

**Presentation by Joseph S. Messer to the Illinois Collectors Association, April 21, 2004**

**Fair Credit Reporting Act Issues**

Recently we have seen a significant increase in the number of lawsuits filed against our collection agency clients under the Fair Credit Reporting Act, 15 U.S.C. §1681 *et seq.* (FCRA). Some lawsuits are legitimate, but most are bogus. We turned the tables on some of the bogus lawsuits.

- A. Often, an FCRA claim comes in conjunction with a lawsuit filed under the Fair Debt Collection Practices Act (FDCPA). Sometimes the FDCPA claim is good but the FCRA claim is bogus. Sometimes it's the other way around. Occasionally, it's just a straight-up FCRA claim. The typical FCRA claim goes something as follows:
  - 1. The Agency has reported false information regarding an alleged debt owed by the consumer plaintiff (*i.e.*, either there is a mistake and the consumer does not owe the debt, or there is an error in the reporting, such as the wrong creditor or amount owed).
  - 2. The Credit Reporting Agencies ("CRAs") (*e.g.*, Trans Union or Experian) have been falsely or inaccurately reporting that the consumer owes the alleged debt through the issuance of consumer credit reports. Often, one or more CRAs is also a defendant to the lawsuit.
  - 3. The consumer has disputed the inaccurate information (either to the CRAs, the Agency, or both).
  - 4. Regardless of consumer's notice of dispute, the CRAs are continuing to publish false and inaccurate credit reports' showing the consumer owes the debt. With respect to the Agency, the consumer alleges:
    - a. The Agency failed to conduct a timely and reasonable investigation of consumer's dispute after being contacted by the consumer and/or the CRA regarding the same;

- b. The Agency willfully or negligently failed to report the results of its investigation regarding the disputed information to the CRA after being contacted by the consumer and/or the CRA regarding the dispute; and/or
  - c. The Agency willfully reported the false information in an effort to collect an illegitimate debt from the consumer.
5. The consumer has applied for and been denied various loans and extensions of credit or has received unfavorable financing or been forced to pay higher interest rates because of the false and inaccurate consumer credit reports issued by the CRAs.
- a. As a result, the consumer has suffered actual damages such as:
    - i) Losses relating to credit denials (e.g., lost opportunity costs through lost use of funds);
    - ii) Losses as a result of having to pay excessive interest rates and financing charges;
    - iii) Out-of-pocket expenses (local & long distance phone calls, faxing and postage in effort to rectify the situation);
    - iv) Decreased credit score due to multiple inquiries;
    - v) Dignitary harm, loss to reputation and embarrassment; and
    - vi) Physical, emotional and mental pain and anguish.
  - b. The consumer is seeking punitive damages from the Agency as a result of Agency's outrageous conduct; and
  - c. The consumer is seeking attorneys' fees and court costs as a result of the claim.
- B. The Law (or, "Are we really in trouble or is this guy just blowing smoke?")
- 1. The FCRA is primarily targeted at CRAs.
    - a. CRAs must "follow reasonable procedures to assure maximum possible accuracy" of the information contained in consumer credit reports. 15 U.S.C. 1681e(b).
    - b. If a consumer notifies a CRA of a dispute regarding information in their credit report the CRA must "reinvestigate" the disputed information or delete it within

30 days<sup>1</sup> after receiving the notice. 15 U.S.C. 1681i(a)(1). As part of the “reinvestigation”:

