RECENT DEVELOPMENTS IN FAIR CREDIT REPORTING ACT LITIGATION: “PRESCREENED” OFFERS OF CREDIT AND INSURANCE

Richard E. Gottlieb
Naomi A. Carry
Dykema Gossett, PLLC

Copyright © 2006, Dykema Gossett PLLC. All Rights Reserved.
Biographical Information

Name: Richard E. Gottlieb, Esq.
Position/Title: Member
Firm or Place of Business: Dykema Gossett PLLC
Address: 10 South Wacker Drive, Suite 2300, Chicago, IL 60606
Phone: (312) 876-1700
Fax: (312) 876-1155
E-Mail: rgottlieb@dykema.com
Primary Areas of Practice: Consumer Financial Services Litigation

Work History: Mr. Gottlieb leads the firm's national Consumer Financial Services practice. An experienced complex litigation attorney, Mr. Gottlieb represents primarily financial services entities in the defense of both individual and class action suits alleging false or deceptive practices and statutory consumer lending violations. Mr. Gottlieb also has substantial experience in commercial, insurance and reinsurance disputes (including arbitrations), regulatory matters (including market conduct examinations) and administrative proceedings before federal and state agencies.

Professional Memberships: Illinois Mortgage Bankers Association; Illinois Bankers Association; Conference on Consumer Finance Law; American Bar Association (Member: Business Law Section, Committee on Consumer Financial Services)
Biographical Information

Name: Naomi A. Carry, Esq.
Position/Title: Associate
Firm or Place of Business: Dykema Gossett LLP
Address: 333 S. Grand Avenue, Suite 2100, Los Angeles, CA 90071
Phone: (213) 457-1800
Fax: (213) 457-1850
E-Mail: ncarry@dykema.com
Primary Areas of Practice: Consumer Financial Services Litigation
Work History: Naomi Carry's practice focuses on consumer financial services litigation, class action defense and other representation of financial services clients.
Professional Memberships: American Bar Association (Member: Business Law Section, Committee on Consumer Financial Services); The Honourable Society of the Middle Temple
# Table of Contents

I. INTRODUCTION TO “PRESCREENED” OFFERS OF CREDIT AND INSURANCE ........................................................................................................ 9  
   A. “You’re Pre-Approved”: Prescreened Offers of Credit and Insurance .................................................................................................................. 9  

II. “FIRM OFFER” DEFINED ........................................................................ 11  
   A. Definition .................................................................................................................. 11  
   B. Permissible Preconditions to the Firm Offer ......................................................... 12  
   D. Dozens of Putative Class Actions Filed After the Decision in Cole ..................... 14  

III. DEFENSES TO ALLEGATIONS OF FCRA VIOLATIONS IN “FIRM OFFER” LITIGATION................................................................. 14  
   A. Material Terms of a Firm Offer Need Not be Set Forth in the Initial Solicitation .................................................................................................. 14  
   B. Plaintiff’s Lack of Standing..................................................................................... 16  
   D. No Injunctive Relief Available .............................................................................. 18  
   E. No Statutory Damages for Willful Violation of FCRA Absent Actual Damages ........................................................................................................ 20  
   F. No Evidence of Willful Violation .......................................................................... 21  
   G. Maintenance of Reasonable Compliance Procedures ........................................... 22  

IV. CLASS CERTIFICATION IN FCRA “FIRM OFFER” CASES ............... 22  
   A. Defenses to Class Certification: Class Action not Superior due to Excessive or Annihilation Damages ......................................................... 22  
   B. Classes Certified ..................................................................................................... 24  
   C. Class Certification Denied .................................................................................... 25
I. INTRODUCTION TO “PRESCREENED” OFFERS OF CREDIT AND INSURANCE

A. “You’re Pre-Approved”: Prescreened Offers of Credit and Insurance

Notwithstanding the existence of stringent federal and state privacy laws, Congress allows for the “prescreening” of consumers for eligibility for credit and insurance offers, and make them “firm offers” of credit or insurance. The process of prescreening involves the use by lenders, insurers and others (“offerors”) of consumer reporting data to identify consumers who satisfy certain creditworthiness criteria identified by the offeror. Once the offeror has obtained from consumer reporting agencies (“CRAs” or “credit bureaus”), or from a credit data vendor (e.g., ChoicePoint), the list of consumers who satisfy the pre-defined criteria, the offeror must extend a “firm offer” of credit or insurance to those consumers, subject to certain conditions discussed below. Prescreening may not be used for general solicitations for loan business; so long as a “firm offer” is extended, Congress deemed the invasion of privacy that results from prescreening justified. The resulting “firm offer” typically takes the form of a “pre-approved” or “pre-qualified” solicitation letter or flyer. Much of the mail received by Americans is the result of prescreening. The offeror may prescreen without the consumer’s permission, though the consumer may exercise the right to opt out of receiving future prescreened solicitations.

