THE GOLDEN CASES

15 U.S.C. § 1681s-2(b) Failure to meet reinvestigation obligations with respect to an erroneous credit report.

Brim v. Midland Credit Management, Inc. et al, 795 F. Supp. 2d 1255, Dist. Court, ND Alabama, 2011. A jury awarded $623,180.00 in punitive and $100,000 in compensatory damages for a debt buyer's failure to meet its reinvestigation obligations with respect to an erroneous credit report and thereby ruining a consumer's good credit rating. The consumer disputed the debt Midland was reporting to the CRAs on numerous occasions, and numerous notices of the dispute were sent to Midland from the CRAs. Midland never investigated the disputes except by conducting a cursory computer check against its own minimal records.

The consumer's lawyer reported that Midland never had a single employee actually investigate any of the disputes, and it never contacted the seller about the alleged debt. Midland's position – which is not uncommon among furnishers of information to the CRAs – was that it had no responsibility to do anything because its computer "investigated" the dispute when it reviewed the information in Midland's own internal system and compared it with the information supplied by the CRAs. Midland's other argument was that even if they had contacted the seller of the debt, the result would have been the same. The court noted:

"Under the defendant's system, when a consumer disputes a debt, 95% of such disputes are checked by a computer merely making sure the disputed debt is the same as the information defendant has in its system already. Upon such review, defendant then asserts the debt is valid each and every time. As plaintiff points out, defendant receives about 8,000 disputes per week and for 95% of those disputes, defendant checks its own records as a means of validating the debt, although the debts are all purchased, at discount, from various creditors who have been unable to collect on them. The jury determined defendant's conduct to be reprehensible.

The trial court upheld the jury's verdict, noting that "… the defendant maintained throughout trial that it had no obligation to determine the accuracy of the accounts it attempted to collect, even though it, in turn, reports them to credit reporting agencies."

NCLC's Consumer Law Pleadings 2012 has Litigation Tools for this Type of Claim. Consumer Litigation Associates of Virginia which was co-counsel in the Brim case submitted numerous memorandum of law and jury instructions from several similar cases for this NCLC publication.

Johnson v. MBNA Am. Bank, *NA,* 357F.3d 426, 431 (4th Cir.2004). Whether an investigation is "**reasonable**" is a question of fact unless the reasonableness of the defendant's procedures is beyond question. This case sets a standard for reinvestigations, and suggests that furnishers should not be verifying the validity of debts they have previously reported unless they have the documents to "conclusively" refute information submitted by disputing consumers.

Brooks v Midland Credit Management, INC., et al Case No. 1:2014-cv-00808, S. D. Indiana

(Memorandum Opinion) May 19, 2014

Brooks alleges that Midland furnished information it knew to be false to the CRAs, when it knew that its balances were incorrect because Brooks had previously told them of the inaccuracy. ECF No. 2 ¶¶ 29-32. This alleges a plausibly unreasonable investigation. *See Johnson,* 357 F.3d at 431. Count IV will not be dismissed."

There are many common issues and great case law cited in this one. It's worth downloading.
http://dockets.justia.com/docket/indiana/insdce/1:2014cv00808/52723

***DIXON-ROLLINS v EXPERIAN INFORMATION SOLUTIONS*, U.S. DIST. COURT, EASTERN DIST. PA. Case number 09-0646… Memorandum Opinion, Sept. 23, 2010**

"When a consumer disputes the completeness or accuracy of any information contained in her credit report, the consumer reporting agency must conduct a reinvestigation. If the reinvestigation reveals that the information is inaccurate or cannot be verified, the consumer reporting agency must promptly delete the information. 15 U.S.C. § 1681(i)(a). Failure to conduct a reasonable reinvestigation violates the FCRA. *Cushman v Trans Union Corp.,* 115 F. 3d 220, 223-24 (3d Cir. 1997).

***GORMAN v WOLPOFF & ABRAMSON, LLP*, 584 F. 3d 1147 (9th Cir. 2009)**

"It also stated in dicta that because original sources have a direct relationship with consumers, Congress intended them to conduct a more exacting investigation than consumer reporting agencies. *Id*. at 1157. However the Ninth Circuit did not state that the 1996 amendments relieved the consumer reporting agencies of their own reinvestigation duties.

