

Understanding FCRA and FACT Act in Collections

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AGENDA

Overview of the FCRA and FACT Act (17 minutes)

- Who Is Covered?
 - Furnisher vs. Consumer Reporting Agency
- What Conduct Is Regulated?
 - Consumer Reporting
 - Data Accuracy
- What Damages Are Recoverable?
- FACT Act Changes

FCRA Duties (9 minutes)

- Duties of Credit Reporting Agencies
 - Accurate Data
 - Data Security
 - Required Disclosures
 - Addressing Disputes
 - Identity Theft and Special Reports
- Duties of Furnishers
 - Accuracy of Reporting
 - Duty to Correct and Update
 - Duty to Investigate Disputes

Best Practices for CRAs and Furnishers (30 minutes)

- Ensuring Accuracy and Integrity of Data
- Direct Dispute Handling
- Indirect Dispute Handling
- Identity Theft Practices

FCRA Liability and Litigation Issues (11 minutes)

- Willful Versus Negligent Violations
- Standing to Sue
- Reasonableness of Investigations
- Accurate Versus Misleading
- FACT Versus Legal Disputes
- Bankruptcy
- Pay Status
- Dispute Codes
- Interaction With State Law
- Interaction With Other Federal Statutes

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A photograph of three diverse professionals in an office setting. A woman with blonde hair is on the left, a man with glasses and a beard is in the center, and a woman with curly hair is on the right. They are all smiling and looking towards the right. The image is partially covered by a dark overlay containing text and logos.

Understanding the FCRA and FACT Act in Collections

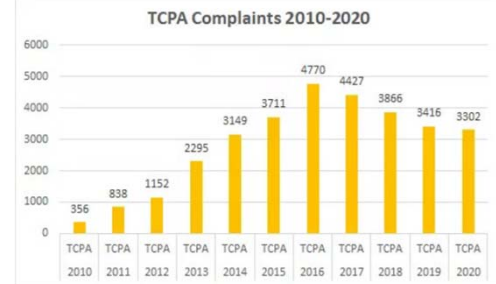
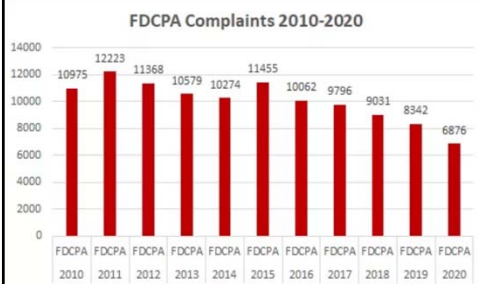
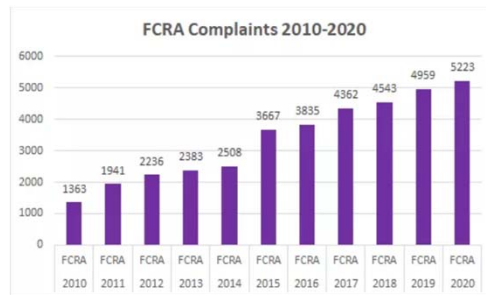
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Trends

<https://webrecon.com/webrecon-stats-for-dec-2020-and-year-in-review/#Reviews>



CFPB Attention

- CFPB Consumer Response Annual Report, March 24, 2021, https://files.consumerfinance.gov/f/documents/cfpb_2020-consumer-response-annual-report_03-2021.pdf (Credit and consumer reporting complaints accounted for more than 58% of complaints received, followed by debt collection (15%), credit card (7%), checking or savings (6%), and mortgage complaints (5%))
- CFPB Supervisory Highlights, June 29, 2021, https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-24_2021-06.pdf

Fair Credit Reporting Act (FCRA)

15 U.S.C. §§ 1681 – 1681x

- Governs the collection, maintenance, and disclosure of consumers' personal credit-related information
- **Prohibits:**
 - Issuing or **using a consumer report for an impermissible purpose** (15 U.S.C. § 1681b)
 - Failing to follow reasonable procedures for **ensuring the accuracy of consumer information** (15 U.S.C. § 1681e(b))
 - **Failing to properly investigate or reinvestigate a consumer's dispute** (15 U.S.C. § 1681s-2)
- Different claims against credit reporting agencies (CRAs) and the entities that furnish information to the CRAs (furnishers)

