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DEVELOPMENTS IN "FIRM OFFER" LITIGATION UNDER THE FAIR CREDIT REPORTING ACT

The Value and Specificity Required for a "Firm Offer of Credit" under FCRA Have Been the Subject of Extensive Litigation and Conflicting Rulings in the Courts. Recently, the Supreme Court Added to Lenders' Risks by Ruling that Reckless Disregard of Consumers' Statutory Rights Was a "Willful" Violation of FCRA, for which the Statute Allows Punitive Damages..

By R. Bruce Allensworth, Irene C. Freidel, Brian M. Forbes & Gregory N. Blase *

In recent months, the landscape has shifted for lenders defending suits by consumers under the "firm offer of credit" provision in the Fair Credit Reporting Act ("FCRA").[1] In June, the United States Supreme Court issued its decision in *Safeco Insurance Co. of America v. Burr*,[2] which clarified the standard for willfulness under FCRA. Numerous decisions from outside the Seventh Circuit either have declined to adopt the landmark cases of *Cole v. U.S. Capital, Inc.*[3] ("*Cole*") and *Murray v. GMAC Mortgage Corp.*[4] ("*Murray*") or have applied the decisions in a lender-friendly manner. Inside the Seventh Circuit, however, the picture is not as rosy for lenders. The district courts continue to reach widely divergent results, making it extremely difficult to predict if a particular offer will satisfy *Cole*'s value test.[5] If it does not, and the offer was made post-*Cole*, the defendant may be held liable for significant statutory damages under the Supreme Court's new "willfulness" test.

RECENT "FIRM OFFER" DECISIONS IN THE SEVENTH CIRCUIT

The Seventh Circuit's decisions in *Cole*[6] and *Murray*[7] opened the floodgates of class action litigation,

[1] 15 U.S.C. §§ 1681b(c)(1)(B)(i); 1681a(l) (2006).

[2] 127 S. Ct. 2201 (2007).

[3] 389 F.3d 719 (7th Cir. 2004).

[4] 434 F.3d 948 (7th Cir. 2006).

[5] The states that comprise the Seventh Circuit are Illinois, Indiana, and Wisconsin.

[6] 389 F.3d 719 (7th Cir. 2004).

[7] 434 F.3d 948 (7th Cir. 2006).

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with plaintiffs' attorneys seeking to capitalize on and expand the requirements that *Cole* and *Murray* added to the plain text of FCRA.[8] While there was previously little litigation involving the firm offer provisions,[9] since *Cole*, hundreds of FCRA firm offer class actions have been filed throughout the country. Most of these cases have been filed against financial services companies, including mortgage lenders, that market their credit products through mailers, as permitted by FCRA and as recognized by the government agency charged with regulating the statute.

Cole and Murray Set the Stage; Perry and Forrest Act Up

In *Cole*, the Seventh Circuit considered whether the plaintiff had adequately pleaded a claim that the defendants had violated FCRA by accessing the plaintiff's credit report without making a firm offer of credit. The promotional material sent to the plaintiff offered a $300 line of credit that could be used only towards the purchase of a car. The material also gave the plaintiff an opportunity to obtain a credit card. The defendants argued that an "offer of credit" was "firm" within the meaning of FCRA as long as "some amount of credit – however small – is guaranteed."[10] In other words, the defendants argued that they could legally access consumers' credit reports as long as they guaranteed some amount of credit, even as low as $1.

The Seventh Circuit rejected the defendants' argument, stating that it "would permit anyone to gain access to a sea of sensitive consumer information simply by offering some nominal amount of guaranteed credit."[11] The court held that a "'firm offer' must have sufficient value for the consumer to justify the absence of the statutory protection of his privacy . . . . It is clear that Congress did not intend to allow access to consumer credit information 'for catalogs and sales pitches.'"[12]

Going beyond the statutory text of FCRA, the court went on to hold that, to determine whether a firm offer of credit is *bona fide*, a court must consider the "entire context" of the offer:

> To determine whether the offer of credit comports with the statutory definition, a court must consider the *entire* offer and the effect of *all* the 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.[13]

The Seventh Circuit appeared to develop its value test to help the fact finder determine whether the "spirit" of FCRA had been satisfied; that is, whether the offer is a meaningful one for credit justifying intrusion into the consumer's credit history or simply a "sales pitch" for a consumer product, which was a car in *Cole's* case.

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[8] 15 U.S.C. §§ 1681b, *et seq.*

[9] Few cases prior to *Cole* dealt directly with the issue of what constitutes a "firm offer" of credit. *See*, *e.g.*, *Kennedy v. Chase Manhattan Bank USA, NA*, 369 F.3d 833 (5th Cir. 2004). In *Kennedy*, the Fifth Circuit affirmed the dismissal of claims alleging that the defendant violated FCRA when it sent plaintiffs "preapproved" offers of credit and subsequently declined to extend credit. The court relied exclusively on the extensive statutory definition of "firm offer of credit" in the statute, to conclude that the plaintiffs failed "to state a claim under [FCRA] because [defendants' preapproved certificates] clearly establish that the respective offers constitute firm offers of credit under [FCRA]." *Id.* at 841. In another case, a federal district court relied entirely on the plain language of FCRA to dismiss plaintiff's claim where it found that an offer of credit was mailed to the plaintiff and such offer would have been honored provided the plaintiff continued to meet the criteria used to select her for the offer. *See Gamble v. Citifinancial*, No. 3:02cv693, 2002 WL 31643028, at *3 (D. Conn. Nov. 19, 2002). In both off these pre-*Cole* cases, the courts relied exclusively on FCRA's extensive statutory definition of "firm offer." *See* 15 U.S.C. § 1681a(*l*). As the court noted, a "firm offer of credit" under FCRA "really means a 'firm offer if you meet certain criteria.'" *Kennedy*, 369 F.3d at 841.

[10] *Cole*, 389 F.3d at 726.

[11] *Id.*

[12] *Id.* at 726-27 (quoting *Trans Union Corp. v. FTC*, 267 F.3d 1138, 1143 (D.C. Cir. 2001)).

[13] *Id.* at 727-28 (emphasis in original).

In *Murray v. GMAC Mortgage Corp.*, which followed *Cole*, the Seventh Circuit spoke indirectly to the issue of what constitutes a firm offer of credit. Although the case involved review of the district court's denial of class certification, the court, *in dicta*, stated that "[n]othing in *Cole* requires an offer's value to be assessed *ex post*, and recipient by recipient. To decide whether GMAC 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 the consumers accept."[14]

The *Cole* and *Murray* decisions touched off a tidal wave of class action lawsuits in the Seventh Circuit and beyond, in which plaintiffs sought to capitalize on the value test in ways that were not supported by the language of FCRA or the *Cole* decision itself. From *Cole* and *Murray*, plaintiffs have argued that the *Cole* value test requires lenders to set forth every material term of the credit offer in the initial mailer and that an offer that is not capable of acceptance based on the terms set forth in the mailer is not a firm offer of credit. Some plaintiffs have had success with this argument, although it is contrary to the plain language of FCRA.