- i) Within 5 days of receipt of the dispute the CRA must notify the Agency of the dispute and include “all relevant information regarding the dispute that the CRA has received from the consumer”. 15 U.S.C. 1681i(a)(2)(A)
  - ii) If the CRA receives additional information from the consumer regarding the dispute within the 30-day “reinvestigation” period, they must promptly provide it to the Agency. 15 U.S.C. 1681i(a)(2)(B)
  - c. If the CRA “reasonably determines” that the consumer’s dispute is “frivolous or irrelevant” (including because the consumer fails to provide sufficient information to investigate the disputed information) the CRA may terminate the reinvestigation, but must notify the consumer if they do so. 15 U.S.C. 1681i(a)(3).
  - d. If the CRA’s reinvestigation determines the disputed information is “inaccurate or incomplete or cannot be verified”, the CRA must promptly delete the information from the consumer’s file or “modify the information, as appropriate”. 15 U.S.C. 1681i(a)(5)(A).
    - i) If information is deleted or modified, at the consumer’s request the CRA must notify those who received the credit report within the prior 6 months of the change (6 years for employment purposes). 15 U.S.C. 1681i(d)
    - ii) Information that has been deleted by a CRA may be reinserted if the Agency “certifies that the information is complete and accurate”, but the CRA must notify the consumer of the reinsertion. 15 U.S.C. 1681i(a)(5)(B).
  - e. If the reinvestigation does not resolve the dispute the consumer may file a brief statement with the CRA setting forth the nature of the dispute. 15 U.S.C. 1681i(b). If the consumer does so the CRA must note the information is in dispute in subsequent credit reports and provide the consumer’s statement or an accurate summary thereof, unless there is “reasonable grounds” to believe the statement of dispute is “frivolous or irrelevant”. 15 U.S.C. 1681i(c).
2. However, **the FCRA also applies to Collection Agencies** (who are “data furnishers”).
- a. An Agency may not furnish information relating to a consumer to a CRA if the Agency knows or “**consciously avoids knowing**” the information is inaccurate.

---

<sup>1</sup> The 30 day reinvestigation period can be extended for not more than 15 additional days if the CRA receives information from the consumer during the 30-day period that is relevant to the reinvestigation, unless within the 30-day period the CRA determines the information is inaccurate, incomplete or cannot be verified. 15 U.S.C. 1681i(1)(B)&(C).

15 U.S.C. 1681s-2(a)(1)(A). This section has been substantially modified by FACTA, discussed below.

- b. An Agency may not furnish information relating to a consumer to a CRA if: (1) the Agency has been notified by the consumer, at the address specified by the Agency for such notices, that the information is inaccurate, and (2) the information is, in fact, inaccurate. 15 U.S.C. 1681s-2(a)(1)(B).
  - i) **IMPORTANT:** An Agency that clearly and conspicuously specifies to the consumer an address to which they can send notice of an error shall not be liable for knowingly furnishing (or consciously avoiding knowledge of ) inaccurate information pursuant to 15 U.S.C. 1681s-2(a)(1)(A). *See*, 15 U.S.C. 1681s-2(a)(1)(C).
  - ii) Thus, to avoid liability under 15 U.S.C. 1681s-2(a)(1)(A) Agencies should not report a delinquent debt to a CRA until **after** the Agency has sent the debtor a letter containing a validation notice.
- c. An Agency that routinely reports debts to a CRA must promptly notify the CRA if it determines that information it has reported is inaccurate or incomplete, provide the information necessary to correct the report and thereafter not report the inaccurate or incomplete information to the CRA. 15 U.S.C. 1681s-2(a)(2)(A)&(B).
- d. If a debtor disputes the completeness or accuracy of any information furnished by the Agency to a CRA, the Agency may not furnish the information without notifying the CRA that the debtor disputes the information<sup>2</sup>. 15 U.S.C. 1681s-2(a)(3).
- e. If an Agency receives a notice **from a CRA**<sup>3</sup> that a debtor has disputed the completeness or accuracy of information provided by the Agency (pursuant to 15 U.S.C. 1691i(a)(2)), the Agency must do the following within 30 days<sup>4</sup>:
  - i) Conduct an investigation regarding the disputed information;
  - ii) Review “all relevant information” provided by the CRA pursuant to 15 U.S.C. 1691i(a)(2);

---

<sup>2</sup> Under 15 U.S.C. 1681s-2(a) (2) and (3), the Agency need only report the debt as disputed if the Agency is aware of the dispute **at the time** the Agency reports the debt to the CRA. The Agency has no duty to investigate the matter if it receives notice of a dispute **from the consumer after the report has been made to the CRA**. To help avoid (or defend) frivolous lawsuits, however, an Agency should treat a post report notice of dispute from the consumer as it would a notice of dispute from a CRA.

<sup>3</sup> As noted above, and interpreted by at least one court, under its plain language §1681s-2(b) only “triggers a [Collection Agency’s] duty to investigate allegedly erroneous information when that [Agency] has received notice from a *consumer reporting agency* (as opposed to the consumer) that the credit information is disputed.” *Dornhecker*, 99 F.Supp.2d at 928.

<sup>4</sup> Which period can be extended as stated in footnote 1 above.

