FCRA Focus – CFPB's Increasingly Active Interest in Credit Reporting
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[DAVE GETTINGS]

Hey, everybody. And welcome to another edition of *FCRA Focus*, the podcast that focuses typically on bad sports analogies and FCRA credit reporting whenever possible.

Today, what we're going to do is talk a little bit about furnishers, and we're going to do so through the lens of some recent CFPB blog entries. CFPB has become a prolific blog poster. And looking at those entries we have found can give some good insight into what the CFPB is thinking. So, we'll talk a little bit about those today from the furnisher's perspective. And joining me today is a partner of mine at Troutman Pepper, Ethan Ostroff. Ethan specializes in credit reporting, especially on the furnisher side, and so we thought he'd be a great addition to today's podcast. So, Ethan, welcome.

[ETHAN OSTROFF]

Great to be with you, Dave. I'm looking forward to what bad sports analogies and other things about the Mets that I can make fun of you about that you might say.

[DAVE GETTINGS]

So, Ethan, now that we're getting started, I actually thought I would, I'd surprise you with this. I've actually gone back and looked at the last five years of our Fantasy Football results in the office, and you were third, fifth, second, fifth, and seventh. And I always really think of you as a really good Fantasy Football player until I realized you've never actually won our league. So, what are you going to do next year to improve your performance?

[ETHAN OSTROFF]

I may turn off auto draft so that I have a better chance at prevailing. And if I really, really want to win, I'll probably get my kids involved.

[DAVE GETTINGS]

Makes sense. Some do that, some do that. All right. So, Ethan, tell us a little bit about your practice outside of Fantasy Football. What do you do mostly at Troutman Pepper?

[ETHAN OSTROFF]

I help companies with a broad range of consumer-facing issues, from individual and class litigation to various types of regulatory and compliance matters spanning the gamut of what we like to call the alphabet soup of consumer financial laws, and do work with companies ranging from product design to how to understand obligations under the Fair Credit Reporting Act and whether you have any, and then how to stand up a compliance management system, put that in place to create the appropriate guardrails with particular businesses and with particular products.

[DAVE GETTINGS]

Really cool, really cool. And I actually learned today that you're actually starting a crypto podcast with the first episode recording next week. How does that play into your practice?

[ETHAN OSTROFF]

So, one of my practice areas has been related to various issues that companies have when they interact with consumers in taking payments, whether that be preauthorized electronic funds transfers or other types of payments-related issues. And there's some interesting cross sections and interrelationships between the payments world and what we generally call the world of cryptocurrency. But there are some particularly interesting things happening especially with the use of blockchain technology and how that is being integrated into consumer financial services companies and other financial services companies and how that may change a lot of products and a lot of ways that businesses interact with consumers.

[DAVE GETTINGS]

Really interesting. That'll be cool to listen to. So today, we'll talk a little bit about the CFPB and furnishers. In your practice generally, Ethan, have you seen the CFPB taking an increasingly active interest in credit reporting, especially for furnishers?

[ETHAN OSTROFF]

Definitely. I think that trend has been with us for a number of years. I think there was some perceived breathing room under the prior administration. And the breathing room, I think, that some saw previously has really been completely washed over by the significant amount of activity in this space by the CFPB. And I will just mention, don't forget the other regulators here. There's the FTC is very active in this space and has been for a very long time. And particularly with the statements recently by the CFPB about the ability of states to enact certain laws and state regulators to perform certain functions and enforce certain laws, we certainly expect there to be a significant uptick in activity in the credit reporting ecosystem by states attorneys general.

[DAVE GETTINGS]

Yeah, it's actually something I was going to mention. It feels like everyone talked about, right or wrong, that the Trump administration was less active on the federal level in terms of enforcement of regulation. And so, the states filled a little bit of the perceived void. Now, we've got a situation where the CFPB, the FTC they're increasingly active, but you still have those state regulators, state attorney generals offices that, at least recently, have been really active in terms of CIDs or enforcement actions. So, you've got a bit of a double whammy in terms of both the federal and the state enforcement regime.

[ETHAN OSTROFF]

Totally agree. And that sort of goes where the political winds blow, right? So, depending on the next AG election in a particular state, that could completely get flipped on its head again.

[DAVE GETTINGS]

Yeah. Agree. So, talk a little bit about some of the CFPB's interests that they've signaled through actually their blog posts. Their blog posts have been a really good way to track what the CFPB's interested in. So, one of them I wanted to talk to you about today was on May 25th, the

CFPB issued a blog post regarding credit card companies and their, at least perceived practice of suppressing payment information. Can you tell us a little bit about the CFPB's post and what it's interested in and what it signals to us?

[ETHAN OSTROFF]

I think basically, the CFPB has indicated that it's concerned about the lack of certain types of data being provided by businesses to consumer reporting agencies and whether or not there should be some type of obligation for certain data fields to be included always. I think the way it was described in the blog post was they want useful, accurate, and complete information to be reported. And I thought the use of the word useful was very interesting there because that's one that I haven't really seen too much in the parlance of the ecosystem of credit reporting.

The focus for the CFPB as they explain it in the blog post is that the suppression of payment data has the potential for harm because they believe the lack of payment data, historical payment data on particular accounts, is negatively impacting the ability of consumers to access credit at the most competitive rates. And they are of the belief that consumers need this data to be reported so that other businesses and entities that are viewing consumers' credit reports, then based upon that data and usually other data sets are making decisions about what type of loan to offer them or what type of product, and then also what type of terms, is being negatively impacted by the suppression of payment data. And so, it's harming lenders' abilities to competitively underwrite credit as well.