Pullium v. American Express et al, No. 08 CV6690, N.D. Ill., Eastern Div.2009

"Pulliam alleges that he disputed the delinquent accounts with American Express and the credit reporting agencies. He also alleges that American Express received notice of the dispute from the credit reporting agency. Despite this, Pulliam alleges, American Express continued to report the false information. These allegations are sufficient to state a claim for relief under subparagraph (b)."

***Crabill v. Trans Union LLC*,** 259 F.3d 662, 664 (7th Cir. 2001)… As a general rule, whether an investigation is "reasonable" under the FCRA is a question of fact for the jury

Cushman v. Trans Union Corp., 115 F.3d 220, 224-25 (3d Cir. 1997)…"perfunctory investigation improper once a claimed inaccuracy is pinpointed";

Henson v. CSC Credit Services, 29 F.3d 280, 286-87 (7th Cir. 1994)… "must verify accuracy of initial information";

Dynes v. TRW Credit Data, 652 F.2nd 35, 36 (9th Cir. 1981)… "single effort to investigate inadequate";

Bryant v. TRW, Inc., 689 F.2nd 72,79 (6th Cir. 1982)… "two phone calls to the creditors insufficient;

Swoager v. Credit Bureau, 608 F. Supp. 972, 976 (D.C. Fla. 1985)… "merely reporting whatever information a creditor furnished not reasonable;

***In re* MIB, Inc.,** 101 FTC 415, 423 (1983)… FTC ordered the CRA to include as part of such reinvestigation a reasonable effort to contact original sources;

In re Credit Data Northwest, 86 FTC 389, 396 (1975)… FTC ordered a credit reporting agency to 'request examination' by the creditor, where relevant, of any original documentation relating to the dispute in addition to its own records. *The previous two cases predate the 1996 amendments to the FCRA.*

Remember the dispute crosses the FDCPA too when validation has been demanded….

Purnell v. Arrow Financial Services, LLC (6th Cir. 2008), Illinois-based debt buyer, Arrow Financial Services, was sued for continuing to furnish a disputed collection account to the credit bureaus before verification and without using a "dispute marker." The court held that a debt collector may either choose not to verify a debt and abandon its effort to collect on a debt (which includes reporting derogatory information to credit reports), or it may verify the debt and resume collection once validation has been provided after a consumer disputes the debt within a 30-day period. Here, it was alleged that Arrow did not validate the debt yet continued to furnish the delinquency to the credit bureaus.

This federal appeals court also found that each negative mark furnished before validation constituted independent, discrete violations of the Fair Debt Collection Practices Act.

PERMISSIBLE PURPOSE

As the Court has clearly stated in ***Cappetta v. GC Services Ltd. Partnership*****,** 654 F.Supp. 2d 453 (E.D. Va. 2009), that section of the FCRA pertains SOLELY to the Credit Reporting Agency and no other….

"Congress clearly directs the relevant portion of the FCRA toward "credit reporting agencies." See § 1681b(a), Subject to subsection (c) of this section any *consumer reporting agency* may furnish a consumer report under the following circumstances and no other." Specifically, subsection (a) allows the credit reporting agency to provide a credit report to a person which *it has reason to believe*… (F) otherwise has a legitimate business need for the information § 1681b(a)(3)(F). The statute requires that the credit reporting agency *(antecedent of the third person singular pronoun **"it"**)* have "reason to believe" the "person" to which it provides a credit report "has a legitimate business need for the information." Without having such a belief, a credit reporting agency may be held liable.

"The defendant never possessed a copy of any application with regard to the account at any time and was not in possession of same when its employee spoke to the Plaintiff."

…"the Complaint must allege facts sufficient to demonstrate that Defendant should have known either that it did not intend to use the credit report "in connection with a credit transaction involving" Plaintiff or "involving… the collection of an account of " Plaintiff. A **user must certify both parts** in order to obtain a consumer's credit report. See § 1681b(a)(3)(A)..("Any consumer reporting agency may furnish a consumer report… To a person which **it** has reason to believe…intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished **and** involving the…collection of an account of, the consumer.") This means, specifically, that Plaintiff withstands the instant Motion if the pleadings demonstrate that Defendant should have known the Account did not "involve" Plaintiff or should have known that the Account did not belong to Plaintiff.

