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Mortgage Banking/Consumer Finance Commentary

Decisions of Federal Courts Create Uncertainty Concerning Use of Prescreened Offers of Credit: An Update on FCRA Prescreened Offer of Credit Class Action Litigation

Recent federal court decisions have created legal and business uncertainty in the consumer lending industry concerning the use of prescreened offers of credit. These decisions threaten liability to the consumer lending industry that could total in the hundreds of millions, if not billions, of dollars. Prescreened offers of credit – a key industry tool for finding new customers – are under attack in class action litigation across the country by attorneys seeking to capitalize on a 2004 decision of the Seventh Circuit Court of Appeals, *Cole v. U.S. Capital, Inc.* ("*Cole*")[1] interpreting the meaning of "firm offers of credit" under the Fair Credit Reporting Act ("FCRA," the "Act").[2] In *Cole*, the Seventh Circuit analyzed the "firm offer" requirement of the FCRA and became the first court in the nation to hold that offers of credit had to represent "value" to customers in order to make the offeror's use of information from consumer reports (including consumer credit reports) permissible under the Act.

Although *Cole* was decided in 2004, the consumer credit lending industry is just now beginning to feel its repercussions. Recent decisions following *Cole* have certified classes and granted summary judgment for plaintiffs in prescreened offer cases based on their mailing of prescreened offers of credit to potential customers. These decisions raise the specter of substantial exposure for the consumer lending industry. In light of developments in these areas, creditors who provide prescreened offers of credit need to carefully consider the form of, and the procedures used in connection with, prescreened offers being mailed to consumers.[3]

In a more positive development for the industry, however, a number of decisions issued in the Northern District of Illinois and in other jurisdictions have held that Congress eliminated the private right of action for "clear and conspicuous" notice violations of the Act.[4] For example, a decision of the United States District Court for the Northern District of Illinois, *Murray v. Cross Country Bank*, was one of the first in the country to dismiss claims alleging a violation of FCRA's "clear and conspicuous" notice requirements.[5] Analyzing amendments to FCRA in 2003, the *Murray v. Cross Country* court, like numerous courts since, held that these amendments eliminated the right of private litigants to bring lawsuits seeking damages for alleged violations of the disclosure requirements of the Act.

KEY PROVISIONS OF FCRA AT ISSUE IN RECENT "FIRM OFFER" LITIGATION

The FCRA principally regulates the use of information contained in consumer credit reports in order to prevent unauthorized and impermissible uses of confidential and highly personal information.[6] The Act imposes disclosure and reporting requirements on credit reporting agencies or bureaus (such as TransUnion, Experian, or Equifax), users of credit reports, such as mortgage lenders or other issuers of consumer credit, and entities that supply information to the credit reporting agencies.[7] The FCRA's fundamental requirement is that a consumer report cannot be disseminated unless it satisfies one or more of the permissible purposes delineated under the Act.[8]

Not surprisingly, the Act permits the use of information from consumer credit reports in situations where the consumer herself initiates a credit transaction or authorizes access to her credit report. The Act also permits the use of consumer credit information in cases where the consumer does not initiate a transaction. One such permissible purpose is obtaining or using consumer credit information to prescreen a prospective borrower for a "firm offer" of credit or insurance, which the statute defines as "any offer of credit or insurance that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer."[9]

The Act further provides that these specific criteria properly include: (1) creditworthiness as determined according to pre-established criteria; (2) verification of the consumer's continuing qualification under those criteria; and (3) the furnishing of any required collateral that was identified in the offer.[10] A key factor in evaluating whether an offer of credit is "firm," and therefore permissible, is whether the criteria for approving the extension of credit, including these creditworthiness criteria, are established prior to the offer being made.[11] Moreover, the allowance for ongoing verification and collateral as conditions of the offer indicates that the Act does not require that the extension of credit be absolutely guaranteed in order to pass muster under FCRA.[12]

