

**WHAT'S GOING ON HERE?
A SURGE OF CONSUMER LITIGATION IN VIRGINIA**

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I. WHAT IS CONSUMER LITIGATION?

A. Litigation arising out of the marketing, sale and performance of loans, goods and services for personal, household or family purposes.

1. Transactions involving individuals, “consumers” and the marketing of consumer goods, services or loans will trigger consumer protection laws.

Example: VCPA is generally limited to “consumer transactions,” that involve goods, real estate or services to be used for “personal, family or household” purposes. Va. Code § 59.1-198.

2. Business-to-business transactions typically are excluded from the scope of consumer protection laws.

Example: VCPA does not extend to the sale of consumer goods between businesses. *Bindra v. Bowman & Associates*, 58 Va. Cir. 47 (2001).

B. Credit reporting and privacy.

1. Individual’s rights as to information maintained by consumer reporting agencies or businesses governed by federal consumer protection statutes and regulations.

Example: The Fair Credit Reporting Act regulates consumer reporting agencies and those who obtain information from, or supply information to, consumer reporting agencies.

- C. Claims for defective products not causing personal injury or damage to property.
 - 1. Warranty litigation regarding motor vehicles typically falls within various consumer protection laws, particularly consumer protection provisions of Article 2 of the UCC, the “Lemon Law” and the federal Mag-Moss Act;
 - 2. Warranty litigation as to other consumer products can trigger the federal Mag-Moss Act and Article 2 of the UCC; and
 - 3. Products liability claims involving personal injury (other than emotional distress) or damage to property caused by defective goods may trigger consumer protection laws, but personal injury claims are a separate specialty.

- D. Claims arising out of financing transactions.
 - 1. Loans to consumers trigger multiple consumer protection laws.
 - 2. *Example:* The federal Truth in Lending Act, and Regulation Z promulgated thereunder, govern disclosure of credit terms in some consumer credit transactions.
 - 3. *Example:* The federal Fair Credit Reporting Act governs use of consumer reports in consumer loan transactions.

- E. Almost all of these transactions are regulated to one degree or another by consumer protection laws, although there is a spectrum of regulation.
 - 1. Sale of consumer goods (other than autos) by general retailers is subject to light regulation.

Example: Advertising regulation by the VCPA is perhaps the main consumer protection regulation of concern in general retail environment.
 - 2. Home loans are subject to heavy regulation.

Example: Plethora of state and federal laws, such as TILA, HOEPA, FCRA, ECOA and RESPA, can be implicated.

- F. Introduction to the Alphabet Soup.
 - 1. Consumer litigation dominated by statutes and regulations, such as: FCRA, ECOA (includes Regulation B), and TILA (includes Regulation Z).

2. Attachment A provides an introductory glossary to sixteen selected consumer protection statutes.

II. PAST.

A. Virginia was a sleepy state compared to other states (California, Illinois).

B. VCPA litigation.

1. Sets forth general prohibitions and numerous specific prohibitions by incorporating other consumer protection statutes.

Example: Automobile Repair Facilities Act

2. Allows for the recovery of attorneys fees, treble damages, and statutory damages (unusually strong remedies).

3. However, arguably has limited reach.

a. Financial institution exclusions.

b. Reliance requirement: *Arardour v. American Settlements Inc.*, No. 1:08cv789 (E.D. Va. July 2, 2009).

4. Example of VCPA use includes individual car fraud litigation.

C. Another notable area of consumer litigation related to warranty litigation: “Lemon Law” claims.

D. Little class action / mass action activity.

1. Virginia has no state class action procedure; unique in the United States.
2. Lack of a developed consumer protection bar.

E. Exceptions that prove the rule.

1. *Chisolm v. TranSouth Financial Corporation*, 95 F.3d 331 (4th Cir. 1996).
2. *Ruth Hunter, et al. v. Fleet Finance, Inc., et al.*, Civ. No. 3:94CV266 (U.S. Dist. E.D. Va).
3. *Housing Opportunities Made Equal, Inc. v. Nationwide Mut. Ins. Co.*, 259 Va. 8, 523 S.E.2d 217 (2000) (rehearing granted; opinion withdrawn).

III. PRESENT.

- A. Recent years have seen the rise of the plaintiff's bar, with consumer law specialists operating state-wide.
- B. FTC's List of Top Consumer Complaints in 2008.
 - 1. FTC compiles and publishes list of areas of top complaints.
<http://www.ftc.gov>.
 - a. No. 1 is identity theft, which involves consumer reporting; No. 6 is other credit reporting.
 - b. No. 2 is debt collection.
 - c. Nos. 9, 14 and 18 are financial services-related complaints.
 - d. No. 16 is auto-related complaints.
 - 2. These same areas of complaint are reflected in cases in Virginia.
- C. The United States District Court for the Eastern District of Virginia: Alphabet Soup claims find a home on the Rocket Docket.
 - 1. PACER shows the two most common "codes" for consumer protection lawsuits, growing to 136 cases filed in 2008, which is about 5 percent of the total core civil docket of the court.
 - 2. A leading consumer protection lawyer counsel of record in more than 450 cases on the Rocket Docket, and counting.
- D. FCRA leadership in the E.D. Va.
- E. Rise of class actions in the E.D. Va.
 - 1. *Williams* certification (see Attachment B).
 - 2. Common features of class cases.
- F. Current wave of mortgage litigation.
- G. Current wave of FDCPA litigation.
- H. Many decisions in federal courts, creating a local jurisprudence in consumer law.

See Attachment B for list of 50 recent selected consumer law decisions.

IV. FUTURE.

A. New federal agency.

Under the proposed Consumer Financial Protection Agency Act, an umbrella consumer financial protection agency would be created that would assume many existing regulatory duties under the federal consumer protection statutes.

B. Arbitration.

1. Arbitration can be used to divert cases into private system and frustrate class actions.
2. NAI.
3. Federal regulation of arbitration.

The proposed Consumer Financial Protection Agency Act would authorize the umbrella agency to regulate or even abolish mandatory arbitration provisions in regulated consumer credit contracts.

C. Anti-preemption.

D. Litigation of state law claims through federal class actions

The Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453, and 1711-1715, creates a new type of federal diversity jurisdiction for class actions, allowing certain types of class actions cases asserting state law claims to be removed from state court to federal court and to be originated in federal court.

E. Increasing importance of compliance, with surprisingly broad reach of new regulations.

1. *Example:* Red Flag Rules (16 C.F.R. § 681.2). Most businesses providing any form of credit to consumers are required to have policies for the detection of possible identity theft.
2. *Example:* Federal regulators, including the FTC, have promulgated new rules effective July 1, 2010, that will, for the first time, impose duties on furnishers of information to consumer reporting agencies to have policies for, and to investigate, disputes by consumers of information of information supplied to consumer reporting agencies. *See, e.g.*, 16 C.F.R. 660 (the FTC's version of regulations).

3. *Example:* New TILA notice. The Helping Families Save Their Homes Act of 2009, signed May 20, 2009, amended TILA effective immediately to require a notice to consumers of a sale of a mortgage loan within 30 days of the sale. Violation of the new statute could subject a non-complying lender to statutory damages and attorneys' fee liability under TILA.

