

## Consumer credit issues that matter to every business

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By David N. Anthony

Businesses confront a host of pressures in the current economic and market climate. Companies are dealing every day with the crushing blow of increased fuel costs, restricted credit, greater government scrutiny, tougher global competition, the housing crisis, the war in Iraq and undertaking other belt-tightening measures.

Unfortunately, Virginia businesses also are facing an often unnoticed series of issues and risks associated with consumer credit lawsuits and regulations. These concerns are rapidly increasing, and companies – large and small alike – must address them in their daily business operations and planning or face the consequences on their financial bottom line.

### More lawsuits

Virginia normally is not the state of choice for plaintiff's lawyers; however, a combination of factors is turning Virginia into one of the true hotbeds for consumer credit lawsuits across this country. Based on one government report, the number of consumer credit lawsuits in federal court in Virginia's Eastern District increased 425 percent between 2000 and 2007.

Many of these claims are filed under the Fair Credit Reporting Act, the Equal Credit Opportunity Act, the Fair Debt Collection Practices Act, the Fair and Accurate Credit Transactions Act and other federal statutes. These federal statutes apply to many Virginia businesses when they provide credit, collect delinquent accounts, report to credit reporting agencies, pull credit reports or use criminal background checks in the employee hiring process. The federal statutory aspect allows these lawsuits to be brought in federal court.

The United States District Court for the Eastern District (which has divisions in Alexandria, Newport News, Norfolk and Richmond) remains one of the fastest federal courts in the country earning its reputation as the "Rocket Docket." Businesses sued in the Rocket Docket face unusual pressures associated with the speed with which the cases move along. While Virginia federal courts generally are on the conservative side, they have not been hostile to consumer credit lawsuits.

At the same time, the U.S. Supreme Court issued a ruling last year allowing a lower standard for a jury to consider an award of punitive damages – damages designed to punish a business for its behavior. For example, the 4th U.S. Circuit Court of Appeals recently upheld an \$80,000 punitive damage award against a business in a case where the individual consumer did not prove any out-of-pocket damages at trial.

Finally, a group of Virginia lawyers has developed an expertise in representing consumers and are bringing consumer lawsuits at a staggering rate. No other type of lawsuit has exploded at this rate (425 percent!) in Virginia, and businesses of nearly every type have been the subject of consumer credit lawsuits. In addition to the financial risk, some businesses have had to change the way they operate in response to these consumer credit lawsuits. These lawsuits require expertise on consumer issues, and many businesses simply are not prepared to handle rigorous litigation in the Rocket Docket.

### Identity theft

Identity theft is among the fastest growing crimes in the country and is an increasing risk and cost to Virginia businesses.

Recent studies have shown that identity theft comprises 37 percent of all national fraud complaints and that Virginia ranks in the top 20 states nationally in identity theft victims. The annual losses to consumers and businesses from identity theft are estimated to be \$50 billion. These losses stem from fraudulent activities in a wide range of activities in which businesses engage everyday, such as the use of credit cards, e-mails, online banking accounts, computer servers, document and information storage, maintenance and disposal as well as business accounts and applications.

Litigation relating to identity theft litigation is on the rise. In 2007, a Virginia jury ruled in favor of an identity theft victim and against a credit reporting agency and awarded her \$256,000 in damages and \$302,000 in attorney's fees.

In 2007, the Federal Trade Commission issued Red Flag Rules that apply to any financial institution and creditor (which are defined broadly) that hold a consumer account. The Red Flag Rules require creditors to develop and implement a written Identity Theft Protection Program by November 1, 2008 to identify, detect and

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respond to patterns, practices or specific activities that could indicate identity theft. Compliance with the Red Flag Rules is a serious and complicated matter, and companies should consult with their attorney to ensure their compliance, especially given the potentially significant downsides.

Similarly, the Virginia General Assembly adopted a new criminal statute dealing with the breach of the security of computer systems. The Attorney General of Virginia has focused on the prosecution of identity theft crimes and has developed an Identity Theft Passport that shields identity theft victims from unlawful detention or arrest for crimes committed by another using a stolen identity. Virginia businesses undoubtedly will see more regulation and oversight, potential for loss and litigation risk over the issue of identity theft.

### **Criminal background checks**

The consequences of improperly using criminal background checks for employment purposes are significant and potentially costly.

Many businesses routinely use criminal background checks in their hiring process for new employees and consider them a valuable tool. The Fair Credit Reporting Act places restrictions on an employer before taking an "adverse action" (such as a denial of employment) based upon a criminal background check for employment purposes. The primary goal of these restrictions is to allow the prospective employee enough time to fix any inaccuracies in the report.

In April 2008, a class action lawsuit on behalf of 272,000 prospective employees alleging a violation of these requirements in the Rocket Docket settled for more than \$20 million. Since the filing of this lawsuit, at least three similar class action lawsuits have been filed in the Rocket Docket against other employers. Virginia businesses should ensure that their use of criminal background checks complies with the Fair Credit Reporting Act and other federal consumer credit statutes.

Virginia businesses need to be aware of the escalating impact that consumer credit issues are having on their day-to-day operations and take proactive steps to eliminate or minimize this business risk.

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