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Data Furnishers Should Watch CFPB Plans for Class Actions

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Information furnishers, beware. A potential rule under consideration by the Consumer Financial Protection Bureau is explicitly aimed at opening a new era of Fair Credit Reporting Act class actions against companies that provide consumer information to consumer reporting agencies.

In the target zone are the approximately 10,000 companies that report 1.3 billion items of consumer data to the major CRAs.[1] The CFPB appears to have big plans to dramatically reset and, in some instances, rewrite the legal risks of furnishing information to CRAs. This points to the need for these companies to understand and engage with the CFPB's proposed rulemaking process.

On Sept. 21, the CFPB released an outline of a proposed rulemaking under the FCRA.[2] The outline was supplied for initial comment to a panel of small businesses convened under the Small Business Regulatory Enforcement Fairness Act.

While this outline would have many significant affects on all participants in the consumer reporting ecosystem — such as data brokers, CRAs and users, as well as furnishers — the specific proposal that this article focuses on would create, by rule, a new process for consumers on a group basis to dispute information provided by furnishers to CRAs.

Buried within the outline is a proposal for a significant change that all furnishers must note: the possibility of class actions against the original furnishers of consumer data, which, under current law, does not effectively exist.

The story starts with the civil liability provisions of the FCRA. Generally, consumers with complaints about the accuracy of information provided by furnishers to CRAs can bring lawsuits. However, a lawsuit claiming inaccuracy can only be brought against the furnisher if:

- The consumer first disputes the information through the CRAs; and
- The furnisher fails to correct the inaccuracy in response.

The gist of the lawsuit would be that the consumer disputed the information and the furnisher failed to reasonably handle the dispute.

The FCRA's civil liability provisions are unusually threatening as class actions because consumers alleging claims can seek statutory damages of $100 to $1,000.[3] While these damages might be modest on a one-off basis, the amount quickly adds up when a common practice affects thousands, tens of thousands or even hundreds of thousands of consumers.

Numerous class actions against CRAs have settled in the eight-figure range, and more than one has resulted in an eight-figure verdict.

On the other hand, FCRA class actions against furnishers have, under existing law, been close to impossible to bring.

This is because claims against furnishers depend on the consumer having disputed information and a furnisher failing to correct inaccurate information due to an unreasonable investigation of the dispute.

The nature of these claims raises too many individualized issues — which must be litigated on a case-by-case basis — to support a class action.

As a result, while there are plenty of lawsuits against furnishers under the FCRA, they are brought individually and not through class actions. Indeed, consumers can individually obtain substantial redress. The FCRA has become the most popular form of consumer litigation in federal courts, with more than 5,000 lawsuits filed annually.

Several verdicts against furnishers in the range of $300,000 to $800,000 have been reported, and verdicts against CRAs range up to $60 million.

Overall, consumer litigation under the FCRA, while quite meaningful, has not generally reached the point of causing furnishers to drop out of the system.

The CFPB is considering creating a brand-new process whereby consumers can not only dispute their own information, but also make disputes on behalf of other consumers who are affected by the same or a similar problem.[4]

The disputes would be submitted in the first instance to CRAs, which would have an obligation to investigate them on a group basis.

The CRAs would be obligated to pass on the dispute to a furnisher, which would also be required to investigate and, if necessary, correct on a group basis.

Upon receiving a dispute, the furnisher would be forced to identify and respond to claims of inaccuracy as to an entire group, which plaintiffs lawyers doubtless will argue moots any need to inquire as to the accuracy or response to the dispute on a one-by-one basis.

Whether this strategy will actually work may be a question for another day. However, one key player — the CFPB itself — believes it will.

According to the outline, the purpose is to "facilitate consumers' ability to receive collective relief from CRAs and furnishers that do not appropriately address systemic issues." While the CFPB does not expressly say that this means class action litigation, this is clearly the import and intent of the proposal.

One thing to keep in mind is that the consumer reporting system in the United States is wholly voluntary. There is no legal requirement that a furnisher supply any information, absent the furnisher contractually obligating itself to furnish in some way.

Yet the credit system of the United States depends on the availability of consumer reports and credit scores that reflect the true credit profile of consumers, which are based largely on information that is voluntarily supplied.

But if furnishers start withholding information because the legal risks become simply too high, then the quality of credit reports and credit scores can only go down, hurting businesses and consumers alike as credit constricts and becomes more expensive to obtain.

And, it must be added, reduced credit reporting would hurt consumers as well, who could face less access to credit and higher costs of credit. Specifically, consumers with good credit profiles who have earned easy access to low-cost credit would not be as able to make their case on the face of their credit reports and scores.

The outline is currently being reviewed by a panel of small businesses convened by the CFPB. The CFPB also has invited stakeholders in the consumer reporting ecosystem — which would include furnishers — to submit written comments as part of that small business review.

Once the review process is complete, it is expected that the CFPB would issue a proposed rule in 2024, opening it up for comment by any interested parties. Finally, after receiving comments, the CFPB would issue final rules and establish an effective date.

So, furnishers beware. If you are a furnisher, your opportunity to be heard is currently underway; what are you going to do?

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[1] These statistics are from the CFPB report, "Key Dimensions and Processes in the U.S. Credit Reporting System: A review of how the nation's largest credit bureaus manage consumer data," available at https://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf.

[2] Consumer Financial Protection Bureau, "Small Business Advisory Review Panel for Consumer Reporting Rulemaking: Outline of Proposals and Alternatives Under Consideration," Sept. 15, 2023, available at https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-rule-sbrefa_outline-of-proposals.pdf

[hereinafter “CFPB SBREFA Outline”].

[3] Consumers can recover actual damages and attorney fees for negligent noncompliance with the FCRA under Title 15 of the U.S. Code, Section 1681o, and actual damages, statutory damages, punitive damages and attorney fees for willful noncompliance under Section 1681n.

[4] CFPB SBREFA Outline at 16-17.

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