

**KEEPING UP WITH THE CFPB EPISODE 3: EVOLVING FEDERAL AND STATE REQUIREMENTS FOR FURNISHERS AND USERS OF CONSUMER REPORTS**

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**GUESTS: ALAN WINGFIELD, CHRIS CAPURSO, DEREK SCHWAHN**

**Ethan Ostroff (00:05):**

Hello, and welcome to a special edition of Troutman Pepper's Consumer Finance Podcast, the Blitz Package, a special four-part series on the latest developments within the CFPB, state AG activities, and private consumer financial litigation. This is episode three in our four-part series. I'm your host, Ethan Ostroff, a partner in the firm's consumer financial services practice. We have a great episode lined up for you today focused on the evolving state and federal requirements, for furnishers and users of consumer reports.

Before we jump into today's discussion, let me remind you to visit and subscribe to our blog, [consumerfinancialserviceslawmonitor.com](http://consumerfinancialserviceslawmonitor.com), where you can find insightful updates about everything interesting that is happening in the world of consumer financial services. And please don't forget to check out our other podcasts, the *FRCA Focus* and *The Crypto Exchange*. You can find those on [troutmanpepper.com](http://troutmanpepper.com) and all your regular popular podcast platforms.

Joining me on this episode are three of my colleagues and veteran consumer financial services attorneys, Alan Wingfield, Chris Capurso, and Derek Schwahn. Gentlemen, welcome to the show. Glad to be here with you today and looking forward to our discussion. So, the CFPB has been active in pushing pro-consumer regulation since Director Chopra was appointed, and he came into office saying that he wants to focus on consumer privacy and related issues. He's used the Fair Credit Reporting Act as a tool to move the needle on a lot of these issues, like obligations to respond to consumer disputes, reporting a medical debt, encouraging states to police credit reporting markets, and other various types of efforts. This has a lot of implications for furnishers and users of consumer reports and has imposed additional burdens on stakeholders in this ecosystem. So, Derek, what has been the CFPB's recent focus regarding the obligations of furnishers to respond to consumer disputes?

**Derek Schwahn (02:08):**

Ethan, thanks for having me on the podcast today. It's a great question. So historically, there has been a distinction made by some courts between a legal dispute and a factual dispute. With respect to consumer reporting agencies, pretty consistently across the board, they've been able to rely on the distinction between a legal and a factual dispute to escape liability when the piece of information that a consumer is disputing requires in essence a court of law to decide a disputed issue, for example, whether or not a consumer is liable for the debt itself, whether the debt is valid, who owns the debt, questions of this nature.

With respect to furnishers, it's been a little bit more hit and miss across the board. In some courts, for example, the First Circuit or the Eleventh Circuit, furnishers have been able to rely on the distinction between a legal dispute and a factual dispute to say that this is a legal issue, we're not capable of resolving this, and therefore we don't have liability for any re-investigation. And therefore, we don't have any liability under, for example, section s-2(b) of the FCRA, but that's changing now with the CFPB. There's been a recent push to disregard the distinction between legal and factual disputes entirely, especially with regards to furnishers.

**Ethan Ostroff (03:32):**

And so, am I correct that the CFPB's waded into this pretty significantly with the filing of some amicus briefs recently?

**Derek Schwahn (03:40):**

That's exactly correct. There's been several amicus briefs file this year, really in the last four or five months or so, by the CFPB. There's a case in the Second Circuit, a Ninth Circuit case, an Eleventh Circuit case. And the CFPB has taken the position that nowhere in the FCRA is a distinction made between a legal dispute and a factual dispute. And in essence, this entire line of argument is born out in the case law. It's created through private litigation and is not reflective, in the CFPB's view, of the FCRA in its requirements. Actually, in one of the cases that the CFPB filed an amicus brief in, *Gross v. CitiMortgage*, it's a Ninth Circuit case, there's been a decision and it came down in May of this year. And I think it's worth getting into the weeds a little bit because it illustrates what is a legal question that has to be resolved by a furnisher.

