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The Seventh Circuit Breathes New Life into "Firm Offers of Credit"; The First Circuit Tells Consumers to "Opt Out" and Stop Complaining

Two federal appeals courts have recently taken up the issue of firm offers of credit under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681, *et seq*. ("FCRA"), and in each case the result has been a victory for the consumer credit industry, and for consumers who are afforded greater access to credit through the receipt of firm offers of credit. In *Murray v. New Cingular Wireless*,[1] the Seventh Circuit issued a landmark decision that should mark the demise of much of the FCRA firm offer litigation that has sprung up around the country since 2004 when the Seventh Circuit decided *Cole v. U.S. Capital, Inc.*[2] Also, in *Sullivan v. Greenwood Credit Union*,[3] and *Dixon v. Shamrock Financial Corp.*,[4] the First Circuit rejected plaintiffs' now-discredited interpretations of *Cole* and *Murray v. GMAC Mortgage Corp.* [5], and became the first federal appellate court outside of the Seventh Circuit to address the *Cole* "value" test head-on. [6]

Seventh Circuit Tells Plaintiffs That They Had It Wrong All Along

The Seventh Circuit's decision in *Murray v. New Cingular Wireless* clarifies that court's approach to firm offer cases under FCRA as set forth in *Cole* and *Murray v. GMAC*. In short, the Seventh Circuit has returned to adherence to the statutory text of FCRA and has rejected several arguments that would have imposed requirements not found in the statute and not intended by Congress.

Under FCRA, lenders may obtain limited information from a consumer's credit report in connection with the extension of a firm offer of credit or insurance. The statute defines "firm offer" generally as "any offer of credit or insurance to a consumer 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."[7] 15 U.S.C. § 1681a(*l*).

In the now-familiar *Cole* case, the Seventh Circuit held 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.[8]

In *Murray v. GMAC*, 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."[9]

The *Cole* and *Murray v. GMAC* decisions unleashed 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. For example, from *Cole* and *Murray v. GMAC*, 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. With its decision in *Murray v. New Cingular Wireless*, the Seventh Circuit has now rejected many of these arguments.

The case was a consolidated appeal of three firm offer cases originating from district courts within the Seventh Circuit. In the first of those cases, *Murray v. New Cingular Wireless*,[10] the district court held that defendant's offer of a free phone when customers signed up for a wireless telephone contract was an offer of "credit" under FCRA, and that the offer had "value" under *Cole*.[11] The district court also held that the required disclosures were not "clear and conspicuous" because they were printed in six-point font, but that the violation was not willful under FCRA, and, thus, plaintiff could not collect statutory damages.[12] In *Bruce v. Keybank N.A.*,[13] the second case on appeal, the district court held that defendant's offer of a mortgage loan was not a firm offer because it lacked sufficient material terms to have value under *Cole*.[14] Yet, the district court ruled that the violation of FCRA was not "willful."[15] Finally, in *Price v. Capital One Bank*,[16] the district court held that defendant's offer of a credit card was a firm offer even though it did not disclose the credit limit on the card being offered.[17]

On appeal, the Seventh Circuit first addressed the issue of whether *Cole* requires a firm offer to "be valuable to all or most recipients."[18] The Court opined that its holding in *Cole* was intended for the limited purpose of preventing merchants from obtaining consumer credit information by making token offers of credit in connection with an offer to sell merchandise.[19] Next, the Court rejected plaintiffs' contention "that this approach must be applied, not only to distinguish between offers of merchandise and offers of credit, but also to decide whether even a simple offer of credit is valuable."[20] The Court held that *Cole* was "beside the point" because it was not intended to require "pure offers of credit" to have "value."[21]

Second, the Court rejected plaintiffs' contention – adopted by many district courts – that a firm offer must contain material terms to comply with FCRA. Confirming that *Cole's* value test could not be used to require loan terms to be included in a firm offer, the Court stated that "[t]o the extent this argument rests on *Cole* … it is wrong."[22] Next, the Court looked to the statutory definition of "firm offer" and concluded that nothing "in FCRA says that the initial communication to a consumer must contain all the important terms that must be agreed on before credit is extended."[23] The Court reasoned that to hold otherwise would render firm offers "turgid, and … uninformative" because they would "be harder to read and grasp."[24]