V. PRACTICE ISSUES.

- A. Cost-shifting and attorneys' fees.
- B. Settlement.
- C. Practice on the Rocket Docket.

ATTACHMENT A
A MENAGERIE OF SIXTEEN SELECTED
CONSUMER PROTECTION LAWS

Article 2, UCC	Uniform Commercial Code-Sales, Va. Code § 8.2-101, <i>et seq.</i> <ul style="list-style-type: none"> • Imposes express and implied warranties in the sale of goods.
Article 9A, UCC	Uniform Commercial Code- Secured Transactions, Va. Code § 8.9A-101, <i>et seq.</i> <ul style="list-style-type: none"> • Governs exercise by second party of rights in collateral.
CROA	The Credit Repair Organization Act, 15 U.S.C. § 1679, <i>et seq.</i> <ul style="list-style-type: none"> • Governs entities that purport to offer credit repair services.
ECOA	The Equal Credit Opportunity Act of 1974, 15 U.S.C. § 1691, <i>et seq.</i> <ul style="list-style-type: none"> • Prohibits some forms of credit discrimination and imposes certain disclosure requirements on lenders. • Federal Reserve System -- Equal Credit Opportunity (Regulation B), 12 CFR 202. • Comptroller of the Currency, Department of the Treasury -- Fair housing home loan data system, 12 CFR Part 27. • Farm Credit Administration -- Nondiscrimination in lending, 12 CFR Part 626. • Federal Deposit Insurance Corporation -- Fair housing, 12 CFR 338. • Federal Reserve System -- Equal Credit Opportunity (Regulation B), 12 CFR 202. • Office of Thrift Supervision, Department of the Treasury -- Nondiscrimination requirements, 12 CFR Part 528. • Small Business Administration -- Nondiscrimination in financial assistance programs of SBA-effectuation of policies of Federal Government and SBA Administrator, 13 CFR Part 113.
FACTA	The Fair and Accurate Credit Transactions Act of 2003, 15 U.S.C. §§ 1681, <i>et seq.</i> (amendments to FCRA).

	<ul style="list-style-type: none"> • Set the stage for significant new regulations in fields of privacy and credit reporting.
FCRA	<p>The Fair Credit Report Act of 1970, 15 U.S.C. §§ 1681, <i>et seq.</i></p> <ul style="list-style-type: none"> • Basic statute regulating consumer reporting agencies. • Comptroller of the Currency, Department of the Treasury -- Fair credit reporting, 12 CFR Part 41. • Federal Reserve System -- Fair credit reporting (Regulation V), 12 CFR Part 222. • Federal Deposit Insurance Corporation -- Fair credit reporting, 12 CFR 334. • Federal Trade Commission -- Fair and Accurate Credit Transactions Act of 2003, 16 CFR Part 602. • Federal Trade Commission -- Definitions, 16 CFR 603. • Federal Trade Commission -- Fair Credit Reporting Act rules, 16 CFR Part 604. • Federal Trade Commission -- Free annual file disclosures, 16 CFR Part 610. • Federal Trade Commission -- Prohibition against circumventing treatment as a nationwide reporting agency, 16 CFR Part 611. • Federal Trade Commission -- Duration of active duty alerts, 16 CFR Part 613. • Federal Trade Commission -- Appropriate proof of identity, 16 CFR Part 614. • Federal Trade Commission -- Model forms and disclosures, 16 CFR Part 698. • National Credit Union Administration -- Fair credit reporting, 12 CFR 717. • Office of Thrift Supervision, Department of the Treasury -- Fair credit reporting, 12 CFR Part 571.

<p>FDCPA</p>	<p>The Fair Debt Collection Practices Act of 1977, 15 U.S.C. § 1692, <i>et seq.</i></p> <ul style="list-style-type: none"> • Basic federal law regulating debt collectors. • Federal Trade Commission -- Procedures for State application for exemption from the provisions of the Act, 16 CFR Part 901.
<p>FTC Act</p>	<p>The Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41-58</p> <ul style="list-style-type: none"> • No private causes of action, enforced administratively by the FTC. • General prohibitions of unfair or deceptive trade practices. • FTC Holder Rule requires credit contract language allowing consumer to assert defenses and claims against holder. 16 C.F.R. § 433.2. • Cooling-Off Period for Door-to-Door Sales, 16 CFR Part 429. • Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 16 CFR Part 436.
<p>GLB</p>	<p>The Gramm-Leach-Bliley Act (Financial Services Modernization Act of 1999), 15 U.S.C. §§ 6801-6827</p> <ul style="list-style-type: none"> • Key Federal statute authorizing, in part, important privacy regulations. • No private rights of action <i>per se</i>, but basis for important consumer-protection regulation. • The Financial Privacy Rule (Subtitle A: Disclosure of Nonpublic Personal Information, 15 U.S.C. §§ 6801-6809). <ul style="list-style-type: none"> ○ Section 4(k) of the Bank Holding Company Act of 1956. ○ Federal Trade Commission -- Permissible nonbanking activities, 12 CFR Part 225.28. ○ Federal Trade Commission -- Activities permissible for financial holding company activities, 12 CFR Part 225.86. • The Safeguards Rule (Subtitle A: Disclosure of Nonpublic Personal Information, 15 U.S.C. §§ 6801-6809) <ul style="list-style-type: none"> ○ Federal Trade Commission -- Standards for insuring the security, confidentiality, integrity and protection of customer

	<p>records and information, 16 CFR Part 314.</p> <ul style="list-style-type: none"> • Pretexting Protection (Subtitle B: Fraudulent Access to Financial Information, 15 U.S.C. §§ 6821-6827).
HOEPA	<p>The Home Ownership and Equity Protection Act of 1994, 15 U.S.C. §§ 1601-1649 (Amendments to TILA).</p> <ul style="list-style-type: none"> • Imposes additional regulation of “high cost” mortgage loans. • Federal Reserve System -- Truth in Lending (Regulation Z), 12 CFR Part 226 (<i>See</i> § 226.32).
LEMON LAW	<p>Virginia Motor Vehicle Warranty Enforcement Act, Va. Code § 59.1-207.9, <i>et seq.</i></p> <ul style="list-style-type: none"> • Provides remedies for enforcement of auto warranties and for defective vehicles.
MAG-MOSS	<p>Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, <i>et seq.</i></p> <ul style="list-style-type: none"> • Provides federal remedies for consumer warranties. • Federal Trade Commission -- Interpretations of the Magnuson-Moss Warranty Act, 16 CFR Part 700.
RESPA	<p>The Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §§ 2601-2617</p> <ul style="list-style-type: none"> • Regulation of mortgage closings. • Office of Assistant Secretary for Housing-Federal Housing Commission, Department of Housing and Urban Development -- Real Estate Settlement Procedures Act (Regulation X), 24 CFR Part 3500. • Comptroller of the Currency, Department of the Treasury -- Organization and functions, availability and release of information, contracting outreach program, 12 CFR Part 4. • Federal Reserve System -- Rules regarding availability of information, 12 CFR Part 261. • Office of Assistant Secretary for Housing-Federal Housing Commission, Department of Housing and Urban Development -- Real Estate Settlement Procedures Act -- Investigations in consumer regulatory programs, 24 CFR Part 3800.