A 2006 decision from the Seventh Circuit, however, gave some hope that district courts within that circuit would take a more balanced view of what constitutes a firm offer under FCRA. In that case, *Perry v. First National Bank*,[15] the court confirmed that whether a mailer constitutes a firm offer of credit is determined by whether it is for a consumer product or a credit product. In *Perry*, the Seventh Circuit upheld a district court's finding of the existence of a firm offer of credit where the defendant offered the plaintiff a credit card with a $300 limit, a definite interest rate, and no restrictions on the use of the credit product offered. The plaintiff argued that the offer failed the *Cole* value test because it was for a small amount and the credit card had numerous fees associated with it. The Seventh Circuit rejected this argument and focused instead on the facts that: (1) the mailer indicated that plaintiff had been "preapproved"; (2) there was no indication that plaintiff would have been denied credit had he applied; and (3) the credit card could be used to purchase *anything* as opposed to a specific consumer product (as in *Cole*). In reaching its conclusion, the court noted, with approval, that "the only product [defendant] offered was a credit line."[16]

More recently, in *Forrest v. Universal Savings Bank, F.A.*,[17] the Seventh Circuit found that the defendant's offer of a credit card was a firm offer under FCRA and upheld the district court's dismissal of the lawsuit. In that case, the defendant offered plaintiff a credit card with a $15,000 limit, but the offer was contingent on the plaintiff transferring $5,000 of "qualifying balances" and maintaining a $3,500 balance on the new card for at least eighteen months.[18] The offer also indicated that there was no annual fee and the card had a 10.99% variable APR. The court rejected plaintiff's argument that the offer lacked value and held that the offer included a minimum credit limit of $5,000 and, accordingly "provides value to the consumer through the offer of a Visa credit card; the card may be used anywhere Visa is accepted and is not restricted to the purchase of a particular product."[19] While *Perry* and *Forrest* give reason for hope to credit providers, the *Perry* decision has not been consistently applied by district courts within the Seventh Circuit. Moreover, by continuing to cite *Cole* and *Murray* approvingly, the more recent Seventh Circuit decisions persist in providing trial judges with leeway to apply FCRA more restrictively than appears is required by the statute's plain language.

A recent oral argument before the Seventh Circuit in *Murray v. HSBC Auto Finance, Inc.*,[20] suggests that that court may be approaching a more reasonable interpretation of *Cole* as well. In that case, Judge Posner of the Seventh Circuit appeared skeptical of the plaintiff's assertion that a firm offer must contain terms not identified in the statute and comport with traditional common law notions of contractual offers:

CIRCUIT JUDGE POSNER: Look, firm offer is defined as an offer, *et cetera*, which I just read. That's the definition of firm offer.

MR. EDELMAN: That's correct, but the –

CIRCUIT JUDGE POSNER: There's nothing missing.

MR. EDELMAN: Well, what is an offer?

CIRCUIT JUDGE POSNER: It's not your idea of a firm offer. It's Congress' idea.[21]

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[14] *Murray*, 434 F.3d at 956.

[15] 459 F.3d 816 (7th Cir. 2006).

[16] *Id.* at 825.

[17] 2007 WL 3102077 (7th Cir. Oct. 25, 2007).

[18] *Id.* at *1.

[19] *Id.* at *3.

[20] Appeal No. 06-3846 (7th Cir. 2006).

[21] Transcript of Oral Argument at 4, *Murray v. HSBC Auto Finance*, Appeal No. 06-3846 (7th Cir. 2006).

Judge Wood also questioned plaintiff on the assertion that a firm offer must contain particular terms.

MR. EDELMAN: It doesn't say we're going to make a loan at "X" percent, any amount.

CIRCUIT JUDGE WOOD: But the statute, where the statute require it to say that?

MR. EDELMAN: Well, the –

CIRCUIT JUDGE WOOD: It just says if the consumer is determined after functionally further investigation to meet the criteria.[22]

The Seventh Circuit's decision in *Murray* is expected in early 2008.

District Courts in the Seventh Circuit Reach Divergent Conclusions

Although no other circuit court of appeals has yet to adopt or reject the Seventh Circuit's holdings in *Cole* and *Murray*, federal district courts in the Seventh Circuit have issued numerous decisions attempting to apply *Cole* in various credit contexts. In general, as discussed below, courts outside the Seventh Circuit that apply the *Cole* value test have found the offers in question to be firm offers of credit, while others have rejected *Cole* altogether. However, within the Seventh Circuit, courts have reached widely divergent conclusions when viewing similar offers. The result has been to increase the level of uncertainty for lenders who extend firm offers of credit to consumers in the Seventh Circuit.

For example, in *Kudlicki v. Farragut Financial Corp.*,[23] the defendant extended an offer for an automobile refinance loan that contained no loan amount, no repayment term, and a statement that interest rates could be "as low as 5.5% APR." The offer further provided that "All loans subject to approval. Only funded loans will qualify for any cash-back promotion. Rates and terms subject to change at any time."[24] The court found that this language prevented a finding that the offer was a firm offer of credit because the rates and other terms were subject to change. The court also suggested that it was persuaded that *Murray* prevented consideration of circumstances external to the language of the mailer itself.[25] The *Kudlicki* decision fanned the flames ignited by *Cole* and, along with other negative decisions issued by district courts within the Seventh Circuit, caused concern in the industry.[26]

One early post-*Cole* and *Murray* decision was favorable to the lending industry. In *Bonner v. Cortrust Bank N.A.*[27] ("*Bonner I*"), the court dismissed the plaintiff's case upon a finding that the defendant had extended a firm offer of credit even where the net amount of credit offered was as low as $75. In that case, the plaintiff received an offer in the mail for a credit card with a $250 limit and an interest rate of 18.9%. However, to get the card, the consumer was required to pay certain fees that were charged to the consumer's first bill.[28] The court found that the offer had "value" under *Cole* and consequently that it was a "firm offer" based on: (1) the offer's definite material terms (*i.e.*, amount of credit offered, interest rate, and disclosure of associated fees); and (2) the fact that there was no allegation that the plaintiff would have been denied credit had he applied.[29]

The plaintiff argued that the low amount of credit offered and the associated fees rendered the offer valueless. In rejecting this argument, the court stated – in a foreshadowing of *Perry* – that "[n]either *Cole* nor

[22] *Id.* at 9-10.

[23] 2006 WL 927281 (N.D. Ill. Jan. 20, 2006).

[24] *Id.* at *1-2.

[25] On the issue of willfulness, the court rejected evidence that the defendant submitted its mailers to a nonattorney compliance officer and concluded that "[i]t is clear from the most cursory glance at defendant's mailer that no firm offer of credit is being extended, and no compliance examiner could conclude otherwise." *Kudlicki*, 2006 WL 927281 at *3.

[26] *See also*, *e.g.*, *Hernandez v. Chase Bank USA, N.A.*, 429 F. Supp. 2d 983, 988 (N.D. Ill. 2006) (finding that *Cole's* "value" test was not satisfied where offer stated: "You have been prequalified for up to $100,000 or more" and contained no other terms); *Murray v. Indymac Bank, F.S.B.*, 461 F. Supp. 2d 645 (N.D. Ill. 2006) (holding that "[t]he absence of the material terms and lack of clarity concerning what loan was being offered is an indication that the Letter was simply a general sales pitch"); *but see Poehl v. Countrywide Home Loans, Inc.*, 464 F. Supp. 2d 882 (E.D. Mo. 2006) (rejecting plaintiff's argument that a firm offer of credit under FCRA must set forth all material terms on the face of the offer).