So, a little bit of background in the case. The plaintiff had a junior mortgage reporting on his credit reports that he claimed had been satisfied or he claimed he was not liable for any longer. His house had been foreclosed on. The proceeds had been used to satisfy the first mortgage and the junior mortgagee was left without anything. In Arizona, they have an anti-deficiency statute, which says, in essence, in this situation, the junior mortgagee cannot recover a deficiency judgment, and the homeowner is not required to pay the debt. The trial court granted summary judgment to the furnisher on this being a legal dispute issue and the Ninth Circuit reversed. They said this is not a situation where the furnisher can escape liability just by throwing their hands up in the air and saying, this is a legal issue. We can't resolve this. The Ninth Circuit opinion specifically cited the CFPB's amicus brief, and they held that furnishers will sometimes be required to investigate and even highlight questions of "legal significance."

And in this case, that was the application of the Arizona anti-deficiency statute of the junior mortgage debt. Well, I think that is a case where not only is it showing that the CFPB is making some progress in trying to overturn some of this case law, change the case law across the country. But also, it illustrates the type of dispute that a furnisher is going to be required to resolve. It's going to require the application of law to fact to resolve the question.

**Ethan Ostroff (06:07):**

There's some irony there, right? The CFPB's amicus briefs are saying it's not contained in the statute, so a furnisher can't rely upon that as a defense to a lawsuit. But there's plenty of other things that are not in the statute that courts have said and imposed on furnishers, and the CFPB seems perfectly happy with continuing that, right?

**Derek Schwahn (06:27):**

I think that's absolutely right and consistent with the overall pro-consumer approach that the CFPB has taken really since Director Chopra came on board.

**Ethan Ostroff (06:36):**

So, it seems like there are defenses to private litigation that the CFPB is trying to take off the table. Because for a furnisher, if you're getting an ACDV and you're doing your investigation, you are not going to decide, oh, wait, this is a legal dispute. I'm just not going to respond. Or,

this is a legal dispute, I'm not going to do my reasonable investigation. This comes up much later if and when you get to the point of defending a lawsuit.

**Derek Schwahn (07:03):**

That's exactly right. I think in the normal course of business, receiving a dispute, it's good policy to ensure that you're handling the dispute, you're processing it timely, you're investigating it to the furthest extent possible. Reasonableness is of course the standard for the investigation.

**Ethan Ostroff (07:20):**

But that's part of the irony, right? Does the word reasonable appear in the statute when it talks about an investigation, re-investigation? It says nothing about reasonable, right?

**Derek Schwahn (07:29):**

Another instance in which courts have supplied, filled in the gaps, and I think the CFPB is not a fan of how they filled in the gaps on the legal versus factual dispute, and hence the amicus.

**Ethan Ostroff (07:39):**

Thinking about this recent activity by the CFPB, its recent statements, what are some steps furnishers can take to ensure they're properly investigating and responding to consumer disputes?

**Derek Schwahn (07:52):**

So, I think there's several things. Number one is going to be right off the bat, you want to ensure you got the right procedures in place and the proper staffing with the appropriate training. Allow the disputes that come in to be processed and to be handled and to have procedures that go a little bit farther than just comparing a document where sometimes, that's enough. Sometimes it's not. For example, in the *Gross* case, simply looking at the underlying documents might not be reasonable there because in the Ninth Circuit's eyes, it requires more to apply the anti-deficiency statute to the specific factual scenario.

So, I think among other things, ensuring that employees who are handling the dispute are thinking about these things, they have the capabilities to understand the law specifically, nuances in state laws. Some states have anti-deficiency statutes, other states don't. Some of those nuances are important to pay attention to. And I think it's important to note if a furnisher, for example, outsources their dispute resolution to a third-party vendor, that doesn't necessarily absolve the furnisher of any liability. Having appropriate oversight of your vendors is another thing that I think is important to keep in mind here.