<p>TILA</p>	<p>The Truth in Lending Act, 15 U.S.C. §§ 1601-1649.</p> <ul style="list-style-type: none"> • Requires disclosure of terms of certain consumer loans. • Federal Reserve System -- Truth in Lending (Regulation Z), 12 CFR Part 226 • Federal Deposit Insurance Corporation -- Filing procedures, 12 CFR Part 303. • Federal Reserve System -- Consumer leasing (Regulation M), 12 CFR Part 213. • Federal Trade Commission -- Administrative interpretations, general policy statements, and enforcement policy statements, 16 CFR Part 14. • National Credit Union Administration -- Organization and operation of Federal credit unions, 12 CFR Part 701.
<p>TIMA</p>	<p>The Truth in Mileage Act (Odometer Act), 49 U.S.C. §§ 32701-32711 (<i>formerly</i> 15 U.S.C. § 1901).</p> <ul style="list-style-type: none"> • Mandates odometer disclosure in vehicle sales. • National Highway Traffic Safety Administration, Department of Transportation -- Odometer disclosure requirements, 49 CFR Part 580. • National Highway Traffic Safety Administration, Department of Transportation -- Rulemaking procedures, 49 CFR Part 553. • National Highway Traffic Safety Administration, Department of Transportation -- Civil and criminal penalties, 49 CFR Part 578.
<p>VCPA</p>	<p>Virginia Consumer Protection Act of 1977, Va. Code § 59.1-196, <i>et seq.</i></p> <ul style="list-style-type: none"> • Basic state consumer protection statute, and is based on a model statute enacted in other states. • Provides for recovery of actual damages, treble damages, statutory damages and attorneys' fees. (Va. Code §§ 59.1-204, -206).

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ATTACHMENT B
INDEX TO
50 RECENT VA. STATE AND
FEDERAL CONSUMER LAW DECISIONS

1. *Adardour v. American Settlements Inc.*, 2009 U.S. Dist. LEXIS 56675 (E.D. Va. Jul. 2, 2009) (Judge Trenga) (VCPA, TILA)
2. *Alabran v. Capital One Bank*, 2005 U.S. Dist. LEXIS 34158 (E.D. Va. Dec. 12, 2005) (Mag. Judge Dohnal) (FCRA)
3. *Barnette v. Brook Road, Inc.*, 429 F. Supp. 2d 741 (E.D. Va. 2006) (Mag. Judge Lauck) (ECOA, FCRA, VCPA, UCC)
4. *Barnette v. Brook Road, Inc.*, 457 F. Supp. 2d 647 (E.D. Va. 2006) (Mag. Judge Lauck) (ECOA, FCRA, UCC)
5. *Barrigan v. Elite Funding*, 2009 U.S. Dist. LEXIS 1105 (E.D. Va. Jan. 6, 2009) (Judge Hilton) (common law)
6. *Betts v. Va. Empl. Comm'n*, 2007 U.S. Dist. LEXIS 10109 (E.D. Va. Feb. 2, 2007) (Mag. Judge Dohnal) (FCRA)
7. *Beverly v. ChoicePoint Inc.*, Civil Action No. 3:07cv541 (E.D. Va. Feb. 13, 2008) (Judge Williams) (FCRA)
8. *Beverly v. Wal-Mart Stores, Inc.*, 2008 U.S. Dist. LEXIS 2266 (E.D. Va. Jan. 11, 2008) (Judge Williams) (FCRA)
9. *Byerson v. Equifax Info. Servs., Inc.*, 467 F. Supp. 2d 627 (E.D. Va. 2006) (Judge Payne) (FCRA)
10. *Byron v. EMC Mortgage Corp.*, Civil Action No. 3:09-cv-197 (E.D. Va. Aug. 10, 2009) (Judge Hudson) (TILA)
11. *Cappetta v. GC Services LP*, 2008 U.S. Dist. LEXIS 58589 (E.D. Va. Aug. 1, 2008) (Judge Spencer) (FDCPA)
12. *Carter v. Countrywide Home Loans, Inc.*, 2009 U.S. Dist. LEXIS 31446 (E.D. Va. Apr. 14, 2009) (Mag. Judge Dohnal) (RESPA, FDCPA)

13. *Cetto v. LaSalle Bank Nat'l Ass'n*, 518 F.3d 263 (4th Cir. 2008) (Judge Niemeyer) (TILA)
14. *Clark v. Carland, Inc.*, 2007 U.S. Dist. LEXIS 16397 (E.D. Va. Feb. 23, 2007) (Judge Doumar) (FCRA, Odometer Act, VCPA)
15. *Clemons v. Home Savers, LLC*, 530 F. Supp. 2d 803 (E.D. Va. 2008) (Mag. Judge Miller) (TILA)
16. *Couch v. Manassas Autocars, Inc.*, 2008 Va. Cir. LEXIS 130 (Prince William Cir. Ct. Jul. 17, 2008) (Judge Alston) (VCPA)
17. *Freeman v. Capital One Bank*, 2008 U.S. Dist. LEXIS 51249 (E.D. Va. Jul. 3, 2008) (Judge Hudson) (ECOA)
18. *Hinton v. Trans Union, LLC*, 2009 U.S. Dist. LEXIS 70144 (E.D. Va. Aug. 11, 2009) (Judge Ellis) (FCRA)
19. *Jefferson v. Briner Inc.*, 2006 U.S. Dist. LEXIS 41423 (E.D. Va. Jun. 21, 2006) (Mag. Judge Dohnal) (ECOA, FCRA, TILA, VCPA, RESPA)
20. *Johnson v. D&D Home Loans Corp.*, 2008 U.S. Dist. LEXIS 24114 (E.D. Va. Jan. 23, 2008) (Judge Friedman) (TILA)
21. *Johnson v. D&D Home Loans Corp.*, 2008 U.S. Dist. LEXIS 24141 (E.D. Va. Jan. 23, 2008) (Judge Friedman) (TILA)
22. *Karnette v. Wolpoff & Abramson*, 444 F. Supp. 2d 640 (E.D. Va. 2006) (Judge Payne) (FDCPA)
23. *Karnette v. Wolpoff & Abramson*, 2007 U.S. Dist. LEXIS 20794 (E.D. Va. Mar. 23, 2007) (Judge Payne) (FDCPA)
24. *Leggat v. Equifax Info. Servs., Inc.*, 2009 U.S. Dist. LEXIS 68723 (E.D. Va. Aug. 6, 2009) (Judge Spencer) (UCC, Article 9A)
25. *Manassas Autocars, Inc. v. Couch*, 274 Va. 82, 645 S.E.2d 443 (2007) (VCPA)
26. *Moore v. Wells Fargo Bank, N.A.*, 597 F. Supp. 2d 612 (E.D. Va. 2009) (Judge Davis) (TILA)
27. *Mullins v. Equifax Info. Servs., Inc.*, 2006 U.S. Dist. LEXIS 24650 (E.D. Va. Apr. 28, 2006) (Judge Payne) (FCRA, FDCPA)

