

Legal Updates & News

Bulletins

Financial Services Report, Summer 2008

June 2008

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Editor's Note

Hollywood screenwriters have it easy. Down market has gone mainstream, which means that puberty is once again funny, not to mention dementia and teen pregnancy. But try doing that with the FACT Act. Or RESPA. If the last few issues haven't been up to snuff, blame the writer's strike. We have been working on "The Idiot's Guide to 'The Idiot.'"

In an incidental, yet parallel, subplot, this is an election year. If you doubt that, search "immigration" in Thomas's congressional legislation website and you get 696 hits. "Foreclosure"? Ninety-one hits. "Credit card" yields 24, and "privacy" will get you 204. There are two dozen bills responsive to "mother" but, sad to say, none addressing "apple pie." Where is the outrage?

The banking regulators in Washington have been lifting weights. Lots of new regs and near regs. The big item this quarter was the new proposed UDAP regs (see "UDAP, I Dap, We All Dap"). Credit cards are the new black, or at least the new subprime: Racial discrimination in pricing, disclosures, new do's and a lot of don'ts. We now have a new student loan bill and could have foreclosure legislation in time for the Fourth of July fireworks. In the courts, the Seventh Circuit may have removed the "Firm Offer of Credit" cases from life support. And the Ninth Circuit said that the payment networks and card-issuing banks didn't violate the antitrust laws in setting interchange fees. All in all, taxpayers got their money's worth. And then some.

Until next time, let's make the pie higher, as President Bush would say. To that, we tip our glass—or, do we lift our hats?—and say: "Ibid."

William L. Stern, Editor

MoFo Metrics

500	Dollars spent annually by advertisers, per American
33	Percentage of American wives who earn more than their husbands
166	Percentage increase in the world price of copper, last three years
5	Age of average child ID theft victim
300	Number (000's) of Americans whose flights the FAA grounded in 2007
1	Active residents of "Second Life" (in millions)
27	Percentage of all food available for consumption that becomes garbage

Ahead of the Summons

Kicking Assets

In April, the Second and Eighth Circuits handed down two landscape-altering class action decisions that could affect consumer class action litigation against financial institutions. A few days later, the Missouri Supreme Court made it a trifecta. Put on your hazmat suit before reading.

The Second Circuit's opinion in *McLaughlin v. Philip Morris*, 522 F.3d 215 (2d Cir. 2008) reversed class certification in a "light" cigarette class action, but the decision turned into a demolition derby. The opinion systematically catalogs and destroys such as courrant theories as presumed reliance, fraud on the market, fluid recovery, statistical sampling, and "diminished value." The Second Circuit takes the class action bar to school: "Rule 23 is not a one-way ratchet, empowering a judge to conform the law to the proof." Ouch.

A few days later, the Eighth Circuit pulled the plug on a heart-valve class action by reversing certification. Individual proof of reliance was the plaintiffs' infarction. *In re St. Jude Medical, Inc.*, 522 F.3d 836 (8th Cir. 2008).

Our favorite, though, came from the "Show Me" state. The Missouri Supreme Court decertified a class in which plaintiffs alleged that Coca-Cola employed a deceptive marketing scheme that misled consumers into believing that fountain Diet Coke is the same as bottled Diet Coke when in fact the fountain formula uses a blend of aspartame and saccharin whereas bottled Diet Coke uses only aspartame. The court held that the class was overbroad. To paraphrase Rhett Butler, "Frankly, my dear, some people don't give a damn." *State ex rel. Coca-Cola Co. v. Nixon*, 2008 WL 1724177 (Mo. April 15, 2008). A too bitter tonic? A little saccharin might help.

We detect a trend. The courts are troubled by class actions that sweep up everyone who bought the good or service, regardless of whether they saw the ad, cared about the representation, or had a bad experience or defective product.

For more information, contact [Will Stern](mailto:wsfern@mofo.com) at wsfern@mofo.com.

Do You Arbitrage?