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

FACT Act

- Fair and Accurate Credit Transaction Act of 2003 amended the FCRA
- Free credit report every 12 months
- www.annualcreditreport.com
- Identity Theft Prevention and Credit History Restoration
- Fraud alerts – 90 day warning upon notification
- Active Duty member provisions
- Red Flags Rule
- Risk-based pricing notifications
- Later amended via Red Flag Program Clarification Act of 2010

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

FCRA: Using Credit Reports Best Practices

15 U.S.C. § 1681m

- **Train employees** regarding the use of consumer reports
 - 12 C.F.R. Pt. 1022, App. E
- Ensure a **permissible purpose** for all reports obtained
 - 15 U.S.C. § 1681b(f)
 - In response to a court order or subpoena
 - In accordance with the written instructions of the consumer
 - For use in connection with certain credit transactions, employment purposes, insurance underwriting, licensure, “otherwise legitimate business needs,” or the issuance of government-sponsored individually-billed travel charge cards
 - In response to a request from a child support agency, under certain conditions
- Comply with procedures regarding address discrepancies
 - 12 C.F.R. § 1022.82

FCRA: 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

FCRA: 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

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FCRA: Overview of Furnisher Duties

15 U.S.C. § 1681s-2

- **Generally, no private right of action for direct disputes**
- **Accuracy duty** – “knows or has reason to believe”
 - Provide accurate and complete information
- **Duty to correct and update**
- **Duty to investigate disputed information**
 - Rules for direct disputes
 - *CFPB v. Syndicated Office Systems, LLC*, 2015-CFPB-0012 (June 18, 2015)

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FCRA: Furnisher Rule

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

Regulation V, 12 C.F.R. 1022, *et seq.*

FCRA: Information Furnishing Best Practices

12 C.F.R. Pt. 1022, App. E

- **Accuracy and Integrity** in furnishing information.
- Appendix E of Regulation V includes guidelines for policies and procedures, including:
 - a system for furnishing information to CRAs that reflects the nature, size, complexity, and scope of the furnisher’s business operations;
 - Standards and procedures for compiling and furnishing data, such as the electronic transmission of information about consumers to consumer reporting agencies;
 - record maintenance designed to substantiate the accuracy of any information;
 - internal controls, including random sampling;
 - training programs;
 - oversight of service providers;
 - a system for preventing re-aging of information or duplicative reporting following a merger, portfolio acquisition, or sale;
 - a system for updating and correcting the debt collector’s records;
 - a system for conducting reasonable investigations of disputes;
 - technological communication with CRAs to prevent duplicative or erroneous reporting
 - periodic evaluation

Responsibilities of Furnishers

15 U.S.C. § 1681s-2(b)

- After receiving notice of a credit reporting dispute a furnisher shall:
 - Conduct an **investigation** with respect to the disputed information;
 - Review **all relevant information** provided by the consumer reporting agency;
 - **Report the results** of the investigation to the consumer reporting agency;
 - If the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis; and
 - If an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified after any reinvestigation under paragraph (1), for purposes of reporting to a consumer reporting agency only, as appropriate, based on the results of the reinvestigation promptly (i) modify that item of information; (ii) delete that item of information; or (iii) permanently block the reporting of that item of information.

FCRA: Damages

- **Willful Violation**
 - \$1,000 in statutory damages or actual damages, whichever is greater
 - Punitive damages
 - No requirement that a consumer demonstrate intentional malice, trickery, or deceit
 - Costs and Attorneys' fees
- **Negligent Violation**
 - Actual damages
 - Costs and Attorneys' fees

FCRA: Dispute Handling Best Practices

12 C.F.R. §§ 1022.41 & 1022.43 & 15 U.S.C. § 1681s

- **Direct dispute handling (no private right of action)**
 - conduct a **reasonable investigation** of all direct disputes and relevant information unless the disputes are frivolous or irrelevant;
 - complete the investigation and notify the consumer within 30 days (or 45 days if the consumer later provides relevant additional information); and
 - notify and provide any corrected consumer information to the CRA.
- **Indirect dispute handling (there is a private right of action)**
 - conduct a **reasonable investigation** of all disputes and relevant information received from the CRA;
 - complete the investigation and notify the CRA;
 - notify and provide any corrected consumer information to all nationwide CRAs; and
 - **modify, block, or delete any information found to be inaccurate**
 - **report consumer dispute status**