**Ethan Ostroff (09:01):**

Thanks, Derek, appreciate those insights. Turning to the reporting of medical debt, what are some recent developments in that space?

**Chris Capurso (09:08):**

So, the CFPB has had quite a few announcements about medical... Thank you, Ethan, and thanks for having me on. Yeah. The CFPB has had quite a few highlights recently about medical debt reporting. They seem to come fast and furious along with everything else that the CFPB

has been announcing since March, to a point where if you're not paying attention, you can miss some major highlights that are coming down the pike. This idea of the medical debt reporting in the CFPB kicks off back in the beginning of March when the Bureau released a report entitled "The Medical Debt Burden in the United States." And that report analyzed how medical debt reporting is in the United States and some highlights around statistics related to it. And one that I found particularly fascinating highlighting why the CFPB looks at this the way it does is that medical debt is the largest reported trade line by third-party debt collectors. Accounted for 58% of those trade lines, and that dwarfs the next highest trade line, which was telecommunications at 15%.

So that just shows how enormous medical debt is. Director Chopra noted that it's hard to call medical debt real debt, trying to highlight the fact that sometimes medical debt is completely unforeseen and sometimes folks don't know exactly how much debt is going to be, and trying to highlight the fact that those types of things, in the Bureau's view, should not be on a credit report, even though it can speak to credit capacity, as we all know.

**Ethan Ostroff (10:37):**

Do you think this is part of an overarching effort of the Bureau to change the content of what actually appears on someone's consumer report?

**Chris Capurso (10:47):**

It's an interesting question, because I think just based on what the CFPB outline and its report and the responses, the answer has to be yes, because the response was engaged to what the CFPB was saying in its report. It's going to drastically change what is in a person's consumer report. This isn't a way to get a view on what somebody's credit capacity is. And if the medical debt is not there, that doesn't really speak to credit capacity entirely. I think the answer is yes. Now, beyond medical debt, I'm not sure if they're going to try to expand this into other areas that are outside of typical consumer financing.

**Ethan Ostroff (11:23):**

I think one of the things we've seen is we've seen them tell credit card companies recently that they feel like they're not reporting enough historical payment data. So, there you have the flip side where they're saying, oh, we think there's more data that should be included on a consumer report in this regard for this type of account or this type of debt. In other spaces, we see the flip side with the Bureau saying, hey, we want to get this type of information off of people's credit reports. So, they're really trying to enforce their vision of what should and should not be contained on someone's consumer report, right?

**Chris Capurso (12:00):**

Yeah. That's a great point, because in this past six months, the CFPB has also opined on buy now, pay later and trying to report that kind of debt/credit. You want to try to have it both ways. You want to try to eliminate certain kinds, but add certain kinds, trying to go with a vision of what a consumer report should be as opposed to what it is.

**Ethan Ostroff (12:20):**

Alan, do you have any thoughts about the idea of the CFPB imposing its own views on people in this ecosystem with respect to what should and should not be contained on a consumer's credit report?

**Alan Wingfield (12:31):**

How much time do we have? But the short answer is yes, definitely. The CFPB is trying to shape what shows up on the consumer report to its liking, and it has significant implications of both furnishers of reports and users, which we're focusing on our report today. Chris mentioned the buy now, pay later blog post where CFPB apparently likes the idea of reporting buy now, pay later experiences. So, they issued a blog post saying, please report this, both negative and positive. In addition to cracking down on landlord tenant records, they are also saying that it should be illegal for a consumer reporting agency to provide to a user report unmatched records, that is records that are aren't actually positively identified by this consumer reporting agency as associated with the specific individual. So yes, they are very definitely on a mode of deciding what and what is not permissible to be reported through the consumer reporting system.

**Ethan Ostroff (13:27):**

And it's just incredibly concerning to all the stakeholders that are involved in this credit reporting ecosystem, because as the winds blow differently depending on who the director of the CFPB is, this could drastically change, right?

