

# **Fair Credit Reporting Act: Litigation, Regulatory and Enforcement Developments in the Financial Services Industry and Beyond**

Minimizing Exposure to Litigation and Adapting to Evolving Regulatory Oversight

TUESDAY, JUNE 23, 2015

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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# **Fair Credit Reporting Act: Litigation, Regulatory and Enforcement Developments in the Financial Services Industry and Beyond**

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# **OVERVIEW OF THE FCRA**

# What Is the Fair Credit Reporting Act?

- Enacted in 1970
  - Concern about “secret” files used to make important decisions
  - Seeking to balance privacy & fairness with benefits of system
- Provides consumers with rights to access and correct data
- Imposes obligations on “users”
  - To notify consumers when “adverse” decisions made
- Imposes duties on “consumer reporting agencies” to
  - Protect data and only provide for a “permissible purpose”
  - Maintain accuracy and investigate disputes
  - Report certain data and not report other data
- Requires “furnishers” to maintain accuracy and investigate disputes

# What Is the Fair Credit Reporting Act?

- Not just about credit
  - FCRA regulates the collection, disclosure and use of *consumer report information*
- Information used by businesses to make important decisions about consumers
  - Such as credit, insurance, employment, check cashing, rental

# 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



# What Is a Consumer Report?

- Which is used, or expected to be used, or collected in whole or in part
- For the purpose of serving as a factor in establishing the consumer's eligibility for
  - credit or insurance to be used primarily for personal, family, or household purposes
    - NOT business purposes
  - employment purposes, or
  - any other eligibility “permissible purpose” authorized under the FCRA

# What Is a Consumer Report?

- “Consumer Reporting Agency” (“CRA”)
  - any person which
  - for monetary fees, dues, or on a cooperative nonprofit basis,
  - regularly engages in whole or in part
  - in the practice of ***assembling or evaluating*** consumer credit information or other information on consumers
  - for the purpose of furnishing consumer reports to third parties.
- No federal registration or licensing required

# 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

# What Is NOT a Consumer Report?

- Statutory Exclusions – FCRA § 603(d)(2)(A)
  - Transaction and experience (“T&E”) information
    - Permits financial institutions to report to one another and to CRAs
  - T&E, when shared among affiliates
  - Non-T&E, when shared among affiliates after notice & opt-out
    - Includes consumer report information, application information
    - Exceptions to the exclusion for medical information (very broadly defined)
- Other Exclusions
  - Employment agencies (FCRA § 603(o))
  - Employment investigations (FCRA § 603(y))
  - Point-of-sale approvals (FCRA § 603(d)(2)(B))

# Duties of Consumer Reporting Agencies

# Duties of CRAs

- Permissible purposes and data security
- Content of a consumer report and accuracy of data
- Consumer file disclosures
  - Credit score disclosures
- Disputes and reinvestigations
- Identity theft and fraud
- Special types of consumer reports
  - Employment reports
  - Investigative consumer reports

# Special Types of CRAs

- Nationwide CRA
  - *A consumer reporting agency that*
  - Regularly engages in assembling or evaluating, *and maintaining*
    - public record information regarding *consumers residing nationwide; and*
    - credit account information
      - regarding consumers residing nationwide
      - from persons who furnish that information regularly and in the ordinary course of business
  - For the purpose of furnishing consumer reports bearing on creditworthiness (*i.e.*, credit reports)
- Prohibition on circumventing status as Nationwide CRA
  - FCRA § 629; 16 CFR § 611
- TransUnion, Equifax, Experian

# 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



# Special Types of CRAs

- Nationwide Specialty CRA
  - A consumer reporting agency that
  - compiles and maintains files on consumers
  - on a nationwide basis
  - relating to
    - medical records or payments
    - residential or tenant history
    - check writing history
    - employment history, *or*
    - insurance claims
- Telecheck, MIB, CLUE
- Free annual credit report (no central source)

# Special Types of CRAs

- Reseller
  - A consumer reporting agency that
  - Assembles and merges information
  - Contained in the database of another CRA or multiple CRAs
  - For purposes of furnishing such information to any third party, and
  - Does not maintain a database of the assembled or merged information from which new consumer reports are produced
- Residential mortgage credit reporting agency
  - “Merge and purge”

# Obligations of Businesses That Use Consumer Reports

# Overview of User Duties

- Permissible purpose
  - Prescreening
- Adverse action
- Disposal of consumer report information
- Medical information
- Notice of address discrepancy
- Employment – notice and consent, pre-adverse action
- Fraud alert duties for lenders
- Red Flags Rule

# Obligations of Businesses that Provide Information to Consumer Reporting Agencies

# Overview of Furnisher Duties

- **Generally no private right of action**
- **Accuracy duty** – “knows or has reason to believe”
- **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)
- **Duties with respect to specific information**
- **Lender duties**
  - Negative information notice
- **Red Flags Rule**



§§ 611, 623

\* *See the additional enforcement actions discussed below.*

# 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.*

# **SHIFTING LITIGATION, REGULATORY, AND ENFORCEMENT ENVIRONMENT**



# History of FCRA Guidance

- Before Dodd-Frank, primary enforcement authority for FCRA rested with FTC.
  - FTC's [40 Years Report](#)
- Post-Dodd-Frank, CFPB is charged with primary enforcement, guidance and rulemaking authority.
- CFPB also vested with examination authority.