Like geezer rock bands that will not fade away, class actions against title companies that arbitrage their escrow deposits are back. Five class actions were recently filed against four title companies: Fidelity National Title Company, First American Corporation, Old Republic Title and Escrow, and Chicago Title Company. The

claims are broad-ranging, including charging for reconveyance fees where the prior mortgage lender performed the service, marking up wire and other charges in alleged violation of § 8(a) of RESPA, and retaining “earnings credits” conferred by depository banks (who are prohibited by Reg. Q from paying interest on those funds) instead of passing those benefits on to escrow consumers. In May, a nationwide class action was filed against First American in federal court in San Francisco. So far, no banks have been named.

For more information, contact [Will Stern](mailto:wstern@mofo.com) at wstern@mofo.com.

Beltway Report

UDAP, I Dap, We All Dap

The elaborate kabuki between Congress and the banking regulators continues. On May 2, the FRB, OTS, and NCUA issued their new joint unfair and deceptive acts and practices (UDAP) rules implementing Section 5 of the FTC Act. Let's put on the lawyer pants and work this one out.

The proposed rules as to credit cards would prohibit banks from: (i) increasing the interest rate on outstanding balances except in specified circumstances; (ii) allocating payments to the lowest rate account balances; (iii) mailing payments less than 21 days before the date when payment must be made in order to avoid being treated as late for purposes other than the grace period; (iv) imposing a fee when the credit limit is exceeded solely because a hold was placed on available credit (e.g., gas station holds); (v) engaging in “two-cycle billing”; and (vi) financing security deposits and fees for credit availability if charges assessed during the first twelve months would exceed 50 percent of the initial credit limit. As to deposit accounts, the rules would prohibit banks from imposing a fee for paying an overdraft unless the bank has provided the consumer with an opportunity to opt out of the payment of overdrafts and the consumer has not done so. In the area of “firm offers of credit,” it would require banks making firm offers of credit advertising multiple APRs or credit limits to disclose the factors that determine whether a consumer will qualify for the lowest APR and highest credit limit advertised. These rules could take the steam out of federal legislation that would ban universal default, double-cycle billing, unilateral changes to card agreements, charging interest on transaction fees, and charging multiple overlimit fees. Our humble pages cannot begin to describe this borscht.

For more information, contact [Ollie Ireland](mailto:oireland@mofo.com) at oireland@mofo.com.

Springtime for Treasury

The Department of the Treasury released its “Blueprint” for reforming financial regulation. Short-term recommendations include creating a new Mortgage Orientation Commission, modernizing the President's Working Group on Financial Markets, and clarifying Federal Reserve liquidity provisioning. In the intermediate future, it recommends closing the OTS and assigning its operations to the OCC, ending oversight of state-chartered banks and putting them under a single regulator, and merging the CFTC with the SEC. These sweeping recommendations could take Congress years to consider. Or not.

For more information, contact [Ollie Ireland](mailto:oireland@mofo.com) at oireland@mofo.com.

Seeking the Lorax

Does anyone speak for the trees? Proposed FTC and FRB regulations to implement Section 311 of the FACT Act would require creditors to provide consumers with a risk-based pricing notice when credit is offered at less-than-favorable terms based on information obtained from the consumer's credit report. The notice must be issued after terms of credit have been set but before the consumer becomes contractually obligated for the credit transaction. The proposed rules allow creditors to use one of two proxy methods when it is not operationally feasible for the creditor to compare the terms of an offer to one customer against all other offers, which means entire categories of customers may receive generic risk-based pricing notices.

For more information, contact [Obrea Poindexter](mailto:opindexter@mofo.com) at opindexter@mofo.com.

Stabilizing Students

It will now be easier than ever to get that Ph.D from Trump University. The President signed into law a bill aimed at stabilizing the student loan market. The legislation will empower the Education Department to buy federally guaranteed loans that lenders are unable to sell as securitized debt and funnel loan capital to state guaranty agencies under a lender-of-last-resort program. Other provisions increase annual loan limits by \$2,000 and raise aggregate loan limits to \$31,000 and \$57,500 for dependent and independent undergraduates, respectively. Between January 1, 2007, and December 31, 2009, the law classifies as extenuating circumstances delinquencies on home mortgages of up to 180 days, allowing parents strained by

the current housing market to secure loans for their children.

For more information, contact [Joe Gabai](mailto:jgabai@mofo.com) at jgabai@mofo.com.