Since November 2004, a multitude of lawsuits (mostly in the Seventh and Ninth Circuits) have been filed alleging: (1) that offerors improperly prescreened consumers for general solicitation purposes, rather than for the permissible purpose of making “firm offers of credit”; and (2) that the disclosures failed to make certain required disclosures clearly and conspicuously. The plaintiffs in these actions do not claim that they have suffered any injury in fact; instead, they seek to recover statutory and punitive damages for alleged “willful” non-compliance with FCRA’s requirements relating to “firm offers of credit.” For the most part, the filing of these lawsuits followed the decision of the United States Court of Appeals for the Seventh Circuit in Cole v. U.S. Capital, Inc. (“Cole”), 389 F.3d 719 (7th Cir. 2004).

The Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 et seq., was enacted in 1970 to promote accuracy, fairness, and to safeguard the privacy of personal information assembled by the credit bureaus. It regulates the dissemination and use of consumer reports. A "consumer report" means the communication of any information by a CRA bearing on a consumer’s creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, used in any part for the purpose of establishing consumer eligibility for credit. 15 U.S.C. § 1681a(d)(1).

Since its enactment in 1970, FCRA has been amended several times. Most recently, it was extensively amended by the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), Pub. L. 108-159, 111 Stat. 1952 (2003). FACTA modified FCRA by adding provisions governing, among other things, identity theft, accuracy of credit reporting, privacy rights (including limits on sharing of information among affiliates), and risk-based pricing notices (notice required if consumer is offered credit on terms “materially” less favorable than others).

FCRA authorizes CRAs to provide consumer reports for certain specific permissible purposes. 15 U.S.C. § 1681b. One such permissible purpose is use of a consumer credit report to make a “firm offer” of credit or insurance to a consumer. 15 U.S.C. § 1681b(c)(1). FCRA defines a “firm offer” as “[a]ny offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer. . . .” 15 U.S.C. § 1681a(l).

Despite its name, a “firm offer” may be conditioned on: (1) the consumer being determined to meet the specific criteria bearing on creditworthiness that are established before selection of the consumer for the offer; (2) verification that the consumer continues to meet the specific criteria used to select the consumer for the offer, or verification that the consumer meets the specific criteria for the credit offered; and/or (3) the consumer furnishing any collateral that is a requirement for the extension of the credit, and it was disclosed to the consumer in the offer of credit. If the firm offer of credit is subject to any of these conditions, the conditions must be disclosed, along with other statutorily required information, in a “clear and conspicuous” manner. 15 U.S.C. § 1681m(d)(2).
The statutorily required information that must be provided with each written “firm offer of credit,” is a clear and conspicuous statement that: (1) information in a consumer report was used in connection with the offer; (2) the consumer received the offer because s/he satisfied the criteria for creditworthiness under which the consumer was selected; and (3) if applicable, credit will not be extended if, after responding to the offer, the consumer no longer meets the criteria used either for selection for the offer, or the criteria for the credit product offered, or if the consumer does not furnish any required collateral. 15 U.S.C. § 1681m(d).

Offerors also must provide a “clear and conspicuous” statement explaining how the consumer may opt out of receiving future pre-screened offers. 15 U.S.C. §§ 1681m(d)(1)(D), 1681b(c)(1)(B). The opt out notice must be “presented in such format and in such type size and manner as to be simple and easy to understand, as established by the Commission, by rule, in consultation with the Federal banking agencies and the National Credit Union Administration.” 15 U.S.C. § 1681m(d)(2)(B) (as amended by FACTA and effective December 4, 2004). In its Final Rule on the Prescreen Opt-Out Disclosure, effective August 1, 2005, the FTC articulated the standard for the “clear and conspicuous” opt out statement that is required under FCRA. See 16 C.F.R. Parts 642 and 698.

FCRA also specifies what remedies, if any, are available to consumers in private civil actions for injuries sustained as a result of violations of the statute. See 15 U.S.C. § 1681n (addressing willful violations), and 15 U.S.C. § 1681o (addressing negligent violations). Statutory damages for willful non-compliance with any provision of FCRA range from a minimum of $100, to a maximum of $1,000, for each violation. 15 U.S.C. § 1681n(a)(1)(A). Any person found to be negligent in failing to comply with any FCRA requirement is liable to the consumer for actual damages sustained as a result of the failure, plus costs and reasonable attorneys’ fees. 15 U.S.C. § 1681o(a). There is no cap for class action damages or punitive damages under FCRA.

II. “FIRM OFFER” DEFINED

A. Definition

Under FCRA, it is permissible to use a consumer credit report to make a “firm offer” of credit or insurance. 15 U.S.C. § 1681b(c)(1). A “firm offer” is “[a]ny offer of credit or insurance to a consumer that...
will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer . . . ." 15 U.S.C. § 1681a(l).

