

THE FAIR CREDIT REPORTING ACT

Overview of Recent Trends and Legal Developments

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Agenda

- Overview of the FCRA
- Permissible Purposes for Obtaining Credit Reports
- Conducting a “Reasonable Investigation”
- Liability for Furnishing Incorrect Information
- Credit Reporting and Bankruptcy
- Recent Enforcement Actions

What Is the Fair Credit Reporting Act?

- Enacted in 1970, amended numerous times
 - Concern about “secret” files used to make important decisions
 - Seeking to balance privacy & fairness with benefits of system
 - Maintain credit reporting rules for national system
- Provides consumers rights to access and correct data
- Imposes obligations on “users” to notify consumers when “adverse” decisions are made
- Imposes duties on “consumer reporting agencies” to:
 - Protect data and only provide reports for a “permissible purpose”
 - Maintain accuracy and investigate disputes
 - Report appropriate data and not other data
- Requires “furnishers” to maintain accuracy and investigate disputes
- When a party may request and use a consumer credit report

More Background

- Not just about credit
 - FCRA regulates the collection, disclosure and use of ***consumer report information***
- Information used by businesses to make important decisions about consumers
 - Such as credit, insurance, employment, check cashing, rental
- FCRA governs collection, maintenance and disclosure of consumers' personal information
- Enforced by Federal Trade Commission and Consumer Financial Protection Bureau

What Is a Consumer Report?

- A communication of information by a ***consumer reporting agency***
- Bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living
- More than credit lines and payment histories:
 - Arrests
 - Judgments
 - Bankruptcies
- Credit score and adverse information

Consumer Report – 15 U.S.C. 1681a(d)

- Prepared by a Consumer Reporting Agency (“CRA”)
- Bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living
- Which is used, or expected to be used, or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for:
 - **credit or insurance** to be used primarily for **personal, family, or household purposes**
 - NOT business purposes
 - **employment purposes**, or
 - any other eligibility “permissible purpose” authorized under act

What Is NOT a Consumer Report?

- Information that does NOT bear on the 7 characteristics
 - Only ID information – “header data”
 - Non-identifiable information – e.g., aggregated or blind data
- Information that is NOT collected or expected to be used for eligibility for a permissible purpose
 - Claims administration, ID verification, law enforcement, portfolio review
 - Non-consumer (e.g., business) purposes
 - Marketing

Who is a CRA?

- Consumer Reporting Agency - 15 U.S.C. 1681a(f)
 - 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**.
- No federal registration or licensing required

Duties of CRAs

- Maintain reasonable procedures to ensure
 - Accuracy of report content and data
 - Permissible purposes and data security
- Consumer file disclosures
 - Credit score disclosures
- Disputes and reinvestigations
 - Reasonably investigate consumers' disputes
- Identity theft and fraud
- Special types of consumer reports
 - Employment reports
 - Investigative consumer reports

Nationwide CRAs

- Nationwide CRA
 - A *consumer reporting agency* that
 - Regularly engages in assembling or evaluating, *and maintaining*
 - public record information regarding **consumers residing nationwide**; and
 - **credit account information**
 - regarding consumers residing nationwide
 - **from persons who furnish that information regularly** and in the ordinary course of business
 - For the purpose of furnishing **consumer reports bearing on creditworthiness** (*i.e.*, credit reports)
- TransUnion, Equifax, Experian

Obligations of a Nationwide CRA

- Annual credit report
 - Centralized source
- Centralized prescreening opt-out
- Toll-free telephone assistance
- Fraud alerts and referrals
 - Additional free reports
- Address discrepancy notices
- Centralized automated consumer dispute verification system
- Referral of ID theft complaints and report to CFPB
- Respond to CFPB consumer complaint referrals

Permissible Purposes - 15 U.S.C. 1681b(a)

The FCRA allows a consumer reporting agency to furnish a consumer report, and for a furnisher to pull one, for only certain circumstances.

Liability for pulled or providing report for other purposes.