SEVENTH CIRCUIT DECISION IN *COLE V. U.S. CAPITAL* APPLIES CONCEPT OF "VALUE" TO FIRM OFFER ANALYSIS

The Seventh Circuit's opinion in *Cole v. U.S. Capital* puts a novel gloss on the statutory definition of "firm offer," holding that FCRA permits the unsolicited use of consumer reports only in cases where "value" is being offered, as may be determined by a contextual inquiry into any number of unspecified factors.[13] *Cole* explained that an offer of nominal "value" to the consumer, which could arise from a combination of factors such as a low dollar amount of the offered credit, ambiguous or contradictory terms, or complex approval procedures, may not actually qualify as a "firm offer" under the FCRA, even if the stated amount is, in fact, guaranteed.

The facts in *Cole* form an essential backdrop for understanding the court's approach. Specifically, among the factors considered by the *Cole* court in reaching its conclusion were that the stated dollar amount of the credit offer ($300) was very low and, moreover, was conditioned upon unspecified and contradictory terms.[14] For example, the *Cole* offer stated that the interest rate could range anywhere from 3% to 25%, made contradictory statements about whether the $300 credit was or was not guaranteed, and did not specify either the repayment term or how the interest would be calculated. There was also a question as to whether the offeror could, at its sole discretion, withdraw the offer entirely. Thus, the *Cole* court held that "these missing terms render it impossible for a court to determine from the pleadings whether the offer has value" therefore making the action not suitable for dismissal.[15]

The *Cole* court's interpretation of the meaning of "firm offers" within FCRA's "statutory scheme" was buttressed by the arguments put forward by the Federal Trade Commission (FTC) in an amicus brief to the court. In its brief, the FTC asserted that offers of credit must be evaluated according to a number of factors:

> [W]hat type of credit was offered? What would be the terms of the credit? Did the creditor have a business plan in place that fully complied with the requirements [of FCRA], including establishing in advance the criteria for the credit? Did any consumers apply for, or actually get, this credit? … [W]as the offer so unintelligible – were the terms so inherently confusing, contradictory or buried in fine print – that no one applied? … Was the credit so trivial, or were there so many conditions, that it was not meaningful?[17]

The *Cole* court applied the FTC's multi-factor, highly contextual analysis to the offer before it, explaining that, under FCRA, a court "must consider the entire offer and the effect of all the material conditions that comprise the credit product in question," holding that the challenged offer did not meet the FCRA "firm offer" standard.[18] The court, however, did not define which criteria must be included in the offer or how they may be expressed to establish that the offer is "firm."

It should be noted that *Cole* was decided on a set of highly particular and, admittedly, unfavorable facts. In addition to the extremely wide range of the interest rate and convoluted and contradictory terms, *Cole* concerned an offer of a relatively small amount of credit that could be used only to purchase a new car. *Cole* did not address the typical factual situation relevant in the mortgage and consumer lending industry, that is, where the credit offered is the product being sold.

COLE DECISION CREATES WAVE OF FCRA "FIRM OFFER" LITIGATION

At the time *Cole* was decided, it was not clear what application, if any, the decision would have to the mortgage lending industry and consumer credit providers. The initial guidance from district courts, however, has not been encouraging.

As a preliminary matter, the *Cole* decision has given rise to a flood of class action suits alleging violation of the firm offer of credit requirements of FCRA, many of them in Illinois and other states within the jurisdiction of the Seventh Circuit. For example, as of a recent count, at least one hundred fifty-one "firm offer" class actions are now pending across the country, ninety-two of which are in Illinois alone. Not surprisingly following *Cole*, the particular targets of these suits are prescreened, preapproved or prequalified offers of credit, based on information derived from consumer reports, which, plaintiffs allege, are nothing more than solicitations for business, making the offeror's use of the consumer report information improper under the FCRA.

