

Credit Reporting: Where The Rubber Meets The Road

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The Fair Credit Reporting Act

- Applies to:
 - Consumer Reporting Agencies (Equifax, TransUnion, etc.)
 - Furnishers of Information (Lenders)
 - Users of Consumer Reports (Lenders, Employers)
- Civil Liability for Negligent or Willful Violations (15 U.S.C. §§ 1681n, 1681o)
- Potential damages include:
 - Actual damages
 - Statutory damages
 - Punitive damages
 - Attorney's fees and costs

FCRA Litigation Trends

- FCRA filings now outnumber TCPA filings. This represents a drastic shift as TCPA filings had consistently outpaced FCRA filings over the previous two years. In each month save one since September 2017, FCRA suits have outnumbered those filed under TCPA. For example, in February 2018, 422 plaintiffs filed suit under the FCRA compared to 296 under the TCPA
- FCRA litigation has also started to exceed its own track record. The 422 suits filed under the FCRA in February 2018 is a 59.2% increase from the 265 that were filed in February 2017. In the same timeframe, TCPA filings decreased 21.3%. As of a few months ago, in raw numbers, 2018 FCRA suits have outnumbered TCPA suits 731 to 611. A higher percentage (36.3%) of all FCRA suits are filed as class actions, as compared to the TCPA (22.3%) and FDCPA (23%)

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Notable Verdict: *Ramirez v. TransUnion*

- *Ramirez v. TransUnion*, Case No. 3:12-cv-00632 (N.D. Cal.)
- Jury awarded over \$60 million in statutory and punitive damages against TransUnion for willful FCRA violations
 - FCRA class action involving TransUnion's service identifying persons whose names matched individuals on the government's list of terrorists, drug traffickers, and others with whom Americans are prohibited from doing business (OFAC list)
 - Plaintiff challenged TransUnion's: (1) name-only matching protocol as a procedure not designed to ensure maximum possible accuracy; and (2) failure to disclose OFAC information to consumers simultaneously with their reports
 - Court denied TransUnion's motion for summary judgment finding that its OFAC product met the definition of "consumer report"
 - Currently on appeal to the Ninth Circuit

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How and Where Credit Reports Are Used

- Employment; Extensions of Credit; Underwriting of Insurance
- Credit reporting under more scrutiny than ever. Not only increased litigation as noted but more regulatory scrutiny
- Judgment and tax lien information no longer reported
- Base and industry specific FICO scores

Duties of Credit Reporting Agencies

A CRA may release a consumer credit report for any “permissible purpose” under the statute:

- Court orders arising from a subpoena relating to grand jury proceedings
- Upon written instruction of the consumer to whom the report relates

Duties of Credit Reporting Agencies (continued)

- To a person the CRA reasonably believes intends to use the information
 - in connection with a credit transaction involving the consumer
 - for underwriting insurance related to the consumer
 - relating to a consumer's eligibility for a license
 - relating to a consumer's credit risk associated with an existing credit obligation – or
- In response to a child support enforcement agency

Permissible Purpose

- A credit report may not be obtained absent a permissible purpose, *e.g.*, extension of credit. 15 U.S.C. §1681b(a)(3)
- Firm offer of credit – an offer that is honored if the consumer is determined to meet the specific criteria used to select the consumer. 15 U.S.C. §1681a(1)
- Great deal of litigation concerning what does or does not constitute a firm offer of credit. *See, e.g., Gelman v. State Farm Mutual Auto. Ins. Co.*, 583 F.3d 187 (3d Cir. 2009).

You Want The Job?

- Prospective employers are prohibited from accessing credit reports absent the consent of the prospective employee. 15 U.S.C. §1681b(b)(2)(A)
- Prospective employee must be provided a “clear and conspicuous” disclosure that report may be obtained and employee must authorize such in writing.

Duties Of A Credit Furnisher

A “furnisher” is any entity that sends consumer information regarding creditworthiness to a CRA.

Furnishers

- have a legal duty under the FCRA to furnish accurate information to CRAs regarding consumers with whom they have maintained direct dealings
- have an ongoing duty to update and correct consumer credit data provided to CRAs
- must establish “reasonable written policies” regarding the “accuracy and integrity” of consumer information
- must notify consumers within 30 days of issuing a negative report
- must investigate upon receiving a consumer notice of dispute regarding a credit report

Duties Of A Furnisher (Continued)

- Adverse Actions
 - A. Defined to include:
 - a denial or cancellation of credit
 - a change to terms of an existing credit relationship
 - the refusal to grant credit in substantially the amount or on substantially the terms requested
 - a denial, cancellation or adverse change in terms of insurance coverage
 - a denial of employment or adverse employment decision
 - a denial of certain government licenses or benefits
 - any action taken relating to any application made by, or transaction initiated by, the consumer

Duties Of A Furnisher (continued)

B. Does not include a refusal to extend credit under an existing credit relationship when a consumer is delinquent or in default

C. Required information to be provided to consumers:

If an adverse action is based on information contained in a consumer report, then the furnisher must provide to the consumer:

- written notice of the adverse action
- the name/address/phone number of the CRA that furnished the report – and –
- notice of his or her right to obtain a free copy of the report within 60 days and to dispute the accuracy of the information

The Savvy Consumer

- A furnisher is required to conduct a reasonable investigation of a direct dispute in most circumstances. 12 C.F.R. § 1022.43
- However, the FCRA does not provide a cause of action for a furnisher's failure to do so.
- A furnisher is required – and the FCRA provides a cause of action for its failure to do so – to perform a reasonable investigation of an indirect dispute, *i.e.*, a dispute made to a CRA.
- If a consumer has an issue with his or her credit report, he or she should dispute the reporting with *both* the credit furnisher *and* the CRA.