1. In response to a court order or Federal Grand Jury subpoena.
2. In accordance with the written instructions of the consumer.

More Permissible Purposes

3. To a person, including financial institution, that the CRA has reason to believe intends to use report as information for any of the following reasons:
 - a. ***In connection with a credit transaction involving consumer*** (includes extending, reviewing, and collecting credit);
 - b. For employment purposes;
 - c. In connection with underwriting of insurance involving consumer;
 - d. In connection with a determination of consumer's eligibility for license or other benefit granted by governmental instrumentality that is required by law to consider an applicant's financial responsibility;
 - e. As a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation

Catch All Purposes

- f. Otherwise has a legitimate business need for the information:
 - i. In connection with ***a business transaction that the consumer initiates***; or
 - ii. To review an account to determine whether consumer continues to meet the terms of the account.
 - iii. In response to a request by the head of a State or local child support enforcement agency (or authorized appointee) if the person certifies various information to the consumer reporting agency regarding the need to obtain the report. (Generally, this particular purpose does not impact a person, such as a financial institution, that is not a consumer reporting agency.)

Duties of Furnishers - 15 U.S.C. 1681s-2

The FCRA requires a furnisher to:

- “[N]ot furnish any information . . . [it] *knows* or has *reasonable cause to believe* . . . is inaccurate.”
 - “Completeness” issue
- **Correct & Update Information**
- **Investigate Disputes**

Furnisher Policies and Procedures:

- Reasonable written policies and procedures re:
 - accuracy and integrity of information
 - appropriate to the nature, size, complexity and scope of the furnisher’s activities

Limited Private Right of Action

- No private right of action for **direct disputes** made by a customer to a furnisher based on incorrect reporting.
- Furnisher must still investigate direct disputes and correct inaccuracies, but a customer may not base a lawsuit on a direct dispute.
- There is only a limited private right of action against a furnisher under 15 U.S.C. § 1681s-2(b).
- Must first receive notice of a dispute from a CRA.
- Bottom line - **if the furnisher did not receive a dispute from a CRA, it has no legal liability.** *SimmsParris v. Countrywide Fin. Corp.*, 652 F.3d 355, 359 (3d Cir. 2011)

Dispute Process Under 15 U.S.C. § 1681s–2(b)

- A furnisher receives notice of dispute made by a consumer through a CRA.
- Occurs electronically through the E-Oscar system. The dispute is titled an “Automated Consumer Dispute Verification”, or “ACDV.”
- The furnisher is then required to conduct a **reasonable** investigation of the disputed information. See 15 U.S.C. § 1681s–2(b)(1)(A).
- The furnisher then report its results to the CRA. See 15 U.S.C. § 1681s–2(b)(1)(C). This is the ACDV response, and the data fields correlate to those in the ACDV itself.
- If the investigation finds that the information is inaccurate or incomplete in any way, the furnisher must report those results to the CRA. See 15 U.S.C. § 1681s–2(b)(1)(D).

Nature of Investigation

- The dispute process is not strict liability. Even if furnisher's ultimately finding is incorrect, it is not liable so long as it conducted a **reasonable** investigation.
- "An investigation is not necessarily unreasonable because it results in a substantive conclusion unfavorable to the consumer, even if that conclusion turns out to be inaccurate." *Gissler v. Pa. Higher Educ. Assistance Agency*, 2017 WL 4297344, *3 (D. Colo. Sept. 28, 2017).
- The FCRA does not require perfection, only a reasonable response." *Alston v. United Collections Bureau, Inc.*, 2014 WL 859013, at *8 (D. Md. Mar. 4, 2014).

What Is A Reasonable Investigation?

- Usually a fact question.
- ***“[A] reasonable procedure is one that a reasonably prudent person would undertake under the circumstances.***
... [T]he factfinder must balance the potential harm from inaccuracy against the burden of safeguarding against such inaccuracy.” *Seamans v. Temple University*, 744 F.3d 853, 864 (3d Cir. 2014).
- Some times the CRAs send associated images to the furnisher – documents received from the borrower.
- Any images should be considered when conducting investigation.
- Sometimes, there are no associated images; therefore, the investigation may be limited based on what is provided.

