

EVALUATING CREDIT REPORTING ERRORS FOR LITIGATION

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Legal Aid offices, prepaid legal services and many general practitioners have clients needing help to straighten out credit reporting problems. Studies have consistently shown that a large percentage of credit reports have errors, and as many as 20% have egregious errors likely to affect credit worthiness. Knowledgeable practitioners can, with a small amount of work, have a large impact in correcting these problems.

In some of these cases, we may be able to provide a benefit beyond clearing up an inaccurate credit record. Lawsuits brought under the Fair Credit Reporting Act (15 USC 1681 et. seq.) may yield sizable settlements or awards. All attorneys working on correcting credit reports should keep an eye out for cases with serious litigation potential.

This article will review the bases for suits against credit bureaus and furnishers (creditors or collection agencies) for erroneous information in standard credit reports, which are the most common issues for litigation. The FCRA has other requirements that may lead to litigation, including: 1) separate reinvestigation and disclosure requirements for more personal "investigative reports"; 2) a requirement that consumer credit reports not be furnished or obtained except for permissible purposes listed in the Act; and 3) special notice and verification requirements when public record information is used in reports provided for employment purposes.

Credit Agency Liability for Errors

Credit reporting agencies cannot be sued for every inaccuracy in reports. They are required to "follow reasonable procedures to assure maximum possible accuracy". 15 USC 1681e. Agencies can be sued for negligent or willful failure to abide by this requirement, including the negligent or willful reporting of obsolete information. Plaintiffs must prove that: 1) an error appeared in a credit report; 2) the error resulted from either a failure to have reasonable procedures or a failure to follow procedures in place; and 3) the failure was negligent or willful.

Agencies also have the obligation under the Act to: 1) reinvestigate disputed items; 2) delete or correct inaccurate or unverified items; 3) include consumer statements submitted on disputed items in reports; and 4) provide corrected statements to past users on request of a consumer. Negligent or willful failure to follow these requirements can also result in agency liability.

In 1996, Congress added the requirement that reinsertion of information previously deleted from a credit report can only be done if it is specifically certified by the furnisher, and notice is given to the consumer.

The easier cases to prove are those where the reporting agency was notified of the error and did not correct it. However, agencies can be liable for reporting inaccurate information even though the inaccuracy was not brought to the attention of the agency before the report was made. In **Thompson v San Antonio Retail Merchants Association**, 682 F2d 509 (5th Cir 1982), for instance, liability was upheld where the agency mixed information about a second consumer with a similar name into the plaintiff's report. The facts showed that the adding of information into the agency's credit reports was generally left under the control of furnishers, with few safeguards to prevent errors of this sort.

A plaintiff's attorney may have a difficult time assessing before suit whether it can be proven that the agency's procedures were inadequate. If the reporting error is one that logically should have been screened out, suit may be filed, and an investigation of procedures done as a part of discovery. Assistance of an expert may become necessary during litigation.

Attorneys who have handled cases involving the same agency may have information that would help. A deposition of a former employee of Experian, taken by a Louisiana FCRA specialist and recently circulated among attorneys handling these cases, documents some poor practices at that agency, including the reporting of public record information, such as judgments, knowing that too little information was available to accurately identify the person. The deposition also shows that Experian was aware of a common practice of collection agencies misreporting information to extend the time it will stay on the credit report, and of other similar problems with information supplied by certain furnishers. Agencies have an obligation to take steps to correct these problems. Information like this available from other cases may help prove that an error left in a report was not an isolated occurrence but a result of inadequate procedures.

Suits for failure to follow the required procedures for reinvestigation should pose fewer proof problems than suits based on the initial inaccurate credit report. The same is true for cases based on a failure to notify the consumer on reinsertion of previously deleted items. In these cases, the required actions are clear, the agency is on notice of its responsibility, and the presence of otherwise adequate procedures is not a defense.

Agencies cannot simply accept the verification by a furnisher that disputed information is correct. The agency has a responsibility to evaluate information you provide for your client. **Stevenson v TRW**, 987 F2d 288 (5th Cir 1993). The more support you provide for your client's dispute of the debt, the better your case against the reporting agency if it continues to report the erroneous but "verified" debt. Cases where credit reporting agencies refuse to remove clearly erroneous information because the creditor still vouches for it, and cases where the information reappears after deletion, are good cases for litigation consideration.