Credit Reporting Accuracy

- “plaintiff must show a **factual inaccuracy** rather than the existence of **disputed legal questions** to bring suit against a furnisher”
- “Whether Hunt was obligated to make payments on the mortgage after the Foreclosure Action was filed is a currently unresolved legal, not a factual, question.”
- Where furnisher provides factually accurate information a reasonable investigation would not uncover inaccurate information
- *Hunt v. JP Morgan Chase Bank, Nat’l Ass’n*, 770 Fed. App’x 442 (11th Cir. 2019)
- A plaintiff therefore must offer evidence that the furnisher provided **inaccurate information** to state a viable claim. *Wadley v. Ford Motor Credit Co.*, 397 F. Supp. 2d 781 (E.D. Va. 2005)
- “furnishers are neither qualified nor obligated to resolve matters that turn on questions that can only be resolved by a court of law.” *Chiang v. Verizon New England, Inc.*, 595 F.3d 26, 37 (1st Cir. 2010)
- “a consumer report that contains technically accurate information may be deemed “inaccurate” if the statement is presented in such a way that it creates a **misleading impression**.” *Saunders v. BB&T*, 526 F.3d 142 (4th Cir. 2008).

Factual Inaccuracy vs Legal Dispute

- A clear line has not been drawn between legal and factual inaccuracies in the FCRA context.
- The paradigmatic example of a legal dispute is when a consumer argues that although his debt exists and is reported in the right amount, it is invalid due to a violation of law.
- In contrast, examples of factual inaccuracies include the amount a consumer owes, and what day a consumer opened an account. These questions do not require the consumer reporting agencies to make any legal determinations about the facts or legal judgments. A legal question may also be resolved as a matter of fact if a tribunal—such as a court or arbitrator—has adjudicated the matter. Taking notice of a previously resolved legal dispute involves some knowledge of the legal impact of court decisions, but it does not require the consumer reporting agency to make any legal determinations about the underlying claim.
- These examples show that the central question **is whether the alleged inaccuracy turns on applying law to facts or simply examining the facts alone**. Consumer reporting agencies are competent to make factual determinations, but they do not reach legal conclusions like courts and other tribunals do. Courts sometimes employ different actors to help answer certain questions, but the ultimate result is a legal determination (e.g., that a party is liable). That means whether something is considered a factual question in a court does not resolve whether it is an inaccuracy under the FCRA. Accordingly, *Chemetal*—in which this court held, applying Illinois law, that the intent to enter an assignment is a question of fact in court—does not decide this case.
- *Chuluunbat v. Experian Info. Sols., Inc.*, 4 F.4th 562 (7th Cir. 2021)

Accuracy Marking Account as “Disputed”

A “reasonable investigation” of the at-issue ACDVs would have resulted in Mr. Cooper discovering that Hrebal’s dispute was, at the least, ‘bona fide,’ which should then have resulted in Mr. Cooper reporting Hrebal’s delinquency as ‘disputed’ to the CRA’s, with one of the company’s ‘dispute’ codes.”

Hrebal v. Nationstar Mortgage LLC, 385 F.Supp.3d 849 (D. Minn. 2019)

But see Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1163 (9th Cir. 2009) (“[A] furnisher does not report “incomplete or inaccurate” information within the meaning of § 1681s–2(b) simply by failing to report a meritless dispute It is the failure to report a bona fide dispute, a dispute that could materially alter how the reported debt is understood, that gives rise to a furnisher’s liability under § 1681s–2(b).”)

“Maximum Possible Accuracy”

- Section 1681s–2 does not define what constitutes accurate reporting. Courts applying this provision in actions against furnishers have often looked to suits brought against CRAs under § 1681e(b) to define accuracy. Section 1681e(b) requires CRAs to strive for “**maximum possible accuracy**” in their reporting, which courts have interpreted to mean the reported information “**must be factually true and also unlikely to lead to a misunderstanding**.” By the same token, reported information is inaccurate if it is “factually incorrect, objectively likely to mislead its intended user, or both.” Likewise, courts, including those within the Eleventh Circuit, have determined that information may be inaccurate or incomplete under § 1681s–2(b) if it is “patently incorrect” or is “technically accurate” but “presented in such a way that it creates a misleading impression.” To be actionable, the information must be misleading in a material sense, meaning it must “mislead[] in such a way and to such an extent that it can be expected to [have an] adverse[] effect” on the consumer. And whether reported information is materially misleading is typically a factual issue for a jury to resolve.
- *Abukhodeir v. Amerihome Mort. Co.*, 2021 WL 3510814 (M.D. Fla.)