# CFPB Supervision

- General Exam Manual Includes Modules for FCRA (furnisher responsibilities)
- Adopts [New Rule](#) to Supervise Larger CRAs
- Releases [Exam Procedures](#) for Consumer Reporting Market
  - Effective September 30, 2012
- Issues [Warning](#) to Specialty CRAs
- [Supervisory Highlights](#) – Furnishing issues, credit reporting
- Issues Reports on [Consumer Reporting Market](#)
  - [Credit Scores](#)
  - [Medical Debt](#)
  - [Credit Invisibles](#)
- Accepts Consumer Complaints on Credit Reporting

# CFPB Guidance

- [CFPB Bulletin 2014-01](#): Obligation of furnishers to conduct investigations
- [CFPB Bulletin 2013-09](#): Obligations of CRAs and furnishers to consider “all relevant information”
- [CFPB Bulletin 2013-08](#): Representations regarding effect of debt payments on credit reports and scores

# Administrative Enforcement

- Banking Agencies
  - Through examinations and enforcement actions
- Consumer Financial Protection Bureau
  - All “covered persons”
  - \$1 million per day penalties
- FTC enforcement
  - \$3,500 for each “knowing” FCRA violation
    - That is part of a pattern or practice of violations
    - Recent orders: \$1 million +
- State AG enforcement
  - \$1,000 for negligent or willful FCRA violations

# CFPB and FTC Enforcement

- [First Investors](#) - accuracy of furnished information, vendor oversight
- [Drive Time](#) – accuracy of furnished information, Furnisher Rule
- [American Express](#) – noting items as disputed
- [Certegy](#) and [Telecheck](#) – Furnisher Rule, investigation of disputes
- [Time Warner Cable](#) – Risk Based Pricing Rule

# Private Right of Action

- Most common area for developing case law
- Allows suits for negligent and/or willful violations of most provisions of the FCRA
- Willful damages provision has led to increase in class action litigation
  - Frequent, repetitive transactions
  - Legal uncertainty for complex statute
  - No need to prove actual damages

# **CUTTING EDGE LEGAL THEORIES**

# Robins v. Spokeo

- **Background:** Website aggregates information from public sources. Allegedly sells it to employers evaluating possible hires.
- **Claim:** Spokeo is a CRA and published inaccurate info about Robins.
- **Alleged Injury:** Invasion of statutory rights. No actual concrete \$\$ injury.
- **Impact:** “No injury” class actions under the FCRA, and beyond.

(See our [alert](#).)





# Suits Against CRAs

- **General Theories**

- Providing a consumer report to users without a permissible purpose - § 1681b
- Establish and/or follow reasonable procedures to assure maximum possible accuracy of information reported about the consumer - § 1681e(b)
- Provide the consumer with all information in his or her file upon a request from the consumer - § 1681g(a)(1)
- Clearly and accurately disclose the source of reporting - § 1681g(a)(2)
- Provide the consumer a notice of issuance of public record reports for employment purposes – § 1681k
- Taking adverse action for employers without sending out pre-adverse action notice to the consumer - § 1681b(b)

# Suits Against CRAs

- **Common Reinvestigation Claims – Failures to . . .**
  - Conduct a reasonable investigation of dispute by a consumer - § 1681i(a)(1)
  - Send the furnisher all relevant information that it received from a consumer’s dispute - § 1681i(a)(2)
  - Review and consider all relevant information received from a consumer and instead “parroting” furnisher verifications - § 1681i(a)(4)
  - Delete information that was inaccurate or could not be verified - § 1681i(a)(5)
  - Accurately provide the notice of the reinvestigation results - § 1681i(a)(6)

# Suits Against CRAs

- Claims against those who do not believe that they are CRAs
  - Fundamentally different category of claims
  - Not about technical compliance, but rather whether the FCRA applies at all

# Suits Against Furnishers



- **No private right of action** (§ 1681s–2(a))
- **But**
  - Duty to conduct “reasonable” investigation
  - Duty to correct
  - State statutes
- **New Scenarios**
  - **Bankruptcy**
    - *Horsch v. Wells Fargo*, 2015 WL 1344836 (E.D. Pa. Mar. 25, 2015) (reporting zero balances on mortgages not inaccurate or incomplete)
  - **Loan Mods / Foreclosure**
    - *Bartlett*, No. 14–1895, 2015 WL 2387013 (4th Cir. May 20, 2015) (1681g(g) disclosures not required in response to loan mod application)
  - **ID Theft**

