

FURNISHER LIABILITY UNDER THE FAIR CREDIT REPORTING ACT: STATUTORY CHANGES AND NEW CASELAW

By Fred Miller

The responsibilities of creditors and debt collectors furnishing consumer debt information to credit reporting agencies under the Fair Credit Reporting Act (FCRA) has been both altered and clarified by amendments to the Act and a recent 4th Circuit appellate ruling.

"Furnishers" of credit information to reporting agencies – creditors and debt collection agencies - were treated well by the FCRA as originally enacted, given nearly blanket immunity from common-law tort liability (defamation, invasion of privacy, negligence) for information given to credit reporting agencies¹ while they got few new responsibilities under the Act. Amendments in 1996 began to define responsibilities for furnishers, and opened a narrow area of potential liability for furnishers to consumers for failure to act in accordance with the statute.

Under the 1996 amendments, furnishers were barred from reporting information they knew was wrong, consciously avoided knowing was wrong, or were correctly informed was wrong by the consumer. Furnishers also were required to correct information sent to agencies when they find out it wasn't accurate and notify agencies when information they were providing was disputed was disputed by the consumer.² However, consumers were given no right to sue for violation of any of these requirements.

The narrow opening for consumer enforcement by suit was for the requirement that furnishers reinvestigate the validity of items they submitted when informed by credit reporting agencies that a dispute was filed by the consumer.³ The furnisher is to report back to the credit reporting agency, correcting information that the furnisher finds is incomplete or inaccurate, in time for the agency to meet deadlines set by the statute for its own investigation, usually 30 days from the filing of the dispute.

Failure to follow the requirements for a reinvestigation can result in liability of the furnisher to the consumer for actual damages, attorney fees, and, if the violation is deemed willful, statutory and punitive damages.⁴ However, the statute does not make clear what kind of investigation is required by the furnisher.

4th Circuit Sets a Standard

The Fourth Circuit is the first federal appellate court to rule on the nature of the required reinvestigation by the furnisher. When the plaintiff in *Johnson v MBNA*⁵ disputed the credit card entry on her credit report, the matter was referred by the credit reporting agency to the creditor, MBNA, for investigation as required by the Act. Like many creditors, MBNA limited its investigation to a review of the computer record. Johnson claimed she was only an authorized user on her husband's account, not a co-

applicant. MBNA investigators saw a computer code supporting Johnson's responsibility, and on that basis verified the debt.

The Fourth Circuit rejected MBNA's argument that the content of the investigation was not regulated by the Act, so it need not be a reasonable investigation, as long as some review was done. The Court said the word "investigation" itself connotes a careful inquiry, so the review has to be reasonable. And the Court concluded MBNA's investigation was not. Since Johnson maintained she was only an authorized user on the original application, not an applicant or cosigner, and the creditor had only a computer code to review (since no documents had been retained), it should have reported back that it could not conclusively verify that Johnson was a co-obligor.

The *Johnson* case sets a standard for reinvestigations, and suggests that creditors should not be verifying the validity of debts they have previously reported unless they have the documents to "conclusively" refute information submitted by disputing consumers.

New Furnisher Requirements in 2003 Amendments

Late last year, amendments to the FCRA were adopted in the Fair and Accurate Credit Transactions Act of 2003 (FACTA).⁶ The amendments have a number of provisions expanding the responsibilities of furnishers, but most are not enforceable by private action of consumers. Most of the provisions of FACTA will go into effect on December 4, 2004, under new rules adopted by the Federal Reserve and FTC.

The basic standard for accuracy in reporting information to agencies was altered, so that it will now prohibit reporting of information that a furnisher "knows or has reasonable cause to believe" is inaccurate, a clearer and somewhat higher standard. However, consumers will continue to have no private right to enforce the standard for initial reporting by furnishers.

In the past, the FCRA required furnishers to respond only to those disputes brought to the furnisher's attention by a credit reporting agency responding to a consumer dispute. Under FACTA amendments, furnishers will now be obligated to respond to disputes about credit report items that are raised directly by the consumer, in the same timeframe now set for agencies, usually 30 days. However, once again, consumers will have no private right to enforce this requirement. To have a right to sue either the agency or the furnisher, consumers will have to continue to invoke the process for correcting report errors by dispute letters sent to the credit reporting agencies.

Violation of one new furnisher requirement can lead to consumer litigation. Under the prior FCRA, furnishers contacted by credit reporting agencies responding to consumer disputes were required to reinvestigate and report back to the agency. Under the FACTA amendments, furnishers in this situation will have to take action in their own databases or files, when appropriate, to modify, delete or permanently block the reporting of the erroneous item. If the erroneous item shows up again on a credit report or in some

other way is used against the consumer, the furnisher may be liable for failure to act to make sure it is changed, deleted or blocked from further dissemination.

There are many other changes in the FCRA under the FACTA amendments. Credit reporting agencies will be required to make "fraud alerts" available for consumers on their reports to protect against damage from identity theft, a practice already used widely but which will now be subject to regulations. Notice to consumers will be required when credit is granted on less favorable terms due to a credit report item, not just when there is a denial.

One other new provision of considerable interest to consumer attorneys is a change in the statute of limitations for FCRA claims. The two-year statute of limitations will now run from the date of discovery of the violation by the consumer, with a limit of 5 years from the date of the violation. This provision goes into effect on March 31, 2004

¹ 15 USC 1681h(e).

² 15 USC 1681s-2(a).

³ 15 USC 1681s-2(b).

⁴ 15 USC 1681n and 1681o.

⁵ 2004 WL 243404 (4th Cir. Va.).

⁶ PL 108-159 (Dec. 4, 2004).