- iii) Report the results of the investigation to the CRA; and
- iv) If the investigation determines the information is incomplete or inaccurate, report those results to all other CRAs to which the Agency furnished the information **and** to all other CRAs that “maintain files on consumers on a nationwide basis **Note that this provision requires the Agency to report results to all nationwide CRAs, regardless of whether the Agency reported to those CRAs in the first place.**

(See, 15 U.S.C. 1681s-2(b).)

C. Liability for Violating the FCRA (or, “Oops, we screwed-up. How much do we have to pay?”)

- 1. Liability for willful noncompliance. An Agency that “**willfully fails to comply**” with any requirement imposed on it under the FCRA is liable to the consumer for:
  - a. The consumer’s actual damages sustained as a result of the failure to comply **of not less than \$100 and not more than \$1,000;**
  - b. Any punitive damages awarded by the Court; and
  - c. In the case of a “successful action to enforce liability”, the Consumer’s court costs and “reasonable” attorney’s fees.

(See, 15 U.S.C. 1681n(a).)

- 2. Liability for Negligent Noncompliance. An Agency that is “**negligent in failing to comply**” with any requirement imposed on it under the FDCPA is liable to the consumer for:
  - a. The consumer’s actual damages sustained as a result of the failure. **Note that there is no cap on liability for actual damages in negligence cases;**
  - b. In the case of a “successful action to enforce liability”, the Consumer’s court costs and “reasonable” attorney’s fees.

(See, 15 U.S.C. 1681o(a).)

D. Defenses to Liability Under the FCRA (or, “It looks like we screwed up, but can we get out of this lawsuit?”)

- 1. First question: Who filed the lawsuit and exactly what violation of the FCRA are they alleging?

- a. Consumers may not sue Collection Agencies for violations of 15 U.S.C. §1681s-2(a). Pursuant to 15 U.S.C. §1681s-2(c) and (d) only the government may enforce this provision<sup>5</sup>. Thus, a consumer cannot sue an Agency for:
  - i) Furnishing information relating to the consumer to a CRA when the Agency knows or “**consciously avoids knowing**” the information is inaccurate. 15 U.S.C. 1681s-2(a)(1)(A); or
  - ii) Furnishing information relating to the consumer to a CRA if: (1) the Agency has been notified by the consumer, at the address specified by the Agency for such notices, that the information is inaccurate, and (2) the information is, in fact, inaccurate. 15 U.S.C. 1681s-2(a)(1)(B).
- b. Therefore, usually the only potentially viable claim a consumer typically has against a Collection Agency is that the Agency violated 15 U.S.C. 1681s-2(b) by failing to properly conduct an investigation and report its findings after receiving a notice **from the CRA** that the consumer has disputed the completeness or accuracy of information provided to the CRA.

Under the proper reading of 15 U.S.C. 1681s-2(b) it is notice from the CRA that counts. An Agency should not be liable to a consumer for failing to respond to such a notice received directly from the consumer<sup>6</sup>.

2. If the consumer has standing to sue, the Agency can defend a claim under 15 U.S.C. 1681s-2(b) on the grounds that:
  - a. The CRA did not send the Agency notice pursuant to § 1681i of a dispute received by the consumer. Thus, the Agency’s obligation to investigate was never triggered.
  - b. The CRA did not send the Agency “all relevant information regarding the dispute that the CRA received from the consumer”, and the Agency was therefore unable to conduct an adequate investigation.
  - c. The Agency did conduct an investigation and reported the results to the CRA but the CRA failed to update the consumer’s credit report with the results.

E. Arguments to limit damages when an Agency is liable under the FCRA (or, “O.K., you got me, but its not that big a deal.”)

---

<sup>5</sup> See also *Dornhecker v. Ameritech Corp.* 99 F.Supp.2d 918, 925 (N.D. Ill.2000), in which the court held that 15 U.S.C. 1681s-2(c) prohibits private parties from bringing a civil action against data furnishers for violating 15 U.S.C. 1681s-2(a).

<sup>6</sup> However, it is good practice for an Agency to treat notices from consumers as they would notices from CRAs. Further, doing so helps to avoid liability to the government for violating 15 U.S.C. 1681s-2(2) for failing to update information reported to CRAs and/or to provide CRAs with notice of the dispute.