Fair Lending Study Urged

Representative Barney Frank (D-MA) and 15 other congressmen sent a letter to the GAO calling for a comprehensive review of the nation's fair lending laws. They expressed concern that federal regulator oversight and enforcement of fair lending laws is insufficient and that HMDA data continue to reveal significant racial and ethnic disparities in mortgage lending. Plaintiffs' class action lawyers are taking note

For more information, contact [Obrea Poindexter](mailto:opointexter@mofo.com) at opointexter@mofo.com.

Fee Disclosure

The GAO presented a report to Congress urging federal banking regulators to step up enforcement efforts to ensure that adequate fee disclosures are made to consumers of checking and savings accounts. The GAO's report notes that about one-third of the time, banks are not making available their disclosures about increased fees for overdrafts, insufficient funds, and stop payments. Brochure printers rejoice.

For more information, contact [Ollie Ireland](mailto:oireland@mofo.com) at oireland@mofo.com.

Emergency Lending Limits

The OCC adopted an interim final rule revising its lending limits regulation. In general, the lending limit for a national bank is 15 percent of its unimpaired capital and surplus to a single borrower, plus an additional 10 percent of unimpaired capital and surplus if the loan is properly secured. The rule enables the OCC to approve exceptions to the national bank lending limit for specific transactions that provide essential funding in emergency situations, such as critical financial market instability.

For more information, contact [Obrea Poindexter](mailto:opointexter@mofo.com) at opointexter@mofo.com.

OCC Telemarketing Enforcement

The OCC announced a settlement with Wachovia Bank directing it to make restitution to consumers harmed by its relationships with several telemarketers and third-party payment processors. The OCC concluded that the bank engaged in unsafe or unsound practices and engaged in unfair practices in connection with the use of remotely created checks. The OCC has also issued updated guidance to national banks to enhance diligence, underwriting, and monitoring of entities that process payments for telemarketers and other merchants.

For more information, contact [Obrea Poindexter](mailto:opointexter@mofo.com) at opointexter@mofo.com.

Credit Card Report

Credit Card Prix Fixe

The Ninth Circuit handed down a victory for card issuers and payment networks in an antitrust suit brought by merchants alleging that Visa, MasterCard, and their member banks fixed the prices of merchant discount and interchange fees. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008). Applying the principles in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), the court stated: "[T]he complaint does not answer the basic questions: who, did what, to whom (or with whom), where, and when?" 518 F.3d at 1048. "[A]lthough appellants allege the Banks 'knowingly, intentionally and actively participated in an individual capacity in the alleged scheme' to fix the interchange fee or the merchant discount fee, this allegation is nothing more than a conclusory statement." *Id.* As for conspiring to fix the interchange fee, "merely charging, adopting or following the fees set by a consortium is insufficient as a matter of law to constitute a violation" of the Sherman Antitrust Act. *Id.* at 1049.

For more information, contact [Mark Ladner](mailto:mladner@mofo.com) at mladner@mofo.com.

Hold the Special Sauce

It is bar-be-que season. Congress and the bank agencies fired up the grill this quarter and put the credit card industry on kabobs. It was like the beach party scene from *Gidget*.

A House subcommittee held hearings on "The Credit Cardholders' Bill of Rights." The name itself implies

mischievous. The OCC testified that the bill would affect the ability of lenders to manage risks and suggested that disclosure rather than outright prohibition of practices could lead credit card lenders to change practices that are difficult to explain and defend. The FRB also conducted a review of the credit card industry. It invited credit card issuers, processors, consumer advocates, credit counseling agencies, and regulators to a one-day forum to get more information about "relevant industry trends and to identify areas that may warrant action or further study." The FRB wants to ensure that banks focus on risk management fundamentals.

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Truncate This!

Retailers, the conga line forms here. A bill that could end the 300-plus FACT Act class actions that have been brought against retailers and others for failing to truncate card expiration dates on receipts is on the President's desk. The collective exposure to retailers in these cases is enough to finance the invasion of several small nations. H.R. 4008 passed the Senate unanimously on May 20 and the House by a vote of 407-0. Not even the trial lawyers opposed. The legislation states that if retailers include the expiration date on the receipt, they are not in willful violation of the law. If signed into law, the measure will apply retroactively to pending cases.

