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Credit Information Furnishers’ Duty to Investigate Under FCRA



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Introduction

The relative ease with which Americans access credit is a hallmark of our economy. Consumers routinely are approved for credit in just a few hours, if not instantly. The ability of credit providers to make such rapid decisions confidently depends on a complex system of credit reporting and credit scoring that emerged over the past several decades. This “elaborate mechanism,” as Congress characterized it in its 1970 findings in support of passage of the original Fair Credit Reporting Act (FCRA), plays a “vital role” in consideration of consumer creditworthiness.¹

The credit reporting system keeps track of every line of credit, every request for credit, and every monthly payment made or missed, for millions of consumers. Due to the sheer size and

complexity of the consumer credit reporting system, inaccuracies inevitably exist. A credit card sales agent mistypes a Social Security number and Tom Jones gets approved for a credit card on the strength of Tim Jones’s credit report. An algorithm designed to match names, birthdates, and addresses mistakenly ascribes John Smith’s foreclosure to Frank Smith’s credit report. These unintentional discrepancies, coupled with the consequences of fraud and identity theft, produce inaccuracies in the system that undermine the credit reporting regime, frustrate consumers, and can leave banks and other entities vulnerable to lawsuits and government enforcement actions.

Perhaps the most onerous duty imposed by FCRA on furnishers of credit information is the duty to investigate credit information disputed by a consumer.

The Fair Credit Reporting Act was enacted to provide some accountability and transparency in the credit reporting system. The law contains provisions relating to each of the four main players in the credit reporting system—the consumer, the credit information furnisher, the user of credit reports, and the credit reporting agency. It provides various protections and rights for the consumer while imposing obligations and creating enforcement mechanisms against the furnishers, users, and the reporting agencies.

This article will focus on the responsibilities of one actor, the credit information furnisher, with a special focus on the duty to investigate disputes relating to information accuracy.

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General Duties of Credit Furnishers

Credit information furnishers—typically banks that provide credit cards and loans, but also hospitals and any other service providers to whom a consumer might owe a debt—provide information relating to account status, account balances, and late or missed payments to credit reporting agencies (CRAs) such as Equifax, Experian, and TransUnion. Under FCRA, credit information furnishers cannot provide information known to be inaccurate,² and have a duty to correct and update information that it discovers is inaccurate.³ Information furnishers also have duties to provide notices to the CRAs in certain circumstances. For example, furnishers must alert the CRAs if any reported information is disputed by a consumer,⁴ or if a consumer voluntarily closes an account.⁵

Furnishers additionally must provide notices to consumers whenever any negative information is provided to a CRA,⁶ and must halt the furnishing of any information that a consumer alleges is a result of identity theft.⁷ An important caveat to these duties is that they are only enforceable by government agencies acting in a regulatory capacity, and are not subject to lawsuits by consumers.⁸ In addition, many of the duties of credit furnishers are further limited by FCRA's preemption provisions, which prohibit states from imposing any obligations beyond those prescribed by FCRA.⁹

Duty to Investigate

Perhaps the most onerous duty imposed by FCRA on furnishers of credit information is the duty to investigate credit information disputed by a consumer. As a threshold matter, it is important to note that, under FCRA, a credit information furnisher's duties to investigate essentially arise twice—where a consumer disputes the accuracy of credit information directly with the furnisher, and where a consumer disputes such information with a credit agency.