Other Reasonableness Factors

- Did nature of dispute match what the borrower later complains about? Example – dispute references an inaccurate payment history, but later lawsuit was based on identity theft.
- Was dispute vague?
- *Anthony v. Experian Info. Sols. Inc.*, 2017 WL 1198499, *5 (E.D. Cal. Mar. 31, 2017) (plaintiff's dispute was insufficient to trigger duty to block reporting of information because it contained little to no information, did not allege identity theft, and instead indicated that plaintiff thought his credit history had been confused with another individual).

“Reasonable” Decisions

- *Scheel-Baggs v. Bank of Am.*, 575 F. Supp. 2d 1031, 1040 (W.D. Wisc. 2008) (consumer’s use of the word “fraud” in isolation did not render a furnisher’s investigation unreasonable when other information consumer provided was “scant” and provided furnisher “no reason to conduct a more thorough investigation”).
- *Tauro v. Capital One Fin. Corp.*, 684 Fed. Appx. 240, 243 (3d Cir. 2017) (affirming summary judgment)
 - Plaintiff complained to CRAs “that their information concerning his account was inaccurate and that the account did not belong to him.”
 - Capital One investigated, despite fact that plaintiff “did not specifically identify the alleged errors,” and compared its internal data with data reported by Experian and TransUnion, finding no discrepancies or inaccuracies.
 - Plaintiff must prove unreasonable investigation, and conclusory allegations/speculation insufficient to defeat summary judgment.

Common Problem Issues

- Not reviewing images
- Simply confirming information in system of record.
 - Example – customer provides information that he paid on time in March 2017, but agent at furnisher simply reviews own payment history and decides what it reported to CRA is accurate.
 - If all furnisher ever does is confirm its own information without considering new information, it could never correct actual errors.
- Not speaking across the institution.
 - Example – the fraud department recently concluded an account was the subject of identify theft. These records are not available to the credit reporting agent. Therefore, she confirms the account belongs to the customer.
- Information not available to credit reporting agent.
 - Example – the agent has no access to emails where the customer provided information regarding payments pertinent to the dispute.

Failure to Mark Account Disputed

- FCRA imposes duty on furnishers to report a dispute to all CRAs to whom it provides information as part of a reasonable investigation. 15 U.S.C. § 1681s-2(a)(3).
- Courts have held that the **failure to report the account as disputed to a CRA is actionable** under 15 U.S.C. § 1681s-2(b).
- See *Saunders v. Branch Banking and Trust Company*, 526 F.3d 142 (4th Cir. 2008) (failure to flag account as disputed is a material inaccuracy under §1681s-2(b)); *Seamans*, (private cause of action arises under § 1681s-2(b) when, having received notice of a consumer's potentially meritorious dispute, furnisher subsequently fails to report that claim is disputed).

When Is It “Disputed”?

- A furnisher is **not under a duty** to report a dispute where the consumer’s dispute is “**frivolous or irrelevant.**” 15 U.S.C. § 1681s-2(a)(8)(F)(i).
- “The dispute submitted by the consumer to the furnisher must be bona fide to create furnisher liability under §1681s–2(b).” See, e.g., *Shap v. Capital One Financial Corp.*, 2012 WL 1080127, at *4 (E.D. Pa. March 30, 2012).
- This is a low threshold.
- Best practice – report account as disputed.
- Pitfall for liability.

