

**CREDITORS V. DEBTORS SEMINAR
FCRA – A POWERFUL OR DANGEROUS TOOL FOR DEBT
COLLECTORS?**

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I. INTRODUCTION

Debt collectors can use the reporting of a debt to a consumer reporting agency (CRA) as a “powerful tool designed, in part, to wrench compliance with payment terms” *Rivera v. Bank One*, 145 F.R.D. 614 (D.P.R. 1993).

The fact that reporting debts owed by consumers is a powerful tool cannot be questioned. Nevertheless, is it a dangerous tool? If the area of credit reports¹ is mishandled in one of several ways then this powerful tool can become extraordinarily dangerous for the debt collector.

We will look at three main areas. First, an overview of the FCRA. Second, when can debt collectors pull the credit reports of consumers who owe money? Finally, what are the dangers for debt collectors reporting

¹ The actual term is “consumer reports” but we will use the common designation of “credit reports” in this paper.

information to the CRAs when the consumer disputes the accuracy of the information reported?

II. OVERVIEW OF THE FCRA

A. Players

Furnishers are those individuals or companies (including debt collectors) that furnish or provide information to the CRAs about consumers. This is normally done on a monthly or quarterly basis.

The consumer reporting agencies (“CRAs”), which include Equifax, Experian, and TransUnion², are the companies that compile the credit reports on consumers. The furnishers send the information about consumers to the CRAs who then store that data. When someone requests a “credit report” then the CRA from whom it is requested will “pull” the data together for that consumer and create or compile the report.

A credit report is defined as “any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness” 15 U.S.C. Section 1681a(d)(1).

² There are many others besides these “big three” but for our purposes these will be sufficient.

A “user” of information is anyone who pulls or requests a credit report from a CRA. There are specific rules about who is allowed to pull a report and under what circumstances it is allowable to pull a report.

B. How Credit Reports Are Obtained

It is now much easier for consumers to pull their credit reports. They are allowed to pull them for free every twelve months by going to www.annualcreditreport.com. With advertising on TV and other places, there is more awareness of the need to pull credit reports. Consequently, more consumers know what is on their credit reports. This fact enhances the effectiveness and dangerousness of the credit reporting tool for debt collectors.

C. How Inaccurate Information Is Disputed

If a consumer feels information is inaccurate, there are two ways to dispute it. One way, which invokes the FCRA, is to send a dispute to the CRAs. This can be done in a variety of ways, but the two main ways are by letter and by using the web based system at each CRA’s website. The other way is to dispute directly with the furnisher. Unfortunately for consumers, while this imposes duties upon the furnisher, there appears to be no private

right of action (under the FCRA) unless the CRA notifies the furnisher of the dispute.

Basically the dispute needs to identify the consumer and the account or “trade line” that is alleged to be in error. It also needs to identify what the problem is unless the furnisher has the information in its file to show that the account is inaccurate. For example, if the debt collector knows that the account has been included in bankruptcy and discharged, the dispute letter could simply state the account is “inaccurate” as the debt collector knows it is inaccurate. But, for example, if the debt collector has the wrong “Sara D. Williams” then the consumer should send a letter pointing this out and possibly including an affidavit. The more information given to the CRA, the more responsibility this puts on the CRA to do an adequate job of investigating the dispute.

The CRA is supposed to forward all relevant information to the furnisher so, once again, the more information that is provided then the more responsibility the furnisher has to investigate.

The CRA has thirty days from receipt of the dispute to investigate. 15 U.S.C. Section 1681i(a)(1)(A). In our experience, the extent of the investigation by the CRA is simply to forward the dispute on to the furnisher with an electronic code which describes the dispute. That might be

“bankruptcy” or “disputes account balance” or “not his/her account” etc. This means as a practical matter whether the account/trade line will stay on the consumer’s report or will be deleted or will be modified is up to the furnisher. Therefore, the debt collector must ensure that it has performed a reasonable investigation as it cannot count on the CRA to independently investigate and catch the debt collector’s errors.

D. Statute of Limitations For FCRA Claims

The statute of limitations is now two years from the date the consumer discovers the violation and within five years of the actual violation. 15 U.S.C. Section 1681p. This is a change in the law as *TRW Inc. v. Andrews*, 122 S.Ct. 441 (2001) had held there was no discovery rule in the FCRA. But Congress changed the statute to, in essence, overrule *Andrews* in the 2003 amendments to the FCRA.

With respect to a consumer who has disputed with a CRA information provided by a furnisher, it is two years from when the furnisher received the notification from the CRA of the dispute as there is no private cause of action against a furnisher (under FCRA) until the CRA notifies the furnisher of the dispute. We’ll address this in the final section.

