



Consumer Financial Services Update

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Early Glimpses into FCRA Litigation after *Safeco v. Burr*

In the two months since *Safeco Insurance Company v. Burr* (2007) 127 S. Ct. 2201 was decided, it has had mixed results for lenders. On one hand, *Safeco* has not turned out to be the panacea for consumers lenders initially feared. On

the other hand, it has been used effectively by plaintiffs in some areas, notably in the context of motions to dismiss. This article discusses all civil cases citing *Safeco* as mandatory authority from the time of its decision until August 9, 2007, the date of the latest case prior to publication of this update. It also demonstrates the range of contexts in which *Safeco* has been implicated to date.

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The *Safeco* Decision

In *Safeco*, the Supreme Court addressed the standard for proving willfulness under the FCRA. Specifically, the Court

held that “reckless disregard” of the FCRA’s requirements constitutes willfulness and that recklessness is decided via an objective standard, under which a person acts in reckless disregard of the FCRA’s requirements if it violated the statute’s terms and “ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.” *Id.* at 2215. *Safeco* has been utilized in a number of different contexts.

Motions to Dismiss

Defendants have enjoyed mixed results in motions to dismiss decided since the *Safeco* decision. *Safeco* does not appear to have had much effect one way or the other. While acknowledging the existence of the *Safeco* decision, courts focused their attention on the factual allegations set forth in the complaints

at issue, and not on *Safeco*’s definition of “willful” conduct to include reckless behavior.

Motions to Dismiss Denied

In *Lopez v. Gymboree* (N.D. Ca. 2007), 2007 U.S. Dist. LEXIS 44461, the plaintiff filed a lawsuit for violation of the Fair and Accurate Credit Transactions Act of 2003 (“FACTA”), 15 U.S.C. § 1681, *et seq.*, which amended several provisions of the Fair Credit Reporting Act (“FCRA”). Specifically, FACTA requires all retailers to avoid printing more than the last five digits of a credit card number or its expiration date on a receipt provided to a consumer. FACTA also provides for statutory damages of \$100 to \$1,000 for willful violations, even if no actual damages are proven.

In *Lopez*, the defendant was alleged to have “knowingly and intentionally” continued to use cash registers after the statute’s effective date that did not comply with FACTA. The plaintiff also alleged that defendant “knew” that its receipt-printing practices violated consumer’s FACTA rights, or at least “recklessly disregarded” whether its practices violated FACTA. The court held that these allegations were sufficient to withstand a motion to dismiss under F.R.C.P. 12(b)(6).

The *Lopez* decision does not appear to



have been materially affected by *Safeco*. The plaintiff in *Lopez* alleged both knowing and intentional conduct, on the one hand, and reckless behavior on the other hand. The court cited both standards, indicating that the motion to dismiss would likely have been denied even if *Safeco's* definition of willfulness had been more restrictive. 2007 U.S. Dist. LEXIS 44461 at *7 – 8.

Interestingly, the *Lopez* court did not address the new standard set forth in *Bell Atlantic Corporation v. Twombly* (2007) 127 S. Ct. 1955, which requires a complaint to contain “enough facts to state a claim to relief that is plausible on its face.” *Id.*, at 1960. Instead, the *Lopez* court merely accepted the plaintiff’s conclusory allegations that the defendant’s actions were done “knowingly and intentionally” or “recklessly.” The court did not look beyond the conclusions themselves to determine whether they were plausible.

Ehrheart v. Lifetime Brands, Inc. (E.D. Pa. 2007) 2007 U.S. Dist. LEXIS 56763 is another FACTA case in which the defendant moved to dismiss. In this case, the court examined the allegations of the complaint in light of *Bell Atlantic's* requirement that the complaint be “plausible on its face.” 127 S.Ct. at 1960. The court noted that the complaint alleged that the defendant knew of, or should have known of, FACTA’s requirement of truncation of the credit card receipts, and the prohibition against publishing expiration dates, because there had been a great deal of publicity by various vendors and others in the

industry. The court found that these allegations, together with assertions that the defendant’s receipt violated FACTA, sufficiently alleged that the violations were either knowing or reckless. 2007 U.S. Dist. LEXIS 56763 at *6 – 7. It is difficult to state with certainty whether the case would have been decided differently pre-*Safeco*, because the court stated that the allegations were sufficient to allege that the violation was “either knowing or reckless...” *Id.*, at *7. It is possible that the court might have reached a contrary result if the definition of “willful” did not include a “reckless” standard. However, the author is not aware of any motion to dismiss in a FACTA case decided prior to *Safeco* which was granted. Therefore, *Safeco* probably did not play a role in the denial of the motion in the *Ehrheart* case.