# Suits Against Employers

- **§ 1681b**

- (b)(2)(A) – Providing a clear and conspicuous disclosure made in writing to the consumer before the consumer report is procured
- (b)(2)(A) – Providing a disclosure “in a document that consists solely of the disclosure”
- (b)(2)(A) – Having the consumer authorize in advance consent to the procurement of a consumer report for employment purposes
- (b)(2)(B)(i) – Providing the applicant with notice that a consumer report may be obtained for employment purposes

# Suits Against Employers (cont'd)

- **§ 1681b**
  - (b)(3)(A)(i) – Providing a copy of the consumer report used to make an employment decision before taking an adverse action based on report
  - (b)(3)(A)(ii) – Providing the consumer with a summary of FCRA rights before taking adverse action
  - (b)(3) – Complying with the timing requirements before taking adverse action

# Expansion Beyond Traditional Financial Services Targets

- **Alleged Data Aggregators**

- *Robins v. Spokeo, Inc.*, 2011 WL 1793334 (C.D. Cal. May 11, 2011)

- *Sweet v. LinkedIn Corp.*, 2015 WL 1744254 (N.D. Cal. Apr. 14, 2015)  
(LinkedIn is not a CRA. The search results are not consumer reports.)

- Differences?

- T&E exception
    - Self-provided information
    - Information not “about” consumer
    - Policy



# Expansion Beyond Traditional Financial Services Targets

- **Underwriting Software**

- *Thomas v. Cendant Mortg.*, 2004 WL 2600772 (E.D. Pa. Nov. 15, 2004).
- *McCalmont v. Fed. Nat'l Mortg. Ass'n*, No. 2:13-cv-02107 (July 21, 2014)

- **Employers**



# **CLASS ACTION DEFENSE TACTICS AND STRATEGIES**

# Alleged Technical Violations

- High exposure
- Easy to file
- Commonly systematic or repetitive processes
- Statutory Damages
- Possibly still punitive damages
- Significant defense costs

# Common Defenses

- Defense to Merits of FCRA Claim
- Elements to Certify a Class Action
  - Generally – “rigorous analysis”
  - Numerosity
  - Commonality
  - Typicality
  - Adequacy of class counsel
  - Predominance/superiority
  - Ascertainability

# Common Defenses

- Arbitration – individual or class
- Standing
- Statute of limitations
- Damages sought
  - Actual damages
  - Capable of measurement on classwide basis
- Defeating willfulness
  - Statutory damages
  - Punitive damages

# Negligence and Willfulness

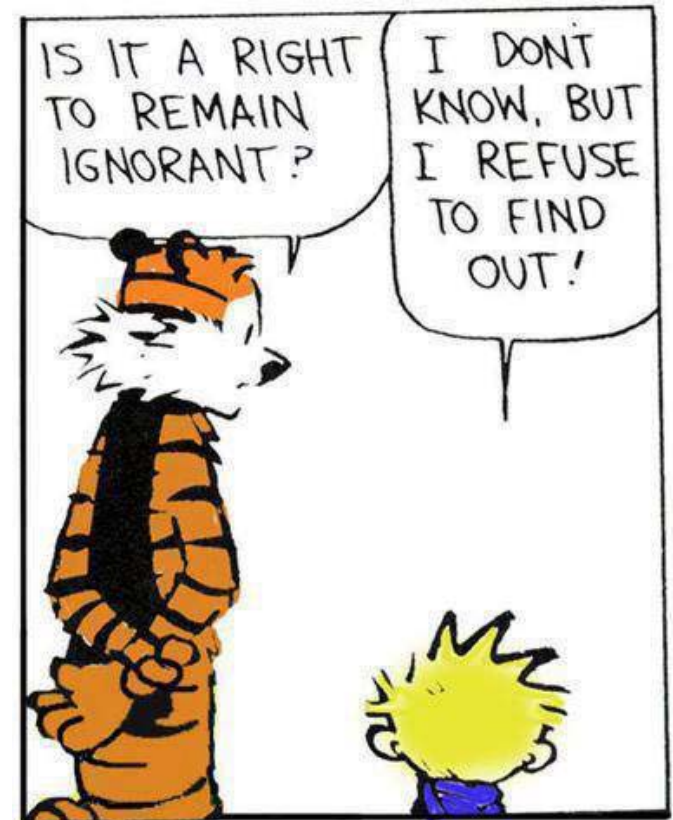
## 1. Negligence

- **Penalty:** “Actual Damages”
- *Spokeo* questions
- Alleged damages to credit score

## 2. Willfulness

- **Penalty:** Actual Damages OR Statutory Damages of \$100-\$1k
- Using *Safeco*
  - Standard
  - When to use it

## 3. Class Cert. Strategies



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# *Thanks.*

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