The Savvy Consumer (Continued)

- A consumer cannot sue a furnisher for inaccurate credit reporting.
- State law claims – *e.g.*, defamation – are preempted as to furnishers. 15 U.S.C. § 1681t(b)(1)(F)
- The only cause of action that may be brought against a furnisher is for failure to conduct a reasonable investigation of an indirect dispute.

Common Issues

- Technically accurate versus accurate but also not misleading or incomplete. *Compare Heupel v. Trans Union LLC*, 193 F. Supp.2d 1234, 1240 (N.D. Ala. 2002) *with Dalton v. Capital Assoc. Indus.*, 257 F.3d 409, 415 (4th Cir. 2001)
- Pre-discharge, may a debt be reported as derogatory including the existence of an outstanding balance. *Compare Lugo v. Experian Info. Sol., Inc.*, 2017 WL 2214641 (N.D. Cal. May 19, 2017) *with Aulbach v. Experian Info. Sol., Inc.*, 2017 WL 1807612 (N.D. Cal. May 4, 2017)
- Nor does such constitute a violation of the automatic stay. *In re Keller*, 568 B.R. 118 (9th Cir. B.A.P. 2017)

Safeco's Standard for Willfulness

- Where violation willful, statutory and punitive damages may be awarded.
- *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007)
 - Holding: A FCRA defendant's conduct is reckless (and thus willful) only if it was "objectively unreasonable" in light of "legal rules that were 'clearly established' at the time."
 - A "company subject to FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company an a risk violating the law substantially greater than the risk associated with a reading that was merely careless."

Safeco's Standard for Willfulness

- Some courts suggest that a defendant must allege it had a specific reading of the statute before it can rely on a *Safeco* defense. *See Lewis v. Southwest Airlines Co.*, Case No. 3:16-cv-01538, 2018 WL 400775, 2018 U.S. Dist. LEXIS 5576 (N.D. Tex. Jan. 11, 2018)
- *Cortez v. Trans Union, LLC*, 617 F.3d 688, 721 (3d Cir. 2010). Affirming award of punitive damages while rejecting argument that lack of appellate authority meant violation could not be considered reckless: “the lack of definitive authority does not, as a matter of law, immunize Trans Union from potential liability.”
- *Safeco Insurance Co. of America v. Burr*, 551 U.S. at 70. Concluding the defendant’s reading of the statute not objectively unreasonable in part because of lack of “guidance from the court of appeals or the Federal Trade Commission.”

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Defining “Consumer Reporting Agency”

- A “consumer reporting agency” (or “CRA”) is “any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.” 15 U.S.C. § 1681a(f)
- Examples:
 - The Big 3: Equifax, Experian, TransUnion
 - Also specialty consumer reporting agencies
 - Data aggregators?

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Defining CRA – Case to Watch

- *Kidd v. Thomson Reuters Corp.*, 299 F. Supp. 3d 400 (S.D.N.Y. 2017)
 - Issue: Is Thomson Reuters a CRA?
 - Thomson Reuters offered an online research platform (“Consolidated Lead Evaluation and Reporting,” *i.e.*, “CLEAR”) to investigate crimes and suspected fraud.
 - Thomson Reuters explicitly prohibited customers from using CLEAR for any purpose regulated by the FCRA.
 - The Georgia Departments of Public Health used CLEAR to perform a background check as part of the plaintiff’s employment application.
 - Holding: No, because Thomson Reuters did not intend for the CLEAR reports to be consumer reports.
 - Currently on appeal to Second Circuit (No. 17-3550)
- Should the definition of a CRA turn on how the consumer information is used or on the compiling entity’s intent?

The FCRA and Data Breach Claims

- The FCRA’s purposes include protecting consumer information.
 - The FCRA requires CRAs to “adopt reasonable procedures . . . in a manner which is fair and equitable to the consumer, with regard to the confidentiality” of the consumer’s information. *See* 15 U.S.C. § 1681(b)
- A CRA must “maintain reasonable procedures” to ensure that it does not furnish a consumer report for an impermissible purpose. *See* 15 U.S.C. § 1681e(a)
 - “Reasonable procedures” requirement applies only to CRAs
 - *Tierney v. Advocate Health & Hosps. Corp.*, 797 F.3d 449, 450 (7th Cir. 2015) (plaintiff failed to allege defendant was a CRA).

Data Breach Claims (continued)

- Standing
 - Circuits are split on whether a substantial risk of harm exists for Article III standing solely “by virtue of the hack.”
 - *Compare Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688 (7th Cir. 2015) (standing); *Ree v. Zappos.com, Inc. (In re Zappos.com, Inc.)*, 888 F.3d 1020 (9th Cir. 2018) (standing); *Attias v. CareFirst, Inc.*, 865 F.3d 620 (D.C. Cir. 2017) (standing), *with Whalen v. Michaels Stores, Inc.*, 689 F. App'x 89, 90 (2d Cir. 2017) (no standing); *Katz v. Pershing, LLC*, 672 F.3d 64 (1st Cir. 2012) (no standing); *Beck v. McDonald*, 848 F.3d 262, 274 (4th Cir. 2017) (no standing).
 - Does the FCRA's stated goal of maintaining consumer confidentiality affect the standing analysis in data breach cases?
 - *Compare In re Horizon Healthcare Servs. Data Breach Litig.*, 846 F.3d 625 (3d Cir. 2017) (standing exists in data breach case brought under the FCRA), *with Reilly v. Ceridian Corp.*, 664 F.3d 38 (3d Cir. 2011) (no standing in data breach case).