COVID-19: CREDIT REPORTING IN THE AGE OF COVID-19

Date: 30 April 2020

U.S. Financial Institutions and Services Litigation Alert

By: Robert W. Sparkes, III, Brian M. Forbes

As part of the federal government's efforts to provide relief from the economic impact of the COVID-19 pandemic to consumers, Congress took aim at financial services companies that provide consumer account information to credit reporting agencies (CRAs). The reporting activities of those companies, which are known as “furnishers” and include, among others, creditors, mortgage loan servicers and credit card account servicers, are governed by the Fair Credit Reporting Act (FCRA).[1] The Coronavirus Aid, Relief, and Economic Security (CARES) Act,[2] enacted on March 27, 2020, expressly amends FCRA and alters the duties of furnishers when reporting the status of accounts provided with COVID-19-related payment relief.[3] Despite the potential exposure carried by a violation of FCRA generally—either through private civil litigation, most notably class actions, or government enforcement—key defenses remain in place for furnishers to mitigate FCRA liability.

THE CARES ACT AMENDMENTS TO FCRA

A typical aspect of loan and credit card account servicers' businesses is furnishing information to CRAs regarding the status of consumer accounts (i.e., as “current” or “delinquent”). Under FCRA, furnishers are subject to certain duties and prohibitions that, broadly described, fall into two categories: (1) reporting of accurate information and (2) investigating and responding to consumer disputes.[4]

Since the start of the pandemic, federal and state laws, regulations, and guidance encourage financial services companies to offer payment relief to consumers impacted by COVID-19. The CARES Act adds new reporting duties for accounts that have been provided with a COVID-19 related accommodation. Applicable “accommodations” include any “assistance or relief granted to a consumer who is affected by the coronavirus disease 2019 (COVID-19) pandemic,” such as agreements to (1) “defer 1 or more payments,” (2) “make a partial payment,” (3) “forbear any delinquent amounts,” (4) “modify a loan or contract,” and (5) “any other assistance or relief” provided to a consumer affected by COVID-19.[5]

For accounts provided an accommodation, furnishers must report as follows:

- Report as “current,” if the account was current before the accommodation, as long as the consumer makes the required accommodation payments or is not required to make a payment under the accommodation; or
- Report as “delinquent,” if the account was delinquent before the accommodation, unless the consumer brings the account current during that period, at which time it should be reported as “current.”[6]

Although the CARES Act does not create a new private right of action,[7] its new requirements likely create new litigation risks for furnishers under FCRA. For example, lawsuits are sure to follow from consumer accounts that

were delinquent before the pandemic and are, therefore, reported as “delinquent” despite the consumers' compliance with the terms of their accommodations. Similarly, an increase in litigation may arise from consumer accounts that are reported for the first time as delinquent after the accommodation period expires.

LIABILITY RISKS UNDER FCRA

FCRA generally authorizes aggrieved consumers to bring civil claims for damages claiming either a negligent or a willful violation of its provisions.[8] If a consumer can prove negligent noncompliance, he or she may recover actual damages and reasonable attorneys' fees and costs.[9] If, however, a consumer can prove willful noncompliance, he or she may recover: (1) actual damages or, if greater, statutory damages between $100 and $1,000 per violation; (2) punitive damages; and (3) reasonable attorneys' fees and costs.[10] Moreover, unlike other federal consumer protection statutes, FCRA has no statutory maximum on damages recoverable in a class action.[11] Accordingly, a FCRA class action alleging willful violation threatens potentially high exposure and, for that reason, is an attractive vehicle for class action plaintiffs.

The provisions of FCRA may also be enforced against financial services companies by the Consumer Financial Protection Bureau (CFPB) and other federal agencies with oversight responsibilities for particular institutions.[12] Enforcement actions present a risk of civil penalties, including penalties of up to $2,500 per violation for “knowing” violations that constitute a pattern or practice of noncompliance.[13]

DEFENSES TO PRIVATE CIVIL CLAIMS UNDER FCRA

Although FCRA presents the dual risks of potentially high class action damages and significant government enforcement activity, several factors and potential defenses reduce the risks faced by furnishers. And, even where a furnisher may violate FCRA's new COVID-19 reporting requirements, its potential liability to consumers or the federal government may be limited.