[27] 2006 U.S. Dist. LEXIS 47410 (N.D. Ind., July 12, 2006), *appeal dismissed per stipulation*, No. 06-3196 (7th Cir. Nov. 2, 2006).

[28] The fees included an "'acceptance fee' of $119.00 . . . an annual membership fee of $50.00 . . . a 'participation fee' of $72.00 which is billed at a rate of $6 per month . . . [and] a one-time 'processing fee' of $9.00." *Id.* at *6.

[29] *Id.* at *16-17.

Murray hold that a 'firm offer' must have some specific minimum credit line in order to have value to the ordinary consumer. In other words, we need not determine whether the offer is a good one, only whether it is an offer with some value to a consumer as an extension of credit. Thus, we must consider the value of the offer only as a means to distinguish between true offers of credit products and mere solicitations."[30]

Bonner I's significance lies in its rejection of an argument that had been advanced by plaintiffs in the wake of the decisions in *Cole* and *Murray*. Specifically, the court in *Bonner I* refused to evaluate subjectively the quality of the terms of the credit product offered to determine how much value it had to a consumer. That is to say, the court recognized that *Cole* and *Murray* do not require a determination of whether the offer was a "good" one, but only whether it had virtually *any* value as a credit product. If so, in the court's view, there was no violation of FCRA and its inquiry was at an end.

Though *Bonner I* was a positive outcome for lenders sending prescreened credit card offers to consumers in the Seventh Circuit, it did not involve any of the particular circumstances that are applicable to mortgage lenders. Specifically, *Bonner I* did not address the fact that mortgage lenders lack vital information about the consumer and her collateral (*i.e.,* the residence that will be used to secure the loan) when they extend firm offers of credit, making it difficult to include all material terms in an offer. Since *Bonner I*, and despite the generally positive opinion in *Perry*, district courts within the Seventh Circuit have reached widely divergent conclusions on this issue, which should serve as a caution to mortgage lenders extending firm offers of credit within the Seventh Circuit.

In decisions that have been favorable to lenders, district courts have not rigidly required every loan term to be in the mailer. For example, in *Murray v. HSBC Auto Finance, Inc.*,[31] a district court in Illinois found the existence of a firm offer of credit and granted summary judgment even where the offer lacked definite terms and was explicitly conditioned upon certain collateral requirements. The mailer at issue was an offer to refinance an automobile loan with a rate and terms that could vary based on the applicant's creditworthiness. The offer was also conditioned upon the applicant providing collateral of an automobile that met maximum mileage, model year, and other conditions. To aid consumers in understanding the value of the offer, the mailer contained a description of a sample loan in which a typical consumer might save $2,728.32 over 56 months. Finally, the offer invited consumers to call a number to obtain additional income and collateral information and obtain a quote.

In granting summary judgment for the defendant, the court noted that nothing in FCRA or its legislative history requires the inclusion of particular loan terms.[32] The court further noted that in the context of an auto loan, like a home mortgage refinance, the actual loan terms depend greatly on the specific collateral information that consumers provide at the time of their application for credit.

Another case extended the analysis to offers for mobile telephone contracts and found the existence of a firm offer of credit. In *Murray v. New Cingular Wireless Services*,[33] the court awarded summary judgment in favor of the defendant, which had extended an offer for a cellular telephone contract that failed to disclose an interest rate and other terms. In that case, Judge Castillo of the Northern District of Illinois found that an offer for a cellular telephone contract was an offer of credit under FCRA. The court went on to find that the lack of a precise interest rate and other terms in the defendant's offer was not decisive as to the existence of a firm offer of credit. In the case of a telephone bill, the interest rate for untimely payments was not a *material* term since it is only at issue when a customer makes a late payment. Therefore, consumers would not likely consider the interest rate when determining whether the offer had value. The fact that other terms were not disclosed was not an objection because it did not indicate to the consumer that the offer would not be honored, if accepted.

The decisions in *Bonner I*, *Murray v. HSBC*, and *Murray v. New Cingular*, appear to have opened the door to arguments, long advanced by credit providers and now adopted routinely by district courts outside the Seventh Circuit (see discussion below), that FCRA permits firm offers of credit to be made based on partial information that will be supplemented when the consumer fills out an application and authorizes the lender to obtain a full credit report.

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[30] *Id.* at *17-18 (noting that "[t]o separate the use of credit data to sell products (forbidden) from the use of credit data to make firm offers of credit (allowed), we held, a court must determine whether the offer has value as an extension of credit alone") (citing *Murray,* 434 F.3d at 955).

[31] 2006 WL 2861954 (N.D. Ill. Sep. 27, 2006).

[32] *Id.* at *4; *see also Poehl* 464 F. Supp. 2d at 884 (stating that "Congress . . . did not specify what, if any, credit terms had to be included for something to be a 'firm offer'").

[33] 432 F. Supp. 2d 788, 791 (N.D. Ill. 2006) *appeal filed*, No. 06-2477 (7th Cir. May 24, 2006).

Significantly, in *Cavin v. Home Loan Center, Inc.*,[34] Judge Castillo, combining many of the concepts in the cases discussed above, found that the defendant's offer of a home mortgage loan was a firm offer of credit and dismissed plaintiff's claim. In that case, the defendant's offer for a mortgage refinance loan disclosed: (1) a 30-year term; (2) an ARM with a 1% payment option for a fixed period; (3) notice that the interest rates may change after 30 days; (4) a description of how interest is calculated; and (5) a sample payment chart. Notably, the court found that sufficient material terms were disclosed even where the mailer did not disclose the following: (1) the precise interest rate; (2) the maximum negative amortization term; or (3) whether prepayment penalties or other fees applied.

Plaintiff argued that a firm offer must contain every material term. The court rejected that contention, stating that "we do not read *Cole* or *Perry* to require disclosure of every single loan term for an offer to be considered firm."[35] Next, the court noted that such contention "poses particular difficulty in the case of a mortgage, because unlike a credit card, a mortgage is tailored to the individual consumer depending on how much he or she wishes to borrow, his or her current income, and the value of the property offered as collateral; all of this information would have to be provided by the individual borrower."[36]

Cavin is among the first cases by a district court within the Seventh Circuit to recognize the unique context of an offer for a mortgage loan that is, by necessity, extended before the lender knows most of the information that it will factor into deciding whether to extend credit, and if so, how much to extend. In short, *Cavin* recognized the ability of lenders, and in particular mortgage lenders, to make conditional offers of credit under FCRA's "firm offer" provisions. The decision is currently on appeal in the Seventh Circuit and oral argument took place on October 24, 2007. A decision in the case is being widely anticipated by mortgage lenders.[37]

Some district courts within the Seventh Circuit have declined to adopt the more favorable, less rigid reasoning set forth in *Cavin* and have issued decisions that apply an unyielding interpretation of *Cole* and *Murray* and are decidedly unfavorable to lenders. For example, an opinion from the district court in Indiana, *Bonner v. Home123 Corp.* ("*Bonner II*"),[38] reached a conclusion that is opposite to that stated in *Cavin*. The *Bonner II* case involved two different mailed offers of credit. The first mailer contained what is referred to as a "faux check," on which appeared an estimate of how much the borrower might receive in cash in taking a loan. The second offer contained a chart that purported to demonstrate potential savings from a home loan with defendant, with the statement that the chart was "based on a fixed rate, $64,700 loan, with a 360-month term APR 8.0849%."[39] The court noted that a consumer responding to the offer was required to fill out a loan application and that the application was subject to further verification of the consumer's collateral.