For more information, contact [Obrea Poindexer](mailto:Opindexer@mofo.com) at opindexer@mofo.com.

Arbitration Report

Enough NAF?

The San Francisco City Attorney wants to vote the National Arbitration Forum off the island. NAF is an arbitration service provider used by a number of credit card issuers. Brought on behalf of the People, the City's lawsuit alleges that NAF stacks the deck in favor of issuers by handing out inflated awards, improperly imposing attorneys' fees, and other things. The complaint alleges that over a four-year period, less than 0.2% of the arbitration hearings conducted by NAF were won by consumers. The complaint steals a page from the plaintiff bar's hymn book, but it remains to be seen whether the choir will sing.

For more information, contact [Rebekah Kaufman](mailto:rkaufman@mofo.com) at rkaufman@mofo.com.

Parties Can't Modify Federal Arbitration Act Review Standard

The Supreme Court ruled on March 25 that contractual provisions expanding the grounds to vacate or modify an arbitration award under the FAA are unenforceable. In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), the parties entered into a written agreement under the FAA that permitted a district court to vacate or modify any arbitration award if the arbitrator's findings of facts were not supported by substantial evidence or if the arbitrator's conclusions of law were erroneous. The FAA, however, provides that a court "must" confirm an arbitration award unless grounds such as fraud, evident partiality, or corruption in the arbitrator or the like exist—more stringent grounds than the parties had provided in their agreement. This case was argued by the Firm's Beth Brinkmann.

For more information, contact [Beth Brinkmann](mailto:bbrinkmann@mofo.com) at bbrinkmann@mofo.com.

Class Waivers Waived

On May 27, the U.S. Supreme Court denied certiorari in *T-Mobile USA, Inc. v. Laster*, No. 07-976, a case that would have tested whether the Federal Arbitration Act preempts California state law finding unconscionable class action waivers that are part of consumer arbitration agreements. Earlier in the year, the Supreme Court declined to take up that same issue in *Circuit City Stores, Inc. v. Gentry*. T-Mobile's rival, AT&T, filed an unusual *amicus* brief urging the high court to decline review because better clauses are on the way (read, AT&T's clause).

For more information, contact [Will Stern](mailto:wstern@mofo.com) at wstern@mofo.com.

Mortgage Report

ARMs and the Man

In May, the federal financial regulatory agencies jointly issued final guidance illustrations for helping consumers

understand certain hybrid adjustable-rate mortgage (ARM) products. These illustrations follow on the July 2007 "Statement on Subprime Mortgage Lending," which recommended that advertisements and promotional materials provide clear, balanced, and timely information to consumers. This includes information about the risk of payment shock, ramifications of prepayment penalties, balloon payments, and a lack of escrow for taxes and insurance. The illustrations are intended to assist institutions in providing all of this information.

See <http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20080522a1.pdf>.

For more information, contact [Joe Gabai](mailto:jgabai@mofo.com) at jgabai@mofo.com.

RESPA Excessive Fees Class Certification Vacated

The Eleventh Circuit recently vacated an order by a lower court certifying a class of borrowers where one of the stated common issues of law was whether a mortgage lender violated subsection 8(b) of RESPA by requiring loan borrowers to pay an escrow waiver fee for which the lender had performed no services. *Friedman v. Mkt. St. Mortg. Corp.*, 520 F.3d 1289 (11th Cir. 2008). The Eleventh Circuit determined, however, that it was the law of the case that the lender had in fact performed some services. On that basis, the court vacated class certification and remanded with instructions to dismiss with prejudice, finding that there can only be a RESPA violation where no services were rendered in exchange for a settlement fee and because subsection 8(b) does not apply to settlement fees that are alleged to be excessive.

For more information, contact [Michael Agoggia](mailto:magoggia@mofo.com) at magoggia@mofo.com.