28. *Mullins v. Equifax Info. Servs., Inc.*, 2007 U.S. Dist. LEXIS 62912 (E.D. Va. Aug. 27, 2007) (Judge Payne) (FCRA)
29. *Nedelka v. KIA Motors of America, Inc.*, CL07-2598-01 (Norfolk Cir. Ct. February 10, 2009) (Judge Poston)
30. *Packer v. Sec. Nat'l Auto. Acceptance Corp.*, 2007 U.S. Dist. LEXIS 9467 (E.D. Va. Feb. 8, 2007) (Judge Friedman) (Lemon Law)
31. *Roach v. Option One Mortgage Corp.*, Civil Action No. 1:08cv225 (E.D. Va. Jan. 21, 2009) (Judge Ellis) (TILA)
32. *Robinson v. Equifax Info. Servs.*, 560 F.3d 235 (4th Cir. 2009) (FCRA)
33. *Saunders v. Branch Banking and Trust Co. of Virginia*, 526 F.3d 142 (4th Cir. 2008) (FCRA)
34. *Schmidt v. Household Fin. Corp., II*, 276 Va. 108, 661 S.E. 2d 834 (2008) (TILA, RESPA, VCPA)
35. *Scott v. WFS Fin., Inc.*, 2007 U.S. Dist. LEXIS 3967 (E.D. Va. Jan. 18, 2007) (Judge Jackson) (TILA, FCRA, RICO, Mag-Moss)
36. *Sears v. Federal Credit Corp.*, 2009 U.S. Dist. LEXIS 73892 (W.D. Va. Aug. 18, 2009) (Mag. Judge Urbanski) (Report and Recommendation) (FDCPA)
37. *Sloane v. Equifax Info. Servs., LLC*, 510 F.3d 495 (4th Cir. 2007) (FCRA)
38. *Sloane v. Equifax Info. Servs., LLC*, Civil Action No. 1:05cv1272 (E.D. Va. Jun. 24, 2008) (Judge Brinkema) (FCRA)
39. *Smith v. Busch Entertainment Corp.*, Civil Action No. 3:08cv772 (E.D. Va. Jun. 3, 2009) (Judge Hudson) (FCRA)
40. *Stinson v. Asset Acceptance, LLC*, 2006 U.S. Dist. LEXIS 42266 (E.D. Va. Jun. 12, 2006) (Judge Cacheris) (FDCPA)
41. *Stith v. Thorne*, 488 F. Supp. 2d 534 (E.D. Va. 2007) (Mag. Judge Dohnal) (RESPA)
42. *Stith v. Thorne*, 247 F.R.D. 89 (E.D. Va. 2007) (Mag. Judge Dohnal) (VCPA)
43. *Stith v. Thorne*, 2006 U.S. Dist. LEXIS 80191 (E.D. Va. Sept. 19, 2006) (Mag. Judge Lauck) (Report and Recommendation) (FCRA, ECOA, RESPA, CROA)

44. *Switzer v. Credit Acceptance Corp.*, 2008 U.S. Dist. LEXIS 95830 (W.D. Va. Nov. 24, 2008) (Judge Wilson) (FDCPA)
45. *Tabler v. Litton Loan Servicing LP*, 2009 U.S. Dist. LEXIS 70768 (E.D. Va. Aug. 12, 2009) (Judge Spencer) (TILA)
46. *Wadley v. Experian Info. Solutions, Inc.*, Civil Action No. 1:05cv467 (E.D. Va. Feb. 20, 2008) (Judge O’Grady) (FCRA)
47. *Whitlock v. Whitten Motor Co.*, 2005 U.S. Dist. LEXIS 38150 (E.D. Va. Dec. 28, 2005) (report and recommendation) (Mag. Judge Dohnal) (FCRA)
48. *Williams v. LexisNexis Risk Mgmt., Inc.*, 2007 U.S. Dist. LEXIS 62193 (E.D. Va. Aug. 23, 2007) (Judge Payne) (FCRA)
49. *Wright v. SunTrust Bank*, 2008 U.S. Dist. LEXIS 58891 (E.D. Va. Aug. 4, 2008) (Judge Cacheris) (ECOA, FCRA)
50. *Yu Zhang v. GC Servs., LP*, 537 F. Supp. 2d 805 (E.D. Va. 2008) (Mag. Judge Dohnal) (FDCPA)

**DIGEST OF
50 RECENT VA. STATE AND
FEDERAL CONSUMER LAW DECISIONS**

Adardour v. American Settlements Inc., 2009 U.S. Dist. LEXIS 56675 (E.D. Va. Jul. 2, 2009)
(Judge Trenga)

- Plaintiff sued a loan closing company under the VCPA for allegedly backdating loan closing documents and orally refusing an effort to rescind the loan under TILA, which resulted in her failure to rescind the loan in accordance with the formalities required by TILA.
- The Court held that reliance is a necessary element of a VCPA claim, and because the loan closing documents correctly disclosed the deadline and method to rescind, the plaintiff could not have reasonably relied on the oral statements of the loan closing company.

Alabran v. Capital One Bank, 2005 U.S. Dist. LEXIS 34158 (E.D. Va. Dec. 12, 2005) (Mag. Judge Dohnal)

- Plaintiff was an authorized user on Capital One credit card account, but not obligated for indebtedness. Capital One provided inaccurate information to CRAs that Plaintiff was a co-obligor on account.
- Plaintiff alleged that Capital One's recklessness in reporting of inaccurate information to CRAs amounted to defamation and that Capital One's failure to conduct a reasonable investigation upon being notified by the CRAs of Plaintiff's dispute violated the FCRA.
- Court denied Capital One's Motion for Summary Judgment holding that genuine issues of material fact existed regarding Plaintiff's claims.

Barnette v. Brook Road, Inc., 429 F. Supp. 2d 741 (E.D. Va. 2006) (Mag. Judge Lauck)

- Plaintiff brought ECOA, FCRA, VCPA, UCC and other state law claims against a car dealer arising out of a failed "spot delivery" car purchase.
- This was the first of two complex decisions in the case dealing with a number of issues of first impression.
- The first decision was on motion to dismiss.
- The court denied the motion to dismiss as to the FCRA claim, rejecting an argument that there no private cause of action exists under the FCRA for failure to send an

adverse action notice. (Judge Lauck’s position has been since rejected by most other courts.)

- The Court also rejected the argument that VCPA damages are limited to economic losses, and held that such damages could include insult, pain, mental suffering, injury to reputation and the like.
- The court denied the other portions of the motion to dismiss as well.

Barnette v. Brook Road, Inc., 457 F. Supp. 2d 647 (E.D. Va. 2006) (Mag. Judge Lauck)

- Plaintiff brought ECOA, FCRA, VCPA, UCC and other state law claims against a car dealer arising out of a failed “spot delivery” car purchase. The defendant moved to dismiss.
- On cross motions for summary judgment, the Court held that a car dealer who shopped for credit for plaintiff among multiple lenders was a “creditor” subject to ECOA, but held that the dealer did not take adverse action on the application for credit triggering an obligation to send an adverse action notice under ECOA.
- The Court, however, held that the car dealer had, by repossessing the vehicle after it failed to find a willing lender, taken “adverse action” within the meaning of the FCRA, triggering a duty to send an adverse action notice.
- The Court found the dealer liable for an unlawful repossession under the UCC, and that issues warranting a trial existed on other claims.