**B. Permissible Preconditions to the Firm Offer**

As noted above, a “firm offer” may properly be conditioned on, among other things, verification that the consumer continues to meet the creditworthiness criteria for the offer. Based on the language of the statute alone, a “firm offer” does not appear to have to be very firm at all. Until fairly recently, courts readily granted motions to dismiss for failure to state a claim, so long as some amount of money was guaranteed (however small) and the offeror could show simply that the offer would have been honored if the consumer had responded and satisfied the relevant creditworthiness criteria. See, e.g., *Kennedy v. Chase Manhattan Bank USA, NA*, 369 F.3d 833, 840-41 (5th Cir. 2004) (complaint dismissed for failure to state claim); *Sampson v. Western Sierra Acceptance Corp.*, 2003 U.S. Dist. LEXIS 13429 (N.D. Ill. 2003) (no minimum amount of credit was stated in offer and consumer was required to call to find out the amount; held, if any amount was guaranteed, offer was a “firm offer” under FCRA); *Tucker v. Olympia Dodge of Countryside, Inc.*, U.S. Dist. LEXIS 9201 (N.D. Ill. 2003) (same).

**C. Cole v. U.S. Capital, Inc., 389 F.3d 719 (7th Cir. 2004)**

In *Cole*, plaintiff Oneta Cole received a prescreened credit solicitation letter stating that she was pre-approved to receive a Visa or MasterCard with a limit of up to $2,000, and automotive credit up to $19,500. The offer letter guaranteed the plaintiff a credit line of at least $300 to be used towards the purchase of a car. The letter also stated that the offer could be withdrawn if the plaintiff no longer satisfied the initial selection criteria. Cole filed a putative class action lawsuit for violations of FCRA, alleging that the offer did not qualify as a “firm offer” under FCRA because: (1) it was a sham to justify obtaining her credit information; (2) it contained an offer too vague to be accepted; (3) the language of the flyer was ambiguous or inconsistent; (4) the reservation of a right to require plaintiff to pay off existing car loans constituted an option to withdraw the $300 offer; and (5) the disclosure in the letter was not sufficiently clear and conspicuous. The U.S. District Court for the Northern District of Illinois dismissed the complaint for failure to state a claim because, among other things, the guaranteed amount of $300 was sufficient to constitute a “firm offer of credit.”
On appeal, the appellate court reversed the dismissal. The appellate court rejected the argument that there is a “firm offer” so long as some amount of credit is guaranteed and would be extended if the consumer responded to the offer. Instead, the appellate court held that: (1) for a prescreened credit offer to qualify as a “firm offer” under FCRA, the offer must have sufficient value for the consumer to justify access to the consumer’s credit report; and (2) value is not shown simply because at least some amount of credit is guaranteed; rather, the entire context of the offer should be examined to determine whether an offer is a legitimate firm offer or merely a guise of solicitation. *Cole*, 389 F.3d at 726-27. The Court explained:

We believe that the reading of ‘firm offer of credit’ suggested by the defendants, and accepted by the district court, eviscerates the explicit statutory purpose of protecting consumer data and privacy. Indeed, such a definition would permit anyone to gain access to a sea of sensitive consumer information simply by offering some nominal amount of guaranteed credit. The statutory scheme of the FCRA makes clear that a ‘firm offer’ must have sufficient value for the consumer to justify the absence of the statutory protection of his privacy. A definition of ‘firm offer of credit’ that does not incorporate the concept of value to the consumer upsets the balance Congress carefully struck between a consumer’s interest in privacy and the benefit of a firm offer of credit for all those chosen through the pre-screening process. From the consumer’s perspective, an offer of credit without value is the equivalent of an advertisement or solicitation. It is clear that Congress did not intend to allow access to consumer credit information ‘for catalogs and sales pitches.’ Such importuning simply—and understandably—is not among the permissible reasons for which a credit agency may disclose a consumer’s credit information. Defining a firm offer of credit as merely any offer that will be honored elevates form over substance, ‘exalts artifice above reality and . . . deprives the statutory provision in question of all serious purpose.’

*Id.* at 726-27.

The Court further held that to determine whether an offer of credit comports with the statutory definition, “[a] court must consider the entire offer and the effect of all the material conditions that comprise the credit product in question.” *Id.* at 728. In this regard, the Court explained:

In making this assessment [of sufficient value to the consumer], one important term for courts to evaluate is the amount of credit to be extended. However, neither a creditor nor a debtor considers the amount of credit in a vacuum; both must know the other terms attached to that credit to determine whether it is advantageous to extend or to accept the offer. The terms of an offer, such as the rate of interest charged, the method of computing interest and the length of the
repayment period, may be so onerous as to deprive the offer of any appreciable value.

Id. at 728. In addition, finding that the disclosures in the letter to Cole were not sufficiently clear and conspicuous, the Court provided some cautionary guidance as to what may be required under FCRA to satisfy the requirement that statutory disclosures relating to firm offers of credit be “clear and conspicuous.” Id. at 731.

D. Dozens of Putative Class Actions Filed After the Decision in Cole

The Seventh Circuit’s decision in Cole spawned the filing of dozens of putative class action lawsuits against offerors engaging in prescreening activities. The complaints typically allege that the offeror willfully violated FCRA by: (1) failing to make a “firm offer of credit,” and thus the offeror lacked a permissible purpose for accessing the consumer’s credit report; and (2) failing to make the required statutory disclosures sufficiently clear and conspicuous. There typically is no allegation of actual injury suffered by the plaintiff, and thus no claim for any negligent violation of FCRA. In some actions, a claim for injunctive relief has been made. The majority of these actions have been filed in the district courts of Illinois, Indiana, and Wisconsin. Recently, putative class action lawsuits have been filed in other jurisdictions, including California.