After examining the "four corners" of the defendants' offers to see whether they had value to the "normal consumer," the court ruled that they were not firm offers of credit. The court reasoned that, "Defendants' mailings do not include any crucial terms, such as an interest rate percentage, or a range of interest rate percentages, whether the offer is for a fixed- or variable-rate mortgage loan, a reasonable estimate of the amount of the loan, the length of the loan, how the loan was to be repaid, or any applicable fees."[40] Next, the court went on to reject each argument offered by the defendants, including the argument that after extending a firm offer, the lender is permitted to seek additional information from the consumer before concluding a loan agreement. Specifically, the court stated that:

> [E]ven when the consumer responded to the mailer, Defendants still did not make a firm offer of credit. They first obtained the consumer's credit reports, had the consumer fill out an application, analyzed the consumer's property and his creditworthiness, and asked the consumer to select a specific loan program for which he qualified. The consumer was not provided the value of Defendants' offer – that is, the loan terms – until this drawn-out application process was completed and

[34] 469 F. Supp. 2d 561 (N.D. Ill. 2007) *appeal docketed*, No. 07-1136 (7th Cir. Jan. 17, 2007).

[35] *Id.* at 569.

[36] *Id.*

[37] *Cavin v. Home Loan Ctr., Inc., appeal docketed*, No. 07-1136 (7th Cir. Jan. 17, 2007).

[38] 2007 WL 778447 (N.D. Ind. Mar. 9, 2007).

[39] *Id.* at *2.

[40] *Id.* at *6.

> Defendants could determine what loan products the consumer qualified for.[41]

The court concluded that, while it would not require a lender to include *all* terms in its initial offer to a consumer, "[d]efendants must include *some* material terms to allow a consumer to evaluate the offer."[42]

The decision in *Bonner II* is troubling for a number of reasons. First, the court appears to reject the plain language of FCRA, which expressly permits a lender to condition a firm offer of credit on information, such as the value of the collateral that will secure the loan; such information is only obtained after the consumer responds to the offer, fills out an application, and authorizes a lender to obtain a full credit report.[43] Second, following *Cole* and *Murray*, the court required the lenders to include *some* material terms in their offer.

Similarly, in *Walker v. Calusa Investments LLC*,[44] an Indiana district court issued a strikingly poor decision denying the mortgage lender defendant's motion for judgment on the pleadings. The court held that the mailer was not a firm offer of credit even though the offer at issue – which was for a mortgage loan, the proceeds of which could be used "for any purpose" – included the loan term, interest rate, and APR.[45] The offer also stated that the APR would vary by state and that the extension of a loan was contingent on the plaintiff meeting collateral, income, and other creditworthiness criteria. The offer contained a chart that showed the potential savings in monthly payments that the plaintiff could achieve by taking a loan with the defendant. Despite these terms, the court held that the mailer was not a firm offer because the amount of the loan was printed on a "faux check," and thus was not considered by the court to be a specific amount of credit. Moreover, the court viewed the terms identified on the loan as a "sample loan," and not the actual terms applicable to the plaintiff.

Finally in *Bernal v. American Money Centers, Inc.*,[46] – another post-*Perry* decision – the court appears to have come close to holding that an offer must contain specific terms in order to be a firm offer under FCRA. In *Bernal*, the plaintiff received an offer of a mortgage refinance loan for up to 125% of the value of his property.[47] The offer stated that the repayment amount was "based on a fixed-rate loan, with an APR of 4.89%. This is a rate that was recently offered, and may, or may not reflect the interest rate on which loans are currently closed."[48] In ruling that the offer violated FCRA, the court concluded that the offer lacked material terms such as "the precise rate of interest charged, a method for computation of such interest, the length of the repayment period, or if there is a minimum loan amount."[49] The court concluded that the failure to disclose terms ran afoul of *Cole* and its progeny because "the offer was too vague to constitute an offer capable of acceptance," and therefore lacked value to the normal consumer.[50]

In reaching its conclusion, the court rejected the defendant's argument that the offer contained an interest rate of 4.89% and that the plaintiff testified that he understood that to be the rate he was being offered. First, the court held that the plaintiff's subjective understanding of the offer's terms was irrelevant to determining whether a "normal" consumer would conclude that the offer contained a particular interest rate.[51] Further, the court held that the statement that the interest rate "may not reflect the interest rate on which loans are currently closed," indicated that it was not guaranteed and, therefore, that the offer lacked terms upon which the normal consumer could evaluate the offer's value.[52]

For mortgage lenders extending firm offers of credit within the Seventh Circuit, *Bonner II*, *Walker*, and *Bernal* among other decisions, serve as a cautionary reminder of the inconsistent and unfavorable interpretation that courts may give to *Cole* and *Murray*.

A Rosier Picture: District Courts Outside the Seventh Circuit

While courts in the Seventh Circuit have reached divergent and often unpredictable conclusions, a more or less predictable pattern has emerged outside the Seventh Circuit, where district courts either have rejected *Cole* altogether – adopting a strict constructionist approach to

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[41] *Id.*

[42] *Id.* at *8 (emphasis in original).

[43] *See* 15 U.S.C. § 1681a(*l*)(1)-(3).

[44] No. 1:06-cv-508-LJM-WTL, slip op. (S.D. Ind. Feb. 27, 2007).

[45] *Id.* at *2-3.

[46] No. 05-CV-1327, slip op. (E.D. Wis. Aug. 6, 2007).

[47] *Id.* at 2.

[48] *Id.* at 2-3.

[49] *Id.* at 9.

[50] *Id.*

[51] *Id.* at 8.

[52] *Id.*

FCRA – or have opted for a more reasonable approach as to its appropriate application. Courts that reject *Cole* generally do so on the ground that FCRA provides a comprehensive statutory scheme that should not be disrupted with the addition of judge-made rules. Where an offer meets the plain language of the statute, these courts have dismissed FCRA firm offer claims even where the offers lack material terms, fail to state a loan amount, or would plainly fail the *Cole* value test as it is applied within the Seventh Circuit.