Third, on the issue of whether a creditor may vary the terms of the offer after it is sent to the consumer, the Court was less clear. Although the Court held that an offer itself need not disclose credit terms, the statute requires that a firm offer be honored if the consumer continues to meet the criteria used to select the consumer for the offer.[25] Plaintiffs argued that a lender's reservation of the right to vary terms violates FCRA because it would permit a lender to deny credit even where a consumer meets the criteria used to select him or her for the offer. For example, in *Bruce v. Keybank*, Keybank's offer stated that interest rates and closing costs could vary and that "rates, fees, and terms are … subject to change without notice."[26] The Court reasoned that this language may render the offer illusory, as plaintiffs argued, or that it may be reserving the lender's statutory right to verify the consumer's creditworthiness when he responds to the offer.[27] Because the Court concluded that the answer would require discovery, and plaintiffs did not seek any discovery on this issue, they were not entitled to relief under their theory.[28] Nevertheless, the Court appears to have left the door open to challenges where an offer contains numerous qualifications such as the ones that were at issue in *Bruce v. Keybank*.

Finally, the Court held that New Cingular Wireless violated FCRA when it printed the required FCRA disclosures in 6-point font.[30] However, the Court concluded that the violation was not "willful." The Court reasoned that when New Cingular Wireless sent its offer to the plaintiff in 2003, the law was

undeveloped and, thus, could not support a finding that New Cingular acted recklessly in violating the statute.[31]

The Seventh Circuit's decision in *Murray v. New Cingular Wireless* likely spells the end of the line for the numerous FCRA firm offer class actions that were filed in the wake of *Cole* and *Murray v. GMAC*. The Seventh Circuit has soundly rejected arguments advanced by plaintiffs that a firm offer of credit must contain material terms and that it must be "valuable" to consumers. Perhaps of most importance was the Court's ruling that the "value" test in *Cole* is only to be used when "disentangling" sham offers of credit from what the Court terms "pure offer" (*i.e.* offers that are not a guise for pitching merchandise). The question remains, however, whether viable claims are possible where a lender's offer states that terms may be cancelled or varied at any time.

First Circuit To Consumers: "Opt Out" And Stop Complaining

In a pair of opinions preceding the Seventh Circuit's *Murray v. New Cingular Wireless* decision by a matter of days, the First Circuit upheld dismissals of two firm-offer-of-credit class actions by adhering to FCRA's plain language. The First Circuit became the first federal appellate court to address the value test in the Seventh Circuit's *Cole* opinion. The apparent conflict between the two courts, however, quickly evaporated upon the release of the *Murray v. New Cingular Wireless* decision.

The First Circuit held that a firm offer of credit is an offer that complies with the plain terms of the definition of "firm offer of credit" set forth in FCRA. Notably, neither of the firm offers at issue in *Sullivan* and *Dixon* enumerated material loan terms such as a definite loan amount, interest rate or repayment term. For example, the *Sullivan* firm offer stated that the plaintiff had been pre-approved to receive a home loan of "up to 100% of the value of your home," and that plaintiff could call lender Greenwood to "secure a great program."[32] The *Dixon* offer merely invited plaintiff to contact lender Shamrock Financial to learn how he could "save lots of money," "pay off revolving debt," "refinance your mortgage balance," and increase plaintiff's credit score by "100 points or more." Both offers contained notices advising the consumer of the ability to opt out of receiving firm offers of credit, and notifying plaintiff that the offer was not guaranteed unless plaintiff met certain credit and collateral criteria.[34]

In evaluating the offers at issue in these cases, the First Circuit took a common-sense approach in holding that the offers need only comply with the plain language of FCRA. Specifically, the Court held that: (1) a firm offer need not disclose particular loan terms; and (2) it does not have to have "value" to a consumer beyond what is required by the statute, that is, a guarantee that the consumer will not be denied credit if he meets the criteria set forth in the offer. The Court reasoned that this was enough value to the consumer since the lender extending the firm offer has only been given a small amount of personal credit information, most often just a FICO score.

