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## Seventh Circuit Limits Its Holding In *Cole v. U.S. Capital* And Clarifies The Requirements For Making Firm Offers Of Credit Under The Fair Credit Reporting Act

The Seventh Circuit's 2004 decision in *Cole v. U.S. Capital*, 389 F.3d 719 (7th Cir. 2004) threatened to greatly expand liability associated with making "firm offers of credit" under the Fair Credit Reporting Act (FCRA). The *Cole* decision touched off a wave of class action lawsuits by plaintiff's firms, all of which were based on the notion that the FCRA, as interpreted in *Cole*, required that firm offers of credit include a detailed description of the terms of the credit being offered. These lawsuits carried the potential for massive liability.

The Seventh Circuit's decision this week in three consolidated cases, *Murray v. New Cingular Wireless*, No. 06-2477; *Bruce v. Keybank*, No. 06-4368; and *Price v. Capital One*, No. 07-2370 (7th Cir. April 14, 2008) (hereafter "*Keybank*"), rejects the notion that terms must be included in mailers extending firm offers of credit, and holds that *Cole*'s "value test" does not apply to pure offers of credit. In so doing, the Seventh Circuit joined the First Circuit, which also recently held that firm offers of credit need not include terms. See *Sullivan v. Greenwood Credit Union*, 2008 WL 726135 (1st Cir. 2008); *Dixon v. Shamrock Financial*, 2008 WL 902200 (1st Cir. 2008). These decisions significantly reduce the liability faced by defendants who make firm offers of credit under the FCRA. Substantial potential liability still exists, however. Lenders who make firm offers of credit must continue to be very cautious to ensure that they are complying with the FCRA.

### Pre-Screening and Firm Offers of Credit Under the FCRA

*Cole* initiated a flood of litigation arising out of a marketing practice known as pre-screening. Pre-screening is a form of targeted marketing, whereby marketing materials (e.g., a mass mailing) are sent to those individuals who meet certain pre-established criteria. For example, a mortgage lender may wish to send marketing materials only to individuals who own single-family homes, and who have a credit score above a certain level. Pre-

screening based on credit information, though, generally requires accessing an individual's consumer report without the individual's knowledge or consent, which implicates the FCRA.

The FCRA generally prohibits accessing an individual's consumer report without his or her consent unless there is a "permissible purpose" as defined by the statute. 15 U.S.C. §1681b(a). One such permissible purpose exists when the user intends to make a "firm offer of credit or insurance." 15 U.S.C. § 1681b(c). A firm offer of credit is defined by the FCRA to be a conditional offer of credit—one that will be honored so long as the consumer meets certain criteria that were pre-established by the lender, such as credit worthiness and the ability to provide collateral.

Thus, the FCRA allows a lender to use individuals' consumer reports to create a mailing list, so long as the lender makes a firm offer of credit to each individual who is included on the list. Familiar examples of firm offers of credit are mailings offering a pre-approved credit card or pre-approved mortgage loan.

### *Cole*'s "Value Test" Threatened to Greatly Expand Liability for Pre-Screening

The *Cole* case involved the use of firm offers of credit to market a car dealership to individuals with certain credit characteristics. The defendants in *Cole*, a car dealership and an auto financing company, accessed consumer reports in order to pre-screen recipients of mailed advertisements for the car dealership. In order to justify accessing the consumer reports, the defendants offered \$300 of credit towards the purchase of a car at the auto dealership. The district court dismissed the complaint, but the Seventh Circuit reversed, holding that the offer of credit "was a sham made to justify access to the consumer credit reports." *Cole*, 389 F. 3d at 728. The court held that to comply with the "statutory scheme" of the FCRA, a firm offer of credit must have sufficient value to justify the intrusion into a consumer

report. *Id.* at 726-727. The court went on to hold that because the advertising mailer sent by defendants did not include any of the terms of the credit being offered (e.g., amount of credit, interest rate, repayment period), the court could not determine, on a motion to dismiss, whether the offer had sufficient value to satisfy the FCRA. *Id.* at 728. As a result, the court remanded the case to the district court to make a factual determination regarding whether, when considering all the material terms of the credit, the offer had sufficient value to comply with the FCRA. *Id.*