**Alan Wingfield (13:41):**

Absolutely. There's this system and it has been whipsawed by political changes before, but it's also two other things about this whipsaw that is concerning. One is the mechanism by which the CFPB is trying to affect its goals creates actually affirmative legal risks for furnishers and users. They're saying, if you don't abide by our views, then you can get sued. In fact, they issued a blog post last year basically saying they think there ought to be more lawsuits on the FCRA. So, there's a direct impact on furnishers and users by legal exposure. That's what the CFPB's trying to whip up for them.

The second major impact is on the user side. What's available for the consumer reporting agency, consumer reporting system gets tailored and cut down to size the CFPB likes. The net effect is reduce the amount of information that's going to be available from consumer reporting. That degrades the value of consumer reports. It has a negative impact on credit scores, the value of credit scores to be predictive. That's the concern as CFPB cracks down on amount of information that comes through the system. So, what does that mean? That means more poor decisions. Costs to consumers have good credit are going to be subsidizing people with poor credit, for example, as everybody gets leavened out. Everybody gets treated more the same. That means people with better credit paying on their background screening front.

That means people who should be screened out of job of employment situations, whether you create risks for customers and other fellow employees, are not screened out of the labor force or at least certain sensitive jobs. You have tenants and employees or landlord tenant operations who should not have access to the facilities being given access, creating personal injury, actually risk of crime. So net impact may be degrading the value of the credit reporting system. We're already seeing in our practice that users are being diverted from the consumer reporting

agencies to get information to non-consumer reporting agency sources of information, that is junk that you look up on the internet literally. As they get less information through quality sources like consumer reporting agencies, they're looking to other ways to get the same information. And basically, it's degenerating to people just Googling up information and relying on the internet. So, all these collateral implications of the CFPB's rampage are simply having no effect. They disregard all these negative implications as they go down these roads.

**Ethan Ostroff (16:03):**

Very interesting insights. Chris, coming back to medical debt, after this initial CFPB report, how did the consumer reporting agencies respond? And what happened next? What did the CFPB do with that initial report?

**Chris Capurso (16:15):**

Before I get to that, Alan's comments just made me think of two very interesting points. One, Alan noted that this could potentially result in consumer reports being less reliable and less accurate. So maybe users/creditors end up granting credit to those who previously may not have gotten it because of credit capacity or things like that. And then perhaps out of that, it results in more negative trade lines, which would be scrutinized by the CFPB. And it's like this interesting circle of life on the regulatory front. But the other interesting thing is, okay, if the consumer reports aren't exactly as reliable or there's information missing that makes them less reliable, then maybe creditors turn to alternative methods, alternative data, machine learning, AI, things like that, which the CFPB has also scrutinized.

It's been an interesting thing where they keep pushing on a certain thing and then some other lever is going to go up that they also scrutinize. It's an interesting regulatory balancing act that they're pulling off over there. I will say about the CRA response is it was surprisingly swift. The response to the CFPB's report, the three nationwide CRAs back in March after this report announced some big changes that they were going to implement effective July 1st, and it's really three big changes. One, that any paid medical collection debt will no longer appear on consumer credit reports. Second, that they will extend the period that an unpaid medical debt can be reported from the now prior period of six months to a year. And finally, that in the first half of 2023, those nationwide CRAs will no longer include medical collection debt under \$500 on credit reports. And together, those CRAs anticipated that those measures would result in the removal of nearly 70% of medical debt trade lines.

Recently, the CFPB responded to that measure and Director Chopra wasn't exactly patting anybody on the back. He basically said more changes need to happen, even though almost 70% of trade lines would be eliminated with these measures. What the CFPB did was an analysis of what those changes would do to the medical debt ecosphere or the medical debt reporting ecosphere. And they noted some interesting information in the report, such as how these measures would disproportionately impact different areas of the country. For example, it noted that the Northeast would see the benefits of this more than the Southeast and also how different ethnic backgrounds would receive this. For example, that majority Black and Hispanic households may see this less potentially because the medical bills are more than \$500 or they would just see this differently than other ethnic groups, which is an interesting thing that they point out in this report and actually has all this data in it.