Creditor or Furnisher Liability for Erroneous Information

In 1996, Congress added responsibilities for creditors and others furnishing information to credit reporting agencies. 15 USC 1681s-2. Unfortunately, most of the requirements for providing accurate information, and supplementing information previously provided, have no private right of action for enforcement. Only the furnisher's reinvestigation requirements afford a private right of action when violated. Still, this is an important and potentially useful right of action.

Creditors and collection agencies furnishing information to credit reporting agencies are required to participate in the reinvestigation process. The credit reporting agency must pass on to the furnisher information it receives from a consumer disputing an item. The furnisher must conduct an investigation, review all relevant information provided by the reporting agency and report the results back to the agency. If the furnisher finds that information previously provided is incomplete or inaccurate, the furnisher must report this to all agencies that have been provided with the inaccurate information in the past. Furnishers must report back to the agency within the 30-day period the agency has to conduct the reinvestigation.

The Act does not spell out a standard for the investigation by the furnisher. Presumably, it must be reasonable and in good faith, but case law has not developed on this question yet. One reported decision rendered after the changes in furnisher liability provisions entirely misreads the current statute, effectively eliminating all furnisher liability to the consumer. **Carney v Experian**, 57 F Supp 2d 496 (WD Tenn 1999). More recent cases have rejected Carney, holding that there is a private right of action against furnishers who do not conduct required investigations. See **Dornhecker v. Ameritech Corporation**, 99 F Supp 2d 918, (N.D. Ill, 2000). However, the ultimate standard for furnisher liability is yet to be determined.

Many creditors are probably unaware of their potential liability for verifying inaccurate information during a credit agency reinvestigation. They may repeat previously reported information as a matter of course, with little effort to review the account. Again, the more information the creditor has been given about the nature of the dispute, both through the credit reporting agency and directly from us, the better the case for negligent or willful violation of the reinvestigation requirements if the credit report is not changed.

Damages

The mere presence of inaccurate information in a copy of a credit report provided to the consumer does not give the consumer a basis for damages, even if there are violations of the FCRA involved. There must be some dissemination of the information. **Casella v Equifax**, 56 F3d 469 (2d Cir 1995). However, it is probably not necessary to prove a denial of credit based on the inaccurate information in order to maintain a suit. **Guimond v Trans Union**, 45 F3d 1329 (9th Cir 1995).

Emotional distress and humiliation are compensable "actual damages" under the Act, along with any monetary loss from a denial of credit. Thus, whenever a violation of

the Act by an agency or furnisher results in a credit report being disseminated with errors that cause embarrassment or emotional distress, a legal action is available.

In the absence of any actual damages, statutory damages of \$100 to \$1000 are available if the violation is willful. More important, punitive damages can be awarded for willful violations.

Very large jury verdicts have been reported in recent years in some FCRA cases with egregious violations, but they have proved vulnerable on appeal. A jury in an Oregon case, **Jorgensen v TRW**, awarded \$600,000 in actual damages and attorney fees in a case where the Plaintiff spent 1½ years trying to get erroneous information off a credit report. In **Cousin v Trans Union**, it took 3 ½ years and two lawsuits to get a series of erroneous entries, resulting from fraud by a relative, off a credit report. The jury in the second case awarded \$50,000 in actual damages and over \$4 million in punitive damages. The Fifth Circuit reversed the entire award, finding insufficient evidence of actual damages and no proof of willful violations. 246 F3d 359 (2001).

Summary: What to Look For

The strongest cases will involve erroneous information that stays on a credit report after a consumer dispute, or reappears later, and is disseminated to potential creditors. A client does not have to have otherwise perfect credit to have damages and sue. The availability of emotional distress damages, punitive damages and attorney fees means that credit reporting agencies and creditors or collection agencies that furnish the information have very great potential liability. We can serve our clients well and also have an impact on a giant industry that affects all Americans by identifying and pursuing credit reporting litigation cases.