Client Advisory
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Seventh Circuit Issues Landmark Decision Under Fair Credit Reporting Act "Prescreening" Provisions

INTRODUCTION

On April 16, 2008, the Seventh Circuit issued a significant decision under the Fair Credit Reporting Act's "prescreening" provisions that will have major implications for any company using prescreened lists of consumers to market products and services. The decision, *Murray v. New Cingular Wireless Services, Inc.*, --- F.3d ----, 2008 WL 1701839 (7th Cir. Apr. 16, 2008), resolves several significant FCRA issues from three consolidated appeals, all in favor of the defendant companies. The decision throws cold water on many pending FCRA class action lawsuits and provides clarity about what is and is not prohibited under FCRA's prescreening provisions.

OVERVIEW OF FCRA'S PRESCREENING PROVISIONS

The Fair Credit Reporting Act, 15 U.S.C. § 1681, *et al.* ("FCRA") prohibits companies from accessing information from consumer credit reports unless the consumer has first initiated a transaction with the company (*e.g.*, by applying for credit). FCRA makes an exception, however, for companies making a "firm offer of credit or insurance" to groups of consumers that meet specified credit criteria. *See* 15 U.S.C. §1681b(c)(1)(B)(i). This practice is referred to as "prescreening," and is widely used in target marketing.

FCRA defines a "firm offer" 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 specified criteria used to select the consumer for the offer," but the offer may be conditioned on additional pre-selected criteria bearing on the consumer's creditworthiness, verification that the consumer still satisfies the criteria used to select the consumer for the offer, or the consumer's furnishing of pre-established collateral. 15 U.S.C. §1681a(l). FCRA defines "credit" as "the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor." 15 U.S.C. §1681a(r)(5)(incorporating §1691a(d)).

Companies that obtain prescreened lists but do not make a "firm offer of credit or insurance" to affected consumers may be liable for to up to $1,000 in statutory damages for each person on the list obtained, and FCRA places no cap on aggregate damages. *See Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) (upholding the certification of a FCRA class action seeking statutory damages for over a million people). However, statutory damages are only available for FCRA violations that are "willful." 15 U.S.C. §1681n.

In 2004, the Seventh Circuit held that prescreened offers must meet the FCRA definition of "firm offer" and must have "sufficient value" to the consumer based on the context of the offer and all of its material terms. *Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 726-28 (7th Cir. 2004). That decision sparked a wave of class actions alleging that many different pre-screened offers were, taken in context, lacking in sufficient value. As described below, the recent *Murray* decision addresses issues from three such class actions and resolves much of the debate over the meaning of the Seventh Circuit's prior holding in *Cole*.

THE CASES ON APPEAL

The *Murray* decision resolved issues in the following three FCRA class action cases:

1 ***Murray v. New Cingular Wireless***, 432 F.Supp.2d 788 (N.D. Ill. 2006).

In *Murray*, the mailer at issue offered a free cellular phone with a wireless service package. In the district court, plaintiffs argued that the mailer did not present an offer of credit and was not a firm offer because it failed to disclose certain material terms, including the interest rate on late charges and that customers may have to pay a deposit to activate service. The district court disagreed, holding that a wireless service plan constitutes an extension of credit because it allows customers to defer payment, *i.e.*, pay for services at the end of the month rather than purchasing them in advance. The district court noted that Cingular's offer involved risk, a key attribute of credit, because, "at a minimum, the consumer must sign up for a plan that is $29.99, but this credit can extend into hundreds or thousands of dollars depending on the consumer's actual use and the plan selected." *Id.* at 791. The district court further held that the absence of certain terms was irrelevant because "there [was] no indication . . . that any of the missing information made it impossible for the customer to accept the offer." *Id.* at 792. Further, the N.D. Illinois held that the interest rate was not material because it was only applicable if the customer paid late.

The district court did hold, however, that Cingular violated FCRA's Section 1681m(d), which requires certain disclosures in prescreened mailers to be "clear and conspicuous." The court was faced with this issue because the *Murray* case was filed prior to the effective date of FCRA amendments that removed any private right of action under Section 1681m. However, the court proceeded to hold that Cingular's violation of this provision was not "willful," and thus that the plaintiff was not entitled to statutory damages.

2 ***Bruce v. Keybank Nat'l Assn.***, No. 2:05-CV-330, 2006 WL 3743749 (N.D. Ind. Dec. 15, 2006).

In *Bruce*, the mailer at issue offered a home equity line of credit. The offer specified several key terms of the offer, including the minimum amount of the loan, the maximum loan to value on the line of credit, and the variable annual percentage rate, but left other terms undisclosed and expressly reserved the right to change terms without notice. The district court held that the offer was not a firm offer of credit because, while it did disclose some terms of the offer, it "fail[ed] to disclose many of the other material terms of [the] loan," including the length of the loan, how the loan is to be repaid, how the interest will be compounded, or any fees associated with the loan. *Id.* at *4. The district court held that even if the offer had disclosed all material terms, its reservation of the right to change such terms without notice would have left the court "hard pressed to find that any 'firm offer of credit' existed." *Id.* Relying heavily on *Cole*, the district court concluded that the offer "did not offer anything of real value," as the "creditor and debtor 'both must know of the other terms attached to that credit to determine whether it is advantageous to extend or to accept the offer' because the terms of the offer 'may be so onerous as to deprive the offer of any appreciable value.'" *Id.* at *5 (citing *Cole*, 389 F.3d at 728).