The report did not examine the impact of the CRA's extension of time from six months to a year, but they did note that change could mean that many more medical billing disputes are resolved before the credit reporting occurs, essentially eliminating the trade line. And perhaps the most

unsurprising part of this report is that the CFPB noted that they will continue looking at this and that they are going to reform more on it as these changes start to be implemented in 2023 and beyond.

**Ethan Ostroff (19:41):**

There is clearly a new director's footprint being put on the credit reporting ecosystem, and how this is going to shake out over the next couple years, it is going to be fascinating to watch. Alan, what other issues has the CFPB focused on regarding the obligations of furnishers and users of consumer reports?

**Alan Wingfield (20:02):**

I want to focus our remaining time on one particular settlement that happened in July of this year with Hyundai, because I think it covers at least four meat, potatoes, common recurring issues that the CFBs has focus on and will focus on in the future, I believe. First, this was a settlement of a claim in Hyundai Capital America, the auto finance arm of Hyundai, agreed to pay \$19 million for problems in its furnishing of information to the consumer reporting agencies, the consumers who owe money to the Hyundai based on automobile financings and how they reported those to CRAs over the years.

The first meat and potatoes issue is this is a graphic illustration of the interest and rigor of the enforcement in this space. The CFPB is all over this and it has been in multiple administrations. Yes, it was maybe a lightening of the pressure during the Trump years, but insistent interest and enforcement in this space and no more so vigorous in today is the message here with this settlement.

The second and third and fourth points I want to make are basic blocking and tackling of furnishing of information that, even in this day and age, still continues to cause problems. It caused problems with Hyundai and I believe with other furnishers in this area so they're worth mentioning. First, Hyundai was accused of failing to report accurately the date of first delinquency information. As you spend time with the FCRA, you understand that there are a lot of important data points, but there are data points that are first among equals on about a trade line. And probably the date of first delinquency is one of the most important data points of all that needs to be handled correctly. It's one of the few data points that are required to be reported under the statute itself. It's mandatory. It controls the aging off of trade lines, which is a critical interest to the law, as well as the CFPB.

This high degree of focus on the date of first delinquency has been a longstanding theme, and yet here we have a settlement in 2020 accusing a major creditor of messing that up. Second, a more technical issue, but a recurring one, is Hyundai is also accused of having inadequate identity theft procedures. Furnishers have specific obligations about how to handle claims by consumers, that they're victims of identity thefts so that the bad things that happen on a trade line, they didn't originate, don't get attributed to them. That's a recurring strong interest in the law. Congress has enacted parts of the FCRA specifically to address that. There are regulatory requirements as well, and many enforcement actions. As longtime practitioners, you and I know, Ethan, when something shows up as an identity theft issue, it's treated with high sensitivity because those are where the biggest risks are in litigation context, for example. Yet here we have, again, a major creditor of this late date being accused of not putting an appropriate amount of emphasis and energy and getting those compliance issues straight.

Finally, Hyundai is accused of having patently out of date and inadequate policies and procedures. Regulation V under the FCRA explicitly requires a written policy procedure for credit reporting for a furnisher doing credit reporting. That's required. It's one of the few places in the consumer protection world at the state or federal level where there's an actual requirement of written policy procedure. This is one of them. There's a formula for doing an adequate policy procedure on Regulation V and it requires essentially a yearly update and review to keep the policy procedure up to date. Despite this clear requirement and a cookbook for getting it right and its very express obligation to keep it current, Hyundai stands accused of having wholly inadequate out of date accuracy and integrity policy. These are recurring.