Pullium v. American Express et al, No. 08 CV6690, N.D. Ill., Eastern Div.2009

American Express contended that it had permissible purpose on the grounds that there was an "account with Pulliam" at one time. The court found that; "As an initial matter, the statute does not grant creditors the right to access the consumer report of a consumer who had an open account at some point in time"

REASON TO BELIEVE….

11th Circuit cites on reason to believe…

Paragraph four of the affidavit states that Defendant "had a reasonable basis to believe that the debt belonged to the named Plaintiff." Id. There are no facts set forth in the affidavit which explain what gave Defendant "a reasonable basis to believe that the debt belonged to the named Plaintiff." The Court finds that this statement is conclusory and insufficient to support Defendant's motion for summary judgment.1 *See* ***Leigh v. Warner Bros., Inc.***, 212 F.3d 1210, 1217 (11th Cir. 2000) ("This court has consistently held that conclusory allegations without supporting facts have no probative value.") (quoting ***Evers v. General Motors Corp.***, 770 F.2d 984, 986 (11th Cir. 1985) (internal quotation marks omitted); ***Evers v. Gen. Motors Corp.***, 770 F.2d 984, 986 (11th Cir.1985) ("[C]onclusory allegations [in an affidavit] without specific supporting facts have no probative value ."); see also Fed. R. Civ. P. 56(e) ("[a] supporting or opposing affidavit must be made on personal knowledge"); cf. ***Ellis v. England***, 432 F.3d 1321, 1325-26 (11th Cir. 2005) ("mere conclusions and unsupported factual allegations are legally insufficient to defeat a summary judgment motion"); ***Bald Mountain Park Ltd. v. Oliver***, 863 F.2d 1560, 1563 (11th Cir.1989) ("Mere conclusions and unsupported factual allegations are legally insufficient to create a dispute to defeat summary judgment.").

DISCOVERY ISSUES….

Gold v. Midland Credit Management, Inc., et al., Case No. 13-cv-02019-WHO (MEJ), U.S. Dist. Court, N.D. California, February 20, 2014

MCM was ordered to produce un-redacted copies of original Accounts Purchasing Agreements and respond properly to other discovery components. The court ruled that the existing protective order was sufficient to protect MCM's claim of sensitive information at risk.

Trevino v ACB American, Inc., Hilco Receivables, LLC, B. Masters and K. Francis, No. C05-00239 JF(HRL), (Jan. 2006), 232 F.R.D. 612
The District Court, Lloyd, United States Magistrate Judge, held that: (3)"defendants would be compelled to produce unredacted "recovery agreement" which detailed their business relationship over objection that redaction was necessary to protect confidential financial information and trade secrets, as stipulated protective order would prevent disclosure of trade secrets."…. "*Creditor which bought bulk debt and debt collection agency which contracted to collect such debt for creditor would be compelled to produce unredacted "recovery agreement" which detailed their business relationship in suit brought against them by debtors under the Fair Debt Collection Practices Act (FDCPA), notwithstanding claim that redaction was necessary to protect confidential financial information and trade secrets, as stipulated protective order would eliminate risk that such secrets would be disclosed;…" "Accordingly, the parties must have a protective order sumitted for the court's approval within two weeks from the date of this order. There-after, defendants must produce an unredacted version of the Agreement."*

Also from Trevino…. See Doc. 40, "A party's unilateral perception does not begin to meet the stringent standards for confidentiality." See *Baxter Intl., v. Abbott Labs*, 297 F.3d 544(7th Cir. 2002), citing *Composite Marine Propellers, Inc. v. Van Der Woude*, 962 F.2d 1263 (7th Cir. 1992)(a litigant must do more than just identify a kind of information and demand secrecy); *DDS, Inc. v. Lucas Aerospace Power Transmission Corp.*, 182 F.R.D. 1,4 (N.D.N.Y. 1998).