Mortgage Brokers Aren't "Creditors"

Is a mortgage broker a "creditor" under the Truth in Lending Act? The Fourth Circuit thinks not. In *Cetto v. LaSalle Bank Nat'l Ass'n*, 518 F.3d 263 (4th Cir. 2008), plaintiffs sought to rescind their loan claiming it was a "high-cost mortgage" entitling them to specific disclosures that they were not afforded. The court rejected plaintiffs' argument that the broker should be considered a "creditor," holding that TILA unambiguously defines "creditor" to refer only to a person who both regularly extends consumer credit and is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness.

For more information, contact [Joe Gabai](mailto:jgabai@mofo.com) at jgabai@mofo.com.

Option ARMs Armed

Option ARM litigation is heating up. There are approximately 45 class actions pending around the country, the overwhelming majority in California. Court rulings on threshold pleading challenges are all over the map. District judges have come out differently on questions of basic contract interpretation. Most of these reflect a fundamental misunderstanding of TILA, such as the difference between the contractual interest rate and the APR. Some lenders are separately challenging the notion that TILA rescission is available on a class-wide basis, all the while keeping an eye on the Seventh Circuit appeal in *Andrews v. Chevy Chase Bank*, FSB, 240 F.R.D. 612 (E.D. Wis. 2007). Expect to see dispositive motions rulings in the next few months.

For more information, contact [Nancy Thomas](mailto:nthomas@mofo.com) at nthomas@mofo.com.

Fannie (and Freddie) Packs

Fannie Mae and Freddie Mac entered into an agreement with the Office of Federal Housing Enterprise Oversight (OFHEO) and the New York Attorney General requiring them to adopt the "Home Valuation Code of Conduct" by January 1, 2009, for all mortgages sold to them. The agreement was prompted by a probe into fraudulent house appraisals that resulted in overvalued mortgage loans. As a result of that settlement, as of January 1, 2009, Fannie Mae and Freddie Mac will only purchase mortgages that comply with the Code of Conduct, which means buying mortgages only from lenders that use independent appraisers, that is, no appraisers employed by lenders, affiliates, or subsidiaries. The Code will force big changes in the way appraisals are processed in the mortgage industry. You can review the Code at <http://www.oag.state.ny.us/press/2008/mar/Code%20Final%203-2.pdf>. Time to check your Florida swamp listing on eBay.

For more information, contact [Obrea Poindexter](mailto:opointexter@mofo.com) at opointexter@mofo.com.

FHA Claim Alleging Racial Discrimination Revived

In *Boykin v. Keycorp*, 521 F.3d 202 (2d Cir. 2008), the plaintiff alleged that a bank discriminated against her for a home equity loan because she is a black woman and her home is in a predominantly African-American neighborhood. The district court dismissed on the ground that the claim was untimely and had been insufficiently pled. The Second Circuit reversed, finding that the two-year statute of limitations for plaintiff to file

her complaint did not begin to toll until the Department of Housing and Urban Development sent plaintiff a final administrative letter closing her case, and also finding that the FHA claim had been sufficiently pled.

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Rescue Mission

A House Committee on Financial Services approved "The FHA Housing Stabilization and Homeownership Retention Act," designed to restore stability to the housing market and increase market liquidity. It allows the FHA to provide up to \$300 billion in new guarantees to help refinance at-risk borrowers into viable mortgages. In exchange for accepting a substantial write-down of principal, the existing lender or mortgage holder would receive a "short payment" in an amount less than the outstanding balance as payment in full from the proceeds of a new FHA-guaranteed loan. The loan would have terms the borrower may reasonably be expected to pay, and the borrower agrees to share future home appreciation with the government.

A bipartisan compromise in the Senate reached just before Memorial Day makes Senate passage likely. GSE reform is key. The bill establishes a high-cost loan limit for Fannie Mae and Freddie Mac of 132 percent of the conforming loan limit, which currently would allow purchases of loans up to \$550,000. The GSEs would be prohibited from holding loans purchased with principal obligations greater than the normal conforming limit on their portfolios, either as whole loans or as mortgage-backed securities, except to the extent that such loans are held for securitization.

A bill may be on the President's desk by July 4. President Bush vowed to veto an earlier version of the House bill as a taxpayer bailout, but that threat has receded.

For more information, contact [Ollie Ireland](mailto:oireland@mofo.com) at oireland@mofo.com.

