FCRA FOCUS PODCAST: THIRD CIRCUIT HANDS DOWN DECISION IN FCRA PAY STATUS CASES
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GUESTS: ETHAN OSTROFF, BROOKE CONKLE AND JON KENNEY
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Dave Gettings:

Hey everybody and welcome to another edition of *FCRA Focus*, the podcast that focuses on the Fair Credit Reporting Act, and all other things credit reporting. I'm your host, Dave Gettings. And today we're going to talk about a recent Third Circuit decision in the *Bibbs* case. It pertains generally to consumer reporting agencies, and furnishers, deals with the accuracy of credit reporting, specifically discussing pay status. You may have heard this as the pay status cases, or the law on pay status. And so, we'll dig in a little bit on that today.

Our three guests with us today are Jon Kenney, Brooke Conkle, and Ethan Ostroff. All attorneys in the consumer financial services section of Troutman Pepper that focus on FCRA significantly. And so, I'll let each of them introduce themselves briefly. I'll first start with Jon, and I will tell you, Jon is our fantasy football commissioner. We had our draft earlier this week and John was supposed to order pizza for everybody, but the pizza never showed. So, Jon is appearing on the podcast today as a debt to me to work his way out of the, what we will call, pizza debacle of 2022. Jon, why don't you introduce yourself briefly and tell the audience something interesting about you that is non work related.

Jonathan Kenney:

Hi everybody, I'm Jon Kenney. Dave got me on this podcast telling me this was going to be a Fantasy Football podcast, and so I'm a little bit unprepared to talk about the Fair Credit Reporting Act, but I have been working in this area for quite some time, so I guess I'll be ready to go.

Dave Gettings:

Let's be honest, if this was a Fantasy Football podcast based on your draft, you'd be unprepared for that as well.

Jonathan Kenney:

That is accurate. That is accurate as well. So.

Dave Gettings:

Brooke, why don't you introduce yourself?

Brooke Conkle:

Certainly. I'm Brooke Conkle. I am an associate in Troutman Pepper's Consumer Financial Services section here in Richmond, Virginia. I've been practicing for close to 10 years at this point, and been litigating the pay status cases for about two years now.

Dave Gettings:

Thanks, Brooke. Ethan, over to you.

Ethan Ostroff:

Yeah, I'm a partner in the group. I've been dealing with the Fair Credit Reporting Act and various types of litigation and compliance issues for over a decade now. And have been dealing with these pay status cases for about five, or six years at least.

Dave Gettings:

As someone who was at our draft earlier this week, how did you view Kenney's role as commissioner?

Ethan Ostroff:

Yeah, I mean, I think debacle was the appropriate reference. I mean, I think under any reasonable person standard, it was a lackluster effort clearly.

Dave Gettings:

All right, so let's go back to credit reporting. We're going to talk about the *Bibbs* case, and the pay status issue more generally. Ethan, can you kick us off, and just tell us before *Bibbs*, where did the pay status cases originate? And how do we sort of start on this path that eventually led to *Bibbs*?

Ethan Ostroff:

This goes back to a Southern District of Texas case called *Macik*, and that case was decided in 2015. It went to a jury trial, and the lawyers involved in that case are sort of the ones that I view as the originators of this theory. They've been filing cases based upon this theory since about 2015. The *Macik* case, they defeated it at furnisher's motion for summary judgment, took it to a jury trial. They got a $90,000 actual damages award, $100,000 punitive damages.

And that is all about this sort of situation where you have a closed account with a zero balance, but nonetheless, there is a negative pay status indicating something about payments being past due at some point in the past. And that firm, I view them really as having taught the other lawyers on the plaintiff's bar about this theory, which is what has led to the explosion over the past, I'd say, maybe about two years in the volume of these cases being filed.

