BuchalterNemer
A Professional Law Corporation

Lenders Get Welcome Relief Regarding Firm Offers of Credit Under the FCRA

Rachael H. Berman, Esq.

In November 2004, the Seventh Circuit created an uproar in the financial services sector by calling into question the legality of financial service companies' targeted marketing practices under the Fair Credit Reporting Act ("FCRA"). Many financial service companies commonly market their products by sending mailers to consumers who were pre-selected or prescreened from information obtained about them from a credit reporting agency without their knowledge or consent. Indeed, most, if not all of us, have received these mailers which state "You have been pre-approved" for certain credit or a mortgage loan.

In *Cole v. U.S. Capital,* 389 F.3d 719 (7th Cir. 2004) the Seventh Circuit held that these promotional mailers which make unsolicited "firm offers" of credit to consumers under the Fair Credit Reporting Act ("FCRA") must have sufficient value for the consumer to justify the absence of the FCRA statutory protection of privacy for consumers' credit information. However, the Seventh Circuit left no clear guidelines on what "value" means.

The FCRA statute itself contemplates that a consumer's credit information may be accessed for prescreening purposes without his or her knowledge provided that the consumer receives a firm offer of credit (which is a defined term under the statute). However, the FCRA statutory definition of firm offer of credit says nothing about value to the consumer, and does not require that a firm offer set forth all material terms.

Nevertheless, based on *Cole*, class action plaintiffs lawyers immediately instituted litigation across the nation against mortgage lenders and other financial service companies, alleging that their firm offer of credit mailers violated the FCRA because these mailers failed to include specific credit terms so that the consumer could evaluate whether the offer had value. These lawsuits claimed that the promotional mailers were simply sham offers that had no terms and no "value" to the consumer. Although these lawsuits generated mixed results in interpretations of *Cole*, they posed serious threats to the companies that faced them in the form of statutory damages of $100 to $1,000 per willful violation of the FCRA. Based on the vast quantities of promotional mailers that financial service companies typically send, these companies faced potentially catastrophic damages. Given the risk, some companies opted to pay significant sums to settle these types of cases.

In the spring of 2008, the Seventh Circuit and First Circuit finally provided much needed relief to mortgage lenders and financial service companies whose direct mail marketing practices had been attacked. This relief came in the form of decisions entitled *Murray v. New Cingular Wireless Services, Inc.,* 2008 U.S. App. LEXIS 8004 (7th Cir. 2008), and *Sullivan v. Greenwood Credit Union*, 520 F.3d 70 (1st Cir. 2008). These cases hold, contrary to *Cole*, that a firm offer of credit mailer need not contain specific credit terms in order to comply with the FCRA statutory definition of firm offer of credit. Indeed, the Seventh Circuit went so far as to state that the *Cole* case "is beside the point for pure offers of credit" such as mortgage loans. In an almost 180 degree turnaround to what it said in Cole, the Seventh Circuit stated that to determine whether a mailer constitutes a firm offer, the focus should be on "whether the offer will be *honored* (if the verification checks out), not whether all terms appear in an initial mailing."

The *Murray* and *Sullivan* decisions are good news for mortgage lenders and financial service companies, who faced significant challenges in trying to bring their marketing practices in line with the *Cole* requirements. The *Murray* decision even acknowledges that it would be near impossible to set forth all of the material terms for a home equity loan or credit card in an initial mailer.

The *Murray* and *Sullivan* cases have class action plaintiffs' lawyers running scared, and likely herald the demise of this type of litigation.

Rachael H. Berman is an Associate in the Firm's Litigation Practice Group. She can be reached at (213) 891-0700 or rberman@buchalter.com.