PRIVATE RIGHT OF ACTION BOTH WILLFUL AND NEGLIGENT

The FCRA permits a private action for both willful and negligent violations of the act. A negligent violation entitles a consumer to actual damages, and willful one entitles the consumer to actual, statutory, and punitive damages. (*Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007) at 53 (citing 15 U.S.C. § 1681n & 1681o).

***Tucker v MCM* 2:09-cv-00046-IPJ US Dist. Court, N. Dist. Ala., Southern Div.** (MEMORANDUM OPINION Dkt 22)

"Eleventh Circuit Court of Appeals has held that there is a private right of action under § 1681s-2(b). This court also holds that § 1681s-2(b) provides plaintiff with a private right of action." (pg 7 ¶1)

PRIVATE RIGHT OF ACTION under § 1681s-2(b) establishment cases:

[Unpublished Eleventh Cir.] ***Green v RBS National Bank***, 288 Fed. Appx 641, 642 (11th Cir. 2008)

Nelson v Chase Manhattan Mortgage Corp., 282 F.3d 1057, 1060 (9th Cir. 2002)

Saunders v Branch Banking and Trust Co. of Virginia, 526 F.3d 142 (4th Cir. 2008)

Gravlee v Midland Credit Management, Inc.,

Lofton-Taylor v. Verizon Wireless, 2006 WL 3333759, *5 (S.D. Ala. 2006)

Bosarge v. T-Mobile USA, Inc., 2008 WL 725017, *3 (S.D. Ala. 2008)

Knudson v Wachovia Bank, N.A., 513 F. Supp. 2d 1255, 1258 (M.D. Ala. 2007)

FCRA -1681q

Duncan v. Handmaker, 149 F. 3d 424, 426-28 (6th Cir. 1998)… no legitimate business needs to obtain report to prepare for litigation.

Rice v Montgomery Ward & Co., Inc. 450 F. sup. 688, 670-72 (M.D. N.C. 1978)…Defendant violates FCRA if it obtains a consumer report on Plaintiff after Plaintiff insitutes an action against defendant. Such an inquiry is impermissible.

Bils v. Nixon, Hargrave, Devans & Doyle, 880 P. 2d 743 (Ariz. App. 1994)… improper to get report to discover information which might be used in litigation.

Baker v. Mckinnon, 152 F. 3d 1007, 1011-12 (8th Cir. 1998)(same); ***Auriemma v. Montgomery***, 860 F. 2d 273, 219, 280-281 (7th Cir. 1998)... extra-judicial investigation by attorneys improper, no privilege.

Mone v Dranow, 945 F. 2d 306, 308 (9th Cir. 1991)… obtaining credit report to investigate for purposes of litigation improper; ***Boothe v. TRW Credit Data***, 557 F. Supp. 66, 70-71 (S.D.N.Y. 1982); ***Rylewicz v. Beaton Services*, Ltd**., 698 F. Supp., 1391, 1400 n. 10 Q.J.D. 111 1988), aff'd 888 F. 2d 1175, 1181 (7th Cir. 1989)

***Houghton v. N.J. Manufacturer's Ins. Co*.,** 795 F. 2d 1144, 7149 (3d Cir. 1986)… obtaining report after litigation for use in litigation improper).

When you are challenged over a mistake in procedure or your right to assistance or even the right to litigate…..

Conley v. Gibson, 355 U.S. 41 at 48 (1957)

"Following the simple guide of rule 8(f) that all pleadings shall be so construed as to do substantial justice"… "The federal rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." The court also cited Rule 8(f) FRCP, which holds that all pleadings shall be construed to do substantial justice.

Davis v. Wechler, 263 U.S. 22, 24; ***Stromberb v. California***, 283 I/S/ 359; ***NAACP v. Alabama***, 375 U.S. 449

"The assertion of federal rights, when plainly and reasonably made, are not to be defeated under the name of local practice."

Elmore v. McCammon, (1986) 640 F. Supp. 905 … "the right to file a lawsuit pro se is one of the most important rights under the constitution and laws."