The two gentlemen in that firm are generally nice guys, and I enjoy working with them on our cases. But they were counsel of record in the district court in all three of the cases that were consolidated on appeal on *Bibbs*. And, from my perspective, are the ones who have been at the tip of the spear on this theory for many years. And just to forecast what we're going to talk about later on today. I mean, this theory is not over, and they're constantly tweaking and evolving it. It's going to see some more light.

Dave Gettings:

And just at a high-level, we'll get to it in more detail in a little bit. But the theory is that you've got arguably, or at least plaintiff's bars would argue, conflicting information on a report. You've got a payment rating on their credit report, where the payment rating is showing 60 days past due or 120 days past due. And the account status might be closed, it might be zero balance. And the defense bar and plaintiff's bar disagree on whether the payment rating is historical or current information, and whether it's misleading. Did I sort of summarize that appropriately?

Ethan Ostroff:

I think so. Although, I would make a slight nuance in the sense that a furnisher does not actually report a pay status. There's no Metro 2 field, there's no field on an ACDV form. There's no field on AUD, right, where a furnisher ever sends me anything called a pay status. What furnishers are providing to consumer reporting agencies in appropriate circumstances depending on the account status code is a payment rating code as well. And so, when we talk about these cases, I think, we should be clear from a furnisher perspective, it's a payment rating that is being read in conjunction with other data points that a furnisher is providing a CRA. For a CRA to then decide on its own, what it's going to say, if anything, about a pay status?

Dave Gettings:

Right. And so that's why the claim sort of differs a little bit. And there's different defenses, whether you're a furnisher defending an SUV claim, or a CRA defending an EB and I claim. A lot of the accuracy arguments are the same, but some of the nuances different. All right. So, Brooke, why don't you talk about how we got from *Macik*, which is what Ethan was just talking about, to how we got to *Bibbs*. Where were the cases going nationwide? Talk a little bit about the split and what we were seeing.

Brooke Conkle:

Just as Ethan mentioned, about two and a half years ago, the theory really started to kind of snowball. And courts nationwide were dealing with the issue, but we saw a large concentration of cases in the Third Circuit and also in the Second Circuit. And courts really kind of ran along two different fault lines. When courts looked at dispositive motions, either motions to dismiss or motions for judgment on the pleadings on this specific pay status issue, courts took what we call either a pointillist approach, or a landscape approach to the reporting and whether or not it was accurate. So, in those cases where a court denied a dispositive motion, the court took that sort of pointillist approach, and really focused singularly on the pay status. And said, it's a contradiction to say that a consumer is both 30 days late, 60 days late and also has a closed account.

So those courts really looked at that singular line, that singular pay status, to determine whether or not the reporting was accurate. And for those courts that granted dispositive motions, they took what we call the landscape approach. They looked at the trade line in its entirety and said, we can't focus just on the pay status to figure out whether this reporting is accurate or not. And those courts looked at all of the other data points that are on this sort of pay status trade line, looked at the accounts closed, or the accounts transferred, it's with another entity. There's no pass due balance, there's no balance remaining on the account at all. When you add up all of those data points, it shows that the pay status is a historical data point rather than a current one. And that really was kind of where the rubber met the road for defendants. We're looking at these and saying, this is historical reporting, whereas plaintiff's counsel is really trying to highlight that contradiction between pay status that doesn't necessarily match up with a closed account.

Dave Gettings:

Got it. So, first follow-up question, what was that word you used? Was it pointillist, and what does it mean?

Brooke Conkle:

Yeah.

Dave Gettings:

How do you spell it?

Brooke Conkle:

Pointillist, Dave, did you not take art history?

Ethan Ostroff:

Seriously, Dave. It's a pretty common term in the world of art, right.

Dave Gettings:

I've never heard that word in my entire life. So, for the laymen like me, can you translate what that means? I know what landscape means. It's the thing in word, where you turn the paper sideways, but what does pointillist mean?

Brooke Conkle:

Pointillist means pop art that you see with the tiny little dots that all of the dots add up to make some art. That's what these courts are doing.