3 ***Price v. Capital One Bank***, No. 05-C-0947, 2007 WL 1521525 (E.D. Wis. May 22, 2007).

In *Price*, the mailer at issue offered Visa or Mastercard credit cards and disclosed the annual membership fee, introductory rate, and subsequent variable rate, but did not disclose the minimum and maximum credit line. The plaintiff, citing *Cole*, argued that this omission precluded a finding that the offer constituted a "firm offer"

of credit. The district court disagreed, holding that the offer included sufficient terms to constitute a firm offer of credit and that an express disclosure of the minimum line of credit was not necessary to make a firm offer. *Id.* at *4.

These three decisions were consolidated on appeal and resolved in favor of the defendants.

SUMMARY OF THE SEVENTH CIRCUIT'S HOLDINGS

The *Value* of an Offer of Credit is Irrelevant to *Firmness* of the Offer

The first question decided in the Seventh Circuit's opinion was whether an offer of credit must be valuable to all or most recipients to constitute a "firm" offer, addressing the district court's holding in *Bruce* and revisiting its own prior decision in *Cole*. The court explained that *Cole* prohibits the use of prescreened lists to promote merchandise by pairing the offer of merchandise with a "token line of credit," such as $100 toward the cost of the merchandise. *Murray*, 2008 WL 1701839, at *1. The court explained that, under *Cole*, "this gimmick does not work," because "the offer must have value if viewed as one of credit alone." *Id.* However, the court significantly limited its holding in *Cole*, explaining that *Cole* is to be used to distinguish offers of merchandise from actual offers of credit, not to distinguish between offers of credit that have value and those that do not. Essentially, the court ruled that so long as an offer is a "pure" offer of credit and otherwise meets the FCRA's definition of "firm offer" (*i.e.*, the offer will be honored if the consumer meets the criteria used to select them for the offer), it meets FCRA's prescreening requirements. The Seventh Circuit concluded that FCRA calls for a *firm* offer but not a *valuable* firm offer, and therefore that the specific terms of an offer, such as the amount of the line of credit extended or the rule for compounding interest, are "not relevant" to the finding of a "firm offer." *Id.* at *2.

A Wireless Service Contract is an Offer of Credit for Purposes of the FCRA – Even When Paired with Offer for a Free Phone

The court next decided the issue of whether a promise of "free" merchandise automatically means that the offer is not one "of credit," and, specifically, whether Cingular violated FCRA by obtaining a prescreened list to offer a free phone with a year or more of cellular service. The court affirmed the district court's finding in *Murray* that an offer for a cellular service contract is credit because the service is provided before the payment is due. The court further held that the accompanying offer for a free phone did not negate this fact and, to the contrary, that the offer for the phone was also credit because the deferred payments for the service "include the phone, which is amortized over the length of the contract." *Id.* Because the payments for services and equipment were both deferred, the Seventh Circuit held that the entire offer was one of credit.

The Offer Need Not Contain All Material Terms to be "Firm"

The next question decided by the Seventh Circuit was one at issue in the *Bruce* and *Price* decisions – whether the initial offer must contain all material terms. Examining FCRA's definition of "firm offer," the court emphasized the complete absence of any requirement that an initial offer "must contain all of the important terms that must be agreed on before credit is extended." *Id.* at *4. Overruling the district court's holding in *Bruce*, the Seventh Circuit held that inclusion of all material terms is not necessary to communicate the value of an offer, but may detract from the value of an initial offer by rendering the

offer "paradoxically[] uninformative" and "harder to read and grasp." *Id*.

An Offer Reserving the Right to Vary Terms Can Still be "Firm"

The Seventh Circuit next addressed the issue in *Bruce* of whether the power to vary the deal's terms impairs an offer's "firmness" under FCRA. The court held that if a reservation-of-rights provision is simply an expression of the company's preexisting right to verify that a consumer still meets the criteria used to select them for the offer, or that "routine terms such as late fees . . . may change," such a provision will not detract from the firmness of the offer. *Id*. If, however, a reservation-of-rights provision renders the offer illusory – if there is "nothing on the table that a consumer could accept" – the offer's "firmness" will fail under FCRA. *Id*. The *Bruce* plaintiff argued that the mere presence of a reservation provision destroyed the offer's firmness under FCRA, which the Seventh Circuit rejected. But the appeals court did leave open the possibility that a discovery record about how the reservation provision was actually applied might yield a different result.

Finally, the Seventh Circuit also affirmed the *Murray* court's decisions that Cingular violated Section 1681m's "clear and conspicuous" requirement, but that this violation was not "willful" for purposes of FCRA.

CONCLUSION

If your company uses prescreening to market products or services, the following general points may be taken away from the *Murray v. Cingular* decision;

- Prescreening can be used to make offers for service contracts that allow deferred payment (e.g., payment after services or products are provided);
- Prescreened offers of credit can be paired with offers for free merchandise, so long as the offer of credit has value standing alone;
- Prescreened offers need not include all applicable terms so long as the most material terms of price and product/service attributes are disclosed; and
- Prescreened offers are not by definition non-compliant if, on the face of the offer, the offeror reserves the right to change terms, so long as the reservation is applilied consistent with the statutory definition of "firm offer" (*i.e.*, is not applied to render the offer illusory).

Of course, any prescreened offer should be reviewed by counsel before being mailed to ensure its compliance with all statutory and regulatory requirements, as well as case law in the jurisdictions in which the offer is being mailed.

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