III. DEFENSES TO ALLEGATIONS OF FCRA VIOLATIONS IN “FIRM OFFER” LITIGATION

A. Material Terms of a Firm Offer Need Not be Set Forth in the Initial Solicitation

Each putative class action filed after the decision in Cole advances the theory that a “firm offer” must include all of the material terms in the initial written communication. In essence, plaintiffs argue that the principles of offer and acceptance under ordinary contract law principles should be applied with equal force to prescreened offers of credit or insurance. However, as there is no express requirement under FCRA that a “firm offer of credit or insurance” be in writing, it logically follows that it is not necessary to state in writing all of the material terms associated with the offer at the time of the first communication with the consumer. The statute does not state any one medium for communicating an offer of credit; indeed, the definition of a “firm offer of credit or
“insurance” simply refers to “. . . any offer of credit or insurance to a consumer that will be honored. . . .” 15 U.S.C. § 1681a(l) (emphasis added). Other related FCRA provisions regulating prescreening also are silent as to the method by which firm offers should be communicated. See 15 U.S.C. §§ 1681b(c) and (e), 1681m(d).

This argument is consistent with the FTC’s own view of firm offers under FCRA. In 1988, the FTC published proposed revisions to its Statements of General Policy or Interpretations under FCRA. In its proposed Commentary, the FTC stated:

“Prescreening” means the process whereby a consumer reporting agency, using the client’s criteria for creditworthiness, compiles lists of qualified consumers (or deletes unqualified consumers from client-supplied lists) to be solicited by its clients who market products or services by direct mail solicitations.

Commentary on the Fair Credit Reporting Act, 53 Fed. Reg. 29,696, 29,705 (Aug. 8, 1988) (to be codified at 15 C.F.R. § 600) (emphasis added). However, when the FTC issued its final Commentary, it deleted its reference to “direct mail solicitations”:

“Prescreening” means the process whereby a consumer reporting agency compiles or edits a list of consumers who meet specific criteria and provides this list to the client or a third party (such as a mailing service) on behalf of the client for use in soliciting these consumers for the client’s products or services.

Commentary on the Fair Credit Reporting Act, 55 Fed. Reg. 18,804, 18,815 (May 4, 1990) (to be codified at 15 C.F.R. § 600). Significantly, in the section addressing “Significant Public Comments Not Adopted”, the FTC explained that firm offers may be communicated through any medium: “Comment 6 has also been amended to reflect that a prescreened list is subject to the FCRA, regardless of the medium through which the client ordered it solicits consumers.” Id. at 18,807.

The Board of Governors of the Federal Reserve System also agrees that it is not necessary, or even possible in all cases, to state all material terms of a “firm offer” in the initial solicitation. In its Report to the Congress on Further Restrictions on Unsolicited Written Offers of Credit and Insurance (December 2004) (submitted to Congress pursuant to section 213(e) of FACTA), the Board stated:

[unlike prescreened solicitations for credit cards,] insurance sales typically require an extra step before the benefits can be fully realized. Prescreened solicitations for insurance generally do not contain complete pricing information tailored to a consumer because it is difficult to set the price of insurance solely based on information in CRA files. Specifically, prescreening using
CRA files reveals something about the creditworthiness of the individuals (maybe because it reveals something about the reliability of the insured), but it does not reveal any information about the property or life to be insured. The insurance company must obtain that information through some sort of further contact with the recipient of a prescreened solicitation before the underlying insurance price can be specified completely.

*Report to the Congress on Further Restrictions on Unsolicited Written Offers of Credit and Insurance* (December 2004) at 30.

Just as in the context of prescreened offers for insurance, prescreened offers for mortgage loans also require an “extra step” before a lender can determine the specific mortgage price (i.e., loan amount and interest rate). There are many complex underwriting variables that go beyond the credit history, which extend to the physical characteristics of the property to be encumbered. Similarly, underwriting variables extend beyond information in CRA files, to the borrower’s financial assets, such as the amount of any down payment, and the amount of the borrower’s reserves. Other variables may include the loan-to-value ratio, and the debt-to-income ratio. In addition, the pricing of mortgage credit also changes frequently, sometimes several times a day, based on prevailing market conditions. It would be extremely difficult, if not impossible, to include all of these variables as “material” terms in the initial solicitation. Moreover, there is no way to determine what terms a borrower would consider to be “material”; what is “material” to one borrower may not be “material” for another.

Even in *Cole*, the Seventh Circuit suggested that all the material terms of a “firm offer of credit” need not appear in the initial solicitation letter to the consumer: “To determine whether the offer of offer of credit comports with the statutory definition, a court must consider the entire offer and the effect of all the material terms and conditions that comprise the credit product in question.” *Cole*, 389 F.3d at 727-28 (emphasis in original). Significantly, the court in *Cole* was unable to decide the issue on a motion to dismiss, precisely because it noted that “several material terms are missing” and “[t]hese missing terms render it impossible for a court to determine from the pleadings whether the offer has value.” *Id.* at 728.