“Maximum Possible Accuracy” (cont.)

- Applying these standards, the Court finds that Plaintiffs have adequately pled that AmeriHome’s reporting was misleading. Plaintiffs have alleged that they enrolled in AmeriHome’s autopay program; they had sufficient funds to make their mortgage payments; they gave AmeriHome the authority to withdraw the funds from their account; and AmeriHome inexplicably **failed to process their automated payments**. The Eleventh Circuit has recognized that materially misleading reporting is potentially actionable under §1681s–2(b) but has not expressly adopted this standard. Plaintiffs also allege that AmeriHome promised to delete any late fees they had incurred and promised to help them correct any related issues. Accepting these allegations as true, which the Court must at this stage, AmeriHome was responsible for Plaintiffs’ late payments and even acknowledged its responsibility to some extent. So it is thus plausible that AmeriHome’s continued reporting of the late payments could have given potential lenders **a false impression that Plaintiffs were responsible for the delinquencies** and a credit risk, an impression Plaintiffs say manifested itself as evidenced by their claimed damages. For these reasons, the Court finds that Plaintiffs have alleged a potential inaccuracy in AmeriHome’s reporting. AmeriHome’s attempt to refute that it was at fault for Plaintiffs’ late payments is also unavailing and premature.
- *Abukhodeir v. Amerihome Mort. Co.*, 2021 WL 3510814 (M.D. Fla.)

Accuracy – Charged Off Account

“Plaintiff’s credit report plainly states that the Santander Account was ‘closed’ on January 31, 2013, and that the Account was ‘Charged Off,’ ‘Paid in Full,’ and had a ‘\$0’ balance.”

“The fact that the credit report shows that the historical payment terms of her contract required monthly payments of \$345 is not inaccurate or misleading in any way.”

Rodriguez v. Trans Union LLC, No. 19-379 (W.D. Tex. Oct. 28, 2019). See also *Marshall v. Robins Financial Credit Union*, 2020 WL 620575 (M.D. Ga.).

But see Tillman v. Equifax Information Services, 2020 WL 249004 (E.D. Mich.) (“Credit Union knew that the plaintiff’s account was closed and charged-off, with a zero balance, and it was informed that the trade line was reported with a monthly payment obligation, but the Credit Union nonetheless failed to correct the inaccurate reporting”)

FCRA: Identify Theft Best Practices

15 U.S.C. § 1681c-2

- Need policies and procedures to ensure that items of consumer information resulting from **identity theft** are not refurnished to CRAs.
- Cannot furnish information allegedly resulting from an identity theft once the consumer has provided it with an identity theft report, until investigation on identify theft is resolved
- For third-party debt collectors, must notify the creditor for whom it is collecting the debt if any information relating to the debt is fraudulent or the result of identity theft.

Credit Reporting Disputes: the Reasonable Investigation Standard

- AmeriHome also argues that Plaintiffs have failed to state a claim because there are no facts in the Amended Complaint about what exactly AmeriHome did or did not do after it received notice of Plaintiffs' dispute. It argues that without these facts, Plaintiffs have failed to plead an essential element of their FCRA claim—that AmeriHome failed to undertake a reasonable investigation. This is another argument better suited for summary judgment. At this stage, it is enough for Plaintiffs to allege that the furnisher failed to conduct a reasonable investigation by pointing to the errors in the post-investigation reporting. The details of AmeriHome's investigative procedures are solely within its knowledge and will not be revealed until Plaintiffs begin discovery. **Plaintiffs have alleged that AmeriHome continued reporting the late payment information even after reviewing its records and conducting an investigation. This is sufficient for the Court to infer that AmeriHome's investigative procedures were unreasonable.**
- *Abukhodeir v. Amerihome Mort. Co.*, 2021 WL 3510814 (M.D. Fla.)