Thus, *Cole* simply held that sham offers of credit, designed to sell something other than credit (e.g., a car) did not comply with the FCRA, and that, if no terms are included in the mailer, the issue of value cannot be decided on a motion to dismiss. For some reason, though, *Cole* was quickly interpreted by many plaintiffs' attorneys as holding that the absence of terms in the mailer was a *per se* violation of the FCRA. Because the FCRA contains no provision requiring the inclusion of terms in firm offers of credit, many lenders and other entities who had pre-screened had sent firm offers of credit without terms in the mailer. These mailers quickly became the target of hundreds of class action lawsuits.

The class actions spawned by *Cole* were potentially devastating to defendants for two reasons. First, the FCRA allows the recovery of statutory damages of between \$100 and \$1,000 per plaintiff even without a showing of actual damages (although the recovery of statutory damages requires a plaintiff to prove a "willful" violation of the FCRA). Second, unlike other federal consumer protection statutes that allow statutory damages, such as the Truth in Lending Act, the FCRA does not limit recovery in class actions. Some defendants sent out hundreds of thousands, or even millions, of pre-screened mailers. Based on the statutory damage award that is permitted, the potential exposure in a nationwide class action of all individuals who received such

mailers could reach in to the hundreds of millions, or even billions, of dollars. This massive potential liability existed even if the pre-screening caused no harm to anyone.

### In *Keybank*, the Seventh Circuit Held that Terms Need Not be Included in Mailers.

After *Cole*, several federal district courts agreed with plaintiffs' theory that the FCRA required terms in the mailer, and entered summary judgment finding that mailers without terms were not firm offers of credit as a matter of law. *See, e.g., Murray v. GMACM Mortgage Corp.*, 483 F. Supp. 2d 636 (N.D. Ill. 2007); *Bonner v. Home123 Corp.*, 2007 WL 778447 (N.D. Ind. 2007); *Krey v. Jennings Chevrolet*, 2006 WL 3392200 (N.D. Ill. 2006); *Murray v. Sunrise Chevrolet*, 441 F. Supp. 2d 940 (N.D. Ill. 2006); *Murray v. Finance America*, 2006 WL 862832 (N.D. Ill. 2006); *Kudlicki v. Farragut*, 2006 WL 927281 (N.D. Ill. 2006); *Bruce v. Keybank*, 2006 WL 3743749 (N.D. Ind. 2006). These decisions put pressure on defendants facing potentially massive liability to enter into significant settlements despite the fact that they had not caused any harm.

The *Keybank* decision released earlier this week reversed this trend, and will serve to significantly limit FCRA claims relating to firm offers of credit. The *Keybank* decision contained the following key holdings:

1. Firm offers of credit do not need to include terms of the credit being offered;
2. *Cole's* "value test" does not apply to pure offers of credit; it only applies to offers of other products that contain a credit component;
3. Firm offers of credit can condition the terms of credit on an individual's qualifications (such as income or value of collateral).

#### Firm Offers Need Not Include Terms

The district court in *Bruce v. Keybank* granted summary judgment to the plaintiff,

finding that the mailer did not constitute a firm offer of credit because it did not contain all the material terms of the credit being offered. The Seventh Circuit reversed, and unambiguously held that mailers communicating a firm offer of credit need not contain terms of the credit being offered:

To the extent that these arguments reflect a belief that there can be no offer of any kind without all material items, it is wrong because "firm offer" is a defined phrase. . . . Neither [the statutory definition of firm offer of credit] nor anything else in the FCRA says that the initial communication to a consumer must contain all of the important terms that must be agreed on before the credit is extended.

*Keybank*, slip op. at 7-8.