Motion to Dismiss Granted

On the other hand, the defendant in *Gelman v. State Farm Mutual Automobile Insurance Company* (E.D. Pa. 2007) 2007 U.S. Dist. 58237 filed a motion to dismiss, which was granted with prejudice. In *Gelman*, the defendant requested and obtained the plaintiff’s consumer report from Experian, a credit reporting agency, without plaintiff’s consent or authorization. Ordinarily, this would be a violation of FCRA, but FCRA makes an exception if the credit information is obtained for the purposes of making a firm offer of credit or other financial services, including insurance. The court held that the mail sent to the plaintiff constituted a firm offer of

insurance, and therefore that the credit information was obtained for a permissible purpose under FCRA. Accordingly, the motion to dismiss was granted, with prejudice. 2007 U.S. Dist. 58237 at *34. Having said this, however, it is important to note that the *Safeco* case did not play a major role in the court’s analysis. However, the court did cite the case, and it is noteworthy that the motion to dismiss was granted despite the court’s review of *Safeco*.

Summary Judgment

The *Safeco* decision helped plaintiffs avoid summary judgment in three cases. However, two other courts have granted summary judgment in FCRA cases despite *Safeco*.

Cases in which Summary Judgment was Denied

On June 26, 2007, a Federal District court denied motions for summary judgment in companion cases filed by the same plaintiff against two credit reporting agencies. See *Harris v. Experian Information Solutions, Inc.* (S.C. Dist. 2007) 2007 U.S. Dist. LEXIS 46824 and *Harris v. Equifax Information Services, LLC* (S.C. Dist. 2007) 2007 U.S. Dist. LEXIS 46828. In the *Harris* cases, the court held that the plaintiff had succeeded in creating a genuine issue of material fact as to whether the defendants’ conduct was reckless. For example, the plaintiff designated evidence that the defendant Experian was reckless in that it knew that one method it uses to



calculate credit scores might artificially deflate some consumers' credit scores. Specifically, plaintiff demonstrated that Capital One did not provide information describing credit limits for its accounts to Experian. The absence of credit limits might make it appear that some consumers had maximized their credit when the consumers may actually have had unused credit available to them. By utilizing this method, Experian reported credit limits which were lower than would have been the case had Capital One provided full information. The court held that this evidence raised a genuine issue of material fact as to whether Experian had acted willfully. 2007 U.S. Dist. LEXIS 46824 at *6 – 7.

The court found that similar evidence designated against Equifax also created a triable issue of fact. 2007 U.S. Dist. LEXIS 46828 at *5 – 6.

Bernal v. American Money Centers, Inc. (E.D. Wis. 2007) 2007 U.S. Dist. LEXIS 57274 is another case in which the court denied a defendant's motion for summary judgment. In *Bernal*, the plaintiff filed a complaint under FCRA asserting that he and approximately 64,000 others received a mailing which did not comply with FCRA in that it did not contain a "firm offer of credit" pursuant to 15 U.S.C. §1681a(l). The court noted that there was an issue of fact as to whether the mailing constituted a firm offer of credit. The court then turned to whether this FCRA violation was willful. The plaintiff argued that the defendant willfully violated FCRA by not instituting a system to actively

solicit whether callers were responding to a particular mailer. The court noted that without such a system, a reasonable finder of fact could conclude that the defendant had no intention of honoring any offer allegedly made in the mailing, that the mailing had no appreciable value to the recipient, and that the mailing was merely a guise for solicitation. Accordingly, summary judgment was denied. 2007 U.S. Dist. LEXIS 57274 at *19 – 21.