Barrigan v. Elite Funding, 2009 U.S. Dist. LEXIS 1105 (E.D. Va. Jan. 6, 2009) (Judge Hilton)

- Plaintiff brought suit against a lender and mortgage broker for fraud and breach of fiduciary duty arising out of a home loan. Plaintiff had been quoted certain terms, but later terms offered and the terms on which the loan closed were not as favorable.
- The Court dismissed the claims on summary judgment as being barred by Virginia’s two-year statute of limitations applicable to fraud and breach of fiduciary duty claims. The court held in the alternative that no fraud claim could be asserted, because the loan terms were disclosed at closing, and the plaintiff signed.

Betts v. Va. Empl. Comm’n, 2007 U.S. Dist. LEXIS 10109 (E.D. Va. Feb. 2, 2007) (Mag. Judge Dohnal)

- Plaintiff applied for a position with VEC, and the VEC obtained a consumer report and turned down the application at least in part based on the report. Plaintiff sued the VEC for an alleged violation of the FCRA in the procedures used to obtain the report and failing to give notices required by the FCRA.
- The VEC plead sovereign immunity, and the Court dismissed the claim on that basis.

Beverly v. ChoicePoint Inc., Civil Action No. 3:07cv541 (E.D. Va. Feb. 13, 2008) (Judge Williams)

- Plaintiff brought putative FCRA class action against consumer reporting agency that provides criminal background check reports to employers on ground that the consumer reporting agency did not comply with FCRA requirements for a notice to be sent by the agency to the affected applicant when potentially adverse information was being supplied to the employer.
- Defendant moved to transfer venue to Charlotte, NC, where the defendant’s operations responsible for sending notices was located. The Court granted the motion to transfer venue.

Beverly v. Wal-Mart Stores, Inc., 2008 U.S. Dist. LEXIS 2266 (E.D. Va. Jan. 11, 2008) (Judge Williams)

- Plaintiff brought putative FCRA class action against employer that used criminal background check reports on ground that the employer did not comply with FCRA requirements for a notice to be sent by the employer to the affected applicant when employer was considering taking adverse action on the application based on the report.
- Defendant moved for summary judgment on the ground that Wal-Mart did not take adverse action; the court held that a disputed issue existed whether adverse action was taken.
- Defendant also argued that the notice was provided; the Court held that a disputed factual issue existed whether the notice was provided in a timely manner as required by the FCRA.

Byerson v. Equifax Info. Servs., Inc., 467 F. Supp. 2d 627 (E.D. Va. 2006) (Judge Payne)

- Plaintiff brought putative nationwide class action under the FCRA against three consumer reporting agencies alleging that they had been improperly reporting the credit limits for Capital One accounts.
- The defendants moved to transfer venue to South Carolina for coordination with another similar pending class action.

Byron v. EMC Mortgage Corp., Civil Action No. 3:09-cv-197 (E.D. Va. Aug. 10, 2009) (Judge Hudson)

- Plaintiff alleged that mortgage lenders violated TILA by failing to provide her with two copies of the required notice of her right to rescind, despite the fact that she had received one copy.
- Plaintiff argued that this violation, even though she had refinanced the original loan, would allow her to still rescind the original transaction and receive statutory damages along with return of the finance charges arising from the loan.
- The Court granted defendants’ motion to dismiss holding that equitable considerations preclude Plaintiff’s claim, given that she plead no facts alleging that she was damaged by the oversight.
- The Court refused to interpret TILA in a manner that would permit a consumer who received actual notice of TILA’s disclosures to profit from the lender’s harmless error.
- The Court declined to rule on the issue of whether a consumer loses the right to rescind a loan under TILA by refinancing and paying off that loan. The Court noted that this is an issue on which the circuits are split.

Cappetta v. GC Services LP, 2008 U.S. Dist. LEXIS 58589 (E.D. Va. Aug. 1, 2008) (Judge Spencer)

- Plaintiff asserted FDCPA claim, which the Court characterized as “poorly drafted.”
- The Court denied a motion to dismiss, but granted a motion for a more definite statement as to the FDCPA claim.

Carter v. Countrywide Home Loans, Inc., 2009 U.S. Dist. LEXIS 31446 (E.D. Va. Apr. 14, 2009) (Mag. Judge Dohnal)

- Plaintiffs sued under RESPA and FDCPA alleging that the holder of their mortgage loan had failed to properly credit payments. Defendants moved for summary judgment on the ground that the claim of actual damages based on emotional distress were non-recoverable under RESPA and FDCPA.
- The Court held that “[a]ll provable damages, including emotional, are permitted under RESPA and FDCPA.”

Cetto v. LaSalle Bank Nat’l Ass’n, 518 F.3d 263 (4th Cir. 2008) (Judge Niemeyer)

- Plaintiffs sought to rescind the refinancing of their home based upon claim that the points and fees charged for the loan qualified the loan as a “high cost mortgage” under TILA, which entitled Plaintiffs to specific disclosures and terms which they were not provided.
- To support claim, Plaintiffs alleged that the cost of the title search and the title binder fees charged by the settlement agent should be included in the calculation of the “points and fees” because (a) the settlement agent was affiliated with the mortgage broker and (b) the mortgage broker was a “creditor” as defined by TILA.
- Court held that mortgage broker was not a “creditor” on the transaction and acted only as a mortgage broker, given that mortgage broker did not lend any money to Plaintiffs and thus, the fees paid to settlement agent, which was an affiliate of the mortgage broker, were not “points and fees.” The fact that the mortgage broker acted as a “creditor” in prior unrelated transactions did not change this analysis.

Clark v. Carland, Inc., 2007 U.S. Dist. LEXIS 16397 (E.D. Va. Feb. 23, 2007) (Judge Doumar)

- Four marines claimed they were pressured into entering into contracts with dealer to purchase a vehicle.
- The dealer’s license had been revoked by administrative action.
- The trial court denied car dealer’s motion for summary judgment as to FCRA, Odometer Act and VCPA claims, and allowed plaintiffs to use administrative order as evidence to support their claims.

Clemons v. Home Savers, LLC, 530 F. Supp. 2d 803 (E.D. Va. 2008) (Mag. Judge Miller)

- Homeowner got behind on her home loan, and entered into a transaction with a foreclosure-rescue company in a transaction she claimed was a loan but in form was a sale of the home with a right to repurchase. Homeowner brought a claim under TILA that the transaction was improperly disclosed.
- The Court granted the defendant summary judgment on the ground that the transaction was a sale and not a loan transaction. A state law claim for fraud was dismissed on the ground that the closing documents showed the transaction was a sale.

Couch v. Manassas Autocars, Inc., 2008 Va. Cir. LEXIS 130 (Prince William Cir. Ct. Jul. 17, 2008) (Judge Alston)

- In a VCPA case on remand from Virginia Supreme Court for determination of attorneys' fee award on appeal, court awarded \$11,777.64, after reducing time to reflect that fees incurred on other claims not covered by the VCPA.

Freeman v. Capital One Bank, 2008 U.S. Dist. LEXIS 51249 (E.D. Va. Jul. 3, 2008) (Judge Hudson)

- Plaintiff brought putative class action alleging that Capital One violated the ECOA by failing to provide a statement of reasons for denying a request to raise the credit limit on a credit card.
- Capital One bought a motion to compel arbitration.
- The court held that a class action waiver included in the arbitration clause was enforceable, and therefore granted the motion to stay the litigation pending arbitration on an individual basis.