Haines v. Kerner, 404 U.S. 519 (1972)… "Allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient"…"which we hold to less stringent standards than formal pleadings drafted by lawyers."

Jenkins v. McKeithen, 395 U.S. 411, 421 (1959); ***Picking v. Pennsylvannia R. Co***., 151 Fed. 2nd 240; ***Pucket v. Cox***, 456 2nd 233…. "Pro se pleadings are to be considered without regard to technicality; pro se litigants' pleadings are not to be held to the same high standards of perfection as lawyers."

***Maty v. Grasselli Chemical Co*.,** 303 U.S. 197 (1938)… "Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end. Proper pleading is important, but its importance consists in its effectiveness as a means to accomplish the end of a just judgment."

***Picking v. Pennsylvannia R. Co*.,** 151 Fed. 2nd 240; Third Circuit Court of Appeals… "The plaintiff's civil rights pleading was 150 pages and described by a federal judge as "inept". Nevertheless, it was held "Where a plaintiff pleads pro se in a suit for protection of civil rights, the Court should endeavor to construe Plaintiff's Pleadings without regard to technicalities."

Pucket v. Cox, 456 2nd 233, (1972) (6th Cir. USCA)… It was held that a pro se complaint requires a less stringent reading than one drafted by a lawyer per **Justice Black in Conley v. Gibson**.

B. ***Platsky v. CIA***, 953 F. 2d 25, 26, 28 (2nd cir. 1991)… "Court errs if court dismisses pro se litigant without instruction of how pleadings are deficient and how to repair pleadings."

FEDERAL RULES OF CIVIL PROCEDURE, Rule 17, 28 USCA "Next Friend"

A next friend is a person who represents someone who is unable to tend to his or her own interest.

NAACP v. Button, 371 U.S. 415; United ***Mineworkers of America v. Gibbs***, 383 U.S. 715; and ***Johnson v. Avery***, 89 S. Ct. 747 (1969)… "Members of groups who are competent non-lawyers can assist other members of the group achieve the goals of the group in court without being charged with "unauthorized practice of law."

WHEN THE OTHER SIDE PLAYS DIRTY….

Roadway Express v. Pipe, 447 U.S. 752 at 757 (1982)… "Due to sloth, inattention or desire to seize tactical advantage, lawyers have long engaged in dilatory practices… the glacial pace of much litigation breeds frustration with the Federal Courts and ultimately, disrespect for the law."

ROBO SIGNED AFFIDAVITS

State of Texas* v. *Midland Funding. LLC*, et al.*
http://www.msfraud.org/law/lounge/State-of-Texas-v-Midland-Funding-Encore-robosigning-2011.pdf

This enforcement action was filed July 8, 2011 in Harris County District Court over robo-signed affidavits in massive numbers of Midland debt collection suits filed across the State of Texas in recent years.

MARTHA VASALLE, et al., v MIDLAND FUNDING LLC, et al, US Dist. Court, Northern District of Ohio, Western Division **Case No. 3:11-cv-00096** http://www.ftc.gov/policy/advocacy/amicus-briefs/2011/06/martha-vassalle-et-al-v-midland-funding-llc-et-al – Overturned settlement and CFPB/FCC amicus brief in opposition to the class action settlement. 38 State Attorney General's filed and FDCPA brief against this sleazy junk debt buyer and collector for this case… http://www.scribd.com/doc/101572113/Encore-Capital-Group-Midland-Funding-38-State-Attorney-General-s-file-FDCPA-brief-against-the-sleazy-junk-debt-buyer-and-collector-Midland-Fundin

West Virginia v. Midland Funding LLC, Midland Credit Management Inc., 2011… http://wvrecord.com/news/242479-debt-buying-company-shocked-by-mcgraws-lawsuit

Swanson v. Midland Funding LLC, Minnesota http://www.ag.state.mn.us/Consumer/PressRelease/121212DebtBuyers.asp On December 12, 2012, Midland Funding, LLC settled a lawsuit filed by Lori Swanson, Minnesota's Attorney General, against the company last year for filing unreliable "robo-signed" affidavits in collections lawsuits and sometimes targeting the wrong people for payment of old bills that it purchased from credit card companies. The lawsuit alleged that Midland filed thousands of collections lawsuits against individuals in Minnesota courts, often supported by unreliable "robo-signed" affidavits generated at Midland's St. Cloud, Minnesota offices. Several Midland employees admitted in sworn testimony to signing up to 400 affidavits per day, either without reading them, without personal knowledge of their contents, and/or without verifying the accuracy of the information contained in them.