Investigation Reasonableness

- The "FCRA does not mandate that the furnisher's investigation resolve the dispute on the merits; the furnisher must only conduct a reasonable investigation **based on the information it receives** from the credit reporting agency."
- "when the information provided to a furnisher ... suggests that a consumer is disputing a debt generally, without specific claims as to why a reported debt is inaccurate, the furnisher satisfies its duty to conduct a reasonable investigation by verifying that the information in its records is identical to that provided by a credit reporting agency."
- "Conversely if notices from a credit reporting agency or a consumer state that a consumer is disputing a debt by alleging fraud or identity theft, the furnisher is obliged to investigate the dispute more thoroughly to have conducted a 'reasonable' investigation."
- *Alston v. Trident Asset Mgm't., LLC*, 2019 WL 2525378 (Md.)

Pay Status / “0” Balance and “Past Due”

- Here, the information Nelnet furnished is not inaccurate, nor does it create a materially misleading impression of Plaintiff’s credit history. Although Plaintiff alleges that Nelnet “is reporting that Plaintiff is currently 120 days delinquent on an account which Plaintiff is no longer obligated to make payments,” when read as a whole, it is clear that the information Nelnet provided is historical and regards Plaintiff’s accounts as of May 2015 when they were closed/transferred to another servicer. As such, that information makes no reference to any current payment obligation.
- To adopt Plaintiff’s position, this Court would have “to read in nonexistent present tense language” into the information Nelnet furnished regarding an account it closed in 2015.
- In addition, this Court would have to “parse and squint, and consider only the pay status line” as opposed to the entirety of the furnished information. This Court declines to take such a narrow approach and instead joins the numerous courts which have held that “the mere reporting of historical information on a closed account with a \$0 balance neither causes confusion nor creates an inaccuracy when it is clear there exists no ongoing obligation for payment.”
- *Egues v. Nelnet Servicing, LLC*, 2021 WL 3486904 (D.N.J.)

Investigation and Accuracy Payment on Note or Payment on Plan?

- Felts’ apparent compliance with the terms of a second, separate agreement she entered into with Wells Fargo — the Plan — has no bearing on the accuracy of the information Wells Fargo reported to the CRAs regarding Felts’ compliance with the terms of her first, original agreement — the Note — unless the Plan legally modified the terms of the Note.
- *Felts v. Wells Fargo Bank, N.A.*, 893 F.3d 1305 (11th Cir. 2018)

Pay Status Field Claims

Example of plaintiffs focusing on one reporting field to exclusion of the rest.

- Pay Status Field –historical data field that shows account’s status at time of some other event; for example, when the account was paid off, charged off, or transferred to another creditor
- Argument that reporting a pay status showing delinquency is inaccurate where account balance is \$0, due to either charge off or transfer. See *Macik v. JP Morgan Chase Bank, N.A.*, 2015 WL 12999728 (S.D. Tex. May 28, 2015) (jury could conclude the information in the pay status field “was inaccurate or incomplete because it was misleading”); *Smith v. Trans Union, LLC, et al.*, No. 20-4903 (E.D. Pa. Mar. 19, 2021) (past due in the pay status field “would lead one to believe the account was past due and continued to be past due, or not fully paid, when the balance was zeroed out when it was closed.”)

Failure to Remove Dispute Code

- Necessarily, an account's status, listed in a notation on the credit report, is considered an item of information for purposes of § 1681i.
- The instant claim is based on a dispute over the status of an account listed in a credit report, and the disputed status happens to be whether the account was disputed with the original creditor. Plaintiff pled that Trans Union incorrectly reported his account's status as disputed, that he notified Trans Union of the inaccurate notation, and that the inaccuracy remained after he contacted Trans Union. Thus, Plaintiff complied with the requirements for stating a claim under § 1681i as listed in *Hamm v. Equifax Info. Servs. LLC*, 2018 WL 3548759 (D. Ariz.)
- *Troy v. Equifax Info. Servs., LLC*, 2021 WL 3191232 (D. Ariz.)