[DAVE GETTINGS]

So, what the CFPB was focusing on in the blog post specifically is credit card companies who were reporting tradelines to the CRAs but who are not reporting actual payment data in those tradelines?

[ETHAN OSTROFF]

Yeah. I think it's historical information that they're particularly focused on. So, it appears that it's not the most recent or freshest account payment information.

[DAVE GETTINGS]

So generally, we typically take the position that companies don't have an obligation to report credit information. You can choose to report it freely if you want, but there's no obligation to report it. And we've actually, as you'd expect, won summary judgment, won motions to dismiss on that issue. Do you think the CFPB, in this blog at least, is signaling that they might view the issue differently, that there actually is an obligation to report credit information, especially for these credit card companies?

[ETHAN OSTROFF]

That is certainly one way to interpret this. I think there are a number of data elements that 1681s-2 of the Fair Credit Reporting Act require to be reported by a furnisher. And so, it's certainly possible that the CFPB could try to do some type of rulemaking to increase the different types of data fields that are required to be reported. It's also possible that they could obtain the same outcome by doing something to require additional data fields or additional length of time of certain data fields to be reported by consumer reporting agencies, which then could flow down as an obligation to furnishers in some way, contractual or otherwise. What do you think about it, Dave?

[DAVE GETTINGS]

I think the CFPB's blog, it typically foreshadows what the CFPB's thinking. And if we know anything about this administration, it's that they don't hesitate to be fairly aggressive in terms of rulemaking, in terms of enforcement. So, I think the blog may be a precursor to the potential initiation of rulemaking related to the possibility of having to actually report specific information, even though right now I think it's pretty established. The law is you don't have an affirmative obligation to report, but if you do report you can't do it in a misleading or untruthful fashion.

So, I think it's possible there's some rulemaking on the horizon for the CFPB that talks about the need to report actual payment amounts or the need to report historical payment information. We'll see what happens certainly in the notice-and-comment period. Things can certainly change if that does happen. But if that occurs, I think it could be significant for other aspects that we see furnishers experience. For example, we've got furnishers that will delete tradelines in response to a settlement or may delete a tradeline in response to a bankruptcy being filed. And maybe rulemaking that talks about the need to actually report credit information could impact what furnishers are allowed to do in those situations.

[ETHAN OSTROFF]

Yeah, to me, I keep coming back to the phrase accuracy and integrity. And that is subject to different interpretations by different regulators at different times. The insertion in the blog post of the word useful to those other two words I think should leave people scratching their heads as to what exactly the CFPB believes is useful, and how it is that they over time may develop different ideas about data elements that they believe are useful and why, and different tools in their toolbox they can seek to use to change the credit reporting ecosystem so more of that data is appearing on consumer reports, which requires more of that data to be provided by furnishers to consumer reporting agencies.

[DAVE GETTINGS]

Yeah, it'll be interesting if they do use the term useful in any future rulemaking - what that actually means. I mean, how would you have a dispute that says the information the furnisher's reporting is accurate, but not useful or could be more useful? Our furnisher clients like objective standards, and useful is not a really objective standard.

[ETHAN OSTROFF]

Yeah, I think that they may not actually use that word, right? But they may seek to impose obligations that are very specific as to data sets and data fields that are required, that from their perspective when combined make the data useful. And it also makes me think back in the litigation world that we play in daily, there's a large focus on the idea of is something technically accurate, but nonetheless materially misleading? And that's also what I think is similar to the word useful in that regard is whether or not the omission of certain data results in materially misleading information.

And we know from having been doing this work for so many years together, Dave, that that's been a huge issue for the plaintiffs' bar for many years, whether it be the use or omission of compliance condition codes to indicate an account's dispute status and where it is in the process of an investigation to special comment codes, particularly as we saw and are still seeing related to the CARES Act and the changes to the Fair Credit Reporting Act because of that. And the use of varying different codes to report things like natural disasters or forbearances or deferments and how the different data elements when taken together after they're provided by a furnisher to a consumer reporting agency are then translated into what the consumer actually sees on their consumer report, which it's not the same way that it's presented to you, if you look at three different national consumer reporting agencies, they don't look the same.

And you will also see data fields on a consumer report that aren't part of what a furnisher provides in its metro to reporting, but rather are data fields that consumer reporting agencies determine based upon the interrelationship of other data points that are actually being reported by furnishers.

[DAVE GETTINGS]

It's one of the biggest issues I see now in furnisher litigation. I mean, what you're alluding to, for example, is all those pay status cases, the pay status cases that are making their way through the Third Circuit right now. It's the issue of what the furnisher reports compared to what actually shows up in the text of the consumer report across all three national CRAs and whether the information's misleading or inaccurate. You know, we've obviously taken the position that it's not misleading and not inaccurate but it's going to work its way out.

And another case I've got right now, same thing, is the plaintiff is alleging that there is a balance updated date and a status updated date in the plaintiff's consumer report. But those aren't fields that a furnisher either reports as an initial matter or reports in response to an ACDV. So, one of the big areas of furnisher litigation right now is, as you said, what the furnisher reports and whether it's accurate compared to what actually shows up in the text of the consumer report.

All right, Ethan. Well, I appreciate you making the time today. I appreciate you talking a little bit about the CFPB and some of its recent positions with respect to furnishers. I think time will tell in terms of how aggressive the CFPB is in terms of creating new rules for furnishers or maybe adopting this usefulness standard we've talked about being completely subjective. But time will tell, and I'm sure you'll be tracking it.

[ETHAN OSTROFF]

Yeah. I think we'll all be tracking it, Dave. And look forward to getting together with you at some time in the future when we see more activity specifically in this space to talk about what's happened and what we expect to happen after that.

[DAVE GETTINGS]

All right, thanks very much. Take care.