Business Records Exception and Collectors Affidavits….

Court of Appeals of Texas,El Paso.
Marina MARTINEZ, Appellant, v. MIDLAND CREDIT MANAGEMENT, INC., Appellee.
No. 08-07-00031-CV.
Decided: March 13, 2008

This decision blows a great big hole in the collectors' theory of what constitutes Business Records Exception even though it is a state case… http://caselaw.findlaw.com/tx-court-of-appeals/1363472.html

THE NINTH CIRCUIT HITS A HOME RUN!

Even though this final case I want to touch on is not an FCRA litigation, it's FDCPA, there are some vital issues which affect both and more…

Tourgeman v. Collins Financial Services, Inc., D.C. No. 3:08-cv-01392-CAB-NLS, 9TH Cir. No. 12-56783, June 25, 2014… these quotes are from the Appeal decision… **pg 5 (footnote 2)** "It is immaterial to this appeal whether Tourgeman actually paid his loan in full; none of his FDCPA claims depends on the validity of the debt."…..

pg 14.."A debt collector who addresses a misleading dunning letter to a consumer as a means of collecting that consumer's debt "use[s]" an unlawful practice "with respect to" the consumer, regardless of whether some interceding condition – such as non-receipt of the letter, or the consumer's failure to read it, or the fact that the consumer is savvy enough not to be misled by it – renders the practice ineffective."

"The manner in which the majority of courts have applied the FDCPA aligns with this construction of the statute. To begin with, a consumer possesses a right of action even where the defendant's conduct has not caused him or her to suffer any pecuniary or emotional harm, E.g., ***Phillips v. Asset Acceptance, LLC***, 736 F.3d 1076, 1083 (7th Cir. 2013); ***Robey***, 434 F.3d at 1212; ***Miller v. Wolpoff & Abramson***, L.L.P., 321 F.3d 292, 307 (2nd Cir. 1982).

And finally my favorite…. **Pg 16 (footnote 5)** … "We also reject Nelson & Kennard's contention that Tourgeman's claims based on the letters are time-barred. The district court appropriately concluded that "the first time that [Tourgeman] reasonably could have become aware of the allegedly false and misleading representations in Defendants' letters was when his father was served with summons and complaint in the state court lawsuit in October 2007, after which litigation discovery revealed the existence of the collection letters. *Tourgeman*, 2011 WL 3176453, at *6; see also ***Magnum v. Action Collection Serv., Inc.***, 575 F.3d 935, 939-41 (9th Cir. 2009) (**holding that discovery rule applies in FDCPA actions**). (*emphasis added*)

This case sets in stone the issue of "standing" both statutory and Article III of the U.S. Constitution but that is such a huge discussion that I won't address it tonight. In fact this case is a barn burner and deserves its own webinar. Sometimes the courts blow us away by actually delivering justice and respecting the LETTER OF THE LAW and the true intent of both our founders and our congress. This case is a perfect example of one of those times.

In closing tonight I would like to share something I came across while researching for this webinar. It is not case law, rather it is a two page notice sent by the FTC to Furnishers of information to credit reporting agencies entitled… **NOTICE TO FURNISHERS OF INFORMATION; OBLIGATIONS OF FURNISHERS UNDER THE FCRA**

On the bottom of page two under the subcategory, "**DUTIES WHEN ID THEFT OCCURS**" the following is stated;

“All furnishers must have in place reasonable procedures to respond to notifications from CRAs that information furnished is the result of identity theft, and to prevent refurnishing the information in the future. A furnisher may not furnish information that consumer has identified as resulting from identity theft unless the furnisher subsequently knows or is informed by the consumer that the information is correct. Section 623(a)(6), if a furnisher learns that is has furnished inaccurate information due to identity theft, it must notify each consumer reporting agency of the correct information and must thereafter report only complete and accurate information. Section 623(a)(2). When any furnisher of information is notified pursuant to the procedures set forth in Section 605B that a debt has resulted from identity theft, the furnisher may not sell, transfer, or place for collection the debt except in certain limited circumstances. Section 615(f).