In both decisions, the First Circuit rejected the oft-made argument that the term "firm offer of credit" should be interpreted using common law principles of contract law. The Court relied on a canon of statutory construction that when a term is defined by the statute, the Court should not look beyond that definition to supply meaning to the term. The Court also noted that the statutory definition of "firm offer of credit" in FCRA sets forth requirements upon which a firm offer may be conditioned.[35] As the *Dixon* Court noted, the statute's definition of firm offer "excludes the common law meaning of 'offer' because the FCRA specifically permits lenders to impose post-offer criteria that would be antithetical to the common law understanding" of the term.[36]

Although the First Circuit did not expressly reject *Cole*, its opinions cite *Cole* for the limited purpose of supporting the notion that under FCRA a consumer's credit information can only be accessed for the purpose of offering credit, rather than offering a consumer product.[37] In *Sullivan*, for example, the Court distinguished the offer at issue – which was unquestionably for a mortgage loan – from the offer in *Cole* which amounted to a $300 coupon toward the purchase of a used car. The question in *Cole* therefore was whether there was an offer of credit at all, and the First Circuit found that this issue was not present in either *Sullivan* or *Dixon* because the offers in those cases were clearly for credit.

To support its holding that a "firm offer of credit" need not disclose material terms, the First Circuit contrasted the detailed disclosure provisions found in the Truth in Lending Act ("TILA") with FCRA and "put into context the limited purposes of" FCRA.[38] The Court

noted that, unlike FCRA, TILA was enacted "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him."[39] While TILA requires the disclosure of, among other things, the applicable finance charges and annual percentage rates, those disclosure obligations are not required until the consumer submits a loan application, *i.e.*, "subsequent to a firm offer of credit."[40] Thus, the Court concluded that because TILA was not implicated at the firm offer stage and FCRA does not otherwise require such disclosures, there was no requirement that the defendants' firm offers of credit provide material loan terms.[41]

As the *Sullivan* Court noted, FCRA was enacted "to ensure fair and accurate credit reporting, promote efficiency in the banking system and protect consumer privacy."[42] FCRA's main thrust is directed at regulating credit reporting by the major credit reporting agencies. The required disclosures under FCRA are those provided for in 15 U.S.C. § 1681m, and the plaintiff in *Sullivan* did not allege any violation of that section.[43]

Finally, the First Circuit noted that the invasion of a consumer's privacy occasioned by the accessing of portions of his or her credit report was balanced by the benefits to consumers in having greater access to credit "and by the presence of a safety-valve – the ability of consumers to opt out of the practice entirely …."[44] The remedy for the unwanted intrusion, according to the First Circuit, is the opt-out provision, not the courts.[45]

With the one-two punch of the First Circuit's decisions in *Sullivan* and *Dixon* and the Seventh Circuit's decision in *Murray v. New Cingular Wireless*, the parade of firm offer of credit class actions that has dogged the industry in recent years appears to have reached the end of the road.[46]

Endnotes

1 --- F.3d ----, 2008 WL 1701839 (7th Cir. April 16, 2008).

2 389 F.3d 719 (7th Cir. 2004). For a more detailed discussion of Cole, and FCRA firm offer litigation generally, see *Developments in "Firm Offer" Litigation Under the Fair Credit Reporting Act*, The Review of Banking & Financial Services, R. B. Allensworth, Irene C. Freidel, Brian M. Forbes, Gregory N. Blase (February 2008); and *Decisions of Federal Courts Create Uncertainty Concerning Use of Prescreened Offers of Credit: An Update on FCRA Prescreened Offer of Credit Class Action Litigation*, Mortgage Banking/Consumer Finance Alert, R. B. Allensworth, Steven M. Kaplan, Irene C. Freidel, Brian M. Forbes, Joshua C. Rowland (April 2006).

3 --- F.3d ---, 2008 WL 726135 (1st Cir. Mar. 19, 2008).

4 --- F.3d --- 2008 WL 902200 (1st Cir. April 3, 2008).

5 434 F.3d 948, 956 (7thCir. 2006).

6 In *Kennedy v. Chase Manhattan Bank USA, NA*, 369 F.3d 833 (5th Cir. 2004), a case that predated *Cole*, 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. Summarizing its decision, the Fifth Circuit explained that a "firm offer of credit" under FCRA "really means a 'firm offer if you meet certain criteria.'" *Id*.