TILA Violation Outside Limitations Period? Fuggedaboutit

A federal court has ruled that the one-year statute of limitations in TILA begins to run on claims arising from open-ended loans when the first finance charge is imposed. *McAnaney v. Astoria Fin. Corp.*, Case No. 04-CV-1101, 2008 U.S. Dist. LEXIS 5535 (E.D.N.Y. Jan. 25, 2008). The court followed the lead of every Circuit to decide the issue and rejected the argument that the "discovery rule" should apply to the limitations period for open-ended lines of credit.

For more information, contact [Joe Gabai](mailto:jgabai@mofo.com) at jgabai@mofo.com.

RESPA Respite

In March, a district court in Alabama dismissed RESPA Section 8 claims filed against a mortgage lender over its imposition of loan discount fees. Plaintiffs alleged that they paid loan discount fees, or points, but received no corresponding discount in the interest rate. The court dismissed, holding that the fee was paid directly to Quicken and not split with any third party, and loan discount fees are not "settlement services." The court refused to give deference to HUD's Policy Statement 2001-1, opining that § 8(b) could provide a basis on which to challenge fees as excessive. The court also found that RESPA's definition of "settlement services" is limited to services and does not include loan discount fees or the substantive terms of a loan, such as the interest rate. *Wooten v. Quicken Loans, Inc.*, Case No. 07-00478, 2008 U.S. Dist. LEXIS 20252 (S.D. Ala. Mar. 10, 2008).

For more information, contact [Michael Agoglia](mailto:magoglia@mofo.com) at magoglia@mofo.com.

Credit Bureau Did Not Violate FCRA

The First Circuit affirmed summary judgment in favor of a credit bureau in a lawsuit alleging Fair Credit Reporting Act ("FCRA") violations. Plaintiff claimed that he was "shocked" to see that the bank financed the new windows and claimed a mortgage on the home. His FCRA claim was that the credit bureau failed to conduct a reasonable investigation after he complained about the mortgage and also failed to delete the disputed debt from his credit report. Could the credit bureau have uncovered the inaccuracy if it had reasonably investigated? The First Circuit said no; there was no dispute the consumer received windows financed by a home mortgage, rather, the plaintiff was attacking the mortgage's validity. This raised a legal issue that the credit bureau was neither qualified nor obligated to address. *DeAndrade v. Trans Union LLC*, Case No. 07-1844, 2008 U.S. App. LEXIS 8030 (1st Cir. Apr. 15, 2008).

For more information, contact [Andrew Smith](mailto:asmith@mofo.com) at asmith@mofo.com.

California Report

Counting Days

A mortgage lender's use of an "equal-months" interest calculation in the year a mortgage loan is paid off does not violate California's unfair competition law ("UCL"), even if a 30.4-day month computation results in an interest charge in the year of payoff for fictitious days. *Puentes v. Wells Fargo Home Mortgage*, 160 Cal. App. 4th 638 (2008). In particular, the court found that the practice cannot violate California's UDAP statute as a matter of law because this method of calculation is required by Reg. Z.

For more information, contact [Will Stern](mailto:wstern@mofo.com) at wstern@mofo.com.

Cash Call

Observing California class action law is a little bit like watching a Will Ferrell movie. When it's over, you wonder what you've just witnessed.

California just made class actions easier. In a case appropriately named "Cash Call," an intermediate appellate court held that it's perfectly alright to bring a class action in the name of someone who doesn't have a claim against the defendant, serve discovery to force the defendant to give up a list of putative class members to be contacted, then allow amendment to substitute someone who was actually affected by the practice. *CashCall, Inc. v. Superior Court*, 159 Cal. App. 4th 273 (2008). The court held that as an issue of first impression, there is no bright-line rule in class actions that requires trial courts to necessarily reject precertification discovery motions by plaintiffs who never had standing to obtain identities of actual class members, and that the "right" of class members to bring a class action outweighed the potential for abuse of the class action procedure so as to permit precertification discovery of class members' identities.

For more information, contact [Will Stern](mailto:wstern@mofo.com) at wstern@mofo.com.