You will remember in a previous episode where I shared that I used only one reason for disputing negative entries in my credit reports, that being; “it’s not mine”. That resulted in each credit reporting agency communicating to the furnishers that the dispute was “identity theft or fraud”. Hmmm, each of them just continued reporting the same false info… **can we say OOOPS**?

A MEDLEY OF INTERESTING CASES

In *Unifund CCR Partners v. Cavender*, No. 2007-CC-3040, 14 Fla.L. Weekly Supp. 975b (Orange Cty. July 20, 2007), the court held that a debt buyer "assignment" that does not refer to specific accounts does not establish ownership by the plaintiff, nor is testimony based on a computer screen sufficient:

The Court has reviewed the documents presented by the Plaintiff, Bill of Sale and the Assignment, and finds that they fail to sufficiently identify the accounts that were assigned or sold to the Plaintiff. Neither the Bill of Sale nor the Assignment indicate the account numbers or names of account holders. They do not provide any information that would allow the Court to determine if the alleged account of Defendant was one of the accounts sold or assigned to the Plaintiff.

Without any indicia of ownership that would sufficiently identify the true owner of the account at the time that Plaintiff filed this action, the Plaintiff is unable to prove that it had standing to bring the action. An assignment is the basis of the Plaintiff's standing to invoke the processes of the Court in the first place and is therefore an essential element of proof. Progressive Express Ins. Co. v. McGrath Community Chiropractic, 913 So. 2d 1281, 1285 (Fla. 2nd DCA 2005); Oglesby v. State Farm Mutual Automobile Ins. Co., 781 So. 2d 469 (Fla. 5th DCA 2001). "Only the insured or medical provider 'owns' the cause of action against the insurer at any one time." Id. at 470.

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"Facsimile" records, which are computer-generated, nonimage documents. Such documents represent an attempt to avoid laying a proper foundation for computer records. If the records are generated by computer, a person familiar with the computer system who can testify that the output is an accurate reflection of the input must lay a foundation. *American Express Travel Related Services Co. v. Vinhnee (In re Vinhnee)*, 336 B.R. 437 (B.A.P. 9th Cir. 2005). Among pertinent subjects of inquiry are "system control procedures, including control of access to the pertinent databases, control of access to the pertinent programs, recording and logging of changes to the data, backup practices, and audit procedures utilized to assure the continuing integrity of the records." 336 B.R. at 449. In *Vinhnee*, "The trial court concluded that the declaration in the post-trial submission was doubly defective. First, the declaration did not establish that the declarant was 'qualified' to provide the requisite testimony. Second, the declaration did not contain information sufficient to warrant a conclusion that the 'American Express computers are sufficiently accurate in the retention and retrieval of the information contained in the documents.' " 336 B.R. at 448.

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The notion that the terms of a valid offer be communicated to the offeree, regardless of whether the contract is unilateral, bilateral or otherwise, before they can become binding is well settled law. Therefore, absent a definite and certain offer outlining the terms and conditions of credit card use with the user's actual signature, the Petitioner . . . has the burden of establishing the binding nature of the underlying contract, including any allegedly applicable arbitration clauses, which entails proof, at a most basic level, that the debtor was provided with notice of the terms and conditions to which Petitioner now seeks to hold Respondent.