7 FCRA further permits a firm offer of credit to be conditioned on the consumer's: (1) creditworthiness; (2) continued ability to meet the credit criteria used to select the consumer for receiving the firm offer; and (3) ability to furnish any collateral that is required for the extension of credit or insurance. 15 U.S.C. § 1681a(l)(1)-(3).

8 *Cole*, 389 F.3d at 726 (emphasis in original). Subsequently, in *Perry v. First Nat'l Bank*, 459 F.3d 816 (7th Cir. 2006), the Seventh Circuit upheld the district court's determination that a credit card offer was a firm offer under FCRA because (1) it was clear the offer would be honored if accepted; (2) the offer set forth the credit line and the interest rate; and (3) the offer had value as an offer of credit.

9 434 F.3d at 956.

10 432 F. Supp. 2d 788 (N.D. Ill. 2006).

11 *Id*. at 791-792.

12 *Id*. at 793-794.

13 No. 2:05-CV-330, 2006 WL 3743749 (N.D. Ind. Dec. 15, 2006).

14 *Id*. at *4-5.

15 *Id*. at * 6.

16 No. 05-C-947, 2007 WL 1521525 (E.D. Wis. May 22, 2007).

17 *Id*. at *4.

18 *Murray v. New Cingular Wireless*, 2008 WL 1701839 at *1.

19 *Id*.

20 *Id*.

21 *Id*. at *2. The Court also held that New Cingular's mailer offering a free phone for anyone who signed up for a one-year service plan was not a violation of FCRA. The Court agreed with the district court's reasoning that the wireless telephone contract at issue was "credit" since the services were provided in advance of payment, and that the offer of a free phone did not bring the offer within the purview of *Cole's* value test. *Id*.

22 *Id*. at *3.

23 *Id*. at *4.

24 *Id*.

25 *Id*. at *3; 15 U.S.C. § 1681(l) (a firm offer is "any offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet specific criteria used to select the consumer for the offer").

26 *Murray v. New Cingular Wireless*, 2008 WL 1701839 at *4.

27 *Id*. at *5.

28 *Id*. at *4

29 In contrast to the *Keybank* offer, the court held that Capital One's omission of a minimum credit amount and maximum interest rate on its mailer did not run afoul of FCRA. *Id*. at *5. In that instance, the court determined that the lender was merely reserving is right to verify the consumer's continued creditworthiness which it is permitted to do under the statute. *Id*.

30 *Id*. at *6

31 *Id*. at *7

32 *Sullivan*, 2008 WL 726135 at *1.

33 *Dixon*, 2008 WL 902200 at *1.

34 *Sullivan*, 2008 WL 726135 at *2; *Dixon*, 2008 WL 902200 at *1-2.

35 15 U.S.C. § 1681a(l)(1)-(3).

36 *Dixon*, 2008 WL 902200 at *4.

37 Notably, the Seventh Circuit has now reached the same conclusion in *Murray v. New Cingular Wireless*.

38 *Sullivan*, 2008 WL 726135 at *4.

39 *Id*.

40 *Id.*, *citing Soroka v. JP Morgan Chase & Co.*, 500 F. Supp. 2d 217, 222 (S.D.N.Y. 2007) (rejecting *Cole* and granting motion to dismiss FCRA firm offer complaint).

41 In any event, in comparing the two mailers, the *Dixon* Court suggested that the *Sullivan* matter *did* contain a maximum loan amount of "100% of the value of [plaintiff's] home." *Dixon*, 2008 WL 902200 at *3, n.2.

42 *Sullivan*, 2008 WL 726135 at *3, *quoting Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2201 (2007).

43 15 U.S.C. § 1681m; *Sullivan*, 2008 WL 726135 at *4.

44 *Dixon*, 2008 WL 902200, *5.

45 *Id*.

46 For example, within days of the First Circuit's decision in *Sullivan*, a federal court in Rhode Island dismissed a similar firm offer lawsuit. *See Dixon v. Calusa Investments, LLC*, No. 06-442-T, 2008 WL 821607 (D.R.I. March 27, 2008) (dismissing FCRA firm offer class action in light of First Circuit's decision in *Sullivan*).

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