

FAIR CREDIT REPORTING ACT AND FDCPA¹

INTRODUCTION

Reporting a debt is a powerful collection tool. Sullivan v. Equifax, 2002 WL 799856, 2002 U.S. Dist. LEXIS 7884, at *15 (E.D. Pa. Apr. 19, 2002). Debt collectors often abuse it. Case preparation should include reviewing the client's credit reports from all three bureaus: Transunion, Experian and Equifax. All three reports should be ordered, as the information contained in the reports may not be the same. The client can obtain reports once a year for free by going to www.annualcreditreport.com. In reviewing credit reports, the lawyer should always look for violations of the Fair Debt Collection Practices Act and the Fair Credit Reporting Act.

Under section 1692e(8) of the Fair Debt Collection Practices Act, a debt collector will be liable for reporting to a credit bureau information that it knows is inaccurate or for failing to disclose to a credit bureau that a debt known to be disputed is disputed.

The Fair Credit Reporting Act applies in the debt collection context in at least four ways. First, a debt collector who furnishes information to a credit bureau must conduct a "reasonable investigation" of its accuracy and completeness after the consumer initiates the FCRA's dispute process with the credit bureau. Second, debt collectors face FCRA liability if they access a credit report without a permissible purpose or under false pretenses. Third, the FCRA imposes special duties on debt collectors in cases of debt arising from fraud and identity theft. Fourth, on limited occasions, a debt collector may meet the FCRA's definition of a "consumer reporting agency" and will face liability if

¹ The outline for this paper and the information contained herein comes from the manual National Consumer Law Center, Fair Debt Collection (6th Ed. 2008).

they fail to comply with the rules applicable to them. The first two scenarios will be discussed here.

LIABILITY FOR FURNISHING INFORMATION TO A CREDIT BUREAU

Debt collectors must report accurate information. 15 U.S.C. § 1681s-2(a)(1). Unfortunately, consumers do not have a private right of action to enforce this section of the FCRA. Enforcement is limited to certain public officials. 15 U.S.C. § 1681s-2(b).

In order to combat inaccurate reporting, a consumer must initiate the reinvestigation process. This is done by notifying the credit reporting agency of the inaccuracy. This can be done in a couple of different ways. Online, by phone or mail. Online and phone disputes should not be done. The dispute should be by certified mail. The letter should identify the dispute in as much detail as possible, identify the account and include any documents that support the dispute. A copy of the report with the account highlighted should also be provided. Copying the debt collector on the letter isn't necessary since the credit reporting agency has an obligation to notify the collector of the dispute and provide any documentation sent with the dispute. However, it may be a good idea to copy the collector.

Once the debt collector is notified by the credit reporting agency of the dispute, the debt collector must investigate. 15 U.S.C. § 1681i. The reinvestigation must be completed within thirty days of receipt of the dispute. A debt collector who fails to conduct a "reasonable reinvestigation" can be liable to the consumer under the FCRA. 15 U.S.C. §§ 1681s-2(b), 1681n, and 1681o. *See also* Johnson v. MBNA Am. Bank, NA, 357 F.3d 426,431 (4th Cir. 2004). The jury should decide whether an investigation is reasonable.

The FTC issued a consent order stating that a debt collector must refer to original account records when necessary to investigate a dispute. U.S. v. Performance Capital Mgmt. (Bankr. C.D. Cal. Aug. 24, 2000) (consent decree). A debt collector shouldn't be able to rely on the balance due transmitted by the original collector during the sale of the account. If the debt collector cannot or is unwilling to obtain the original account records, the information should be deleted. *See* National Consumer Law Center, Fair Credit Reporting § 6.10.4 (6th ed. 2006 and Supp.). An argument can be made that an investigation wasn't reasonable if a debt collector collecting on a sold debt fails to obtain the original account information.

There are many different types of disputes that can arise in the context of debt collection and credit reporting. The most common include debt collectors reporting an incorrect history or inaccurate current status of the debt. In addition, debt collectors may re-age the debt. They will either fail to report the initial date of delinquency or charge-off or they will use a date that makes it appear the debt isn't as old as it actually is. As a result, the debt will be included in the report long after it should have been removed (sevens years after delinquency for most information and tens years for bankruptcy). 15 U.S.C. § 1681c(a)(4). A re-aged debt could also hurt the consumer's credit score.

LIABILITY FOR IMPROPERLY ACQUIRING CREDIT REPORTS

A debt collector may obtain the consumer's credit report in connection with the collection of a debt. They may obtain a credit report for use in a lawsuit to collect a debt. However, they may not access a consumer's credit report in connection with civil litigation such as when the consumer sues the debt collector for violation the FDCPA

and/or the FCRA. Additionally, a debt collector may not obtain a credit report on the consumer's relative or someone who is not obligated on the account. They cannot obtain a report on an authorized user. The individual must be obligated on the account. If a husband is obligated on a credit card and his wife is an authorized user, it would be illegal for the debt collector to pull the wife's credit report. Private remedies are available when a debt collector acquires a credit report without a permissible purpose.

Unlike the FDCPA, the FCRA is not a strict liability statute. The consumer's attorney must establish negligence. Punitive damages are available for willful violations.

FDCPA AND CREDIT REPORTING

Pursuant to the FDCPA, a debt collector is prohibited from publicizing debts unless done in accordance with the FCRA. 15 U.S.C. § 1692d(3). A debt collector is prohibited from using a name that implies it is a consumer reporting agency. 15 U.S.C. § 1692e(16).

When a debt collector receives a written dispute from the consumer within the thirty-day verification period, the debt collector must cease all collection activity until verification is provided. Reporting debt to a credit bureau is considered collection activity. Thus, the debt cannot be reported until verification is provided. Cass, FTC Informal Staff Letter (Dec. 23, 1997) (reporting to a credit bureau is "collection activity" that must cease until verification is provided).

A debt collector violates the FDCPA if it reports a known disputed debt to a credit reporting agency without disclosing the debt is disputed. 15 U.S.C. § 1692e(8). False threats to report a consumer's debt to a credit reporting agency violates the FDCPA.