Petitioner must tender the *actual* provisions agreed to, including any and all amendments,[35] and not simply a photocopy of general terms to which the credit issuer may currently demand debtors agree. For example, Petitioner's Exhibit A which is labeled "Credit Card Agreement and Additional Terms and Conditions" lacks Respondent's signature. Neither does it contain a date indicating when these terms were adopted by MBNA nor how the terms were amended or changed, if at all, over the years appear [*sic*] anywhere on the document. Furthermore, the contract does not contain any name, account number or other identifying statements which would connect the proffered agreement with the Respondent in this action. In fact, petitioners appear to have attached the exact same photocopy, which as noted is not specific to any particular consumer, to many of its confirmation petitions. While on its face there is nothing necessarily unusual about a large commercial entity such as MBNA providing a standard form contract that all credit card consumers agree to, the burden nevertheless remains with MBNA to tie the binding nature of its boiler-plate terms to the user at issue in each particular case and to show that those terms are binding on each Respondent it seeks to hold accountable (the Respondent's intent to be bound *after notice of terms is established* can be shown via card use). The fact that MBNA issues a particular agreement with particular terms with the majority of its customers is of little relevance in determining the actual terms of the alleged agreement before this Court, if not linked directly to respondent in some way[,] shape or form. Just because a petitioner provides a photocopy of a document entitled "Additional Terms and Conditions," certainly does not mean those terms are binding on someone who could have theoretically signed a completely different agreement when they were extended credit. Whether the physical card itself or some solicitation agreement with Respondent's signature referenced the terms and conditions, or whether the terms were made readily accessible to Respondent by e-mail or the internet, and Respondent was in fact aware of this, may all be relevant to an inquiry into constructive notice but such notice must still be established. At bar, MBNA Bank has failed to establish that the provided terms and conditions were the actual terms and conditions agreed to by Nelson. As such, applying *Kaplan*, the Court does not find objective intent on the part of the Respondent to be bound to the contractual statements proffered by MBNA requiring the question of arbitrability to be decided by the arbitrator or that arbitration is the required forum for either party to bring claims against the other.

State law often outlines the acceptable procedures for amendments to retail credit agreements, and courts may treat as a nullity any amendment that did not follow proper notification, opt out or other relevant amendment procedures (*see for e.g. Kurz v. Chase Manhattan Bank USA, N.A.*, 319 F. Supp. 2d 457, 465 [2d Cir. 2004]) (under Delaware law "a credit card issuer seeking unilaterally to add an arbitration clause to the agreement must provide notice and an opt out provision"). However, in order to make such a determination the evolution of the contractual agreement from birth to litigation must be outlined for the court's scrutiny. Without the original agreement provided and its history made available, the court is effectively impinged from exercising its limited review function.

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15 U.S.C. §1643(b) applies to both the original creditor and bad debt buyers and requires them to show that charges were authorized by the account holder.

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False statements in the complaint, affidavits, etc., e.g., that affiant has personal knowledge of records establishing debt, that plaintiff is holder in due course, etc., are violations. A debt collector's misrepresentation in a pleading that it is a subrogee was held to be actionable in Gearing v. Check Brokerage Corp., 233 F.3d 469 (7th Cir. 2000). See also Sayyed v. Wolpoff & Abramson, 485 F.3d 226 (4th Cir. 2007). Filing false affidavits in state court collection litigation is actionable. Todd v. Weltman, Weinberg & Reis Co., L.P.A., 434 F.3d 432 (6th Cir. 2006); Delawder v. Platinum Financial Services Corp., 443 F.Supp.2d 942 (2005), later opinion, No. 1:04-cv-680, 2007 U.S.Dist. LEXIS 31174 (S.D. Ohio, Apr. 27, 2007); Griffith v. Javitch, Block & Rathbone, LLP, 1:04cv238 (S.D. Ohio, July 8, 2004); Hartman v. Asset Acceptance Corp., 467 F.Supp.2d 769 (S.D. Ohio 2004); Gionis v. Javitch, Block & Rathbone, 405 F.Supp.2d 856 (S.D. Ohio 2005); Blevins v. Hudson & Keyse, Inc., 395 F.Supp.2d 655, motion denied, 395 F.Supp.2d 662 (S.D. Ohio 2004); Stolicker v. Muller, Muller, Richmond, Harms, Meyers & Sgroi, P.C., No. 1:04-CV-733, 2005 U.S.Dist. LEXIS 32404 (W.D.Mich., Sept. 8, 2005); Eads v. Wolpoff & Abramson, LLP, 538 F.Supp.2d 981 (W.D.Tex. 2008).