Beyond the sheer volume of the firm offer litigation, however, and still more troubling for the industry, a spate of recent decisions by federal courts suggest that courts are evaluating firm offers of credit by means of a very literal reading of *Cole*, without sufficient attention to the context of the offer and the provisions of the Act itself. For example, in *Murray v. GMAC Mortgage Corp., d/b/a Ditech.com* ("*Murray*"), the Seventh Circuit stated that courts reviewing challenged offers of credit could consider only the "four corners" of the offer to determine whether the challenged offer had "value," as articulated in *Cole*.[19] In other words, *Murray* seems to say that courts may view only the initial written communication in determining whether a firm offer is being made, without considering any additional factors, such as the context or other conditions, which underlay the offer.

Murray, however, does not explain how this "four corners" rule can be reconciled with the text of the Act which (1) defines a "firm offer" as any *offer* that "will be honored" by the lender if the consumer meets additional lending criteria established prior to the offer, albeit not expressed in the offer and (2) does not require each essential term of the offer to be set forth in the initial written communication to the consumer. *Murray*, further, appears to contradict *Cole*, in which the court held that the "value" of a firm offer must be construed according to the entire offer and its context, and to ignore the contextual multi-factor analysis advocated by the FTC, which analysis was cited with approval in *Cole*.[20]

Shortly following the *Murray* decision, a decision from the United States District Court for the Northern District of Illinois granted plaintiff's motion for summary judgment on a FCRA firm offer class claim in *Kudlicki v. Farragut Financial Corp. ("Kudlicki")*.[21] The decision is principally based on the fact that the challenged offer stated that the "rates and terms were subject to change at any time," reasoning that this qualification of the offer rendered it essentially valueless, following *Cole*.[22]

Perhaps more troubling, however, was the *Kudlicki* court's conclusion that the defendant's violation of the Act was "willful," which requires a showing that a defendant "knowingly and intentionally violate[d] the Act."[23] FCRA distinguishes negligent or inadvertent non-compliance with its provisions from "willful" violations of the Act for the assessment of damages. Specifically, the Act provides for statutory damages of $100-1000 per violation for "willful" violations of the Act and permits punitive damages as well.[24] By contrast, the Act provides that a defendant whose non-compliance was merely negligent will be liable only for "actual damages sustained by the consumer as a result of the failure."[25] This distinction is significant because FCRA does not have a cap for statutory damages in a class action, unlike other federal statutes regulating consumer lending such as the Truth-in-Lending Act or the Fair Debt Collection Practices Act which cap statutory damages in a class action at a maximum of $500,000 or one percent of the creditor's net worth, whichever is less. Further, negligence claims for actual damages do not lend themselves to class treatment.

Kudlicki found a willful violation even though the undisputed facts showed that (i) the defendant employed a compliance officer "to review its mailers for compliance with the FCRA before they are sent out"; (ii) the mailers were reviewed and approved by the consumer reporting agency that provided the consumer reports to the defendant; and (iii) the mailers were reviewed by state regulators.[26] *Kudlicki* discounted each of these facts and rejected defendant's argument that it maintained reasonable procedures to assure compliance with FCRA, agreeing with plaintiff's contention that "because defendant's non compliance with the FCRA is *so evident on the face of defendant's mailer*, the Court must conclude that a *true compliance process* could not have existed."[27] The court stated that "the most cursory glance at defendant's mailer [demonstrated] that no firm offer of credit was being offered."[28] *Kudlicki* raises the question whether the initial written communication to the consumer must contain detailed and complete terms of the offer, including the interest rate and repayment term, not only to be a "firm offer" under the Act, but also to avoid being deemed a *per se* willful violation of FCRA.[29]