E. Damages Under FCRA

The basic rule is that if a furnisher negligently violates the FCRA then the furnisher is liable for actual damages (compensatory damages – including emotional distress), court costs, and reasonable attorney fees. 15 U.S.C. Section 1681o(a). If the violation is willful then the consumer can receive statutory damages (up to \$1,000) or actual damages and punitive damages. 15 U.S.C. Section 1681n(a).

If someone obtains a credit report without a permissible purpose then the damages are statutory or actual damages, punitive damages, court costs, and attorney fees. 15 U.S.C. Section 1681n(b).

III. PULLING CREDIT REPORTS – HELPFUL OR HARMFUL?

What are the reasons a debt collector would want to pull credit reports? There are several legitimate reasons and several illegitimate ones. There is also recent case law that warns debt collectors to be careful when deciding whether to pull credit reports.

A. Why Pull Credit Reports?

Debt collectors pull reports to help in collection activities. This is the ultimate reason to pull a credit report of a consumer/debtor. Pulling a report

can help a debt collector find a debtor. It can also give guidance to a debt collector as to whether it is worthwhile to try to collect from a consumer. A credit report is similar to a report card – it shows how the consumer is doing financially. Is the consumer paying her bills on time? Maxed out on credit cards? Applying for more credit – perhaps a mortgage? Finally it lets the consumer know that the debt collector is coming after her and may prompt her to contact the debt collector.

Debt collectors, however, have been known to pull reports in order to intimidate or hurt consumers. For example, some debt collectors have told consumers they will pull the consumer's report every day to trash their credit score. Each debt collector pull is a "hard inquiry" and does damage the credit score. It is unclear if the scoring models used by FICO and the CRAs would still allow multiple pulls by a single debt collector to destroy a consumer's credit score. But the threat is still valid enough to intimidate consumers who want to protect their credit score.

B. When Can A Debt Collector Pull A Credit Report?

It used to be assumed that as long as the debt collector was pulling the report for collection purposes, then it was permissible. Now it is not so clear.

The significance of this is pulling a credit report without permission exposes the debt collector to an FCRA lawsuit. Statutory damages can be awarded as well as attorney fees and punitive damages. Pulling credit reports without permission is a perfect example of an invasion of privacy which could quite naturally lead to a large compensatory damage award for emotional distress.

C. Pintos Decision Is A Warning To Debt Collectors

The recent case of *Pintos v. Pacific Creditors Assoc.*, 504 F. 3d 792 (9th Cir. 2007), has created some concern among debt collectors as to when it is proper to pull credit reports to assist in collecting debts.

Pintos sued Pacific Creditors Association (“Pacific) for violations of the FCRA alleging Pacific obtained her credit report “without any FCRA-sanctioned purpose.” 504 F.3d at 796.

The district court granted defendant’s summary judgment motion citing to the Ninth Circuit’s previous decision under *Hasbun v. County of Los Angeles*, 323 f. 3d 801 (9th Cir. 2003), which had held that debt collection was a permissible purpose for obtaining a credit report. 504 F.3d at 796.

The issue was whether the FCRA and FACTA³ (recent amendments to the FCRA) permit a debt collector to pull a credit report for the purposes of collecting any debt or does the debt have to arise out of a voluntary “credit transaction”?

The facts are fairly simple - Pintos’ car was found by police officers with an invalid registration and was therefore towed by P&S towing. P&S later obtained a lien for the cost of towing and storage. Pintos failed to claim the vehicle and it was sold by P&S. The sales price of the vehicle was not enough to cover the lien, so P&S asserted a claim against Pintos for the difference. P&S transferred the claim to the debt collector Pacific to collect the deficiency. 504 F.3d at 796-797.

On December 5, 2002, Pacific pulled a copy of Pintos’ credit report through Experian. It asserted that this was done in connection with its efforts to collect on Pintos’ debt to P&S. 504 F.3d at 797.

The Court began its analysis by noting that “Congress enacted the FCRA in 1970 to promote efficiency in the Nation’s banking system and to protect consumer privacy.” 504 F.3d at 798 [citation omitted]. It has frequently noted that those two goals are in tension and the FCRA attempts to balance the two competing interests. 504 F.3d at 798.

³ “Fair and Accurate Credit Transactions Act of 2003”.

Section 1681b(a) authorizes the furnishing of credit reports for a limited number of purposes. Section 1681b(a)(3)(A) limits the furnishing of reports “in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer.” [Emphasis added]. The Court noted that this section does not provide that all “account collection” is a permissible purpose for obtaining credit reports. Instead, this section is limited to collections on an account “in connection with a credit transaction involving the consumer.” 15 U.S.C. Section 1681b(a)(3)(A). 504 F.3d at 798.