In a pair of cases from the U.S. District Court for the Southern District of New York, two judges issued strong rejections of the *Cole* value test, which each court viewed as an impermissible extension of FCRA. In *Nasca v. J.P. Morgan Chase Bank N.A.*,[53] the plaintiff received an offer for a home mortgage loan in the amount of "up to $417,000 or more."[54] The offer did not state an interest rate or specific loan amount, but merely stated that "Chase offers fixed- and adjustable-rate mortgages with competitive interest rates."[55] In dismissing the plaintiff's complaint, the court found that the defendant's offer was a firm offer of credit because it complied with the plain language of FCRA. Specifically, the court held that the defendant's offer "qualifies as a 'firm offer of credit' because it is an 'offer of credit … to a consumer that will be honored if the consumer is determined based upon information in a consumer report on the consumer to meet specific criteria used to select the consumer for the offer.'"[56]

Next the *Nasca* court rejected the *Cole* value test, which it viewed as an impermissible extension of FCRA. The court stated that it was "loathe to import a requirement into a statutory definition that was not placed there by Congress" and went on to hold that "[i]f Congress believes the statutory definition of 'firm offer of credit' does not adequately protect a consumer's interest in the privacy of her credit information, it is for Congress to act; it is not for the judiciary to add requirements that do not exist in the statute."[57] The *Nasca* court thus expressly rejected the plaintiff's contention that the defendant's firm offer was required to contain specific terms. The court noted that plaintiff "does not – and cannot – point to any provision of the FCRA that requires a creditor to disclose definitive credit amounts or interest rates to a recipient in the solicitation."[58]

Notably, the *Nasca* court contrasted the lack of any language in FCRA requiring credit terms to be disclosed in a firm offer with other sections of FCRA that require specific disclosures. The court noted, for example, that FCRA requires a clear and conspicuous statement regarding the fact that the offer is a prescreened offer of credit and provides a consumer with instructions on how to opt out of receiving such offers.[59] This holding is significant because it is in line with pre-*Cole* FCRA cases that routinely dismissed firm offer cases where the defendant's offer satisfied the plain language of the statute.[60]

In *Soroka v. JP Morgan Chase & Co.*,[61] also from the Southern District of New York, the court similarly rejected *Cole* and granted the defendant's motion to dismiss. In that case, the defendant sent plaintiff a firm offer stating that the plaintiff was "prequalified" for a home mortgage loan "for up to $100,000 or more."[62] The court concluded that the defendant's offer met the statutory definition of firm offer and was subject to conditions that FCRA permits lenders to attach to such offers. The court dismissed plaintiff's argument that the defendant's offer lacked terms, and compared FCRA's lack of any requirement that terms be included in a firm offer with the Truth in Lending Act's requirement that all material terms be included in transactions that occur subsequent to the extension of such offers. Finally, the court distinguished *Cole*, which, the court noted, involved a car dealership's attempt to market automobiles. The court concluded that "there is no reason to suppose that Defendants are not extending a valuable offer of credit to Plaintiff."[63]

The trend away from *Cole* continued with two decisions from the federal court in Massachusetts joining the *Nasca* and *Soroka* decisions and issuing what are

[53] 2007 WL 678407 (S.D.N.Y. Mar. 5, 2007).

[54] *Id.* at *1.

[55] *Id.* (internal quotations omitted).

[56] *Id.* at *3 (quoting 15 U.S.C. § 1681a(*l*)).

[57] *Id*. at *4.

[58] *Id*. at *3.

[59] *Id*. (stating that "[p]ursuant to the canon of statutory construction *inclusio unius est exclusio alterius* – to express or include one thing implies the exclusion of the other – where Congress has explicitly enumerated certain disclosure requirements within the text of the FCRA, this Court should not imply any additional disclosure requirements").

[60] *See*, *e.g.*, *Gamble*, 2002 WL 3163028, *supra* n. 9.

[61] 2007 WL 895249 (S.D.N.Y. Mar. 19, 2007).

[62] *Id.* at *2.

[63] *Id.* at *5.

arguably the most lender-friendly opinions to date in firm offer cases. In *Dixon v. Shamrock Financial Corp.*,[64] the court rejected *Cole* and dismissed plaintiff's complaint. There, the offer at issue consisted primarily of a letter inviting the recipient to contact the lender to discuss "how you may restructure your debt, maximize tax benefits, improve your credit score, and most importantly, *save lots of money every month*."[65] The letter disclosed nothing in the way of loan amount, interest rate, or other terms. In dismissing the plaintiff's case, the *Dixon* court adopted what it termed a "lender-friendly 'four corners'" test and held that "[t]o decide whether a lender has complied with FCRA, 'a court need only determine whether the four corners of the offer satisfy the *statutory definition* … and whether the terms are honored when consumers accept.'"[66] The court concluded that even where the offer "seems nothing more than an invitation to a high-pressure sales pitch," the statutory definition of firm offer was met because "the letter assured Dixon that he had been 'prescreened' for a loan" and that he was guaranteed to receive one if he continued to meet the prescreening criteria used to select him for the offer.[67]

In *Sullivan v. Greenwood Credit Union*,[68] the court adopted the decision in *Dixon v. Shamrock* and held that a firm offer satisfies the statutory requirements of FCRA if it "assures the consumer that he is guaranteed to receive credit if he meets certain conditions, and there is no evidence that the letter is a sham intended to lure recipients into something other than a bona fide credit transaction."[69] In that case, the court rejected the *Cole* value test, and declined to read state-law contract requirements into the firm offer provision of FCRA, even where the defendant's corporate representative acknowledged in his deposition that the offer "did not disclose specific loan terms," and that it was merely intended to "solicit a phone call" from the recipient.[70]

In *Villagran v. Freeway Ford Ltd.*,[71] a federal court in Houston, Texas similarly found the existence of a firm offer of credit and joined the growing number of district courts outside of the Seventh Circuit that have rejected *Cole*.[72] In *Villagran*, the plaintiff received a letter in the mail indicating that she had been "Preapproved for $27,525 towards the purchase of your next car or truck!"[73] The letter contained no other terms such as an interest rate, APR, or repayment term.[74] In her motion for summary judgment, plaintiff relied entirely on the Seventh Circuit's decisions in *Cole* and *Murray*. The district court rejected plaintiff's argument and held that "[d]isclosure of the exact terms of an auto loan during the preapproval and solicitation process is not only beyond what the FCRA requires, it may be an unrealistic standard. The specific terms of a given loan offer may vary greatly depending on what level of risk a particular customer presents, taking into account each individual's credit score, income, and equity holding in the collateral used to secure that loan."[75] Relying on the Fifth Circuit's decision in *Kennedy v. Chase Manhattan Bank USA, NA*,[76] the court held that FCRA permits a lender to condition a firm offer of credit on additional criteria and that there is no requirement for the offer to disclose material terms.[77]

The increasingly stark contrast between the approaches taken by courts within and without the

[64] 482 F. Supp. 2d 172 (D. Mass. 2007).

[65] *Id.* at 173 (emphasis in original).

[66] *Id.* at 175 (emphasis added) (quoting *Murray*, 434 F.3d at 956).

[67] *Id.* at 176.

[68] 2007 WL 2309866 (D. Mass. Aug. 13 2007).

[69] *Id.* at *3.

[70] *Id.* at *1.

[71] 2007 U.S. Dist. LEXIS 66596 (S.D. Tex. Sep. 10, 2007).

[72] *See*, *e.g.*, *Crossman v. Chase Bank USA NA*, 2007 WL 2702699 (D.S.C. Sept. 12, 2007) (rejecting *Cole* and finding that mortgage lender's offer of refinance loan was a firm offer of credit).

[73] 2007 U.S. Dist. LEXIS 66596 at *5.

[74] *Id.*

[75] *Id.* at *35-36; *see also Phinn v. Capital One Auto Finance, Inc.*, No. 07-CV-10940, 2007 WL 1675282 at *4 (E.D. Mich. June 11, 2007) (rejecting *Cole* and holding that FCRA does not require an offer to include material terms where offer stated that recipient was qualified for an automobile loan of between $10,000 and $25,000).

[76] 369 F.3d 833 (5th Cir. 2004).