Negligent Violations

- Negligent violations entitle a plaintiff to collect actual damages and attorney's fees. 15 U.S.C. § 1681o
- Plaintiff “must prove that inaccurate information in a credit report caused him harm.” *Podell v. Citicorp Diners Club, Inc.*, 914 F. Supp. 1025, 1036 (S.D.N.Y. 1996).
- Plaintiff must establish actual damages attributable to defendants' unreasonable investigation, and “any harm must be traceable to the inaccurate, FCRA-violating information—not just to the report that contained that information or to accurate data within the same report.” *Wenning v. On-Site Manager, Inc.*, 2016 WL 3538379, *23 (S.D.N.Y. June 22, 2016).
- Cannot recover for damages incurred **before** the FCRA violation – for example, incurred before the further responds to a dispute from a CRA.
- Damages may include denials of credit, losses of credit, humiliation, mental distress.
- Jurisdictions vary of quantum of proof for mental distress – e.g., are corroborating medical records required?

Willful Violations

- A defendant who willfully violates FCRA is liable for “actual damages sustained by the consumer as a result of the failure or damages of not less than \$100 and not more than \$1,000,” punitive damages, and attorneys’ fees. 15 U.S.C. § 1681n(a).
- The “plaintiff must show that a defendant ‘knowingly and intentionally committed an act in conscious disregard for the rights of others, but need not show malice or evil motive.’” *Northrop v. Hoffman of Simsbury, Inc.*, 12 Fed. Appx. 44, 50 (2d Cir. 2001).
- Includes both knowing and reckless noncompliance.
- A defendant acts willfully under the FCRA where it “intentionally misled consumers or concealed information from them.” *George v. Equifax Mortg. Servs.*, 2010 WL 3937308, *2 (E.D.N.Y. Oct. 5, 2010).
- In contrast, “the mere failure to correct a plaintiff’s inaccurate credit information, even after notification of the inaccuracy does *not* constitute a willful failure to comply with the FCRA.” *Id.* (emphasis in original).

Credit Reporting In Bankruptcy

- In general, delinquent information may report for 7 years.
- For bankruptcy, may report for 10 years from date the case is filed. 15 U.S.C. 1681(c)(a)(1).
- In practice:
 - Chapter 13 bankruptcy is deleted seven years from the filing date because it requires at least a partial repayment of the debt.
 - Chapter 7 bankruptcy is deleted 10 years from the filing date because none of the debt is repaid.

What Will Report After Discharge?

- Should show a zero balance
- Should show discharged as part of bankruptcy.
- Will not show: currently owed; late or delinquent or outstanding payments; charged off; balance due

Reporting During Ch. 13 Plan

- Whether reporting that debtor's account was past due, adverse, and/or delinquent, despite account's inclusion in and payments made in accordance with Chapter 13 bankruptcy plan, is accurate under FCRA.
- A plan confirmation order does not change debt's legal status. Chapter 13 plan *allowing* debtor to pay at lower monthly rate does not insinuate that the account cannot become delinquent; under the plan, debtor is no longer making payments according to loan's terms.
- If debtor fails to make payments under the plan and it subsequently is dissolved, then debtor would be held to loan's terms as if she never filed bankruptcy. In that scenario, account would be overdue at an amount representing difference between the payments made under the bankruptcy plan and payments debtor originally agreed to pay during the plan's existence.
- Courts have rejected the proposition advanced by debtor that the failure to report that an account is included in a Chapter 13 bankruptcy proceeding is incomplete for purposes of the FCRA.

Barry v. Experian Information Sol., Inc., No. 16-cv-9515 (S.D.W.V. July 5, 2018)

Duty to Report Post-Discharge Payments?

- *Horsch v. Wells Fargo Home Mortgage, et al.*, 94 F. Supp. 3d 665 (E.D. Pa. 2015)
 - Putative class action of two classes: (1) mortgage borrowers who declared bankruptcy; and (2) borrowers' spouses who did not declare bankruptcy.
 - Issue related to credit report marking of: "Discharged through Bankruptcy Chapter 7 / Never Late" with balance reported as \$0.
 - Borrowers claimed "credit reports were inaccurate or incomplete because they did not reflect any payments made to their mortgage servicers after the Notes were discharged in bankruptcy."
 - Court dismissed claim by borrowers who declared bankruptcy based on FTC guidance, fundamental accuracy of reports, and potential liability for violating bankruptcy court injunction.
 - Court allowed co-borrowers' claim to proceed based on factual distinction that co-borrowers had not gone through bankruptcy.