Hinton v. Trans Union, LLC, 2009 U.S. Dist. LEXIS 70144 (E.D. Va. Aug. 11, 2009) (Judge Ellis)

- Repetitive *pro se* litigant brought FCRA suit against three consumer reporting agencies.
- Plaintiff claimed that the consumer reporting agencies had supplied consumer reports to third parties for reasons that violated the FCRA.

- Plaintiff also claimed that one consumer reporting agency did not place a fraud alert as requested on his consumer report in violation of the FCRA.
- The Court dismissed the Complaint for failure to state facts to support the claims under *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), as the complaint merely stated conclusion of FCRA violations but not the facts showing that a cause of action existed.

Jefferson v. Briner Inc., 2006 U.S. Dist. LEXIS 41423 (E.D. Va. Jun. 21, 2006) (Mag. Judge Dohnal)

- Plaintiff filed claims against mortgage brokers alleging ECOA, FCRA, TILA, VCPA, RESPA and state law claims arising out of a failed mortgage loan transaction. The broker first indicated a tentative willingness to originate a loan, and then retracted that expression of willingness. Meanwhile, the plaintiff had relied on the tentative intent in entering into a contract to purchase the real estate to be financed by the loan.
- The Court dismissed the action in its entirety, for a series of reasons specific to the particular causes of action. The court observed that plaintiff could have protected herself by inserting a financing contingency in her purchase contract.

Johnson v. D&D Home Loans Corp., 2008 U.S. Dist. LEXIS 24114 (E.D. Va. Jan. 23, 2008) (Judge Friedman)

- Plaintiffs entered into a contract with defendant Washington to sell their house to him and a subsequent contract for an option to repurchase their house.
- Defendant Washington filed motion for summary judgment based upon Plaintiffs’ allegations that he committed fraud, breach of contract, unjust enrichment, conspiracy, and TILA violations.
- Court granted motion for summary judgment based, in part, upon Plaintiffs’ admission that they never read the contract documents and a failure to present evidence establishing the claims.
- Court held that TILA did not govern transaction, given that the sale and subsequent contract for option to repurchase could not be characterized as an equitable mortgage because a borrower-lender relationship did not exist between the parties.

Johnson v. D&D Home Loans Corp., 2008 U.S. Dist. LEXIS 24141 (E.D. Va. Jan. 23, 2008)
(Judge Friedman)

- Plaintiffs met with defendant Robinson of defendant D&D Home Loans Corporation to discuss refinancing options; Robinson advised Plaintiffs that D&D could not refinance their home due to past bankruptcies and poor credit. Robinson introduced them to defendant Washington. Plaintiffs thereafter entered into a contract with defendant Washington to sell their house to him and a subsequent contract for an option to repurchase their house.
- Defendants Robinson and D&D Home Loans filed a Motion for Summary judgment based upon Plaintiffs’ allegations that defendants committed fraud, breach of fiduciary duty, unjust enrichment, TILA violations, and a violation of the Virginia Mortgage Broker Lender Act.
- Court granted defendants’ Motion for Summary Judgment based upon failure of Plaintiffs to plead sufficient facts to support their claims.
- Court held that TILA and the Virginia Mortgage Broker Lender Act did not govern transaction, given that the sale and subsequent contract for option to repurchase could not be characterized as an equitable mortgage because a borrower-lender relationship did not exist between the parties.

Karnette v. Wolpoff & Abramson, 444 F. Supp. 2d 640 (E.D. Va. 2006) (Judge Payne)

- Plaintiffs filed putative class action complaint against law firm alleging violations of the FDCPA, seeking injunctive relief and damages.
- The defendant sought to compel arbitration.
- The Court held that the arbitration agreement did not require arbitration of claims against a debt collector, and that, in any event, defendant had waived arbitration by participating too extensively in litigation.

Karnette v. Wolpoff & Abramson, 2007 U.S. Dist. LEXIS 20794 (E.D. Va. Mar. 23, 2007)
(Judge Payne)

- Plaintiffs filed putative class action complaint against law firm alleging violations of the FDCPA, seeking injunctive relief and damages.
- Plaintiffs claim that use by defendant of the National Arbitration Forum to liquidate credit card debts violated the FDCPA.

- Judge Payne granted a motion to certify a class of approximately 1,971 Virginia consumers who are subject to defendant’s efforts to use the National Arbitration Forum.

Leggat v. Equifax Info. Servs., Inc., 2009 U.S. Dist. LEXIS 68723 (E.D. Va. Aug. 6, 2009)
(Judge Spencer)

- Plaintiff filed 22 count complaint against six defendants based on Chase’s repossession of plaintiff’s automobile. Chase moved to dismiss a claim under Article 9A of the UCC based on the statute of limitations.
- The Court held that a two-year catch-all limitations period (Va. Code 8.01-248) applies to claims under Article 9A, and dismissed the UCC claim.
- The Court allowed use of an affidavit to establish the critical statute of limitations dates without converting the motion into a motion for summary judgment.

Manassas Autocars, Inc. v. Couch, 274 Va. 82, 645 S.E.2d 443 (2007)

- Plaintiffs brought deceptive advertising claim against auto dealer that advertised a new vehicle for sale, but did not have the vehicle in stock for sale when the plaintiffs visited the store in response to the ad.
- The jury awarded \$2,375 in VCPA damages, which were trebled.
- The Court rejected an argument that technical compliance with a state motor vehicle advertising statute exempted the dealer from VCPA liability, and affirmed the award.
- Plaintiffs also brought a claim under the UCC to revoke acceptance of the vehicle they purchased. The vehicle was sold as being “new,” but had had a defect that had been repaired with painting. Expert testimony was that the painting diminished value of vehicle 20 percent. The Supreme Court upheld jury award of \$3,993.
- See *Couch v. Manassas Autocars, Inc.* for award of attorneys’ fees after remand on appeal.

Moore v. Wells Fargo Bank, N.A., 597 F. Supp. 2d 612 (E.D. Va. 2009) (Judge Davis)

- Plaintiff home owners filed suit against seeking TILA rescission. The lender moved to dismiss motion to dismiss the borrower’s claim for TILA rescission because the borrower alleged in her complaint that she intended “to tender the loan proceeds if rescission [was] ordered” by the Court. *Id.* at 617. The court cautioned against filing unsubstantiated actions and allegations designed “to stall collection/foreclosure

proceedings,” noting that “one need only refer to Rule 11’s provisions governing frivolous suits and the sanction of ‘reasonable attorneys’ fees and other expenses directly resulting from the violation.” *Id.* at 617 n. 3. The Court nevertheless held that the plaintiff had adequately plead intent to tender the loan proceeds in a rescission.

Mullins v. Equifax Info. Servs., Inc., 2006 U.S. Dist. LEXIS 24650 (E.D. Va. Apr. 28, 2006)
(Judge Payne)

- Plaintiff sued three consumer reporting agencies and four creditors disputing the accuracy of her consumer reports, asserting claims under the FCRA and FDCPA.
- Defendants moved to transfer the case from the Richmond Division, to the Alexandria Division, on ground that the defendant had not proven that witnesses would be substantially inconvenienced by plaintiff’s chosen venue.