[77] *Id.* at *39-40. *Villagran v. Freeway Ford Ltd.* is one of a number of recent cases from federal courts in Texas to reject *Cole* and find the existence of a firm offer of credit. *E.g.*, *Villagran v. Central Ford, Inc.*, 2007 WL 3125297, (S.D. Tex. Oct. 23, 2007) (stating that "Neither the FCRA nor the Fifth Circuit's interpretation of the Act requires that an offer include specific information as to interest rates, repayment period, or similar terms, to enable a consumer to determine whether the offer is of 'some value' based on the four corners of the mailing"); *Hoge v. Parkway Chevrolet, Inc.*, 2007 WL 3125298 (S.D. Tex. Oct. 23, 2007) (same); *Hoffer v. Landmark Chevrolet Ltd.*, 2007 WL 3125299 (S.D. Tex. Oct. 23, 2007) (same).

Seventh Circuit is exemplified by three decisions issued in cases challenging the same form of mailer sent by mortgage lender Calusa Investments. These decisions reflect the difficulty faced by – and caution against – any creditor sending out mailers in states within the Seventh Circuit. As discussed above, in *Walker v. Calusa*, the Indiana district court found that Calusa's mailer was not a firm offer of credit even though it contained all material terms pertinent to the secured credit being offered. In contrast, two courts outside the Seventh Circuit – one in Rhode Island and the other in Pennsylvania – have found the same mailer to be firm offers. In *Dixon v. Calusa Investments LLC*,[78] a magistrate judge in the Rhode Island district court declined to follow *Cole* and recommended dismissal of plaintiff's claim against Calusa. In its decision, the court stated that *Cole* could be used as "guideposts" and concluded that Calusa's offer of a mortgage loan for $256,625 to be used for any purpose had value to the consumer and could not be considered a mere solicitation as in *Cole*. The court rejected plaintiff's contention that the offer must contain all material terms to satisfy the requirements of FCRA. Making the same arguments as were made against Calusa in *Walker*, the plaintiff argued that the terms of the offer were provided as mere "examples" and were not actually part of any offer and that the amount of the offer was only hypothetical because it was printed on a "faux check." The court held that even if the offer contained no material terms, as alleged by plaintiff, the lawsuit must still be dismissed because there is no requirement in FCRA that a firm offer contain particular terms. The court cited with approval the decisions in *Soroka*,[79] *Poehl v. Countrywide Home Loans, Inc.*,[80] and *Cavin*,[81] and concluded that the defendant's offer was "a firm offer of credit because it would be of value to the normal consumer and because the lack of clarity concerning the interest rates and loan terms is commonplace in the lending industry until the formal application process is commenced."[82]

Similarly, in *McFarland v. Calusa Investments, LLC*,[83] a district court in the Western District of Pennsylvania recently dismissed a similar claim against Calusa, also based on the same form of mailer, concluding that "[t]here can be no question that [Calusa] solicited potential customers in order to extend credit subject to the provision that the customers proved to be creditworthy." Further, "there has been no allegation that [Calusa] would not have honored the prescreened offer made to plaintiff if plaintiff met the employment, income, credit, and collateral conditions determined by defendant." Finally, the court held that "the mailer here complies with FCRA, as it is a firm offer of credit and not, like in *Cole*, just a sham or guise made only to solicit buyers for a consumer good."

In summary, even where courts beyond the Seventh Circuit have adopted *Cole*, they have tended to take a more reasonable approach and uniformly have rejected plaintiffs' arguments that a firm offer must contain particular credit terms. For mortgage lenders, this is important because they face particular difficulty in stating all material terms before having an opportunity to appraise the collateral that will secure any eventual loan. These decisions also reflect the risk involved when lenders send mailers in the Seventh Circuit even where the mailer appears to include all or nearly all material terms pertinent to an offer of credit.

SUPREME COURT CLARIFIES THE STANDARD FOR WILLFULNESS

The Supreme Court's decision reviewing consolidated appeals of two decisions from the Ninth Circuit Court of Appeals, *Edo v. GEICO Casualty Co.*,[84] and *Burr v. Safeco Insurance Co. of America*,[85] is one of the most significant recent developments affecting FCRA firm offer litigation. In *Safeco Insurance Co. of America v. Burr*,[86] the Court considered whether a "willful"

[78] No. 1:06-cv-442, slip op. (D. R.I. Feb. 20, 2007).

[79] 2007 WL 895249 at *5.

[80] 464 F. Supp. 2d 882 (E.D. Mo. 2006). In *Poehl*, the court adopted *Cole* and held that the defendant's offer of a mortgage loan for $92,500, had value to the consumer and, thus, was a firm offer of credit. Recently, the same judge ruling in a different case held that the defendant's offer of "a home loan for up to $395,375," was not a firm offer because it had "no value … to distinguish it from a sales pitch." *Klutho v. New Day Financial LLC*, 2007 WL 4169429 at *5 (E.D. Mo. Nov. 21, 2007). The court's reason for these two seemingly contradictory opinions appears to be based on its reading of the words "up to" in the latter offer. The court found that the lack of a minimum loan amount suggested that the recipient may only get a nominal amount of credit, as low as $1.00, and that such an offer "is of no more value than the car loan offer in Cole." *Id.* at *6.

[81] 469 F. Supp. 2d 561 (N.D. Ill. 2007).

[82] *Dixon*, No. 1:06cv442, slip op. at *13.

[83] 2007 WL 2119219, slip op. (W.D. Pa. July 20, 2007).

[84] 435 F.3d 1081 (9th Cir. 2006).

[85] 140 Fed. App'x. 746, 2005 WL 1865971 (9th Cir. Aug. 4, 2005).

[86] 127 S. Ct. 2201 (2007).

violation of FCRA, 15 U.S.C. § 1681n(a), includes reckless disregard of the statute's terms or requires a knowing violation. The Court held that a willful violation includes reckless action (but that neither GEICO nor Safeco committed a willful violation of the "adverse action" provisions of FCRA). According to the Court, "a company subject to FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless."[87]

Edo v. GEICO and Burr v. Safeco both stemmed from the respective defendants' failure to give adverse action notices to consumers who applied for automobile insurance.[88] FCRA requires that "[i]f any person takes any adverse action with respect to any consumer that is based in whole or in part on information contained in a consumer report" that person must notify the consumer of such adverse action.[89] Plaintiffs in the two cases sued after they applied for automobile insurance and were not furnished with adverse action notices upon receiving a rate for insurance that was more than the least expensive rate offered by each of the respective defendants.

In *Edo v. GEICO*, the district court granted summary judgment for the defendant because it found that GEICO had applied a "neutral" credit score in selecting the plaintiff's rate, which score was not based on information contained in the plaintiff's consumer report. In *Burr v. Safeco*, the district court granted summary judgment for the defendant because it found that FCRA only requires adverse action notices where there is an "increase" in rates, and that the term "increase," as used in section 1681a(k)(1)(B)(i) of FCRA, does not apply to an initial rate offered to a new applicant for insurance.

