mailer voided firm offer
- **Issues on appeal**
 - » Will 9th Cir. adopt *Cole* analysis
 - » Even if not, will FCRA compliance depend on content of the mailer
- **Fully briefed**

Firm Offer Compliance

- **Record keeping obligation**
 - » **Must maintain criteria:**
 1. **used to select consumer for firm offer;**
 2. **bearing on creditworthiness which served as basis for extending credit; and**
 3. **relating to any collateral requirement**
 - » **For 3 years from offer**
 - » **15 U.S.C. § 1681m(d)(3)**

Mortgage Insurance

Plaintiffs allege:

- ALT-A, similar products have higher premiums based on information in credit reports
- Constitutes Adverse Action under FCRA
- No Adverse Action notices sent

Mortgage Insurance

Which Definition of “Adverse Action” Applies?

- No FCRA violation if credit definition applies
- Insurance definition turns on whether setting of initial premium qualifies as an “increase in charge”

Whitefield v. Radian, Third Circuit holds that setting an initial MI rate higher based on FICO score is Adverse Action

Mortgage Insurance

- All MI companies were sued
- Many of the early cases won
- But MIs voluntarily send Adverse Action notices

Adverse Action Claims Dead?

- FACTA eliminated private right of action
- Courts agree no right to sue for conduct after Dec. 2004

Summary of FCRA Litigation

1. Courts continue to get it wrong
2. Treat any claims very seriously
3. Be very careful with solicitations

Fair Lending Litigation

- Over a dozen class actions filed around the country
- New cases filed on a regular basis
- Edelman began in Chicago
 - » Alleges pricing disparities caused by ysp

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Fair Lending Litigation

- NAACP files suit against 12 lenders
 - » Lots of press
 - » Case has not yet been served on defendants
 - » NAACP suit seeks only injunctive relief

Fair Lending Litigation

- Private Party Cases

- » Plaintiffs make no allegations that they analyzed the HMDA data of any individual defendant before filing the lawsuits

- » They allege that disparities are caused by “discretionary pricing,” but only specific practice mentioned is ysp

- » Purport to bring claims on behalf of minority borrowers subjected to discretionary pricing in retail, wholesale and correspondent channels

Fair Lending Litigation

- Motions to dismiss pending in some of the earlier cases
- Too early to identify litigation trends
- Industry expected to present a vigorous defense