We've seen this in our practice with furnishers who might not have a Regulation V policy, even though there's an expressed requirement. One of the messages I would take from the Hyundai settlement is if I don't know what's going on in my company with the accuracy and integrity policy, the policy required by Reg V, I'm going to pull it out and check it out to see if it's adequate, if it's been updated recently, because it's a lay down issue for the CFPB. It's a requirement and you haven't done it, yes or no? It's all on paper. It's very hard to defend, an argument that you have an inadequate policy when you don't have a policy at all, or one that has not been revisited for years. Hyundai is interesting for all those reasons. Back to basics, meat, potatoes, but these are recurring issues I see in my practice.

**Ethan Ostroff (24:33):**

Back to basics type check the box things that you can look at the CFPB's examination manual and see some of the things they're going to explicitly require you to have.

**Alan Wingfield (24:44):**

Exactly. The CFPB does you a favor. There's an examination manual where they tell you what questions they're going to ask, what documents they want to see when they come into an examination. Of course, in the FCRA module, one of the things is assessing the adequacy, the accuracy, integrity policy. That same checklist applies when they're visiting you for an enforcement action. They're going to assess whether or not you're a bad actor or a good actor that just got something wrong. And they come in and find out that you don't have a policy procedure or have one that's obviously just been a dead letter in your business and not been updated. That's going to be an aggravating factor if in fact you have problems in other areas, and it is a check the box issue, but I think a lot of life in our regulator world comes down to that. You want to touch all the bases where they're coming for you on this issue.

**Ethan Ostroff (25:32):**

That's right. That's right. So, guys, any fearless predictions for where this is going?

**Alan Wingfield (25:38):**

It's clear that Chopra said he's going to use FCRA as a primary cudgel in his wars around privacy and data information in America, and that's going to continue. He said he was going to do it before he took office and he's doing it. Number two, he's not going to do it by formal rule making. He's not going to give notice of a rule and take comments and have an administrative proceeding to issue a rule and go through all. He's not going to do that.



**Ethan Ostroff (26:05):**

Takes too long and it's too expensive, right?

**Alan Wingfield (26:07):**

And the clock is ticking. He has a five-year term and who knows what happens the next election cycle? We did comment about that in episode two, that it does seem that Chopra's preparing for a new era that might occur after an election, and I think he's trying to do as much as he can as quickly as he can, and he's doing it by issuing these interpretive statements, which have the force of rules in his view. He's doing it by jawboning and cajoling and enlisting allies to help him. He's doing everything but trying to organize an actual rule making, and that will continue.

**Ethan Ostroff (26:40):**

Derek, Chris, any predictions from you guys?

**Derek Schwahn (26:43):**

I would agree with a lot of what Alan said. I really think that full steam ahead is the rallying cry at the CFPB. It seems that certainly in the last year and since Director Chopra came on, that he has a vision in mind and he's looking to instill it. And so, I think that we're nowhere close to the end of the ride.

**Ethan Ostroff (27:03):**

And part of that vision is to motivate state attorneys general to get involved and to make sure they know they're empowered to get active in this space. Would you agree with that, Chris?

**Chris Capurso (27:15):**

The CFPB has really been encouraging state AG's to enforce consumer financial services laws, and it was just this week or last that Chopra made that comment about looking to eradicate, not just educate. So, if that doesn't tell you the kind of attitude he has towards some of these financial services topics, I don't know what would.

**Ethan Ostroff (27:37):**

Totally agree. All right, guys. I think that wraps this up. I really appreciate you all joining us today on this special edition of *The Consumer Finance Podcast*. Alan, Chris, Derek, thank you for your time with me today and sharing your valuable insights. I'd like to remind our audience to check out our blog at [theconsumerfinancelawmonitor.com](http://theconsumerfinancelawmonitor.com). Subscribe there and please sign up for our distribution lists so you can receive our alerts, advisories, webinar invitations, and other special content, all from your friends at Troutman Pepper. And please don't forget, this was only episode three of our four-part series. We have one more to offer. And in that episode, my partner, Stefanie Jackman, and her guests will examine hot topics in collections focusing on collection fees and the Regulation F landscape. Thanks, everyone, for tuning in.

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