The Ninth Circuit reversed both decisions and remanded for a determination of whether defendants' violation of FCRA was "willful." In *Edo v. GEICO*, the court held that a willful violation occurs when an entity acts "with reckless disregard of a consumer's rights under" FCRA.[90] In explaining its holding, the court noted that a reckless violation would not be found where a company "diligently and in good faith attempted to fulfill its statutory obligations" and came to a "tenable, albeit erroneous, interpretation of the statute."[91] Finally, the court held that a company may be liable for a willful violation of FCRA both where it deliberately failed "to determine the extent of its obligations," and where it relied on "creative lawyering that provides indefensible answers."[92] Thus, the Ninth Circuit held that a company may recklessly have disregarded FCRA's requirements, and therefore acted willfully, if it, in good faith, consulted with its attorneys for the purpose of complying with FCRA, but the legal advice received by the company was "unreasonable," "implausible," or "untenable."

In *Burr v. Safeco*, the Ninth Circuit relied on its earlier opinion in *GEICO*.

Under the Ninth Circuit's *GEICO* opinion, seeking the advice of counsel and following that advice may not be enough for a company to avoid statutory and punitive liability, even for issues that have not yet been addressed by the courts. If the advice obtained by the defendant consists of "creative lawyering that provides indefensible answers," the defendant may be subject to punitive damages. If the defendant does not seek legal advice but instead intentionally remains ignorant of the statute, the same result will occur. However, "[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."[93] The result of the Ninth Circuit's holding would have required trial courts to engage in a factual inquiry as to the defendant's compliance measures and the process by which the company sought to avoid violating FCRA.

Moreover, the *GEICO* opinion failed to provide an objective standard for companies to follow in connection with their efforts to comply with FCRA and exposed companies to staggering damages for failing to comply with the statute even where they have attempted in good faith to follow the law. Clearly, what is "objectively apparent" to a court, looking back on a decision made by a company, may not be so to the company making that decision in the course of its business. Even though the Ninth Circuit suggested that a company would not be

[87] *Id.* at 2215.

[88] FCRA defines an "adverse action" as a "denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for." 15 U.S.C. § 1681a(k)(1)(B)(i).

[89] 15 U.S.C. § 1681m(a).

[90] *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1099 (9th Cir. 2006).

[91] *Id.*

[92] *Id.*

[93] *Id.*

found to have acted with reckless disregard of consumer rights where the company engages in diligent and good faith attempts to fulfill its obligations, the company may be subject to punitive damages if counsel's interpretation of the statute was erroneous and was either unreasonable or obviously wrong. In other words, in the face of conduct that is based in good faith on the advice of counsel, a company might be crippled by statutory damages. In a positive development for the lending community, the Supreme Court granted certiorari and issued its decision in the *GEICO/Safeco* cases on June 4, 2007.

In its opinion, the Supreme Court adopted the "reckless disregard" standard for FCRA, but at the same time rejected the expansive, subjective approach taken by the Ninth Circuit. First, the Court held that the term "increase" as used in FCRA's definition of "adverse action" "reaches initial rates for new applicants," but that new applicants for insurance are only entitled to an adverse action notice if the provider considers the applicant's credit report in quoting a rate.[94] With respect to GEICO, the Court found that GEICO had not violated FCRA, because its decision as to Edo was based on a "neutral" credit score, and thus had not taken information from Edo's consumer report into consideration. With respect to Safeco, the Court held that Safeco was incorrect in its assumption that the term "increase" did not reach Burr's initial application for insurance, but that Safeco's violation of the statute was not "willful."

On the issue of the correct standard for willfulness, both defendants urged the Court to hold that a willful violation under FCRA requires a knowing violation of the statute.[95] The Court rejected defendants' arguments, however, and held that although "willfully is a word of many meanings whose construction is often dependent on the context in which it appears … where willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well."[96] Having rejected the notion that only a knowing violation will be found to be willful, the Court next turned to a definition of the term "reckless." In that regard, the Court held that "a company subject to FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless."[97]

Regarding Safeco's reading of FCRA's adverse action requirement, the Supreme Court found that the violation of the statute was not reckless because "its reading has a foundation in the statutory text," and there was no guidance from the courts of appeals or the Federal Trade Commission "that might have warned [Safeco] away from the view it took."[98] The Court did not discuss the gray area between negligent and reckless conduct under the statute because it found that GEICO had not taken an adverse action within the meaning of FCRA, and Safeco's reading of the statute was not "objectively unreasonable." The decision is significant, not only because it resolved a split among the circuit courts of appeal as to the applicable standard for willfulness under FCRA, but because – as has already been seen within the Seventh Circuit – it will likely guide the outcome of firm offer cases that have passed beyond the first hurdle in the plaintiff's favor, that is, where the court has found the mailer at issue to violate FCRA.

The damages that are available to a plaintiff under FCRA depend on whether the plaintiff can establish a negligent or willful violation of the statute. "[A]ny person who is negligent in failing to comply with any requirement imposed under [FCRA] with respect to any consumer" is liable for "actual damages sustained by the consumer as a result of the failure," as well as costs and attorney's fees.[99] However, if "[a]ny person … willfully fails to comply with any requirement imposed under this title with respect to any consumer," that

[94] 127 S. Ct. at 2212-13.

[95] Prior to the Supreme Court's ruling in *Safeco*, the federal circuit courts of appeal were split as to the appropriate standard for willfulness under FCRA. The Fifth, Sixth, Seventh, and Eighth Circuits had held that "willfulness" requires actual knowledge on the part of the defendant that the conduct violated FCRA. *See Ruffin-Thompkins v. Experian Info. Sys., Inc.*, 422 F.3d 603, 610 (7th Cir. 2005); *Wantz v. Experian Info. Solutions, Inc.*, 386 F.3d 829, 834 (7th Cir. 2004); *Phillips v. Grendahl*, 312 F.3d 357, 370 (8th Cir. 2002); *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 418 (4th Cir. 2001); *Cousin v. Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir. 2001); *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998). In contrast, the Ninth and Third Circuits had held that a "willful" violation of FCRA could be shown where the defendant acted in reckless disregard of the rights of consumers. *See Reynolds*, 435 F.3d at 1099; *Cushman v. Trans Union Corp.*, 115 F.3d 220, 227 (3d Cir. 1997).

[96] 127 S. Ct. at 2208 (internal quotations and internal citations omitted).

[97] *Id.* at 2215.

[98] *Id.* at 2216.

[99] 15 U.S.C. § 1681o(a).

person "is liable to [the] consumer" for statutory damages ranging from $100 to $1,000 per consumer, reasonable costs and attorney's fees, and punitive damages as allowed by the court.[100] In a class action involving tens if not thousands of consumers, statutory damages can be exorbitant. If a court decides that a defendant did not willfully violate FCRA, the plaintiff may show that the defendant acted negligently and only recovered actual damages, which are often nominal or nonexistent. Moreover, claims for actual damages are rarely, if ever, susceptible to class treatment.