**B. Plaintiff’s Lack of Standing**

If the plaintiff has not responded to the solicitation, one possible defense may be that the plaintiff lacks standing to pursue a claim for violations of FCRA’s “firm offer of credit or insurance” requirements.
As not all material terms of a “firm offer” need be stated in the initial communication, the plaintiff has no basis on which to assert that the solicitation was not part of a “firm offer of credit or insurance.” Stated another way, if the plaintiff never bothered to find out whether s/he would have received credit had s/he responded to the solicitation, the plaintiff cannot assert that a “firm offer of credit or insurance” was lacking.


The Seventh Circuit appellate court’s decision in Cole was issued before certain key FACTA amendments to FCRA provisions took effect. Among other things, FACTA materially amended FCRA to eliminate private right of actions for violations of § 1681m. As amended by FACTA, § 1681m of FCRA now includes the following language at the end of that section:

Enforcement—

(A) No civil actions. Sections 1681n and 1681o of this title shall not apply to any failure by any person to comply with this section.

(B) Administrative enforcement. This section shall be enforced exclusively under 1681s by the Federal agencies and officials identified in that section.


Every court to address this issue to date has concluded that Congress’s references to “this section” mean § 1681m in its entirety. Thus, FCRA’s civil liability provisions, set forth in 15 U.S.C. §§ 1681n and §1681o, no longer apply to alleged violations of § 1681m, which may now only be enforced by federal agencies. (The effective dates of the FACTA provisions varied, with the revised Section 1681m(h)(8) enforcement provision becoming effective as of December 1, 2004. See 16 C.F.R. 602.(c)(3)(xiii) 2005.)

Defendants in lawsuits alleging a FCRA violation for failure to make the statutorily required disclosures in a “clear and conspicuous” manner have successfully argued that FCRA, as amended by FACTA, bars all civil actions for violations of § 1681m. In each such case, the districts courts held that the plan language of the FACTA amendments eliminated the private right of action under 15 U.S.C. § 1681m. See Murray v. Cross Country Bank, No. 05 C 1252, slip op. at 2 (N.D. Ill. Aug. 15, 2005) (holding that plaintiff’s suit for alleged violations of

**D. No Injunctive Relief Available**

Sections 1681n and 1681o of FCRA, which are titled “Civil liability for willful noncompliance” and “Civil liability for negligent noncompliance” respectively, set forth the forms of relief available, if any, to private litigants under the FCRA. See 15 U.S.C. §§ 1681n and 1681o. The listed relief includes only damages and attorneys’ fees; neither provision includes injunctive relief as a remedy available to private litigants. Defendants thus have argued with success that injunctive relief is a remedy that is not available to private litigants. Defendants argue that where Congress specifically intended for private litigants to have access to injunctive relief, FCRA says so expressly. See 15 U.S.C. § 1681u (authorizing consumers under § 1681u(m) to seek, “in addition to” damages, “injunctive relief. . .to require compliance with this section” in actions against the government for disclosures obtained improperly for “counterintelligence purposes”). Likewise, FCRA else-
where grants the power to obtain injunctive relief to the Federal Trade Commission and state governments—but not private litigants. See 15 U.S.C. §§ 1681s(a) (“violations of ‘this subchapter. . .shall be subject to enforcement by the Federal Trade Commission under section 5(b) thereof [15 U.S.C. § 45(b)]’); 15 U.S.C. § 45(b) granting the FTC power to compel parties to “cease and desist” from committing certain acts); § 1681s(c)(1)(a) (a state “may bring an action to enjoin such violation”)

In light of these statutory distinctions in available remedies, the Fifth Circuit has held that injunctive relief is not available under §§ 1681n and § 1681o of the FCRA. Washington v. CSC Credit Services, Inc., 199 F.3d 263, 268 (5th Cir. 2000). The court reasoned that while Congress conferred such power on the FTC, it conspicuously omitted any injunctive remedy for private litigations under §§ 1681n and § 1681o. The court explained that this “omission is significant” and held that it “persuasively demonstrates that Congress vested the power to obtain injunctive relief solely with the FTC.” Washington, 199 F.3d at 268. In reaching this conclusion, the court found equally persuasive the fact that when Congress amended the FCRA to add § 1681u—the FBI counterintelligence disclosure provision—it specified that “injunctive relief shall be available” to private plaintiffs under that section “in addition to” any damages remedy. Washington, 199 F.3d at 269 (citing subdivision 1681u(m)). As the Fifth Circuit aptly noted, “this language would be unnecessary if injunctive relief were otherwise available.” Id.