Firm Offer Update

The Fat Lady Yodels

The Seventh Circuit started it all by giving us *Cole* and *GMAC*. But this quarter it decided three appeals that gut the key theories of liability advanced by the plaintiffs' bar. *Murray v. New Cingular Wireless Serv., Inc.*, ___ F.3d ___, 2008 U.S. App. LEXIS 8004 (7th Cir. Apr. 14, 2008). *Murray* retreats from *Cole*, limiting the latter and its value requirement to offers of merchandise masquerading as credit. *Murray* holds that for pure offers of credit, "*Cole* is beside the point," because "the right question is whether the offer is 'firm' rather than whether it has 'value.'" *Murray* also rejects the notion that an initial mailer for a home equity loan must contain all material terms of the credit offer.

Murray came on the heels of the First Circuit's decision in *Sullivan v. Greenwood Credit Union*, 520 F.3d 70 (1st Cir. 2008), construing the term "firm offer of credit" as a matter of first impression. *Sullivan* agreed that the initial mailer for a home loan need not contain all material terms, but it also found that the mailer had "some value," even though it distinguished *Cole*. See also *Dixon v. Shamrock Fin. Corp.*, 522 F.3d 76 (1st Cir. 2008).

In the wake of these decisions, the plaintiff's class action bar has been crying "uncle" and dismissing class actions hither and yon. While appeals are still pending in the Eighth Circuit, we would expect either dismissals or similar decisions rejecting the core theory of liability that all material terms must be in the initial mailer.

For additional information about new disclosure requirements relating to firm offer solicitations, see article, "UDAP, I Dap, We All Dap" in this issue.

For more information, contact Christina Chen at cchen@mofo.com.

Preemption Report

Dreams of World Domination

The Firm obtained a favorable National Bank Act preemption decision in *Leae v. U.S. Bank*, pending in Los Angeles Superior Court. The action challenged the bank's ability to charge check-cashing fees to non-

depositors. The court held that plaintiff's claim brought under California's unfair competition law was preempted by OCC's regulations, specifically by 12 C.F.R. § 7.4007(b) (providing that state laws concerning "checking accounts" and "disclosure requirements" may not be applied to national banks).

For more information, contact [James McGuire](#) at jmcguire@mofo.com.

FCRA Furnisher Funk

In April, a district court held that state law claims brought under a California identity theft statute alleging a credit card issuer continued collection efforts after being notified by plaintiff of identity theft were not preempted. *Pasternak v. Trans Union*, CV 07-4980, 2008 WL 928840 (N.D. Cal. April 3, 2008). The court recognized a split in authority regarding whether FCRA preempts all claims that bear any connection to furnishers of credit information or only claims concerning the furnishing of information to reporting agencies. Ultimately, the court sided with the courts reaching the narrower result.

In January, however, the Eleventh Circuit held that state law claims for invasion of privacy and defamation were preempted by an FCRA provision that protects truthful statements made by furnishers of credit information to credit reporting agencies. *Lofton-Taylor v. Verizon Wireless*, No. 06-16142, 2008 WL 189853 (11th Cir. Jan. 23, 2008).

For more information, contact [Rick Fischer](#) at rfischer@mofo.com.

Overdraft Program Does Not Violate TILA

A federal court ruled that a bank's overdraft protection program is not a credit extension and therefore not subject to the TILA. A class action was brought against Washington Mutual, alleging that the bank's practice of paying drafts written on accounts with insufficient funds, and then charging account holders a fee violated TILA's prohibition against the unsolicited issuance of credit and the offsetting of a credit card account. The court disagreed. The fact the bank automatically made payments despite insufficient funds, the court said, is not sufficient to conclude the parties had a credit agreement. *In re Washington Mutual Overdraft Protection Litigation*, 539 F. Supp. 2d 1136 (C.D. Cal. 2008).

For more information, contact [Joe Gabai](#) at jgabai@mofo.com.