Mullins v. Equifax Info. Servs., Inc., 2007 U.S. Dist. LEXIS 62912 (E.D. Va. Aug. 27, 2007)
(Judge Payne)

- Plaintiff sued consumer reporting agencies on ground that they violated the FCRA’s requirements that the agencies reinvestigate a consumer report upon a complaint by the consumer.
- After a two-day trial, Trans Union was found liable to the plaintiff, for \$20,000 in actual damages and \$100,000 in punitive damages.
- TransUnion moved post-trial for judgment as a matter of law, a new trial or a remitter of the damages, all of which the Court denied as the verdict “represents substantial justice.”

Nedelka v. KIA Motors of America, Inc., CL07-2598-01 (Norfolk Cir. Ct. February 10, 2009)
(Judge Poston)

- Plaintiffs prevailed on a “lemon law” claim at trial, obtaining a \$33,380 judgment and sought attorneys’ fees and costs.
- The court disallowed time that constitutes work normally done by secretarial or paralegal staff, and awarded a total of \$23,850 in attorneys’ fees.

Packer v. Sec. Nat’l Auto. Acceptance Corp., 2007 U.S. Dist. LEXIS 9467 (E.D. Va. Feb. 8, 2007) (Judge Friedman)

- Plaintiff revoked acceptance of a motor vehicle purchased from a dealer, and stopped making payments on his car loan and returned the vehicle. The lender treated the return as a repossession, and reported it as such to the main consumer reporting agencies.
- The plaintiff filed suit in federal court asserting state claims, and a FCRA claim against the lender, claiming that the lender had failed to correct the report of repossession after it was disputed by the plaintiff.
- The court dismissed the FCRA claim as barred by the FCRA’s five-year limitations period.

Roach v. Option One Mortgage Corp., Civil Action No. 1:08cv225 (E.D. Va. Jan. 21, 2009) (Judge Ellis)

- Pro se plaintiff brought suit against multiple defendants under TILA claiming that she was misled by oral statements of a closing agent as to the monthly payment that would be due under an adjustable rate mortgage home loan.
- Defendants moved for summary judgment. The court dismissed the suit as to some defendants on ground that they were not “creditors” subject to TILA because they were not parties to, nor assignees of, the original debt. As for the one creditor, the court dismissed the case based on TILA’s one year statute of limitations. The court agreed that TILA’s one-year period could be subject to equitable tolling, but held that plaintiff could not establish the elements of the doctrine, particularly that the closing agent was acting as an agent of the lender and that there was active concealment.

Robinson v. Equifax Info. Servs., 560 F.3d 235 (4th Cir. 2009)

- Individual sued Equifax, a consumer reporting agency, under the FCRA for failure to correct errors in her credit report caused by identity theft.
- Jury awarded \$200,000 in actual damages, and trial judge (Judge Lee) awarded attorneys’ fees in the amount of \$268,652.
- On appeal, Equifax argued the plaintiff presented insufficient evidence of harm to support award of \$200,000 actual damages. The Fourth Circuit affirmed, holding that proof of a loan turndown and emotional distress in the form of specific testimony of

“headaches, sleeplessness, skin acne, upset stomach, and hair loss” was sufficient to support actual damages award.

- Equifax challenged attorneys’ fees award based on failure to present proof on the prevailing market rate of attorneys’ fees, a requirement under *Plyer v. Evatt*, 902 F.2d 273 (4th Cir. 1990) for attorneys’ fees awards under the “lodestar” method.
- The Fourth Circuit reversed and remanded attorneys’ fees award to district court to take additional evidence on market rates and for recalculation of the attorneys’ fees award.

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

- Plaintiff claimed that a creditor failed to indicate in reports to consumer reporting agencies that a car loan account had been disputed by the plaintiff, despite direct oral complaints about the account by the plaintiff to the creditor. Fourth Circuit affirmed jury award under FCRA of \$1,000 statutory damages and \$80,000 punitive damages based upon this theory.
- Defendant also argued that the punitive damage award was excessive in that it implied an 80:1 ratio with damages, arguing that U.S. Supreme Court precedent indicated that a proper award usually should be in a single-digit ratio to actual.
- The Fourth Circuit rejected the argument, signaling that a ratio analysis would not necessarily be decisive in low-damage consumer cases.

Schmidt v. Household Fin. Corp., II, 276 Va. 108, 661 S.E. 2d 834 (2008)

- Plaintiff brought claims under TILA, RESPA and VCPA arising out of a mortgage loan. The circuit court sustained demurrer to TILA and RESPA claims, and a plea in bar to VCPA claim.
- The demurrer was affirmed on the ground that the named defendant did not originate the loan, the actual lender was not a named defendant, and therefore rescission could not be had as a matter of law.
- The Supreme Court held that the statute of limitations of a claim based on deception under the VCPA accrues when the cause of action is discovered or by the exercise of reasonable diligence could have been discovered, but that the plaintiff has the burden of showing that the cause of action could not have been so discovered through due diligence.

- The Supreme Court affirmed the circuit court’s sustaining of the plea in bar because the complaint showed suspicious circumstances in the loan closing that should have triggered further inquiry, including the failure of the lender to provide copies of the loan documents.

Scott v. WFS Fin., Inc., 2007 U.S. Dist. LEXIS 3967 (E.D. Va. Jan. 18, 2007) (Judge Jackson)

- Pro se plaintiff brought TILA, FCRA, RICO, Mag-Moss, VCPA and other state claims arising out of purchase and financing of a motor vehicle.
- The court dismissed some federal claims, but allowed state fraud and VCPA claims to proceed.

Sears v. Federal Credit Corp., 2009 U.S. Dist. LEXIS 73892 (W.D. Va. Aug. 18, 2009) (Mag. Judge Urbanski) (Report and Recommendation)

- Plaintiff asserted FDCPA against a debt collector for the debt collector’s failure to identify itself as a debt collector in two recorded telephone messages left for the plaintiff.
- The plaintiff filed for summary judgment and defendant filed no response. The magistrate judge recommended that summary judgment be granted to plaintiff, on the ground that transcripts of voice mail messages showed that the debt collectors had not adequately identified themselves in the messages.
- The magistrate judge recommended an award of \$1,000 statutory damages, plus court costs and attorneys’ fees.

Sloane v. Equifax Info. Servs., LLC, 510 F.3d 495 (4th Cir. 2007)

- Individual sued Equifax, a consumer reporting agency, under the FCRA for failure to correct errors in her credit report caused by identity theft.
- Jury awarded \$351,000 in actual damages, consisting of \$106,000 in economic losses and \$245,000 for mental anguish, humiliation and emotional distress.
- Trial court awarded \$181,083 in attorneys’ fees.
- Equifax argued that evidence was lacking to quantify economic losses; the Fourth Circuit affirmed the economic loss award based on evidence of multiple credit turndowns because of plaintiff’s damaged credit report.