Following the Fifth Circuit’s analysis in Washington, district courts in the Seventh Circuit and elsewhere have reached the same conclusion. In re Trans Union Corp. Privacy Litig., 211 F.R.D. 328, 339-40 (N.D. Ill. 2002) (“The affirmative grant of power to the FTC to pursue injunctive relief, coupled with the absence of a similar grant to private litigants when they are expressly granted the right to obtain damages and other relief, persuasively demonstrates that Congress vested power to obtain injunctive relief solely with the FTC.”), appeal dismissed by Albert v. Trans Union Corp., 346 F.3d 734 (7th Cir. 2003); Anderson v. Capital One Bank, 224 F.R.D. 444 (W.D. Wis. 2004) (same); Bumgardner v. Lite Cellular, Inc., 996 F. Supp. 525 (E.D. Va. 1998) (“Congress’ failure to include injunctive relief as a potential remedy combined with Congress’ delegation of enforcement of the FCRA to the FTC, clearly indicates that Congress did not intend injunctive relief as a remedy.”); Mangio v. Equifax, Inc., 887 F. Supp. 283 (S.D. Fla.
20

1995) (“FCRA’s failure to provide for private relief indicates that such relief is not available”); Phillips v. Accredited Home Lenders, Inc., Case No. SA CV 05-00851 (C.D. Cal. Dec. 9, 2005) (same).

E. No Statutory Damages for Willful Violation of FCRA Absent Actual Damages

It has been argued that a plaintiff who fails to demonstrate actual damages arising out of a violation of FCRA’s “firm offer” requirement, is not entitled to recover statutory damages. The argument is principally derived from the court’s reasoning in Ruffin-Thompkins v. Experian Info. Solutions, Inc., 422 F.3d 603, 608-11 (7th Cir. 2005). See also Lee v. Experian Info. Solutions, 2003 U.S. Dist. LEXIS 17420, at *23 (N.D. Ill. October 2, 2003) (failure to prove actual damages “torpedoes [plaintiff’s] claims for statutory and punitive damages under FCRA); Sarver v. Experian Info. Solutions, Inc., 390 F.3d 969, 971 (7th Cir. 2004) (“the FCRA is not a strict liability statute.”)

In Ruffin-Thompkins, the court treated the existence of harm as a threshold element that must be established before statutory damages may be awarded: “‘Without a causal relationship between the violation of the statute and the loss of credit, or some other harm, a plaintiff cannot obtain an award of actual damages.’” Id. at 608, quoting Crabill v. Trans Union, 259 F.3d 662, 664 (7th Cir. 2001) (internal quotation omitted). The court further explained “The FCRA does not presume damages; instead . . . the consumer must affirmatively prove that she is entitled to damages.” Ruffin-Thompkins, 422 F.3d at 610. The court rejected the plaintiff’s argument that her statutory damages claim should survive absent a showing of actual harm, ruling that if her actual damages claim failed because of her inability to show harm, “it follows, a fortiori, that the Court must deny her claim for punitive or statutory damages.” Id.

Plaintiffs counter this argument by referring to the language of 15 U.S.C. § 1681n, which provides for recovery of “any actual damages sustained by the consumer . . . or damages of” $100 to $1,000. 15 U.S.C. § 1681n(a)(1). See Sampson v. Western Sierra Acceptance Corp., 2004 WL 406992, *3 (N.D. Ill. February 27, 2004) (“the application of statutory damages . . . are unrelated to any actual harm suffered by Plaintiff . . . “); see also Reed v. Experian Info Solutions, Inc., 312 F. Supp. 2d 1109, 1113 (N.D. Minn. 2004) (stating that if a defendant has willfully violated the act, a plaintiff may be entitled to statutory damages without a showing of actual damages). As there may be no need to
prove actual damages in a willfulness case seeking statutory damages alone, class certification frequently is sought, and granted, in cases alleging willful violations of FCRA. See, e.g., Ashby v. Farmers Ins. Co. of Oregon, 2004 U.S. Dist. LEXIS 21060, *24 (D. Or., October 7, 2004) (class of at least 130,000 ordered certified for alleged willful violation of FCRA).

F. No Evidence of Willful Violation

In order to recover statutory damages for a violation of FCRA’s “firm offer” rules, a plaintiff must show that the defendant’s noncompliance was “willful.” 15 U.S.C. § 1681n. Some courts have concluded that there is no willfulness without actual knowledge that the conduct involved violates FCRA or impinges on consumers’ rights under FCRA. These courts hold that the willfulness requirement should be strictly construed because it allows successful plaintiffs to recover punitive damages in addition to statutory damages: “[t]o act willfully, a defendant must knowingly and intentionally violate [the FCRA], and it must also be conscious that [its] acts impinges on the rights of others.” Ruffin-Thompkins, 422 F.3d at 610, quoting Wantz v. Experian Info. Solutions, 386 F.3d 829, 834 (7th Cir. 2004); see also Phillips v. Grendahl, 312 F.3d 357, 368 (8th Cir. 2002) (rejecting the lesser “reckless disregard” threshold for willful noncompliance adopted by some Circuits, and requiring actual knowledge that act or conduct in question violates FCRA); Berman v. Parco, 986 F. Supp. 195, 199 (S.D.N.Y. 1997); Heupel v. Trans Union, LLC, 193 F. Supp. 2d 1234, 1241 (N.D. Ala. 2002); Buxton v. Equifax Credit Info. Services., Inc., 2003 U.S. Dist. LEXIS 21519, *18 (N.D. Ill. 2003).