1. The Agency is not liable for punitive damages because the Agency did not “willfully” fail to comply with the FCRA. 15 U.S.C. 1681n(a).
  2. The consumer did not suffer significant “actual damages” as a result of the Agency’s failure to comply with the FCRA. 15 U.S.C. 1681n(a)(1)(A) & 1681o(a)(1). To make this determination the Agency will likely have to file a “bill of particulars” in response to the consumer’s complaint or seek the information through the discovery process.
  3. The consumer failed to mitigate his damages by not filing a statement of dispute with the CRA pursuant to 15 U.S.C. 1681i(b).
  4. The consumer failed to mitigate his damages by requesting that the CRA notify those to whom credit reports were sent that the consumer has disputed the debt pursuant to 15 U.S.C. 1681i(d).
- F. How to Make the Agency Whole if the FCRA Lawsuit is Frivolous (or, “How do I make those bastards who filed this bogus lawsuit pay my attorneys fees?”)
1. The FCRA has a more favorable attorney’s fee provision for Agencies than the FDCPA. It states: Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or<sup>7</sup> for purposes of harassment, the court shall award to the prevailing party attorney’s fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper. 15 U.S.C. 1681n(c).
  2. But to be made whole the Agency must go on the defensive:
    - a. Don’t cave-in by paying “ransom” to settle frivolous lawsuits. If the “wolf is at the door” don’t throw him a bone, or, in the words of Arnold Schwarzenegger, he will “be back.”
      - i) Agencies that routinely settle frivolous suits are viewed as “low hanging fruit” for predatory attorneys.
      - ii) Conversely, predatory attorneys often shy away from Agencies that aggressively defend frivolous suits.
    - b. File a Counterclaim or a motion seeking attorneys’ fees and costs under 15 U.S.C. 1681n(c), and seek sanctions under Rule 11 of the Rules of Federal Procedure.
      - i) Rule 11 requires attorneys to have a good faith belief that their pleadings (1) are not being filed for an improper purpose; (2) are warranted under the law

---

<sup>7</sup> As opposed to “and” under the FDCPA.

(or a nonfrivolous extension of law); and (3) are likely to have evidentiary support.

c. Take the same approach when the Agency receives a blackmail letter.

G. Summary of Relevant Fair and Accurate Credit Transactions Act of 2003 Amendments to the FCRA:

1. (Sec. 152) Requires a consumer reporting agency to block the reporting of information that the consumer alleges resulted from **identity theft**. Cites circumstances under which such agency may decline to block, or may rescind any block of information.
2. (Sec. 153) Prescribes guidelines for: (1) coordination of consumer complaint investigations; (2) prevention of repollution of consumer reports; and (3) **debt collector** communications concerning identity theft.
3. (Sec. 155) Notice by **debt collectors** with respect to fraudulent information.

Section 615 of the FCRA is amended to require that if a debt collector is notified that any information relating to a debt that they are attempting to collect for a third party may be fraudulent or may be the result of identity theft, they must:

“(1) notify the third party that the information may be fraudulent or may be the result of identity theft; and

“(2) upon request of the consumer to whom the debt purportedly relates, provide to the consumer all information to which the consumer would otherwise be entitled if the consumer were not a victim of identity theft, but wished to dispute the debt under provisions of law applicable to that person.”

4. (Sec. 156) Extends the statute of limitations for civil liability for violations of FCRA from two to five years after the date on which the violation occurs (but not later than two years after the violation is discovered).
5. (Sec. 312) Procedures to enhance the accuracy and integrity of information furnished to consumer reporting agencies.
  - a. Duty of Furnishers To Provide Accurate Information.--Section 623(a)(1) of the Fair Credit Reporting Act (15 U.S.C. 1681s-2(a)(1)) is amended (i), by striking “**knows or consciously avoids knowing that the information is inaccurate**” and inserting “**knows or has reasonable cause to believe that the information is inaccurate**”. Defines “reasonable cause to believe that the information is inaccurate” to mean **having specific knowledge, other than solely allegations by the consumer, that would cause a reasonable person to have substantial doubts about the accuracy of the information.**”.

b. Ability of Consumer To **Dispute Information Directly With Furnisher**. Section 623(a) of the Fair Credit Reporting Act (15 U.S.C. 1681s-2(a))

Requires regulations to identify the circumstances under which a furnisher shall be required to reinvestigate a dispute concerning the accuracy of information contained in a consumer report on the consumer, based on a direct request of a consumer. The regulations must include the following framework:

(D) Submitting a notice of dispute. A consumer who seeks to dispute the accuracy of information shall provide a dispute notice directly to the Agency at the address specified by the Agency for such notices that

- (i) identifies the specific information that is being disputed;
- (ii) explains the basis for the dispute; and
- (iii) includes all supporting documentation required by the furnisher to substantiate the basis of the dispute.