- Equifax also argued that the award for mental anguish, humiliation and emotional distress was excessive.
- The Fourth Circuit found that plaintiff had offered “considerable” evidence of emotional distress, including “protracted anxiety” and damage to her marriage.
- After reviewing awards in other cases, the court reduced the award to \$150,000, which the Court acknowledged was “appreciably more” than awards in most other FCRA cases.
- The Fourth Circuit vacated the attorneys’ fee award to allow Equifax an opportunity to be heard on the issue.

Sloane v. Equifax Info. Servs., LLC, Civil Action No. 1:05cv1272 (E.D. Va. Jun. 24, 2008) (Judge Brinkema)

- On remand from the Fourth Circuit for reconsideration of attorneys’ fee award in this FCRA case, the district court awarded \$302,926 in fees.

Smith v. Busch Entertainment Corp., Civil Action No. 3:08cv772 (E.D. Va. Jun. 3, 2009) (Judge Hudson)

- Plaintiff brought putative FCRA class action against employer that used criminal background check reports on ground that the employer did not comply with FCRA requirements for a notice to be sent by the employer to the affected applicant when employer was considering taking adverse action on the application based on the report.
- Defendant moved to dismiss on the ground that the background check was obtained directly from the Virginia State Police, which was not a consumer reporting agency, and therefore the FCRA did not apply.
- The court dismissed the complaint on the ground that the Virginia State Police is not a consumer reporting agency.

Stinson v. Asset Acceptance, LLC, 2006 U.S. Dist. LEXIS 42266 (E.D. Va. Jun. 12, 2006) (Judge Cacheris)

- Plaintiff asserted five FDCPA claims against a debt collector. On cross motions for summary judgment, the Court ruled in favor of the plaintiff on liability as to one of the theories, and held that the others presented fact issues requiring a trial.

Stith v. Thorne, 488 F. Supp. 2d 534 (E.D. Va. 2007) (Mag. Judge Dohnal)

- Plaintiff claimed that defendant mortgage broker employee induced her to enter into a transaction in which she was misled into believing she would be able to refinance her home loan, the actual result of which was losing all equity in her home.
- Plaintiff alleged defendant mortgage broker employee paid himself \$55,640 fee out of the transaction, and the lender advanced that amount without any written instruction or agreement.
- The lender moved for summary judgment, which the court granted in part and denied in part.
- The court held that plaintiff's claims that defendant lender violated section 2603 of RESPA, requiring that all charges imposed on the buyer and seller in connection with the settlement must be "conspicuously and clearly itemize[d]," could not be maintained because Congress did not intend to create a private cause of action for violation of this provision.
- The court denied the remainder of the motion on grounds that genuine issues of disputed fact existed.

Stith v. Thorne, 247 F.R.D. 89 (E.D. Va. 2007) (Mag. Judge Dohnal).

- Plaintiff claimed that defendant mortgage broker employee induced her to enter into a transaction in which she was misled into believing she would be able to refinance her home loan, the actual result of which was losing all equity in her home.
- Plaintiff alleged defendant mortgage broker employee paid himself \$55,640 fee out of the transaction, and the lender advanced that amount without any written instruction or agreement.
- The lender moved for summary judgment on VCPA claim, which the court granted in part and denied in part.
- The court held that defendants' violation of various consumer statutes in the Virginia Code did not also constitute a per se violation of the VCPA, especially when the consumer statutes on which plaintiff relied provided no independent private cause of action (CRESPA and MLBA). Accordingly, plaintiff's VCPA claims were dismissed.

- The court denied the remainder of the motion on grounds that genuine issues of disputed fact existed.

Switzer v. Credit Acceptance Corp., 2008 U.S. Dist. LEXIS 95830 (W.D. Va. Nov. 24, 2008)
(Judge Wilson)

- Plaintiff alleged that a purchaser of her car loan violated the FDCPA in its collection activities.
- The defendant moved to compel arbitration, which was granted by the Court. The Plaintiff argued that the costs of arbitration would be prohibitive, but the Court observed that the arbitration agreement largely imposed the responsibility for costs on the defendant.

Tabler v. Litton Loan Servicing LP, 2009 U.S. Dist. LEXIS 70768 (E.D. Va. Aug. 12, 2009)
(Judge Spencer)

- Plaintiff homeowners filed suit against a loan originator, broker, and servicer, alleging various statutory violations and common law claims. The borrowers sought, among other things, rescission of the mortgage transaction based on the alleged failure to provide TILA disclosures.
- The defendants moved to dismiss the TILA rescission claim based on the borrowers' failure to demonstrate an intent or ability to repay the loan proceeds.
- The Court granted the defendants' motions and dismissed the borrowers' rescission claim for failing to provide any assurance that they had any intent or ability to repay the loan. The court ruled, “[t]hough Plaintiffs have submitted a Complaint outlining numerous claims, they have not stated their intent, either orally or in briefing, to abide by their rescission obligations, and therefore this Court declines to permit this claim to proceed without assurance of Plaintiff’s willingness or ability to pay.” Therefore, according to the court in *Tabler*, borrowers seeking rescission under TILA bear the burden of pleading sufficient factual allegations indicating their “willingness or ability to pay” the loan proceeds before the court will allow a claim for rescission to proceed.

Wadley v. Experian Info. Solutions, Inc., Civil Action No. 1:05cv467 (E.D. Va. Feb. 20, 2008)
(Judge O’Grady)

- Plaintiff alleged that consumer reporting agency failed to conduct an investigation of his complaint that his credit report was inaccurate.

- Court dismissed claim, finding that Experian had acted reasonably because it had conducted a prior investigation and circumstances had not changed warranting a new investigation.

Whitlock v. Whitten Motor Co., 2005 U.S. Dist. LEXIS 38150 (E.D. Va. Dec. 28, 2005) (report and recommendation) (Mag. Judge Dohnal)

- Husband and wife sued for unauthorized access to their consumer reports by an auto finance company under the FCRA.
- The finance company defaulted; the magistrate judge recommended statutory damages of \$1,000 and \$25,000 in punitive damages.

Williams v. LexisNexis Risk Mgmt., Inc., 2007 U.S. Dist. LEXIS 62193 (E.D. Va. Aug. 23, 2007) (Judge Payne)

- Plaintiff brought putative FCRA class action against consumer reporting agency that provides criminal background check reports to employers on ground that the consumer reporting agency did not comply with FCRA requirements for a notice to be sent by the agency to the affected applicant when potentially adverse information was being supplied to the employer.
- The plaintiff moved for certification of a nationwide class action, which the Court granted.

Wright v. SunTrust Bank, 2008 U.S. Dist. LEXIS 58891 (E.D. Va. Aug. 4, 2008) (Judge Cacheris)

- Plaintiff brought pro se complaint against SunTrust, Equifax and Bank of America as a result of SunTrust retracting a “preapproval” of a car loan based on a credit report.
- Plaintiff asserted ECOA and FCRA claims.
- The Court dismissed the ECOA claims against SunTrust, as the plaintiff failed to allege that the denial of credit was for a reason prohibited by the ECOA.

Yu Zhang v. GC Servs., LP, 537 F. Supp. 2d 805 (E.D. Va. 2008) (Mag. Judge Dohnal)

- Defendant offered judgment on a FDCPA claim, which plaintiff accepted.
- The offer of judgment provided that reasonable attorneys’ fees would be awarded.
- The Court awarded \$18,398 in fees, including hourly rates up to \$350.