Some courts hold that ignorance of FCRA’s requirements is not a defense. Matthews v. Government Employees Ins. Co., 23 F. Supp. 2d 1163, 1164 (S.D. Cal. 1998); see Richardson v. Fleet Bank of Mass., 190 F. Supp. 2d 81, 89 (D. Mass. 2001); Cushman v. Trans Union Corp., 115 F.3d 220, 227 (3rd Cir. 1997). This is particularly true where the defendant has experience in dealing with credit reports and knows that reports can only be obtained legally under certain circumstances. See Phillips v. Grendahl, 312 F.3d 357, 371 (8th Cir. 2002). Some courts have concluded that definitive proof of malicious or wrongful intent is not necessary, and the jury may deduce it from the surrounding circumstances. Cushman, 115 F.3d at 84; Mirocha v. TRW, Inc., 805 F. Supp. 663, 675 (S.D. Ind. 1992).
G. Maintenance of Reasonable Compliance Procedures

Although it remains a plaintiff’s burden to demonstrate a willful violation, a defendant who maintains reasonable procedures to ensure compliance with 15 U.S.C. § 1681m cannot be liable under FCRA. See Taylor v. Cavalry Investment, LLC, 365 F.3d 572 (7th Cir. 2004); 15 U.S.C. § 1681m(c). In a proper case, summary judgment should be available either where there is no evidence of a willful violation of FCRA, or where the defendant shows reasonable compliance procedures (e.g., review of solicitations by trained compliance and legal personnel).

IV. CLASS CERTIFICATION IN FCRA “FIRM OFFER” CASES

A. Defenses to Class Certification: Class Action not Superior due to Excessive or Annihilation Damages

One potential line of defense against class certification is the argument that a class action is not superior because the amount of the potential statutory award for willful violations of FCRA is disproportionate to the actual harm (if any) caused, and could annihilate the defendant’s business. For example, assuming one million mailings, statutory damages for a willful violation of FCRA would range from $100 million to $1 billion. There is precedent for this argument from early Truth in Lending Act (“TILA”) cases. When TILA was first enacted, it was more like FCRA today, in that it did not contain a cap on class action damages awards. As a result, the courts frequently faced class certification motions that could lead to draconian results in the absence of any actual damages. In response, many courts ruled that the provision for statutory damages and attorneys’ fees in individual cases, and the prospect of “annihilating liability” for minor technical violations in a class action, made a TILA class action not “superior” within the meaning of Rule 23. See, e.g., Ratner v. Chem. Bank New York Trust Co., 54 F.R.D. 412, 416 (S.D.N.Y. 1972) (court refused to certify a class of 130,000 members exposing defendant to at least $13 million in potential damages for a technical violation of TILA); Berkman v. Sinclair Oil Corp., 59 F.R.D. 602, 611 (N.D. Ill. 1973) (class action not the superior method of adjudication where is potential for catastrophic liability under TILA); Murray v. GMAC Mortgage Corporation, No. 05 C 1229 (Der-Yeghiayan, J.) (N.D. Ill. Nov. 8, 2005) (court troubled by fact that no actual damages claimed, and litigation would result in
improper windfall to plaintiff’s counsel for technical violations of FCRA).

Since Ratner, some courts have refused to certify FCRA classes brought to recover statutory damages where the putative class is enormous and an order of statutory damages would be based on minor deviations which cause minimal or no actual damages. For example, In re Trans Union Corp. Privacy Litigation, 211 F.R.D. 328 (N.D. Ill. 2002), (plaintiffs sought to certify a class of approximately 190 million members which could have lead to damages of $19 billion. Concluding that a class action was not the superior method of adjudicating the controversy before it, the court noted similarities between FCRA and the pre-amended TILA. Id. at 349. The court’s conclusion was strongly influenced by the fact that only statutory damages and no actual damages were alleged, and because the enormity of the putative class could lead to catastrophic liability. Id. at 350. The court explained: “Although certification should not be denied solely because of the possible financial impact it would have on a defendant, consideration of the financial impact is proper when based on the disproportionality of a damage award that has little relation to the harm actually suffered by the class and on the due process concerns attended upon such an impact.” Id. at 351.2