Another recent decision from the Northern District of Illinois suggests, however, that *Kudlicki* will not be the final statement of the courts in the Seventh Circuit as to the connection between firm offer violations and willfulness. In *Murray v. Finance America* ("*Finance America*"), the court held, on cross motions for summary judgment, that a prescreened offer of credit sent by a mortgage lender was not a firm offer of credit because it lacked "important concrete terms of the home loans and confers little or no value to the consumer.…"[30] Nevertheless, the court rejected plaintiff's contention that the court could decide that the defendant's firm offer violation was willful as a matter of law. Tacitly rejecting *Kudlicki*, *Finance America* explained that "the Court is not the trier of fact and cannot make the inferential leap that because the letters did not contain firm offers of credit, Finance America did not apply its compliance procedures or that its procedures were inadequate" such that the violation was willful.[31]

Just as *Finance America* and *Kudlicki* reached opposite conclusions as to the interplay between firm offer violations and willfulness, federal district courts outside the Seventh Circuit have reached decisions concerning firm offers of credit that suggest that the landscape for the mortgage lending industry may not be uniformly bleak. For example, in *Putkowski v. Irwin Home Equity Corporation* ("*Putkowski*"), the United States District Court for the Northern District of California recently dismissed a putative firm offer class action lawsuit, expressly declining to follow the Seventh Circuit's analysis in *Cole*.[32] The *Putkowski* court specifically rejected plaintiffs' argument, relying on *Cole*, that particular terms of the offer need to be stated in a firm offer of credit, stating that the text of FCRA does not require lenders to state the interest rate nor does it require "that [an offer] must be of sufficient value when judged by a later arbiter, as suggested by the Seventh Circuit in *Cole*."[33] Furthermore, the *Putkowski* court disagreed with plaintiffs' contention that it should construe the meaning of a "firm offer of credit" in accordance with the principles of contract law.[34] Instead, the *Putkowski* court explained, proper explication of the term "firm offer of credit" is found in the Act itself, which expressly defines and permits a "firm offer" to be conditioned upon a number of criteria that are not stated in the offer, so long as those criteria were established prior to the selection of the consumer to receive the offer.[35]

THE SEVENTH CIRCUIT DIRECTS CERTIFICATION OF A FCRA CLASS IN *MURRAY V. GMAC MORTGAGE CORP.*

A threshold question in these cases, as in all class actions, is whether a plaintiff class can be certified in "firm offer" cases. The Seventh Circuit in *Murray v. GMAC Mortgage Corp.* directed the certification of a plaintiff's class in a prescreened offer action.[36]

In *Murray v. GMAC Mortgage Corp.*, the Seventh Circuit reversed the district court's refusal to certify a plaintiff class consisting of Illinois residents who had received an offer of credit from GMAC Mortgage's Ditech mortgage subsidiary. The trial court below had refused to certify the putative class on a number of grounds, including the failure of the plaintiff to seek compensatory damages, the ruinous damages that could result from a verdict against the defendant, and the unfitness of the named plaintiff to represent the class. The Seventh Circuit in *Murray* reversed the lower court on each point, finding (a) that a plaintiff seeking statutory damages need not also demand compensatory damages under FCRA, (b) that the named plaintiff was an appropriate class representative, (c) that class certification is an inappropriate technique for controlling excessive damages, and (d) that it was not appropriate to consider the ruinous effect of potential damages in deciding whether a class should be certified. The court further determined that it need not engage in a consumer-by-consumer evaluation to determine whether an offer had value.[37]

Murray also raises concern in its criticism, in *dictum*, of the proposed settlement in the underlying litigation, which specified that the named plaintiff would receive $3,000 while all other class members would each receive less than $1.00.[38] The court described the disproportionate recoveries of the *Murray* class members as the "sort of settlement that we [have] condemned in the past."[39] Although the court expressly refused to state that a settling class must recover at least the statutory minimum of $100 per member, the court's condemnation of the prospective settlement raises the question as to what percentage of the statutory minimum would a court, following *Murray*, approve in putting its imprimatur on a proposed settlement.