Cases in which Summary Judgment was Granted

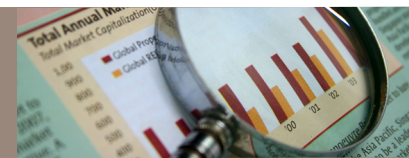
Murray v. GMAC Mortgage Corporation (N.D. Ill. 2007) 2007 U.S. Dist. LEXIS 53777 was a certified class action case involving allegations of FCRA violations. The class was comprised of people who had received a mailing which they alleged did not comply with FCRA. In a well reasoned opinion, the court found that there was no substantial evidence that the defendant knowingly or recklessly violated FCRA, despite the *Safeco* holding. The court first noted that *Safeco* requires a threshold determination of whether or not the defendant's interpretation of FCRA was objectively unreasonable based on the clarity of the statutory text, the availability of judicial or administrative interpretation of that text, and the likelihood of judicial agreement with that determination. Second, if the interpretation was objectively unreasonable, the court noted that, under *Safeco*, it must then be determined whether the defendant's error amounted to recklessness, or mere carelessness or negligence. The court

then reviewed the likelihood that the defendant's conduct would convince a court. Finally, it also reviewed additional factors not considered in *Safeco*.

On the basis of its review of the evidence, the court granted summary judgment. 2007 U.S. Dist. LEXIS 53777 at *8 – 20. *Murray* has been intensely litigated and has already been to the Seventh Circuit once, so it is likely headed there again.

Broessel v. Triad Guaranty Insurance Corp. (W.D. Ky. 007) 2007 U.S. Dist. LEXIS 54426 is another case in which the court granted summary judgment notwithstanding *Safeco*. In *Broessel*, the plaintiff purchased a home through Countrywide Credit Industries. Countrywide required her to insure the home, and it selected Triad to insure the home. Triad issued a policy, but, based on the plaintiff's credit score, set the premium at a higher rate than she would have enjoyed had her credit score been more favorable. The plaintiff alleged that although she had suffered an "adverse action" in that she had to pay a higher premium, she did not receive an adverse action notice required by 15 U.S.C. §§ 1681a, 1681b and 1681m.

The court ruled that the defendant did not willfully violate FCRA. It noted that the defendant "shared Safeco's objectively reasonable, though mistaken belief, [sic] that charging a new customer higher than its best rate did not constitute an adverse action under the statute." 2007 U.S. Dist. LEXIS 54426 at *7. The court concluded that as a



matter of law, the defendant did not act recklessly when it violated FCRA. The court entered summary judgment accordingly. *Id.*, at *8.

Class Certification

Certification of class action cases is another area in which *Safeco* has been discussed.

In *Gardner v. Equifax Information Services, LLC* (D. Mn., 2007) 2007 U.S. Dist. 57416, the plaintiff sent a letter to Equifax, disputing an adverse item on her credit report, and claiming she was a victim of identity theft. Equifax responded to the plaintiff, and told her that her correspondence was being sent to an entity that researches disputes arising in the plaintiff's geographical area. Plaintiff Gardner sent another letter to Equifax. Gardner claimed that Equifax failed to reinvestigate alleged inaccuracies in the credit report, in violation of FCRA, 15 U.S.C. § 1681i(a)(1)(A). The plaintiffs sought class certification. The court denied certification on several grounds. As part of its analysis, the court noted that under *Safeco*, the plaintiffs would have to prove the defendant acted willfully in violating the reasonable reinvestigation requirement. The court noted that this determination would have to be made on a case by case basis and therefore the proposed class would not be sufficiently cohesive to warrant adjudication by representation, pursuant to F.R.C.P. 23(b)(3).

Discovery

In addition to dispositive motions referenced above, courts have begun to decide discovery disputes based in part upon *Safeco*. For example, in *Claffey v. River Oaks Hyundai, Inc.* (N.D. Ill. 2007), 2007 U.S. Dist. LEXIS 49484, the defendant denied that it had willfully violated the FCRA. Accordingly, the plaintiff sought discovery of communications the defendant had had with its legal counsel, arguing that in denying a willful violation, the defendant waived the attorney/client privilege. The court did not agree with the plaintiff. However, the defendant went a step further, and stated that it intended to use evidence that it had consulted with an attorney, apparently without divulging the details of the communication. The court held that evidence of consultation with an attorney would result in waiver of the attorney/client privilege. Accordingly, the defendant agreed not to introduce evidence that it consulted with an attorney. On this basis, the court declined to rule that the defendant had waived the privilege. *Safeco* would not have changed this result, because the issue of waiver of the privilege did not turn on the recklessness standard discussed in *Safeco*. Rather, the fact of consultation was probative of the issue of intentional conduct as well, and so the case would have been decided the same before *Safeco* was announced.

Conclusion

While history will ultimately dictate the nature of the effect *Safeco* will have on FCRA litigation, the early returns demonstrate a mixed result. At first blush, it does not seem to have had the profound effect many lenders feared, or plaintiffs hoped, it would have.

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