In order to determine whether Pacific had a permissible purpose, the Court undertook a detailed analysis of the terms used in § 1681b(a)(3)(A). The Court focused first on the definition of the term “credit transaction,” noting that the original Act did not define the term “credit.” Congress, however, amended the FCRA in the FACTA defining credit as “the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefore.” 504 F. 3d at 798.

The Court held that a “credit transaction” requires “voluntary consumer participation,” noting “[a] consumer who chooses to initiate a

credit transaction implicitly consents to the release of his or her credit report for related purposes.” 504 F.3d at 799. Thus, the act “forges a direct link” between the consumer’s search for credit and the furnishing of the report. This requirement offers the consumer that degree of privacy protection sought by the Act. The two critical elements are “voluntary” and “direct participation.” 504 F.3d at 799.

In this case, Pintos did not voluntarily seek credit. Obviously, Pintos did not intend for her vehicle to be towed and stored and thus incur the resulting debt to P&S. Thus, the Court held the debt arose involuntarily. Additionally, she did not seek and no one offered her “credit.” Therefore, since Pintos’ credit report was not pulled in the underlying debt as a result of a voluntary credit transaction, Pacific did not have a permissible purpose in pulling the credit report to collect. Pacific did not have any more right to pull the credit report than did the underlying creditor P&S. Though the Court did not articulate this, it implicitly found that P&S would not have had the right to pull the credit report.

The district court’s granting of summary judgment was based on a pre-FACTA case. FACTA specifically defined “credit transaction” where the FCRA had not. Interestingly, the Court specifically noted that it was not addressing whether *Hasbun*, a case in which the government pulled a credit

report to assist in collecting on a child support judgment, would have been decided differently today in this post FACTA world.

Thus, the Court reversed the summary judgment because Pacific did not pull Pintos' credit report related a "proper" credit transaction.

D. Bottom Line For Debt Collectors

Debt collectors must make sure the underlying transaction was a voluntary credit transaction in which the consumer directly participated. There does not seem to be much case law on this issue but several types of debt come to mind that probably are not credit transactions. Emergency room visits – the patient may have been unconscious. But would the doctrine of implied consent apply? Fines or penalties? Child support? Debt collectors must think carefully on these matters as a mistake (particularly an "across the board" mistake on thousands of consumers) could be devastating financially for the debt collector. Consumers must examine every time a debt collector pulls their reports to see why it was pulled and whether the debt collector had a legitimate basis to do so. If not, then a suit against the debt collector may be in order.

IV. DANGERS TO DEBT COLLECTORS FROM CONSUMER DISPUTES

There are two areas in which a debt collector needs to be able to properly handle “disputes” from consumers. One arises out of the Fair Debt Collection Practices Act (FDCPA) and the other is from the reinvestigation part of the FCRA.

A. FDCPA – 1692e(8)

This section of the FDCPA states that it is a violation of the FDCPA to “Communicat[e] or threaten[] to communicate . . . credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.” [Emphasis added].

If a consumer disputes⁴ a debt with a debt collector, and then the debt collector reports or updates the reporting of information, it must tell the CRAs that the account is disputed. This will result in a notation under the “Remarks” section of the trade line that the account “is disputed by consumer” which normally has the effect of it not being considered when the various scoring models (FICO, etc) are used to compute a credit score.

⁴ There is a split over whether this must be in writing or if it can be oral, but the trend seems to be that oral disputes are sufficient so the safest thing for debt collectors is to treat all disputes the same.

This is often overlooked by debt collectors either intentionally or unintentionally. There is an incentive to not mark the account as disputed in order to “encourage” the consumer to pay. The danger, of course, is that this is an absolute violation of FDCPA and so suit can be brought against the debt collector.

In the suit, statutory damages can be awarded and attorney’s fees. The other problem for debt collectors is the consumer may bring an invasion of privacy claim which could expose the debt collector to punitive damages. If the violation of the law is not intentional, then the debt collector will be spared the punitive damages but can still be liable under the FDCPA and state law (invasion of privacy primarily) which means compensatory damages or statutory damages, and attorney fees.