Pay Status – Review as a Whole

- Other courts have rejected FCRA claims based on pay status field following a review of tradeline as a whole. *Settles v. Trans Union LLC*, No. 20-84, 2020 WL 6900302 (M.D. Tenn. Nov. 24, 2020) (“implausible that a creditor would be misled into believing Plaintiff is currently 120 days past due on his payment obligation each month when the reporting of the account states that the account was closed in February 2014 and has a zero-dollar balance.”)
- *Bibbs v. Trans Union LLC*, 2021 WL 695112 (E.D. Pa. Feb. 23, 2021) (“we must view the account information given to the creditor in its entirety, and doing so, the reported information is accurate as a matter of law.”). See also *Ostrander v. Trans Union LLC*, 2021 WL 3271168 (E.D. Pa. July 30, 2021) (pay status field of a credit report cannot be read in isolation)

Accuracy – “Included In Bankruptcy”

“standard of accuracy is an objective measure that should be interpreted in an evenhanded manner toward the interests of both consumers and potential creditors”

“‘included in bankruptcy’ was not inaccurate or misleading. That description is factually correct because it demonstrates that the accounts at issue were part of Plaintiff’s bankruptcy filing. Further, upon review of the description, a potential creditor would understand that the account was discharged in bankruptcy despite the fact that the term ‘discharged’ was not specifically utilized.”

Clark v. Trans Union, LLC, 2019 WL 3505446 (N.D. Ga.)

Accuracy – Bankruptcy / Chapter 13 Plan Payments

“a furnisher who reports delinquent debts ‘during the pendency of a bankruptcy should also report the fact that a bankruptcy is pending so creditors know that those delinquent debts may be discharged in the future.”

“defendants deviated from the credit reporting industry Metro 2 standards and that this deviation would mislead potential creditors and prompt those making credit decisions to draw negative inferences”

Sanchez v. Servis One, 2019 WL 2373565 (S.D. Cal.)

FCRA and FDCPA Not Mutually Exclusive

The FCRA does not provide that it is the exclusive remedy when a debt collector furnishes false information to a credit bureau. Even if a consumer cannot sue a furnisher of information under the FCRA, nothing forbids a consumer from suing a debt collector under the FDCPA.

“Communicating ‘false, deceptive, or misleading’ information regarding [the consumer’s] debt obligation to credit bureaus, harming [the consumer’s] credit, may violate both Sections 1692e and 1692f.”

Escobar v. Midland Credit Mgm’t., No. 18-819 (Conn. Aug. 8, 2019)

Punitive Damages for Inaccuracies

The furnisher failed to create a reliable system for inputting information regarding the settlement of litigation, was aware that system was unreliable, was incumbent on it to ensure that the terms of the settlement agreement were communicated to those who report. Since had not taken these necessary steps, it was foreseeable that any investigation of the disputed information would yield an incorrect conclusion by its employees.

willfulness includes reckless conduct, not solely conduct that is intentional or purposeful.

Marchisio v. Carrington Mort. Serv., Inc., 2019 WL 1320522 (11th Cir.)

Permissible Purpose

- The plaintiffs do not contend that evaluating a debtor for alternatives to foreclosure is not a permissible reason for obtaining a credit report under § 1681b(a)(3). And it seems clear to us that using a credit report for this purpose fits within the scope of § 1681b(a)(3)(A): it is using the information “in connection with a credit transaction involving the consumer . . . and involving the extension of credit to, or review or collection of an account of, the consumer.”
- The plaintiffs seem to offer two responses to Ocwen’s claim that it could permissibly use the information in the credit reports to evaluate them for alternatives to foreclosure. First, the plaintiffs assert that, following their discharges, they never expressed interest in alternatives to foreclosure. But we fail to see why this should matter. In evaluating the plaintiffs for eligibility for alternatives to foreclosure, Ocwen would have been reviewing the plaintiffs’ outstanding accounts and attempting to collect the value of the collateral, which it was permitted to do even after the plaintiffs received discharges. Thus, even if the plaintiffs did not request alternatives to foreclosure, Ocwen could have explored those options and, if the plaintiffs qualified for an alternative, presented them with an offer in lieu of foreclosure. Nothing in § 1681b(a)(3)(A) suggests that a consumer must request an alternative to foreclosure before the creditor may review the consumer’s account to determine whether he or she is eligible.
- Second, the plaintiffs claim that, by the time Ocwen obtained their credit reports, they had “surrendered and vacated” their properties. . . . Still, it does not follow that Ocwen did not have a reason to review their accounts to determine if they qualified for alternatives to foreclosure. Ocwen could have reasonably thought that even a debtor that moved out of his or her home might be interested in returning if Ocwen made a sufficiently attractive offer. Thus, Ocwen was permitted to review the plaintiffs’ accounts—and their credit reports—to determine whether it could offer them alternatives to foreclosure.
- In reaching this conclusion, we do not mean to suggest that there is never a point at which a mortgage servicer or lender will lack a permissible purpose to review the credit report of a consumer whose mortgage debt has been discharged. We imagine that if a consumer clearly informs the servicer or lender that he or she has no interest in avoiding foreclosure, then the servicer or lender might lack a permissible purpose for continuing to review the consumer’s credit.
- *Marino v. Ocwen Loan Servicing, LLC*, 978 F.3d 669 (9th Cir. 2020)