Enforcement – CFPB

- Before Dodd-Frank, primary enforcement authority for FCRA rested with FTC.
- Post-Dodd-Frank, CFPB is charged with primary enforcement, guidance and rulemaking authority.
- CFPB also vested with examination authority.

Enforcement Actions – CFPB

- State Farm Bank, FSB – December 6, 2018 CFPB Consent Order
 - Alleged violations:
 - “Obtained consumer reports without a permissible purpose”
 - “Furnished inaccurate information about consumers’ credit to CRAs that it knew or had reasonable cause to believe was inaccurate”
 - “Failed to promptly update or correct information furnished to CRAs that respondent determined was not complete or inaccurate”
 - “Furnished information to CRAs without providing notice that the information was disputed by the consumer”
 - “Failed to establish and implement reasonable written policies and procedures regarding the accuracy and integrity of information provided to CRAs.”

Enforcement Actions – CFPB

- State Farm Bank, FSB – December 6, 2018 CFPB Consent Order
 - Alleged violations:
 - “Obtained consumer reports without a permissible purpose”
 - Obtaining consumer reports of consumers not involved in any transaction, extension of credit, etc...
 - Initiated credit applications for the wrong consumer, resulting in credit report being pulled
 - Lack of policies and procedures prior to September 2016

Enforcement Actions – CFPB

- State Farm Bank, FSB – December 6, 2018 CFPB Consent Order
 - Alleged violations:
 - “Furnished inaccurate information about consumers’ credit to CRAs that it knew or had reasonable cause to believe was inaccurate”
 - Furnished account information for the wrong consumer...
 - Reported current accounts as delinquent...
 - Reported inaccurate payment histories and past-due amounts...
 - ...when furnished information was in direct conflict with the information in Respondent’s files.

Enforcement Actions – CFPB

- State Farm Bank, FSB – December 6, 2018 CFPB Consent Order
 - Alleged violations:
 - “Failed to promptly update or correct information furnished to CRAs that respondent determined was not complete or inaccurate”
 - Took multiple months for service provider to correct incorrect or incomplete information furnished to CRA
 - Failed to make prompt corrections and updates even when consumers made repeated requests to do so

Enforcement Actions – CFPB

- State Farm Bank, FSB – December 6, 2018 CFPB Consent Order
 - Alleged violations:
 - “Furnished information to CRAs without providing notice that the information was disputed by the consumer”
 - Furnished information, often through a service provider, without providing notice that it was disputed by a consumer.

Enforcement Actions – CFPB

- State Farm Bank, FSB – December 6, 2018 CFPB Consent Order
 - Alleged violations:
 - “Failed to establish and implement reasonable written policies and procedures regarding the accuracy and integrity of information provided to CRAs.”
 - Failed to comply with Reg. V’s requirement that furnisher “establish and implement reasonable written policies and procedures regarding the accuracy and integrity of the information relating to consumers that it furnishes to a CRA.”
 - Policies to be appropriate to the nature, size, complexity and scope of furnisher’s activities.
 - State Farm Bank was heavily consumer focused (consumer credit cards and auto loans)

Enforcement Actions – CFPB

- State Farm Bank, FSB – December 6, 2018 CFPB Consent Order
 - Lessons Learned
 - Do policies and procedures address establishing and implementing internal controls for accuracy and integrity of information furnished to CRAs?
 - Have staff that pull credit reports or furnish information been trained?
 - Service providers
 - Effective oversight?
 - SLAs in third-party contracts?
 - Effective policies and procedures at service providers?
 - Indemnification obligations for failures?
 - Appropriate technology designed to communicate with CRAs?
 - Periodic evaluation of policies and procedures to ensure appropriateness and continued compliance?