Direct Disputes

Under 15 U.S.C. § 1681s-2(a)(8), furnishers must investigate disputes brought to the direct attention of a furnisher by a consumer. Consumers disputing credit information directly with a credit information furnisher must provide to the furnisher a dispute notice that identifies the specific information being disputed, explains the basis for the dispute, and includes supporting documentation.¹⁰ Upon receipt of such a notice, the furnisher must conduct an investigation into the disputed credit information. The furnisher is required to review all evidence submitted by the consumer and must complete the investigation within 30 days.¹¹ If the furnisher concludes that any reported information is inaccurate, it must promptly notify each credit reporting agency of its conclusion and provide each agency any necessary corrections to ensure that accurate information is provided.¹²

Like other requirements arising under § 1681s-2(a), enforcement of this dispute mechanism falls exclusively to government agencies. Consumers cannot seek individual damages against a furnisher for failing to meet the direct dispute requirements under this section.¹³ As required under the statute, the federal banking agencies jointly issued regulations relating to the direct dispute process on July 1, 2009. The regulations became effective on July 1, 2010.¹⁴ The regulations impose obligations on furnishers relating to the implementation of policies and procedures, and the conduct of investigations of direct disputes by consumers.

Under the regulations, furnishers of credit information are required to maintain “reasonable written policies and procedures” relating to the accuracy of consumer credit information.¹⁵ The policies must be “appropriate” for the nature and scope of the furnisher's activities,¹⁶ and must be updated periodically.¹⁷ The regulations additionally require that furnishers, when crafting the necessary policies and procedures, consider the guidelines published at Appendix E of each agency's regulations.¹⁸ While implementation of policies and procedures is mandatory, the guidelines themselves are only advisory.

Investigations of Direct Disputes

The regulations promulgated under § 1681s-2(a) require that furnishers of credit information conduct a “reasonable investigation” of direct consumer disputes.¹⁹ The duty to investigate arises only where the dispute relates to the consumer's liability on an account; the terms of a credit account; the consumer's performance or conduct relating to an account; or any other information reported to a CRA regarding an account.²⁰ The regulations specifically note that furnishers are not required to conduct investigations into consumer disputes relating to certain biographical information that often accompanies a credit report, such as a consumer's date of birth or Social Security number; the identity of employers contained in a report; requests for a consumer report; information contained in public records; information relating to fraud alerts and military service active duty alerts; or information about a consumer provided by another furnisher.²¹

Under the regulations, furnishers of credit information are required to maintain “reasonable written policies and procedures” relating to the accuracy of consumer credit information.

Consumer Obligations

Consumers themselves are not unaffected by the banking agency regulations. Consumers wishing to dispute credit information directly with a furnisher are required to include certain information in the dispute notice sent to a furnisher. The notice must provide the furnisher with information sufficient to allow the furnisher to identify the relevant account and the specific information being disputed, and include all supporting documentation reasonably required by the furnisher to conduct an investigation.²² Consumers also must send the dispute notice to the proper place. Furnishers are only required to conduct an investigation when such a dispute notice is sent to an address provided by the furnisher—either on a consumer credit report or otherwise provided directly to the consumer—for the purpose of receiving such disputes.²³ If the furnisher has designated no such address, a consumer may send a direct dispute notice to any business address of the furnisher.²⁴

Frivolous Disputes

If a furnisher reasonably determines that a consumer direct dispute is frivolous or irrelevant, it need not conduct an investigation into the disputed information.²⁵ Disputes can be deemed frivolous or irrelevant if the consumer provides insufficient information to conduct an investigation; the dispute is substantially the same as a previously submitted dispute that already has been handled by the furnisher consistent with its obligations under FCRA; or if the dispute relates only to issues of biographical or employment information, or other issues excepted from the duty to investigate.²⁶ Furnishers must, within five days of determining that a direct dispute is frivolous or irrelevant, provide the consumer with a notice of such a determination that includes the reason for the determination and a recitation of any information it needs in order to conduct an investigation.²⁷

Regulators and courts have interpreted the investigation requirement as a duty to conduct a “reasonable investigation.”