Other courts have applied the same reasoning to deny class certification where awards of statutory rather than actual damages are sought and the potential liability is disproportionate to the harm actually suffered. See, e.g., Quiller v. Barclays American Credit, 727 F.2d 1067 (11th Cir. 1984), aff’d en banc, 764 F.2d 1400 (11th Cir. 1985), cert. denied, 476 U.S. 1124 (1986) (class certification denied where statutory liability for violation of state usury laws potentially was billions of dollars). More recently, a court denied class certification in a willfulness-based FCRA lawsuit arising out of prescreened offers of credit, on the ground that a class action was not the superior form of adjudication because the statutory damages award would be disproportionate and unrelated to the harm caused. Sampson v. Western Sierra Acceptance Corp., et al., 2004 U.S. Dist. LEXIS 2786 at **6, 10-11 (N.D. Ill., February 27, 2004) (class certification properly denied where class of 65,000 potential members could lead to a damage award of between $6.5 and $65 million). In Sampson, Judge Zagel noted that the minimum statutory damages award far outstripped the value of the defendants’ respective businesses, and class certification thus would deal “an unwarranted and crushing blow” to defendants. Id. at **10-11.
However, courts elsewhere have been reluctant to deny class certification unless the defendant asserts that the financial impact of a successful class action will deal a fatal financial blow to its business. See, e.g., Ashby v. Farmers Ins. Co. of Oregon, 2004 U.S. Dist. LEXIS 21060, *24 (D. Or., October 7, 2004) (class of at least 130,000 ordered certified where court observed: (1) that defendant did not contend that large award of statutory damages for willful violation of FCRA would deal a fatal financial blow to its business; (2) trier of fact had to determine whether violation was “willful” in any event; and (3) “willful” would require more than a mere technical violation). Moreover, the Second Circuit has proposed a “middle ground,” suggesting that a court could construe the relevant statutory damages statute in such a way as to authorize an award of less than the minimum amount to all but the initially named plaintiffs who instituted the class action, thereby reducing the aggregate statutory damages, while still punishing the defendant for the defendant without violating due process considerations. See Parker v. Time Warner Entertainment Co., L.P., 331 F.3d 13, 25, 27 (2d Cir. 2003) (district court’s order denying class certification under Cable Communications Policy Act of 1984, on grounds that award of statutory damages would be disproportionately large to actual harm suffered, vacated because district court’s order was based on assumptions of fact rather than findings of fact). More recently, district courts in the Seventh Circuit have certified a class even where the potential for an enormous award of statutory existed. See Murray v. New Cingular Wireless Servs., Inc., No. 04 C 7666 (Castillo, J.), 2005 U.S. Dist. LEXIS 29162 (N.D. Ill. Nov. 17, 2005); Murray v. Cingular Wireless II, LLC, No. 05 C 1334 (Manning, J.) (N.D. Ill. Dec. 22, 2005); Kudlicki v. Faragut Financial Corp., No. 05 C 2459 (Lindberg, J.) (N.D. Ill. Sept. 29, 2005).

B. Classes Certified

Classes have been certified in a number of “firm offer” cases since Cole:

1. Kudlicki v. Faragut Financial Corp., No. 05 C 2459 (Lindberg, J.) (N.D. Ill. Sept. 29, 2005): The court rejected defendant’s argument that individualized damages issues will predominate over any common questions of law or fact. See slip op. at 2. The court also rejected defendant’s argument that plaintiff’s claim is not typical of the claims of the class because plaintiff suffered no
actual damages, and the actual damages of the class members may be different. Slip op. at 3.

2. Murray v. New Cingular Wireless Servs., Inc., No. 04 C 7666 (Castillo, J.), 2005 U.S. Dist. LEXIS 29162 (N.D. Ill. Nov. 17, 2005): The court found that the numerosity, commonality, typicality, and adequacy of representation requirements were met. Id. at **7-16. The court rejected the notion that determining the value of the promotion from one class member to another was a barrier to class certification, and also rejected defendant’s Ruffin-Thompkins argument regarding individualized damages as a bar to class certification. Id. at **19-22. Although the court recognized that the potential statutory award under FCRA is disproportionate to the harm caused, the court found that superiority was not lacking, because the court could reduce any damages award. Id. at *25.

3. Murray v. Cingular Wireless II, LLC, No. 05 C 1334 (Manning, J.) (N.D. Ill. Dec. 22, 2005): The court similarly rejected Cingular’s arguments based on Ruffin-Thompkins, and found no lack of predominance and superiority. However, the court observed that if evidence eventually shows that individual actual damages claims predominate, the court may revisit its decision to certify a class.

C. Class Certification Denied

At least two courts have denied class certification:

1. Murray v. GMAC Mortgage Corporation, No. 05 C 1229 (Der-Yeghiayan, J.) (N.D. Ill. Nov. 8, 2005), the court denied plaintiff’s motion to certify a class for lack of adequacy of representation of both the class representative and her counsel. Troubled by the fact that no actual damages are claimed in the litigation, the court also found that a class action was not superior to other methods for the fair and efficient adjudication of the controversy, because it would do nothing more than award a windfall to Murray’s counsel for technical violations of FCRA.

2. Sampson v. Western Sierra Acceptance Corp., et al., 2004 U.S. Dist. LEXIS 2786 at **6, 10-11 (Zagel, J.) (N.D. Ill., Feb. 27, 2004) (class certification properly denied where class of 65,000 potential members could lead to a damage award of between $6.5 and $65 million). In Sampson, Judge Zagel noted that the mini-
mum statutory damages award far outstripped the value of the defendants’ respective businesses, and class certification thus would deal “an unwarranted and crushing blow” to defendants. *Id.* at **10-11.