Dave Gettings:

Is that like the magic eye, where you look at it, and it becomes another picture when you focus really carefully?

Brooke Conkle:

Sure.

Dave Gettings:

Okay. All right. So even before *Bibbs*, would you say there's a direction the courts were going? Do they tend to look at the report in the entirety? Do they tend to look at it as historical information? Where do you think the weight of the law was going pre-*Bibbs*.

Brooke Conkle:

Pre-*Bibbs* the weight of the law was trending for defendants. So, the weight of the law was trending towards the landscape approach. Reading a tradeline in its entirety and looking at the pay status as a historical marker.

Ethan Ostroff:

Yeah, I would just add as part of that trend, what the plaintiff's bar was doing was making further efforts to change the way they're alleging what happened in their complaints, and also trying to take affirmative steps to avoid the courts having sufficient information in front of them when they're dealing with a motion to dismiss, or motion for judgment on the pleadings in an attempt to preclude the court from getting to the point where it feels like it should dismiss the claim,

because it's not plausible. That was the cat and mouse game that's been going on for years, because from the plaintiff's perspective, they needed to get over the hump of that initial dispositive motion. And they felt like if they get past that, then the case is going to resolve one way or another to their benefit.

Dave Gettings:

Yeah, they have defendants face the quandary of, well, I think I'm right here, but do I want to spend a couple $1000 to get this case dismissed, or litigated through dispositive motion?

Ethan Ostroff:

Not only that, but I think the plaintiff's bar would also say, and they've got this jury verdict from *Macik* in their back pocket that says, if I get to a jury, I think I'm going to convince a jury to find in favor of the plaintiff and to find a violation and to award six figures plus attorney's fees and costs. It's a big risk for people who are defending these cases knowing that the downside risk at the end of the day is significant, because there's a jury verdict directly on point.

Dave Gettings:

Yeah, absolutely. So, Jon, let's take us to *Bibbs*. So, we've now made it to the Third Circuit. We're through the district court. What were the just sort of high-level facts and procedural background of *Bibbs*? How did we get there?

Jonathan Kenney:

Bibbs, as you mentioned, was previously consolidated on appeal after originating from three separate district court cases, before the Eastern District of Pennsylvania claiming that TransUnion violated the Fair Credit Reporting Act. *Bibbs* was just one of the appellants, but there were two other individuals, Parke and Samoura, who also had their own cases before the EDPA, but because the cases were so similar, they were consolidated for purposes of the appeal before the Third Circuit. In each one of these cases, the individuals borrowed student loans from various lenders for one reason or another they fell behind on their payments and so their respective lenders closed the accounts and transferred those loans to a new servicer. Shortly after those loans were transferred, the appellants reviewed their credit reports, saw that their trade lines were showing a pay status that was 120 days past due. It's worth noting that these trade lines also showed that the student loan accounts were closed, that they had been transferred, and that they all had $0 account balances.

The appellants then hired the same attorney, who wrote to TransUnion a dispute saying that the accounts were inaccurate, because they each have a $0 balance with a late status. Quote, “If my client owes them no money and has no payments that are needed, then it is impossible for their current status to be listed as late.” Unquote. The attorney asked for those trade lines to be removed, and so TransUnion invested those disputes and timely provided the results of the investigation. In those investigation results, there included a quote note on credit report updates, which explains that for accounts that have been closed and paid, pay status represents the last known status of the account. Ultimately, TransUnion verified the pay status notations, and did not remove it from the appellants’ credit reports. The appellants each filed their separate lawsuit in the Eastern District of Pennsylvania in 2020.

Each claim that TransUnion violated section 1681e(b) of the FCRA, which requires credit reporting agencies to include only accurate information on their credit reports under the

maximum possible accuracy standard. And also claim that TransUnion violated Section 1681i, by failing to conduct a good faith investigation of their respective disputes and failing to delete what they claimed was erroneous information from their credit report. I'll note that while the appellants all agreed that their loans were at least 120 days past due at the time the loan was closed and transferred from their previous lender. They argued that the notation stating that the account was 120 days past due was inaccurate, because they no longer had financial obligations to that previous lender.