Liability

Despite the lack of a consumer enforcement mechanism,²⁸ a furnisher’s response to a direct dispute can affect its exposure to liability in other contexts. Federal banking agencies retain the ability to enforce the basic requirement that furnishers receiving direct complaints from consumers apply the “reasonable investigation” standard required for all disputes.²⁹ In addition, a furnisher’s behavior in response to a direct dispute by a consumer

also could affect its liability for failure to respond adequately to complaints first lodged through a CRA. A consumer will have an easier time demonstrating that a furnisher’s investigation of a complaint made through a CRA was insufficient if the consumer can demonstrate that the furnisher was notified of the disputed information through direct contacts with the consumer.³⁰ Furnishers who demonstrate a practice of deficient investigations run a greater risk of liability.

Disputes Through a CRA

Under § 1681s-2(b) furnishers must conduct an investigation into any disputed information brought to its attention pursuant to a notice from a CRA. As mentioned, the primary feature of this provision is the furnisher’s susceptibility to consumer lawsuits for non-compliance.

Procedure

When consumers dispute credit information, the more typical process is to do so through a CRA—in no small part because FCRA provisions relating to direct consumer complaints only became effective on July 1, 2010. A consumer provides notice to a CRA of a dispute, and the CRA, in turn, notifies each relevant information furnisher.³¹ After receiving such notice, the information furnisher is required to conduct an investigation, review all the relevant information submitted by the CRA, and report the results of the investigation to the CRA.³² Credit information that is inaccurate, or whose accuracy cannot be determined, must be modified or blocked from further reporting as appropriate,³³ and in such cases the furnisher must relay its findings to all CRAs to which it reports.³⁴

The “Reasonable Investigation” Standard

Regulators and courts have interpreted the investigation requirement as a duty to conduct a “reasonable investigation.”³⁵ Determining what constitutes such a reasonable investigation requires analysis of the statute itself and case law. FCRA makes explicit that a “review of all relevant information provided by the CRA forwarding the consumer dispute is required.”³⁶ According to case law, relevant factors in determining whether an investigation was reasonable include whether the furnisher examined all consumer correspondence and submitted documentation relating to the disputed matter,³⁷ whether the furnisher consulted any third parties to gather information,³⁸ and the amount of time spent on the investigation.³⁹ One factor limiting the extent to which a furnisher can be expected to investigate is the scope of information provided in the notice from the CRA. Some courts have found that because a furnisher’s duty to investigate flows from the CRA’s referral, a furnisher need only investigate what it learned about the nature of the disputed information from the CRA’s dispute notice.⁴⁰

Damages

A furnisher who willfully fails to comply with its duty to investigate can be liable to a consumer for the amount of actual damages, or at least between \$100 and \$1000 in statutory damages, and may be liable for punitive damages, as well as costs and fees.⁴¹ For negligent non-compliance, a furnisher can be liable for actual damages sustained as a result of non-compliance, as well as fees and costs.⁴² These two standards for liability—willful non-compliance and negligence—were deliberately chosen by Congress to provide the consumer recourse only where the furnisher’s efforts are deliberately or negligently insufficient. A technical violation of a FCRA requirement, standing alone, is not enough.

The United States Supreme Court has weighed in on what constitutes a willful violation of FCRA. In *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007)⁴³ the Court ruled that “where willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well.”⁴⁴ In this sense, a “willful” violation of FCRA extends beyond those acts a furnisher knows are in violation of the statute to any act that demonstrates a furnisher’s reckless disregard for a consumer’s rights. A plaintiff, then, “has a choice of mental states”—the defendant acted knowingly or recklessly—to show in court to demonstrate liability for willful non-compliance of FCRA.⁴⁵

Consumers who sue furnishers for negligent non-compliance bear the burden of demonstrating that the furnisher breached its ordinary duties of care, and that the consumer-plaintiff suffered economic damages as a result of that breach. The requirement that a consumer demonstrate actual damages before bringing a successful claim for negligent non-compliance is paramount. The denial of credit by a potential creditor using a credit report containing inaccurate, negative information is considered an economic harm for which a CRA or furnisher may be liable.⁴⁶ However, inaccuracies in credit reports not actually relied upon by a potential creditor do not constitute actual damages sufficient for recovery for negligent non-compliance with FCRA.⁴⁷