Standing

- Spokeo-Art. III Standing requires a concrete and particularized injury.
- *Ramirez*-confirmed *Spokeo* holding that a plaintiff must have suffered “concrete harm” resulting from an alleged statutory violation to satisfy the injury-in-fact requirement for Article III standing. A plaintiff may not allege a bare statutory violation to have standing in federal court. And class members who themselves lack standing cannot participate in federal class actions.
- *Ramirez* quotes:
 - “[U]nder Article III ,an injury in law is not an injury in fact.”
 - Only “those plaintiffs who have been concretely harmed by a defendant’s statutory violation may sue that private defendant over that violation in federal court.”
 - “Congress’s say-so” is not enough to create concrete harm where none otherwise exists.
 - Courts should “assess whether the alleged injury to the plaintiff has a ‘close relationship’ to a harm ‘traditionally’ recognized as providing a basis for a lawsuit in American courts.”

Cases After *Ramirez*

- *Norman v. BosakMotors of Burns Harbor LLC*, 2021 WL 4749617 (N.D. Ind.) (Oct. 12, 2021) (“lowered credit score, without more, is insufficient to constitute an injury in fact”)
- *Gadomski v. PatelcoCredit Union*, 2022 WL 223878 (E.D. Ca. Jan. 25, 2022) (no standing even though borrower alleged actual damages and emotional distress)
- *But see Persinger v. Southwest Credit Sys., L.P.*, No. 21-1037 (7thCir. Dec. 22, 2021) (held that privacy harms can be sufficient for standing, even where there were no other actual injuries)
- *Grauman v. Equifax Info. Servs., LLC*, 2021 WL 3239865 (E.D.N.Y. July 16, 2021)(dismissing FCRA claims for lack of standing where plaintiff’s “pleadings do not state that he has been damaged by any risks of financial or reputational harm, such as fears that his credit report would soon be disseminated”).

Reporting During Bankruptcies

- Delinquencies Prior to Bankruptcy
- P: Violation of the FCRA to furnish to a CRA that a borrower is delinquent for failing to make loan payments while in bankruptcy. In support, they cite the Credit Reporting Resource Guide and/or Metro 2 Guidelines.
- D: courts “have repeatedly and persuasively rejected the argument that it is ‘inaccurate or misleading’ as a matter of law simply to report delinquent debts that have not been discharged in bankruptcy.” See, e.g., *Mosley v. Monterey Fin. Servs., LLC*, 2017 WL 8186861, at *4 (N.D. Ga. May 10, 2017). Moreover, it is well established that these “industry guidelines . . . do not establish the standards for accuracy under the FCRA.” *Coulter v. Chase Bank USA, N.A.*, 2020 WL 5820700, at *12 (E.D. Pa. Sept. 30, 2020).

Service Transfers and Bankruptcy

- Service Transfers
- P: When a furnisher transfers servicing rights to another furnisher, failure to update the tradeline is a violation of the FCRA.
- D: Several district courts addressing this very same argument have held that a furnisher has no duty to update a tradeline to reflect events that occurred after the furnisher transferred the account to another entity. See *Gibbs v. Lending Club Corp.*, 2021 WL 5033484, at *4 (N.D. Ga. Sept. 14, 2021) (holding that furnisher did not violate the FCRA by failing to update its reporting to note that a Chapter 13 bankruptcy was filed after the account was sold to another party).

Questions?



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