THE ELIMINATION OF PRIVATE SUITS ALLEGING VIOLATIONS OF THE CLEAR AND CONSPICUOUS NOTICE REQUIREMENT OF FCRA

The litigation scenario is somewhat brighter with respect to the "clear and conspicuous" disclosure requirements of Section 1681m of the FCRA, where courts are disallowing private rights of action for alleged violations of this provision.[40] In *Murray v. Cross Country Bank*, for example, plaintiff alleged that the defendant bank's prescreened credit card offer did not set forth the disclosures required under FCRA Section 1681m in a "clear and conspicuous manner."[41] The United States District Court for the Northern District of Illinois rejected this claim, holding that Congress's extensive revision of FCRA in 2003, specifically the addition of § 1681m(h)(8)(A), barred any private right of action based on alleged violations of the "clear and conspicuous" disclosure requirements of 15 U.S.C. § 1681m.[42] Although *Cross Country* is currently on appeal to the Seventh Circuit, its effect has nevertheless been positive in that other courts have agreed with its reasoning. In fact, FCRA class actions filed since the *Cross Country* ruling have not included clear and conspicuous notice claims and others have seen such claims voluntarily dropped from existing, "firm offer" class action suits.[43]

IMPLICATIONS OF THESE DECISIONS FOR THE CONSUMER CREDIT INDUSTRY

The cases discussed here represent a mixed bag for lenders. On the positive side, *Murray v. Cross Country* and similar decisions which find that there is no private right of action for alleged violations of the "clear and conspicuous" disclosure requirements of 15 U.S.C. § 1681m, if upheld on appeal, eliminate a potentially troublesome and costly source of compliance and litigation concerns.

On the negative side, and it is a substantial negative, the Seventh Circuit's novel incorporation of the notion of "value" into the statutory meaning of a "firm offer" of credit under FCRA in *Cole* seems to have created almost overnight a cottage industry of class action litigation against lenders. Although it is worth repeating that Cole was based on an unfavorable and atypical factual scenario, courts, such as in the *Kudlicki* decision, have begun to apply the *Cole* rule to invalidate prescreened offers of credit and to find willful violations of FCRA based solely on a facial examination of the initial written communication to the consumer. This fact, combined with the absence of any cap on statutory damages, has caused great concern across the consumer credit and mortgage lending industries of potentially catastrophic damages from this litigation and has sparked discussions about the need for prompt action by Congress to clarify FCRA so as to prevent these suits inflicting crippling financial harm on consumer lenders.

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ENDNOTES

1 *Cole v. U.S. Capital.*, 389 F.3d 719 (7th Cir. 2004).

2 15 U.S.C. §§ 1681, *et seq*.

3 For an analysis of the changing disclosure requirements for prescreened offers of credit, please see K&LNG Alert: *FTC Final Rule on Opt-Out Notices for Prescreened Offers May Not Be 'Simple and Easy' for Business*, February 2005, at www.klng.com.

4 *See, e.g., Murray v. Household Bank (SB), N.A.*, 386 F. Supp. 2d 993 (N.D. Ill. Sept. 12, 2005). *See also McCane v. America's Credit Jewelers, Inc.*, slip op., 2005 WL 3299371, Civil Action No. 05-05089 (N.D. Ill. Dec. 1, 2005); *Pietras v. Curfin Oldsmobile, Inc.*, slip op. 2005 WL 2897386 Civil Action No. 05-04624 (N.D. Ill. Nov. 11, 2005); *Murray v. Cingular*, Civil Action No. 05-01334, slip op. (N.D. Ill. Nov. 2, 2005).

5 *Murray v. Cross Country Bank*, Civil Act. No. 05-1252, slip op. (N.D. Ill. August 15, 2005).

6 The FCRA's express purpose is to "require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." 15 U.S.C. § 1681(b). *See also* 15 U.S.C § 1681(a)(4).

7 15 U.S.C. §§ 1681e, 1681k, 1681l.