And the reason why that's important is because according to the appellants, the pay status could mislead future creditors and assuming that the loans currently more than 120 days passed late, at the time, a future creditor reviews their reports, when in reality these loans were closed. When these cases were before the district court, the EDPA granted TransUnion's motion for judgment on the pleadings in all three cases, and dismissed the lawsuits. And so, the appellants then appealed, and now, we're before the Third Circuit where we get the opinion we're talking about today.

Dave Gettings:

Got it, Jon. Thanks, I appreciate it. And then I would note while we're talking about procedure, there have been a bunch of other cases in the Third Circuit that have been stayed pending *Bibbs*, so it'll be really interesting to see how those cases pan out, now that *Bibbs* has been decided. Whether the Third Circuit will sort of decide them summarily. Whether a lot of counsel will just sort of settle out. So, *Bibbs* will likely lead to new developments in other cases. Ethan, looks like you wanted to say something.

Ethan Ostroff:

Not only that, Dave, but not all the cases got stayed, right. So, there's a case called *Sigler*, which is actually on appeal right now to the Third Circuit. And the court just issued a briefing notice beginning of August, so the opening brief in that case is due in September. It's the same lawyers who are involved from the plaintiff's side. So that one has not been dealt with yet. That's one to watch, and maybe the first one that the Third Circuit actually deals with.

Dave Gettings:

So, at a really high-level in *Bibbs*, what we've got, and there's way more nuance than this. But you've got a situation where there's a quote unquote, pay status reporting 120 days late. On the flip side there is the account is closed, there's a zero balance, sometimes it says transferred, and you've got plaintiff's counsel arguing that the reporting is conflicting and misleading. And you've got defense counsel arguing that when you look at the report as a whole, it is very, very clear what it's saying, and it's not misleading, it's not inaccurate. So, we get to the Third Circuit, and the Third Circuit in its opinion lays out really three issues that it's addressing. It lays out what standard applies you determining accuracy under 1681e(b). And then once it decides the standard, it talks about whether the pay status was misleading under that standard. And then, third, whether the district court should have ordered discovery to assess whether or not it was misleading. So, let's talk about the first issue, what standard the district court applied in assessing whether or not a report is accurate. Who wants to touch on that?

Brooke Conkle:

Sure, Dave, I'll take that one.

Dave Gettings:

It's almost as if that wasn't scripted and actually that one wasn't, because in my notes I had no idea who was taking that one. So, thank you, Brooke, for chiming in.

Brooke Conkle:

Absolutely. The district court applied a reasonable creditor standard, and viewed the trade line as a reasonable creditor would view that trade line. And it took kind of the landscape approach from a creditor's perspective. And on appeal, appellants argued that this was the wrong standard, that instead the district court should have applied the reasonable reader standard, and argue essentially the FCRA is not limited to creditors. The FCRA applies to persons under the statute, and persons include folks who are not creditors, who do not have the sophistication necessarily that a creditor would. So, on appeal, TransUnion certainly argued that the reasonable creditor was the correct perspective, and the correct standard.

And the Third Circuit gave plaintiffs a win on this one. They said that the appropriate standard is the reasonable reader, and really highlighted those arguments that appellants made, essentially saying, the FCRA is not limited to creditors. And it applies to folks who have a sophisticated reading of consumer reports and trade lines, but also folks who are just kind of using credit reports in an everyday sense. And the example the courts gave was kind of a residential landlord, who doesn't have a ton of properties, they use consumer reports in the same way that a sophisticated bank would and the standard that courts should use when analyzing whether or not trade lines are accurate, is the reasonable reader standard to encompass all of those different perspectives.