At the time of writing, several courts had already issued decisions applying the new standard for willfulness to the FCRA firm offer context. For example, a recent firm offer decision from a district court in Illinois has cogently summarized the new willfulness test based on the *Safeco/GEICO* opinion. In *Murray v. GMAC Mortgage Corp.*,[101] Judge Coar of the U.S. District Court for the Northern District of Illinois (the same judge who issued the early, unfavorable decision in *Kudlicki* discussed above), granted the defendant's motion for reconsideration and entered summary judgment in the defendant's favor, finding no willful violation of FCRA. The *Murray* court described the "two-stage process for determining whether or not a party's interpretation was reckless: first, the reading of the statute must have been objectively unreasonable; and second, in making that unreasonable determination, the party must have run 'a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.'"[102]

Drawing from the *Safeco/GEICO* opinion, the district court focused on three factors that would assist the fact finder in determining whether a defendant's interpretation of the statute was "not objectively unreasonable": (1) the reasonableness of the defendant's rationale based on the text of the statute; (2) the likelihood that the defendant's interpretation of the statute would convince a court; and (3) the absence of judicial or administrative guidance on the statute. Using these factors, the *Murray* court held that GMAC had not willfully violated FCRA. GMAC's interpretation of FCRA – as not requiring material terms to be in the offer other than the question of "whether or not the offer would have been honored" – was objectively reasonable because it "arguably" followed the text of FCRA "without adopting its spirit."[103] First, according to the court, GMAC "has asserted that the language in question carries no explicit requirement of terms and allows for conditions. This is reasonable. Indeed, other courts have found that the Seventh Circuit's *Cole* opinion – requiring more – inappropriately added additional requirements that simply aren't supported by the statutory language."[104] For support, the court cited the *Nasca* decision, discussed above. Second, the court found that the "judicial or administrative guidance" that existed at the time GMAC designed and implemented its offer, in early 2004 pre-*Cole*, favored both the defendant's and the plaintiff's positions because at the time "the legal rules were [not] 'clearly established.'"[105] Last, since GMAC's interpretation of FCRA has been adopted outside the Seventh Circuit, the court found that the three factors taken together required a finding that GMAC's interpretation of FCRA – as of early 2004 – was not objectively unreasonable. Thus, GMAC's violation of FCRA was not willful and an award of statutory damages was not required.

In *Murray v. Indymac Bank F.S.B.*,[106] another court similarly granted the defendant's motion for summary judgment on the issue of willfulness. The defendant argued that its prescreening and compliance activities insulated it from a finding that it acted recklessly – and therefore willfully – in violating the FCRA. The court agreed, and found that plaintiff had failed to produce any evidence to contradict Indymac's assertion that it implemented an extensive, well-funded compliance program, and that its compliance officers consulted with in-house and outside legal counsel when they deemed it necessary to do so.[107] Moreover, the court held that consultation with legal counsel was not necessary in a case, such as this one, where the plaintiff failed to provide any evidence that the defendant's compliance personnel failed to keep abreast of developments in the law governing FCRA.

The court also rejected plaintiff's contention that Indymac's interpretation of the law at the time it mailed the firm offer of credit at issue was unreasonable. As the court noted, the defendant mailed its firm offer out in October 2004, which was one month before the Seventh Circuit's decision in *Cole*. The court further concluded that "Murray has not cited to any case law, statute, regulatory authority, or other legal guidance in effect in

[100] *Id.* § 1681n(a).

[101] 2007 WL 2317194, (N.D. Ill. July 23, 2007).

[102] *Id.* at *2 (citing *Safeco*, 127 S. Ct. at 2204).

[103] *Id.* at *4.

[104] *Id.*

[105] *Id.* at *5-6.

[106] 04-cv-7669, slip op. (N.D. Ill. Sept. 13, 2007), *appeal filed*, No. 07-3205 (7th Cir. Sep. 14, 2007).

[107] *Id.* at 10-16.

October of 2004 that would have adequately informed Indymac that the [firm offer] violated the FCRA."[108] The court concluded that "Mere trends in the law in lower courts and in other Circuits were not sufficient to put the [defendant] on notice that the Seventh Circuit was going to rule as it did in *Cole*."[109] In reaching this conclusion, the court relied on language in *Safeco* which provided that "'[w]here . . . the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation, it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator.'"[110]

For lenders in the consumer finance industry, the result in *Safeco v. Burr* – as further applied by *Murray v. GMAC*, *Murray v. Indymac*, and other cases – is a mixed bag. The Supreme Court rejected the more stringent "knowing" standard advanced by defendants, and governing in the Seventh Circuit and other circuits. However, the Court has sanctioned a standard under which lenders who are found to have violated FCRA will not be hit with statutory damages for a willful violation unless their actions rested on an unreasonable reading of the statute – based on agency guidance and relevant court opinions – and they are found to have acted in disregard of the risk associated with an incorrect reading of the statute. As reflected in the recent *Murray* decision, this will lead to more positive results for defendants facing claims in the Seventh Circuit who sent their mailers out pre-*Cole*. Post-*Cole*, however, mailers that do not meet the standards set forth in *Cole*, *Murray*, and possibly district court decisions rigidly applying *Cole* and *Murray*, will be harder to defend against statutory damages claims.

Already, there are signs that the discussion in the coming months will focus on application of the *Safeco* test to "firm offer" cases at various procedural stages.[111] A Missouri federal court's recent decisions issued in different cases on the same day are illustrative. In the first case, the court denied defendant's motion for judgment on the pleadings and held that the issue of willfulness "is a fact question that cannot be decided on the pleadings alone."[112] In the second ruling involving a different creditor and mailer, the court granted defendant's motion for summary judgment upon finding based on the factual record that defendant's violation of FCRA was not reckless under *Safeco*.[113] There, the court held that the defendant's compliance counsel's advice to the defendant at the time the mailer was sent – *i.e.*, that FCRA did not require inclusion of specific terms and that the *Cole* decision had limited application to auto finance loans -- was reasonable at the time.[114] The court concluded that "[p]laintiff's arguments that this is an unreasonable position do not create a genuine dispute of material fact, given the large divergence of court opinions."[115]

As parties and the district courts continue to wrestle with application of *Safeco* and the more fundamental requirements of FCRA in the first instance, all eyes will be on the Seventh Circuit as it continues to consider upcoming "firm offer" appeals.■

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[108] *Id.* at 20.

[109] *Id.* at 20-21.

[110] *Id.* at 22 (quoting *Safeco* 127 S. Ct. at 2216 n.20). The court rejected the plaintiff's assertion that determination of recklessness under FCRA must always be submitted to a jury. Specifically, the court noted that, while fact questions are usually reserved for juries, the court could determine factual issues as a matter of law where, as in this case, the plaintiff had failed to support his allegations with any objective factual support. *Id.*

[111] Another developing issue under *Safeco* is whether the newly announced test is an objective one to be applied by the court as a matter of law or whether it requires findings of fact as to the actor's intent, which findings must be made by a trier of

footnote continued from previous column…

fact. For example, plaintiffs have seized upon the Third Circuit's recent decision in *Whitfield v. Radian Guarantee, Inc.,* 2007 WL 2452641 (3d Cir. Aug. 30, 2007). In *Whitfield*, the Third Circuit remanded the case to the district court for a factual determination on the question of willfulness. Although the court stated that the question of whether the defendant acted willfully under FCRA "is a factual issue, not a question of law," *id.*at *9, the decision is likely limited to the particular facts of the case. Specifically, the court noted that the defendant had conceded facts that a jury could conclude supported a finding of willfulness. *Id*. Notably, the decision was not in the context of a firm offer of credit case and, as such, has limited applicability to those types of cases.

[112] *Klutho*, 2007 WL 4169429 at *6.

[113] *Klutho v. Home Loan Center, Inc.*, No. 4:06CV1212 CDP, 2007 U.S. Dist. LEXIS 86303 at *8 (E.D. Mo. Nov. 21, 2007)

[114] *Id.*

[115] *Id.*