8 15 U.S.C. § 1681b states the permissible purposes for which a consumer report may be released. In addition to provision for a court seeking consumer report information, the statute provides that a consumer report may be released without prior authorization of the consumer in cases involving the extension of credit, the underwriting of insurance, use in employment purposes, licensing, assessment of credit risk of an existing credit obligation, a legitimate business need for the information, in securing payment of child support obligations. 15 U.S.C. § 1681 b(3)(A-F); 15 U.S.C. § 1681b(4).

9 15 U.S.C. § 1681a(l).

10 15 U.S.C. § 1681a(l)(1-3).

11 *Id*.

12 *See* K&LNG Alert: *FTC Final Rule on Opt-Out Notices for Prescreened Offers May Not Be 'Simple and Easy' for Business*, February 2005.

13 389 F.3d 719, 726-727 (7th Cir. 2004).

14 *See id.* at 728.

15 *See id.*

16 The Seventh Circuit had invited the FTC to file a brief in the case. 389 F.3d at 722, n.2.

17 389 F.3d at 728, n.9.

18 389 F.3d at 728.

19 *Murray v. GMAC Mortgage Corp. d/b/a Ditech.com*, 434 F.3d 948 (7th Cir. 2006).

20 The Mortgage Bankers Association ("MBA") and the Consumer Mortgage Coalition ("CMC") made this argument in an amicus brief in support of GMAC's petition for an en banc rehearing of the *Murray* decision. *Compare Cole*, 389 F.3d at 727-28. The MBA and CMC argued that the *Murray* decision expressly contradicted *Cole*, which required a court to consider the "entire" offer and "the effect of all the material conditions" and has created significant uncertainty about the viability of prescreened offers of credit. Comparison of the text of 15 U.S.C. § 1681a with the text of *Murray* – "To decide whether [defendant] has adhered to the statute, a court need only determine whether the four corners of the offer satisfy the statutory definition, and whether the terms are honored when consumers accept" – suggests that the *Murray* court may have been unaware that the Act appears to acknowledge that a firm offer might not contain all the terms of the ultimate loan, in its provision that a "firm offer" is to be evaluated by the relationship between the offer and pre-established creditworthiness and income criteria. The Seventh Circuit in *Murray* denied the petition for rehearing on February 21, 2006.

21 *Kudlicki v. Farragut Financial Corp.*, Civil Action No. 2459 (N.D. Ill. Jan. 20, 2006).

22 *See id*.

23 *See id.*, slip op. at 2-3.

24 FCRA, 15 U.S.C. § 1681n, provides: Civil liability for willful noncompliance

(a) In general. Any person who willfully fails to comply with any requirement imposed under this title [15 USC §§1681, *et seq.*] with respect to any consumer is liable to that consumer in an amount equal to the sum of-

(1)

(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $ 100 and not more than $ 1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $ 1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court….

25 15 U.S.C. § 1681 (a)(1). 15 U.S.C. § 1681o(a)(2) also provides for an award of attorneys fees in a successful action to enforce liability for negligent non-compliance.

26 *See Kudlicki v. Farragut Financial Corp.*, slip op. at 2-3.

[27] *Id.* (Emphasis added). FCRA expressly identifies the purpose of the Act to "require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information…" 15 U.S.C. § 1681(b). 15 U.S.C. § 1681m(c) states that "no person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of this section."

[28] *See Kudlicki v. Farragut Financial Corp.*, slip op. at 3.

[29] The chief focus of FCRA is upon the actions and procedures of "consumer reporting agencies" who assemble and disseminate consumer credit information, rather than upon "users" of this data, such as creditors and mortgage lenders. *See, e.g.*, 15 U.S.C. § 1681e(a) (describing compliance procedures: "*every consumer reporting agency* shall maintain reasonable procedures designed to avoid violations of section 1681c of this title and to limit the furnishing of consumer reports to the purposes listed under section 1681b of this title [e.g. a firm offer of credit or insurance].") (Emphasis added). 15 U.S.C. § 1681m, which describes the duties of "users" of consumer report information, states that a user "will not be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of this section," but provides no other details as to what such procedures should be. 15 U.S.C. § 1681m(c).