Preemption of State Law Claims

Consumers hoping to bring state law claims relating to credit reporting against furnishers face a difficult, but not impossible, challenge. As FCRA makes clear, states may not impose any requirement or prohibition relating to the responsibilities of credit information furnishers.⁴⁸ Nevertheless, consumer plaintiffs have had some success escaping the preemptive grip of federal law by pointing to a separate section of FCRA that bars state common law claims relating to defamation, invasion of privacy, and negligence, “except as to false information furnished with malice or willful intent to injure such consumer.”⁴⁹ This exception for cases where plaintiffs claim that furnishers acted maliciously or with willful intent provides an opening for state common law claims.⁵⁰ Courts seem willing to let FCRA’s two preemption sections coexist. Generally, civil actions based on state statutes are

considered preempted by § 1681t(b)(1)(F), while actions based on state tort law and sufficiently supported by allegations of malice or willful intent to injure are allowed to proceed under § 1681h(e).⁵¹

Conclusion

The American system of credit reporting attempts to compile and organize unimaginable amounts of data relating to millions of consumers. Furnishers of consumer credit information arguably play the most important role in the system by serving as the initial source of consumer information compiled in reports by the CRAs. The Fair Credit Reporting Act acknowledges the importance of this role by setting forth detailed standards of care for credit information furnishers, and providing discrete avenues of redress for consumers harmed by inaccurate information. Furnishers of consumer credit information should take their duty to investigate consumer complaints seriously by developing reasonable, standardized processes for investigating disputes.

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¹ 15 U.S.C. § 1681(a). For additional background reading on the Fair Credit Reporting Act, see Federal Trade Commission, 40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations (July 2011), available at <http://www.ftc.gov/os/2011/07/110720fcrareport.pdf>.

² 15 U.S.C. § 1681s-2(a)(1).

³ 15 U.S.C. § 1681s-2(a)(2).

⁴ 15 U.S.C. § 1681s-2(a)(3).

⁵ 15 U.S.C. § 1681s-2(a)(4).

⁶ 15 U.S.C. § 1681s-2(a)(7).

⁷ 15 U.S.C. § 1681s-2(a)(6).

⁸ 15 U.S.C. § 1681s-2(c).

⁹ 15 U.S.C. § 1681t(b)(1)(F).

¹⁰ 15 U.S.C. § 1681s-2(a)(8)(D).

¹¹ 15 U.S.C. § 1681s-2(a)(8)(E).

¹² *Id.*

¹³ 15 U.S.C. § 1681s-2(a)(8); see also *Nelson v. Chase Manhattan Mortgage Corp.*, 282 F.3d 1057 (9th Cir. 2002) (explaining that Congress limited enforcement of § 1681s-2(a) to governmental bodies).

¹⁴ See 74 Fed. Reg. 31,484 (July 1, 2009). Substantially similar regulations are codified in various sections of the Code of Federal Regulations, once for each regulatory body with enforcement authority. See 12 C.F.R. § 41.40 (Office of the Comptroller of the Currency); 12 C.F.R. § 222.40 (Federal Reserve Board); 12 C.F.R. § 334.40 (Federal Deposit Insurance Corporation); 12 C.F.R. § 571.40 (Office of Thrift Supervision); 12 C.F.R. § 717.40 (National Credit Union Administration); 16 C.F.R. § 660.1 (Federal Trade Commission). For ease of reference, subsequent citations are to the Office of the Comptroller of the Currency regulations only.

¹⁵ 12 C.F.R. § 41.42(a).

¹⁶ *Id.*

¹⁷ 12 C.F.R. § 41.42(c).

¹⁸ 12 C.F.R. § 41.42(b).

¹⁹ 12 C.F.R. § 41.43(a).

