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to take legal action against Miller, UCS did not receive the more comprehensive information contained in Wolpoff's own file due to software constraints. UCS also did not have access to Lord & Taylor's file, which included, among other things, the credit card agreement, Miller's correspondence, and Lord & Taylor's internal collection efforts. Instead all UCS received was basic information regarding Miller such as his address, telephone number, and social security number. UCS asserts that it had a strong working relationship with Wolpoff and had confidence in Wolpoff's initial review because it was familiar with Wolpoff's review process. However, the court noted that at the time the attorney for UCS signed the collection letter, he did not have access to any relevant information regarding the validity of the debt other than Miller's most basic information provided by Wolpoff. Also, to the extent that Miller's file was physically reviewed by UCS personnel, those persons were non-attorneys. The debt-collection letter sent to Miller, although it bore the signature of an attorney, was drafted by non-attorney personnel.

The FDCPA prohibits the practice of "false representation or implication that any individual is an attorney or that any communication is from an attorney." Although the letter sent to Miller by UCS was literally "from" an attorney, the court required some degree of attorney involvement before a letter will be considered "from an attorney" within the meaning of the FDCPA. The court concluded that UCS's review practices and commencement of legal action were inadequate for FDCPA purposes because evidence presented at trial indicated the lack of independent attorney judgment in connection with Miller's file. Because UCS failed to fall within the FDCPA, the court held that all communications with Miller by UCS are rendered misleading. Furthermore, the court rejected UCS's reliance upon Wolpoff's review, reasoning that to allow attorneys to rely on another's prior review would absolve an attorney's professional obligation to review debt-matters independently.

CONSUMER CREDIT

BANK DID NOT VIOLATE TRUTH IN LENDING ACT BY INCREASING APR RETROACTIVELY

Shaner v. Chase Bank U.S.A, N.A., 587 F.3d 488 (1st Cir. (Ma.) 2009).

FACTS: Jessica Shaner ("Shaner") filed a class action against Chase Bank USA, N.A. ("Chase") in Massachusetts Superior Court, which Chase later removed to federal district court. The class included all persons with Massachusetts billing addresses on their Chase consumer credit card accounts for which interest rates on outstanding balances were retroactively increased "without warning or advance notice" from July 30, 2003, onward. Shaner's complaint did not dispute that "retroactive" adjustments were consistent with the language of the credit card agreement; rather, the complaint alleged that it was unlawful, primarily based on a reading of Federal Reserve Board regulations. Shaner's complaint accused Chase of violating the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601 et seq. (2006), by failing to provide notice of a rate increase on or before the effective date of the increase.

On Chase's motion to dismiss, the district court sided with Chase and concluded that the Federal Reserve Board's TILA regulations, as read by the Board itself, did not require Chase to provide advance notice when it made end-of-month adjustments apply from the start of the month where the agreement so permitted.

Shaner appealed from the adverse judgment and this court reviewed the motion to dismiss *de novo*, accepting as true the factual allegations Shaner pleaded in this complaint. Two subsections of the TILA regulations were of importance. Section 226.9(c)(1) and section 226.9(c)(2), 12 C.F.R. § 226.9(c)(1), (2) (2003). Shaner and Chase disputed the meaning behind these two subsections and whether they stipulated that notice be required.

HOLDING: Affirmed.

REASONING: Recent revisions to TILA and its notice regu-

lations that tightened disclosure restrictions on the banks, have resolved the TILA question as to future transactions in favor of Shaner. The new statute and regulations by their terms, however, did not take effect until August 2009 and Shaner did not claim that the new restrictions apply to transactions, such as hers, that occurred prior to the new statute.

The court noted that this issue had been considered by the Federal Reserve Board, and that: "It is the Board's position that at the time of the transactions at issue in this case, Regulation Z did not require a change-in-terms notice to be provided when a creditor increased a rate to a figure at or below the maximum allowed by the contract in the event of default."

FAIR CREDIT REPORTING ACT DOES NOT REQUIRE ACTUAL DAMAGES

Beaudry v. Telecheck Serv. Inc., 579 F.3d 702 (6th Cir. 2009).

FACTS: Cheryl Beaudry ("Beaudry") filed a class action suit against Telecheck Services and others ("defendants") alleging violations of the federal Fair Credit Reporting Act ("FCRA"). Specifically, the complaint alleged that defendants – a group of foreign corporations who provide check-verification services – failed to account for a 2002 change in the numbering used by the Tennessee driver's license system. This failure lead systems to reflect incorrectly that many Tennessee consumers were first-time check-writers. The complaint alleged the defendants' actions constituted a willful failure to provide accurate information and entitled the class members to declaratory relief, injunctive relief, statutory damages, punitive damages, attorney's fees, costs and expenses. The defendants filed a motion to dismiss on the grounds that Beaudry's complaint failed to allege that she had suffered actual damages. The district court dismissed the class action, holding that Beaudry had not alleged any injury and that the statute does not authorize courts to grant injunctive relief. Beaudry appealed.