[30] *Murray v. Finance America*, slip op., Civil Action No. 05-1255 (N.D. Ill. April 4, 2006) at 5.

[31] *See id.* at 8.

[32] *See Putkowski v. Irwin Home Equity Corp.*, slip op., Civil Action No. 05-3289 PJH (N.D. Cal. March 23, 2006).

[33] *Id.*, slip op. at 9.

[34] *See id.,* slip op. at 7-9.

[35] *See id.*, slip op. at 8-9, citing 15 U.S.C. § 1681a(l).

[36] *Murray v. GMAC Mortgage Corp. d/b/a Ditech.com*, 434 F.3d 948 (7th Cir. 2006).

[37] *See Murray*, 434 F.3d at 950-956.

[38] *See Murray*, 434 F.3d at 951-952.

[39] *Id.*

[40] Section 1681m(d)(1) requires "users making written credit or insurance solicitations on the basis of information contained in consumer files" to "provide with each written solicitation… a clear and conspicuous statement that –

(A) information contained in the consumer's credit report was used in connection with the transaction;

(B) the consumer received the offer of credit or insurance because the consumer satisfied the criteria for credit worthiness or insurability under which the consumer was selected for the offer."

Section 1681m(d)(1)(C) expressly provides, however, that the written solicitation must also clearly and conspicuously state that, "if applicable, the credit or insurance may not be extended if, after the consumer responds to the offer, the consumer does not meet the criteria used to select the consumer for the offer or any applicable criteria bearing on credit worthiness or insurability or does not furnish any required collateral." Section 1681(m) also requires that the written solicitation clearly and conspicuously disclose both the consumer's right to prohibit information in her consumer file from being used to make such offers (the "opt out provision") and the telephone numbers and addresses to exercise this "opt out" right. 15 U.S.C. §§ 1681m(d)(1)(D)-(E); 15 U.S.C. § 1681m(d)(2).

[41] *Murray v. Cross Country Bank*, Civil Act. No. 05-1252, slip op. (N.D. Ill. August 15, 2005).

[42] *See id.* at *2. Specifically, the Fair and Accurate Credit Transactions Act of 2003, 108 P.L. 159, 117 Stat. 1952 (2003) ("FACTA"), amended Section 1681m, among others, by adding two provisions;

(A) No civil actions. Sections 1681n and 1681o of this title shall not apply to any failure by any person to comply with this section.

(B) Administrative enforcement. This section shall be enforced exclusively under section 1681s of this title by the federal agencies and officials identified in that section.

15 U.S.C. § 1681m(h)(8). The legislative history of the amendments further supports the argument that Congress intended to eliminate private rights of action for violations of the clear and conspicuous disclosure requirements of the Act. See Conf. Report on H.R. 2622, Fair and Accurate Credit Transactions Act of 2003, 149 Cong. Rec. E2512-02 at E2517 (Dec. 9, 2003), 2003 WL 22900844. Thus, as Senator Oxley stated in support of the legislation: "the FCRA is also amended to clarify liability and enforcement under the FCRA. Specifically, the new requirements imposed upon furnishers of information are subject to administrative enforcement, not private rights of action." *See id.*

[43] *See Murray v. Household Bank*, 386 F. Supp. 2d 993. *See also McCane*, slip op., 2005 WL 3299371 (N.D. Ill. Dec. 1, 2005); *Pietras,* slip op., 2005 WL 2897386 (N.D. Ill. Nov. 11, 2005); *Murray v. Cingular*, slip op., Civil Action No. 05-01334 (N.D. Ill. Nov. 2, 2005).

MORTGAGE BANKING/CONSUMER FINANCE PRACTICE

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