(E) After receiving a notice of dispute from a consumer pursuant to subparagraph (D), the Agency must:

- (i) conduct an investigation with respect to the disputed information;
- (ii) review all relevant information provided by the consumer with the notice;
- (iii) complete such person's investigation of the dispute and report the results of the investigation to the consumer before the expiration of the period under section 611(a)(1) within which a consumer reporting agency would be required to complete its action if the consumer had elected to dispute the information under that section; and
- (iv) if the investigation finds that the information reported was inaccurate, promptly notify each consumer reporting agency to which the Agency furnished the inaccurate information of that determination and provide to the CRA any correction to that information that is necessary to make the information provided by the person accurate.

(F) Frivolous or irrelevant dispute.

- (i) In general. This paragraph shall not apply if the person receiving a notice of a dispute from a consumer reasonably determines that the dispute is frivolous or irrelevant, including:

- (I) by reason of the failure of a consumer to provide sufficient information to investigate the disputed information; or
- (II) the submission by a consumer of a dispute that is substantially the same as a dispute previously submitted by or for the consumer, either directly to the person or through a CRA under subsection (b), with respect to which the person has already performed the person's duties under this paragraph or subsection (b), as applicable.

(ii) Notice of determination. Upon making any determination under clause (i) that a dispute is frivolous or irrelevant, the Agency shall notify the consumer of such determination not later than 5 business days after making such determination, by mail or, if authorized by the consumer for that purpose, by any other means available to the person.

(iii) Contents of notice. A notice under clause (ii) shall include:

- (I) the reasons for the determination under clause (i); and
- (II) identification of any information required to investigate the disputed information, which may consist of a standardized form describing the general nature of such information.

(G) This new procedure shall not apply if the notice of the dispute is submitted by, is prepared on behalf of the consumer by, or is submitted on a form supplied to the consumer by, a credit repair organization, as defined in section 403(3), or an entity that would be a credit repair organization, but for section 403(3)(B)(i).

6. (Sec. 314 ) Improved Disclosure of the Results of Reinvestigation.

a. Requires consumer reporting agencies which determine, upon reinvestigation, that information was inaccurate, incomplete, or unverified to promptly notify the information furnisher, such as a **Collection Agency**, of such action. Requires the Agency in such instances to promptly delete or modify such information.

- (1) Imposes Requirements on Agencies Relating to Inaccurate, Incomplete, or Unverifiable Information. This provision require that if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified by the Agency after any reinvestigation, for purposes of reporting to the CRA only, as appropriate, based on the results of the reinvestigation the Agency must promptly—
  - (ii) modify that item of information;
  - (iii) delete that item of information; or
  - (iv) permanently block the reporting of that item of information."

7. (Sec. 316 ) Sets forth reinvestigation requirements for resellers notified of disputed consumer information.
8. (Sec. 317) Revises the requirement that a consumer reporting agency reinvestigate disputed information to require a reasonable reinvestigation to determine whether the disputed information is inaccurate.
9. (Sec. 412) Prohibits a consumer reporting agency from including in any consumer report the name, address, and telephone number of any medical information furnisher except in code, unless the report is provided to an insurance company for other than property and casualty insurance purposes.
10. (Sec. 711) Repeals the termination after January 1, 2004, of Federal preemption of State law by FCRA (thus extending such Federal preemption indefinitely).

H. Effective Dates – *see attachment*

---

Messer & Stilp, Ltd. is a Chicago firm specializing in the defense of collection agencies in Fair Debt Collection Practices Act, Fair Credit Reporting Act and other consumer litigation. We provide efficient and effective representation and strive to terminate frivolous and abusive lawsuits as rapidly and decisively as possible.

If you have questions or comments feel free to contact Joe Messer at (312) 334-3440 or by e-mail: [Messer@MesserStilp.com](mailto:Messer@MesserStilp.com)

---

Disclaimer: These materials have been prepared for educational purposes. They are not intended to give legal advice, nor should they be relied upon as such. Because specific circumstances affect compliance with the laws described herein, you are advised to review your circumstances with qualified legal counsel to ensure proper implementation.