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HOLDING: Reversed and remanded.

REASONING: The court summarized the FCRA, and the differences between negligent and willful violations of the FCRA. Of particular relevance is the fact that willful violations allow a party to recover statutory damages without showing actual injury. The defendants argued that the FCRA requires a showing of some form of “consequential damages.” In this case, however, the defendants argued that plaintiff had not had a check rejected or any other transaction terminated as a result of a TeleCheck recommendation and that she had not suffered any harm with respect to the availability of credit. The court disagreed, stating that the FCRA imposes no such hurdle on willful violation claimants. Instead the FCRA allows recovery of either actual damages or statutory damages as fixed by Congress for willful violations. The court found that the district court erred in dismissing the class action complaint on the ground that plaintiff had not suffered any actual injury. For these reasons, the court held that the private right of action does not require proof of actual damages as a prerequisite to the recovery of statutory damages for a willful violation of the FCRA. The court reversed the district court and remanded the class action for further proceedings.

FAIR CREDIT REPORTING ACT DOES NOT PREEMPT STATE LAW CLAIMS AGAINST MORTGAGE SERVICER

Ortiz v. Nat’l City Home Loan Servs. Inc., ____ F. Supp. 2d ____ (S. D. Tex. 2009).

FACTS: In 2006, the plaintiff, Albert Ortiz, brought suit against the defendants in state court asserting unfair debt collection, violation of the Texas Deceptive Trade Practices - Consumer Protection ACT (“DTPA”), slander of credit and for wrongful foreclosure. Plaintiff executed a Promissory Note and Deed of Trust on March 15, 2004, in the amount of \$ 472,000 on an improved property located in Houston, Texas. The Note and Deed of Trust were subsequently transferred to National City Bank of Indiana. Although National City Bank owned the Note, Home Loan Services, Inc. (“HLS”), serviced the Note, receiving payments and insuring that the terms of the Note were kept by the plaintiff.

On several occasions after the loan closed, the plaintiff was declared to be in default because the monthly payment amounts were not, according to HLS, sufficient to cover the plaintiff’s Note obligations. HLS claimed that, because the plaintiff had not obtained appropriate insurance on the property it was necessary for it, HLS, to obtain the needed coverage. To obtain this coverage, HLS deducted a portion of the monthly mortgage payment, before applying it to principal and interest, thereby resulting in a shortage in the Note obligation. HLS declared the Note in default on one or more occasions. However, the plaintiff and HLS resolved their differences. Nevertheless, the pattern continued and the property was eventually posted for foreclosure on June 6, 2006. On June 6, HLS foreclosed on the property and the plaintiff’s suit followed. The defendant caused the case to be removed on or about June 27, 2009, after the plaintiff’s last amended petition on August 24, 2007.

Holding: Remanded.

Reasoning: The defendants stated basis for removal rested in 15 U.S.C. §§ 1681h(e) and 1681t. The defendants contended that § 1681s-2(b) allows a consumer to bring a private cause of ac-

tion against a furnisher of credit information. The defendants alleged they were “furnishers” of credit information, and that the plaintiff’s state law causes of action were, therefore, preempted by federal law. The defendants argued that the plaintiff’s suit, which asserts only state law causes of action, is totally preempted by the FCRA, and that the plaintiff’s suit gave rise to federal question jurisdiction, removal was proper and remand would be improper.

The court disagreed. The court stated that in determining whether Congress has preempted state law in an area and thereby permits removal to a federal court, a federal statutory scheme must provide: (a) a civil enforcement provision that creates a federal cause of action replacing and protecting the same interests as the preempted state law causes of action; (b) a specific jurisdictional grant to the federal courts to enforce the cause of action created by the federal statute; and, (c) a clear Congressional intent to make the preempted state law claims removable to federal court. The court noted that the FCRA specifically states that it does not preempt state law causes of action except in areas where state law conflicts with the purposes of the federal statute.

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The court held that nothing in the language of the statute reflects a clear intent on the part of Congress to make even preempted claims removable where a plaintiff chooses state court, refusing to plead a federal cause of action. Therefore, a plaintiff cannot be forced to amend his complaint to do so. The court held that the plaintiff’s pleadings state only causes of action for violations of state statutory and common law. The court noted that at no time has the plaintiff sought or claimed relief based on a federal statute. The court held that the relief sought by the plaintiff in his state law claims did not require the resolution of a substantial question of federal law. The plaintiff sought to establish liability based on a breach of contract, oral and/or written by Lombardo. Assuming that any state law claim is preempted, the court stated that it is nevertheless, not a basis for removal. The court held that it is simply an affirmative defense. Finding no clear Congressional intent to make the preempted claims removable to federal court, the court held that the third element of the defendant’s burden of persuasion for complete preemption was not satisfied. The court remanded the case to state district court.

BUSINESS CREDIT CARD USE NOT WITH SCOPE OF FAIR AND ACCURATE CREDIT TRANSACTIONS ACT

Pezl v. Amore Mio, Inc., 259 F.R.D. 344 (N. D. Ill. 2009).