²⁰ *Id.*

²¹ 12 C.F.R. § 41.43(b).

²² 12 C.F.R. § 41.43(d).

²³ 12 C.F.R. § 41.43(c).

²⁴ *Id.*

²⁵ 12 C.F.R. § 41.43(f).

²⁶ *Id.*

²⁷ *Id.*

²⁸ For a recent case discussing the bar against direct consumer lawsuits against information furnishers, see *SimmsParris v. Countrywide Financial Corp.*, No. 09-4542, 2011 BL 196540 (3d Cir. July 28, 2011).

²⁹ 12 C.F.R. § 41.43(a); 74 Fed. Reg. 31,484, 31,497 (July 1, 2009).

³⁰ See, e.g., *Saunders v. Branch Banking & Trust Co. of Virginia*, 526 F.3d 142 (4th Cir. 2008).

³¹ 15 U.S.C. § 1681i(a)(2).

³² 15 U.S.C. § 1681s-2(b)(1)(A)-(C).

³³ 15 U.S.C. § 1681s-2(b)(1)(E).

³⁴ 15 U.S.C. § 1681s-2(b)(1)(D).

³⁵ See, e.g., *Gorman v. Wolfpoff & Abramson, LLP*, 584 F.3d 1147, 1157 (9th Cir. 2009) ("Requiring furnishers, on inquiry by a CRA, to conduct at least a reasonable, non-cursory investigation comports with the aim of the statute.")

³⁶ 15 U.S.C. § 1681s-2(b)(1)(B).

³⁷ *Gorman v. Wolfpoff & Abramson, LLP*, 584 F.3d 1147, 1161 (9th Cir. 2009) (concluding that a furnisher's review of pertinent records in its possession, beyond the CRA's notice, constituted a reasonable investigation).

³⁸ *Scheel-Baggs v. Bank of America*, 575 F. Supp. 2d 1031, 1040 (W.D. Wisc. 2008) (holding that a jury could reasonably find that a furnisher's failure to check with its lawyers regarding the status of an account known to be in arbitration constitutes an unreasonable investigation).

³⁹ *DiPrinzio v. MBNA America Bank, N.A.*, No. 04-00872 (E.D. Pa. 2005).

⁴⁰ *Anderson v. EMC Mortg. Corp.*, 631 F.3d 905, 908 (8th Cir. 2011); *Chiang v. Verizon New England Inc.*, 595 F.3d 26, 38 (1st Cir. 2010); *Gorman*, 584 F.3d at 1157.

⁴¹ 15 U.S.C. § 1681n.

⁴² 15 U.S.C. § 1681o.

⁴³ 551 U.S. 47 (2007).

⁴⁴ *Id.* at 56-57.

⁴⁵ *Id.* at 60.

⁴⁶ See, e.g., *Philbin v. TransUnion Corp.*, 101 F.3d 957 (3d Cir. 1996).

⁴⁷ See, e.g., *Perez v. TransUnion, LLC*, 526 F. Supp. 2d 504 (E.D. Pa. 2007), abrogated on other grounds relating to the willful noncompliance standard

by *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007).

⁴⁸ 15 U.S.C. § 1681t(b)(1)(F) (expressly preempting the FCRA provisions relating to furnisher duties under 15 U.S.C. § 1681s-2).

⁴⁹ 15 U.S.C. § 1681h(e).

⁵⁰ See, e.g., *Gagliardi v. Experian Information Solutions, Inc.*, No. 08-00892 (W.D. Pa. 2009); *Ori v. Fifth Third Bank*, 674 F. Supp. 2d 1095, 1099 (E.D. Wis. 2009).

⁵¹ See, e.g., *id.*; *Llewellyn v. Shearson Financial Network, Inc.*, 622 F. Supp. 2d 1062, 1069-70 (D. Colo. 2009); *Saint Torrance v. Firststar*, 529 F. Supp. 2d 836 (S.D. Ohio 2007).