Dave Gettings:

So, what's the practical impact of choosing a reasonable reader of a reasonable creditor, that arguably there might be some things that a reasonable creditor would find either misleading or not misleading, but a reasonable reader might not have that same perspective?

Brooke Conkle:

I think that's essentially what plaintiffs and appellants were arguing, that a reasonable reader might view things as inaccurate, that a creditor would have a higher standard for, that a creditor would kind of know more intricately than a reasonable reader would. And from a plaintiff's perspective, it would be easier under a reasonable reader standard to find an inaccuracy.

Ethan Ostroff:

I think there's another way to read this, and I think the other way to read it is practically speaking, a judge is not a creditor. And so, if you have a reasonable creditor standard, how does a judge make a decision on a 12(b)(6) or a 12(c) or even on summary judgment about what a reasonable creditor would do, or how a reasonable creditor would view it without some sort of evidence, right? And that could have been a much more difficult situation for defendants in these cases down the road. And by adopting the reasonable reader standard to some extent, and making it objective, I think it gives more ammunition for defense in these cases to be able to explain to judges why the judges themselves can take a holistic view of the investigation results, or a credit report and come to a conclusion about what a reasonable reader would conclude about the meaning of the data and the trade line. So, I think, it might end up actually being to the benefit of the defense side.

Dave Gettings:

Maybe you've got a bunch of experts out there who are credit reading experts that really wanted the reasonable creditor standards, so they could get a bunch of work out of it. Maybe now judges can be the reasonable reader, right?

Ethan Ostroff:

I don't know that I would go that far. The way I would describe it is the language that was used for many years in the context of a trade line can be accurate, but nonetheless materially misleading, right? And the issue was okay, but materially misleading to who, many courts in that context described it as materially misleading to a potential creditor. And that typically comes up in the context of does the way this particular account is being reported, has it caused any type of actual damages to be suffered by an individual? So, what you had was courts viewing it, and using that terminology of materially misleading to a potential creditor. And so, I think that's where this argument came from originally out of a district court about a reasonable creditor, because it comes in sort of a holdover from that prior case law.

Dave Gettings:

Right. So, Brooke, under the reasonable reader standard, what did the court hold about the accuracy of the report?

Brooke Conkle:

Under the reasonable reader standard, the court affirmed the district court's holding that the reporting was accurate. And the court essentially said, this landscape perspective is the right one. You still view it through the lens of the reasonable reader, but you look at all of the data points in conjunction with each other. You don't single out the pay status and say, maybe this might be misleading. You look at all of the data points in a trade line, and a reasonable reader would look at all of those and conclude that this is an account that was closed, that it's not a current pay status of past due, that that's historical information.

Dave Gettings:

And you know something I think that creates some interesting arguments on, is even outside the pay status situation, you've got a bunch of cases now, where CRAs, for example, are using disclaimers on reports, like in matching cases for criminal records. And they always argue that, look at the disclaimer, it says the user's got to verify the match themselves, or has to use third party information to confirm the match. And plaintiff's counsel typically say, well, you can't use a disclaimer. You've got to look at the specific information itself. And I think looking at the report in the entirety, the landscape approach as you discussed, actually, might help strengthen the law in some of those disclaimer cases, because when you look at the report as a whole with the disclaimer, or with some qualifying information, maybe it becomes more accurate holistically than it otherwise might look when you're just looking at the individual record or individual trade line.

Ethan Ostroff:

I totally agree with you, Dave. I would just note, I thought there was one sentence in the court's opinion that I kept scratching my head about, and I kept reading it over and over again. The court talked about applying the reasonable reader standard, right? Not in isolation, but by

reading the report in its entirety, then it has the sentence that I keep shaking my head about. Well, on the other hand, if an entry is inaccurate or ambiguous when read both in isolation and in the entirety of the report, that entry is not accurate under 1681e(b). If I'm a plaintiff's lawyer, I'm focusing on what does that sentence mean? How can I show something is ambiguous? I don't even have to show it's inaccurate anymore under this. I just got to show it's ambiguous.