#### *Cole's* Value Test Does Not Apply to Pure Offers of Credit

The Seventh Circuit also limited *Cole's* value test to the facts of *Cole*—holding that *Cole's* requirement that firm offers of credit have sufficient value to justify intrusion into a consumer report only applies in situations where a defendant makes a combined offer of merchandise and credit:

Ever since *Cole*, plaintiffs have contended that [*Cole's* value test] must be applied, not only to distinguish between offers of merchandise and offers of credit, but also to decide whether even a simple offer of credit is valuable enough to justify the use of consumers' credit files.

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But the principal reason why none of these claims has prevailed, and why none of them *can* prevail, is that [the FCRA] calls for a firm offer of credit but not a *valuable* firm offer of credit. A firm offer of credit suffices. . . . The problem in *Cole* was how to disentangle an offer of merchandise from an offer of credit when they are jointly made.

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*Cole* is beside the point for pure offers of credit. . .the right question is whether the offer is “firm” rather than whether it is “valuable.

*Keybank*, slip op. at 4-5 (emphasis in original).

### Firm Offers of Credit Can Be Conditioned on the Consumer’s Qualifications

The district court in *Keybank* also held that the mailer was not a firm offer of credit because it conditioned the terms of credit on the consumer’s individual credit qualifications. The Seventh Circuit reversed, holding that the FCRA grants lenders the power to alter the terms of credit depending on the consumer’s individual characteristics:

Caveats such as the one in this letter may reflect nothing more than the statutory privilege to verify a consumer’s qualifications and raise the rate of interest (or required security) if it turns out that the consumer is less credit-worthy than it appeared from the preliminary screening.

\* \* \* \*

It isn’t possible to give definitive credit limits and rates without knowing the consumer’s full credit history and other particulars, such as income.

*Keybank*, slip op. at 8-9.

### The First Circuit Has Also Held that Terms Need Not Be Included in Mailers.

Two recent First Circuit opinions also hold that terms need not be included in firm offers of credit, and that a conditional offer can qualify as a firm offer of credit. See *Sullivan v. Greenwood Credit Union*, 2008 WL 726135 (1st Cir. 2008); *Dixon v. Shamrock Financial*, 2008 WL 902200, \*5 (1st Cir. 2008) (“Congress’s choice to omit from the FCRA any requirement for the inclusion of loan terms is properly interpreted to mean that Congress did not intend to require any such terms.”) No Circuit Courts have held that terms need to be included in mailers, or that *Cole’s* value test applies to pure offers of credit.

### Potential Liability Remains

Lenders must still be cautious when pre-screening to ensure compliance with the FCRA. First, although firm offers of credit can be conditioned upon a consumer meeting credit criteria established by the lender, the FCRA explicitly requires that those criteria be *pre-established* before a consumer report is accessed. See 15 U.S.C. §§ 1681a(l)(1)(A); 1681a(l)(3)(A). Thus, lenders need to ensure that any criteria bearing on the extension or terms of credit are clearly established (and documented) before pre-screening of consumer reports begins, and need to ensure that those criteria are consistently applied to all consumers who respond to the pre-screened offers of credit. Second, firm offers of credit must contain certain disclosures, which are described in the FCRA, and those disclosures must be made in a “clear and conspicuous” way. 15 U.S.C. § 1681m(d). This is an easy requirement to meet, though, as the Federal Trade Commission has promulgated regulations describing the content and form of the required disclosures, which acts as a “safe harbor” for any entity involved in pre-screening. See 16 C.F.R. §§ 642.3(a)(2)(B), 642.3(a)(2)(C).

Thus, while the recent decisions by the First and Seventh Circuits represent a significant victory for entities engaged in pre-screening, lenders must still take care to ensure that their pre-screening complies with the FCRA.

#### ABOUT THE AUTHORS

Thomas J. Cunningham, P. Russell Perdew, J. Matthew Goodin and Randall W. Slade represent banks, mortgage lenders, insurance companies and other financial institutions, as well as many other types of business clients, in state and federal courts throughout the country. They concentrate their practice in defending class-action litigation.