Privacy Report

CAN-SPAM? No, You Can't

Exactly three years since proposing new provisions for its rule under the CAN-SPAM Act, the FTC approved a final rule: (1) prohibiting e-mail recipients from having to pay a fee, provide information other than an e-mail address and opt-out preferences, or take any steps other than sending a reply e-mail message or visiting a single Internet Web page to opt out of receiving future e-mail; (2) defining "sender" to facilitate determining which of multiple parties advertising in a single e-mail is responsible for CAN-SPAM Act compliance; (3) allowing a "sender" to include an accurately-registered post office box or private mailbox to meet the statutory requirement to display a "valid physical postal address"; and (4) defining "person" to clarify that the CAN-SPAM Act applies to an individual and specified entities, not just a natural-person spammer. The FTC also adopted a statement addressing the application of the CAN-SPAM Act to "Forward-to-a-Friend" e-mail marketing campaigns.

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SEC to Amend GLBA

Suppose a group of wealth-management professionals moves from one securities firm to another, and solicits clients who still hold accounts with the old firm; can that firm obtain an injunction barring them from engaging in those solicitations? In *Wachovia Securities, LLC v. Gates et al.*, 2008 U.S. Dist. LEXIS 32895, the court said no. It concluded that much of the damage sought to be prevented by the injunction was already done; namely, the clients already were aware that the group left to another firm.

To address the privacy and data security issues arising in these scenarios, the SEC proposed to amend its Gramm-Leach-Bliley Act ("GLBA") rule, Regulation S-P. In particular, the SEC proposed to add a new exception to the privacy rule that would allow SEC-regulated entities to disclose certain, limited information about customers to the outgoing account representatives to enable them to "maintain contact with investors," but without placing the investors at risk of identity theft. The SEC also proposed certain conditions on these

disclosures, including recordkeeping requirements.

In addition, the SEC proposed to trade in the compact data security rules of Regulation S-P for a big sedan: “detailed,” yet risk-based, standards for a “well-designed information security program.” And equipped with a sunroof, too: security breach notice requirements, akin to those imposed by the banking agencies in 2005. In general, the amendments would require SEC-regulated entities to give notice of a security breach to “each individual with whom the [affected] information is identified,” and some entities would be required to notify the SEC about the breach. As an added feature, SEC-regulated entities would be better able to avail themselves of safe harbor provisions contained in several state notification laws by complying with the new notification requirements of Regulation S-P.

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Creditors’ Rights Report

Foreclosure Legislation

Congress started a few months ago with measures that would have allowed bankruptcy judges to rewrite mortgage agreements. Now, a bipartisan compromise in the Senate could clear the way to legislation addressing the foreclosure crisis that would *bar* bankruptcy judges in Chapter 13 proceedings from modifying loan terms on first mortgages. The Emergency Home Ownership and Mortgage Equity Protection Act would increase the FHA’s loan limit to \$550,000 with a 3.5 percent down-payment requirement, provide \$4 billion in community development grants to purchase and rehabilitate foreclosed properties, allocate \$100 million for housing counselors to reach at-risk homeowners, and allow businesses to write off losses retroactively for as many as four years.

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Auto Deficiencies Preserved

On May 19, the Tenth Circuit added its voice to the chorus of appellate courts that permit creditors to recover amounts that bankruptcy debtors still owe on their auto loans, even though the debtors have given up their vehicles. *In re Ballard*, ___ F.3d ___, No. 07-5109 (May 19, 2008). Chapter 13 bankruptcy debtors contend that any remaining debt is wiped out once they give the car back to the dealer or the creditor. But in February, the Eighth Circuit said no, and in March, so did the Sixth Circuit.

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Rescission Demand Valid Regardless of Ability to Pay

A federal court in Illinois has held that a creditor must honor a rescission demand even if it appears that the obligor may not be able to tender the remaining balance of the loan after factoring in the rescission amount. *Lippner v. Deutsche Bank Nat’l Trust Co.*, No. 07-cv-00448, 2008 U.S. Dist. LEXIS 14135 (N.D. Ill. Feb. 26, 2008). That is because, under TILA, the burden does not shift to the obligor to satisfy her end of the rescission transfer until after the creditor satisfies its obligations relating to the rescission. This decision appears to be inconsistent with a line of cases holding that a court may exercise its equitable powers to modify TILA’s statutory rescission procedures. For example, in *Yamamoto v. Bank of New York*, 329 F.3d 1167 (9th Cir. 2003), the Ninth Circuit upheld a district court’s decision to disallow the exercise of the right of rescission where circumstances indicated that the borrower would be unable to repay the loan proceeds.

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