A recent case on this subject explains the law, at least in the Eighth Circuit. In *Wilheim v. Credico, Inc.*, 2008 WL 553207 (8th Cir. March 3, 2008), the Court noted that if the debt collector reports the account and *then* learns of the fact that it is disputed, the debt collector does not have to update the report. But, if the debt collector does update the report, it must note the “disputed” status. 2008 WL 553207 at *2. This opinion ignores the requirements imposed upon debt collectors (furnishers) by 15 U.S.C. Section 1681s-2(a). It does not appear the plaintiff in *Credico* argued this and it will

be interesting to see if this argument changes the outcome of future cases in the Eighth Circuit. But what we do know is that if a debt collector knows about a dispute and then chooses to update or report, it must include the “disputed” status or it faces liability.

B. Disputes Under The FCRA

Section 1681s-2(b) imposes an affirmative duty upon a debt collector (as a furnisher) to investigate a consumer dispute **if** the debt collector receives notice of the dispute from a CRA. That is the critical requirement which many consumers overlook. It makes “common sense” that you could dispute directly with a debt collector for false credit reporting information but that does not trigger any private right of action under the FCRA⁵ if the investigation is either not performed or not performed in a reasonable manner.

Assuming the dispute is made to the CRA and the CRA notifies the debt collector, what must the debt collector do? Basically, the debt collector must perform a reasonable investigation and then report back its findings to the CRA.

⁵ This comment ignores state law which is a different matter as the FCRA obligations supply, in my judgment, the necessary duty under state law.

The debt collector must “conduct an investigation with respect to the disputed information.” 15 U.S.C. Section 1681s-2(b)(1)(A). This includes reviewing all information the debt collector has on the account. The seminal case on what “investigation” means is *Johnson v. MBNA American Bank, N.A.*, 357 F.3d 426 (4th Cir. 2004), which stated in relevant part as follows:

The key term at issue here, “investigation,” is defined as “[a] **detailed inquiry or systematic examination.**” Am. Heritage Dictionary 920 (4th ed.2000); see Webster's Third New Int'l Dictionary 1189 (1981) (defining “**investigation**” as “**a searching inquiry**”). Thus, the plain meaning of “investigation” clearly requires **some degree of careful inquiry by creditors.** Further, § 1681s-2(b)(1)(A) uses the term “investigation” in the context of articulating a creditor's duties in the consumer dispute process outlined by the FCRA. It would make little sense to conclude that, in *431 creating a system intended to give consumers a means to dispute-and, ultimately, correct-inaccurate information on their credit reports, Congress used the term “investigation” to include superficial, unreasonable inquiries by creditors. Cf. *Cahlin v. Gen. Motors Acceptance Corp.*, 936 F.2d 1151, 1160 (11th Cir.1991) (interpreting analogous statute governing reinvestigations of consumer disputes by credit reporting agencies to require reasonable investigations); *Pinner v. Schmidt*, 805 F.2d 1258, 1262 (5th Cir.1986) (same). **We therefore hold that § 1681s-2(b)(1) requires creditors, after receiving notice of a consumer dispute from a credit reporting agency, to conduct a reasonable investigation of their records to determine whether the disputed information can be verified.**

Johnson, 357 F.3d at 430-431 (emphasis added).

This is an area where it becomes very dangerous for debt collectors (particularly debt buyers) to report information when the

debt collector does not keep careful track of the information it has. Being off on the date of the delinquency (“re-aging”) or whether the account is disputed or the amount owed can lead to a lawsuit against the debt collector. In our experience debt collectors do not seem experienced dealing with laws outside of the FDCPA and seem surprised when a case that they view as a “technical” or “statutory” case can result in punitive damages because of the FCRA and state law.

V. CONCLUSION

Using the credit reporting tool can be very useful for debt collectors. It can assist debt collectors in collecting the right debts from the right people. In our practice one of the reasons clients come to see us about suing debt collectors is because the debt collector’s account on the consumer’s credit report is preventing the consumer from obtaining a car or home loan. Credit reporting results in people paying attention.

But, if the credit reporting is misused, this tool can be very dangerous to debt collectors. Lawsuits can result under the strict liability statute of the FDCPA and also under FCRA which allows punitive damages. State law may also be brought against abusive debt collectors.

Debt collectors should be very deliberate about using credit reports and reporting debts to the CRAs. It should not be undertaken lightly – instead serious thought and planning should occur before reporting occurs and before pulling credit reports occurs.

Consumers should be vigilant whenever a debt collector appears in any manner on their credit reports. If there is an inquiry – a credit pull – then this should be investigated. Was there a right to pull the credit report? If not, this may be an excellent lawsuit. If a debt collector is reporting a debt, is it accurate? If not, then it should be disputed with both the CRAs and the debt collector. If it is not resolved, then a lawsuit may be in order pulling from the FDCPA, FCRA, and/or state law.