FACTS: John Pezl (“Plaintiff”) brought a purported class action alleging violations of the Fair and Accurate Transactions Act (“FACTA”) amendment to the Fair Credit Reporting Act (“FCRA”), codified as 15 U.S.C. § 1681c(g), against Amore Mio, Inc. and Doe Defendants 1-10 (collectively “Defendants”).

Plaintiff alleged that on April 11, 2007, he received a computer-generated credit card receipt from Defendants’ Amore

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Mio Restaurant, displaying more than the last five digits of the credit card number. Plaintiff was using his business, CE Design, Ltd. ("CE Design"), credit card and admitted that the transaction was for business purposes. Plaintiff alleged that Defendants' action of printing more than the last five digits of the card number violated FACTA. Plaintiff sought to bring this action on behalf of himself and other similarly situated individuals, and requested class certification. Defendants filed a motion for summary judgment.

HOLDING: Denied as to Plaintiff's motion for class certification, granted as to Defendants' motion for summary judgment.

REASONING: The court first analyzed whether class certification was appropriate. The court stated that a class may be certified if "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Plaintiff claimed that this case involves approximately 11,486 violations of FACTA. The court

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found that joinder of potentially thousands of suits in this case was impractical; therefore, the numerosity requirement was satisfied. Plaintiff alleged that Defendants engaged in standardized conduct arising from a common nucleus of operative fact: the printing of receipts in violation of FACTA. Accordingly, the

court held that the questions of law and fact are common for each member of the class and commonality was satisfied.

The court then analyzed the third Rule 23(a) requirement that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The court reasoned that a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and her claims are based on the same legal theory. The court noted that the presence of defenses particular to the named plaintiff may destroy typicality.

Defendants argued that Plaintiff's claim was not typical because he was suing based on a credit card number belonging to a corporation and was therefore subject to unique defenses. Plaintiff used his business credit card and admitted that the transaction at issue was for business purposes. Defendants argued that transactions involving business credit cards are excluded from the FCRA. The court looked to the FCRA § 1681n: "Any person who willfully fails to comply with any requirement of this [subchapter] with respect to any consumer is liable to that consumer" Since "consumer" is defined as "an individual" under § 1681a(c), the court held that the FCRA provides a private right of action for individuals and not business entities.

Plaintiff argued that he was suing under FACTA specifically, and not FCRA generally, and that FACTA expressly applies to all receipts printed for any "cardholder" including Plaintiff. However, the court held that FACTA does not contain a separate provision establishing a private cause of action; the right to sue is

granted under the FCRA.

Plaintiff also claimed that the credit card at issue does not belong to a corporation. Plaintiff argued that he is "personally responsible" and "personally liable" for the card, and therefore class certification was appropriate. However, Plaintiff's credit card agreement states that Plaintiff is a "Business Cardmember" authorized under "the Company's application" to use the card only for "commercial or business purposes." Therefore, the court held that Plaintiff was not entitled to relief under the FCRA because the "consumer" in this case was CE Design, and not Plaintiff.

Finally, Plaintiff argued that the issue of whether an "individual" or "business" credit card was used should not preclude class certification. The court disagreed, holding that the typicality requirement is not met because Plaintiff's transaction involved a business credit card, which creates a unique defense. Since, Plaintiff failed to meet all of the requirements of Rule 23(a), class certification was denied.

ELECTRONICALLY DISPLAYED E-MAIL CONFIRMATIONS ARE NOT PROTECTED BY THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT

Shlahitichman v. 1-800 Contacts, Inc., 2009 WL 4506535 (N.D. Ill. 2009).

FACTS: Defendant 1-800 Contacts Inc. is in the business of selling contact lenses and related items over the internet. Plaintiff, Edward Shlahitichman, used his credit card to purchase contact lenses over the internet from the Defendant on June 2, 2009. On the same day, Plaintiff received a e-mail confirmation from Defendant with a computer-generated receipt that displayed the expiration date of Plaintiff's credit card. On July 6, 2009, Plaintiff filed a state-court complaint alleging Defendant had "willfully" violated section 1681c(g) of the Fair and Accurate Credit Transactions Act ("FACTA") by listing the expiration date of Plaintiff's credit card on the receipt. Defendant subsequently filed a motion under Rule 12(b)(6) challenging the sufficiency of the complaint.

HOLDING: Defendant's Motion to Dismiss Granted.

REASONING: The court noted that the FACTA prohibits the electronic printing of receipts that contain more than the last five digits of a consumer's credit or debit card number. In the instant case, however, the e-mail order confirmation is not a "receipt" under the FACTA and is not protected under the Act. The court also noted that the term "print" under the FACTA is not understood to apply to a display on a computer screen, and Congress intended "print" to be interpreted according to this plain meaning. In addition, the court reasoned that an e-mail confirmation is not provided at the point of the sale or transaction under the FACTA, and is thus not protectable.