Dave Gettings:

I focus on both there. But because the court said both, I would argue, well, even if it's ambiguous, maybe when you're looking at it individually that if it's not ambiguous when you're looking at it as a whole, you're still okay. But yeah, I take your point. I actually read that sentence multiple times, and wasn't really sure exactly what the court was saying. Brooke, last question to you on the specific decision, the court also denied discovery on whether a reasonable reader would be misled. I, actually, think that's a really important point. Can you just touch on that a little bit?

Brooke Conkle:

It is a really important point, Dave, and it validates this idea that defendants can use early dispositive motions as a means to get out of these types of cases. Essentially, the court was saying, plaintiff you don't need additional discovery on this point, because the trade line that you have implead into your pleading, that provides all of the information that the court needs to make a determination under the reasonable reader standard.

Ethan Ostroff:

Guess what plaintiff's lawyers are going to do, that stuff, they're going to omit, right? They're going to make it so that it's more difficult for a judge to look at this, and so the judge isn't comfortable making a decision on an early dispositive motion. I mean, that seems to be one of the next iterations we're going to see.

Dave Gettings:

Yeah, I was thinking we might see more attachment of adverse action letters or things like that to the complaint, and then argue, look, the mortgage company or the creditor or the landlord took adverse action. Maybe have some allegations about the pay status leading to the adverse action, and try to argue that that reasonable reader was misled. We're getting close to time. So, let's talk a little bit about life after *Bibbs*, and where we see it going. I thought it was really interesting that since *Bibbs*, we've seen at least two cases talk about the pay status issue. The first was out of the district of New Jersey about 10 days after *Bibbs*, and did not mention *Bibbs* at all, and actually denied the dispositive motion on very similar grounds that *Bibbs* would've granted. That's one example of where we might see a motion for reconsideration, or maybe a supplemental authority. But clearly the pay status cases are still in the process of working themselves out.

Then on the flip side, you had another case in a district in Indiana, where the court really warned plaintiff's council about Rule 11 and saying maybe these cases are not even compliant with Rule 11 if they're contrary to the holding in *Bibbs*. Those are only the first two in what likely will be many working themselves out. And sort of a close out takeaway, where do you all see the pay status cases going? I know we historically talk about three buckets of pay status cases. Do

we view *Bibbs* as having addressed all three buckets? Do we view other buckets now as having some more legs? Why don't we touch on that just briefly?

Ethan Ostroff:

We generally think about this, like you mentioned there's three buckets. You have consumer paid in full, then it's closed, you have third party pays in full, then it's closed. Or you have things like student loans, where it's not paid, it's closed and transferred, because they've gotten so delinquent. And I think there will be a push from the defense side to articulate why the same rationale from *Bibbs* applies to all three buckets. And I think you'll see the plaintiff's bar making every effort they can to explain why there's a material difference between a closed and transferred student loan and a separate type of loan product that actually was paid in full either by, for example, a refinance, where the funds technically came from a third party, or by the consumer directly to the servicer or the creditor to pay off their particular loan.

And you're going to find a lot of arguments coming down the pipe about whether or not this particular reasonable reader standard should be applied in courts outside of the Third Circuit. And so there will be certainly a battle over that applicability and how courts should adopt it and how they should apply it.

Dave Gettings:

Yeah, I think that's a good point. If we've learned anything as defendants and defense counsel is that these consumer claims don't just go away. The TCPA didn't just go away after *Facebook*. The FCRA didn't just go away after *Spokeo*. I think your point's correct, Ethan, that plaintiff's counsel will try to limit *Bibbs* and explain why it doesn't apply, and defense counsel will try to argue how broad it is. And there will certainly be litigation to come in the next couple of years. Ethan, Jon, Brooke, thank you all for coming. We appreciate it. Jon, much better job today than you did on the draft. Look forward to hopefully beating you in one of these matchups coming up. Thanks everybody.