Limited Private Right of Action

FCRA limits the types of private civil claims that a consumer may bring against a furnisher. FCRA only authorizes consumer claims challenging compliance with its duties to investigate and respond to consumer disputes.[14] The statute explicitly precludes civil liability based on consumer claims regarding furnishers' reporting-specific obligations.[15]

FCRA's limited private right of action also contains elements often difficult for consumers to satisfy. The consumer must prove that he or she notified a CRA of disputed information, that the CRA notified the furnisher of the dispute, and that the furnisher failed to reasonably investigate, did not timely report its results to the CRA, and/or did not request modification to any allegedly inaccurate information.[16] Claims against furnishers are often dismissed at the early stages due to the consumer's failure to allege each of those threshold elements, even apart from adequately alleging the existence of inaccurate, incomplete, or incorrect reporting.[17] Notably, the CARES Act did not alter these elements or the express limitations on furnisher's civil liability under FCRA.

State Law Preemption

With respect to state law claims, including claims under state consumer protection statutes, furnishers have a strong federal preemption defense. FCRA explicitly preempts most state law claims that relate to the duties, responsibilities, and obligations of furnishers under FCRA.[18] Indeed, courts have found state common law claims,

state statutory claims, and state consumer protection law and unfair and deceptive trade practices act claims preempted by FCRA.[19]

Safe Harbor from Willful Violations

Claims for willful violations of FCRA present the greatest risks, especially in class actions. To establish willful non-compliance, the consumer must show that the furnisher violated FCRA either knowingly or with a "reckless disregard of statutory duty."[20] The U.S. Supreme Court has made clear that a violation of FCRA is neither knowing nor reckless where the defendant relied on an interpretation of law that "albeit erroneous, was not objectively unreasonable."[21] This "objectively unreasonable" standard is sometimes treated as a "reasonable interpretation" safe harbor defense.[22] A consumer pursuing a willfulness claim in federal court must also establish Article III standing, which requires, at a minimum, that he or she suffered an injury in fact that is concrete and particularized and traceable to the defendant's conduct.[23] As actual damages are often difficult for a consumer to establish, Article III standing is an important defense to willful claims under FCRA.

GOVERNMENT ENFORCEMENT UNDER FCRA

The plain language of FCRA makes federal agencies and state officials the primary mechanisms for enforcing its furnisher-related provisions.[24] For many financial services companies, that means FCRA enforcement is primarily in the hands of the CFPB.[25] Importantly, the CFPB recently stated that it will take a "flexible supervisory and enforcement approach" with respect to furnishers' reporting and investigatory duties relating to COVID-19.[26] Specifically:

- Investigations of Disputes: The CFPB has stated that it does not intend to take enforcement or supervisory actions against furnishers that make "good faith efforts" to investigate disputes, even if those investigations take longer that the deadlines set forth in FCRA and Regulation V;
- Responding to Disputes: The CFPB has stated that it will consider the "significant current constraints" on furnishers when evaluating determinations that a consumer dispute is "frivolous" or "irrelevant" and thus does not require a response under FCRA; and
- Reporting: The CFPB expects furnishers to comply with the CARES Act's reporting provisions, but it has stated that "it does not intend to cite in examinations or take enforcement action against" furnishers that report information "that accurately reflect the payment relief measures they are employing." In other words, so long as the reporting is "accurate," the CFPB will likely not pursue furnishers for failing to strictly comply with the CARES Act reporting requirements.[27]

State officials that believe a furnisher has violated FCRA are authorized to bring actions to enjoin the alleged violations, to seek damages on behalf of its residents, or to recover damages of up to $1,000 per violation.[28] If successful, the state may also collect reasonable attorneys' fees and costs.[29] Although any state enforcement action is subject to the right of the federal regulators to intervene and may be precluded where a federal agency has already taken action,[30] the threat of state action remains a wildcard. As history has taught, where the federal government withdraws from aggressive enforcement in an area, the states are often quick to step in and fill in the gaps.

CONCLUSION

The CARES Act creates a new set of credit reporting requirements for financial services institutions that provide payment accommodations to consumers impacted by COVID-19. Those amendments, however, do not materially change the liability risks that furnishers face under FCRA. Thus, although furnishers will likely see an uptick in FCRA-related class and individual litigation arising from COVID-19 accommodations (or purported lack thereof), the CARES Act did not limit or alter the important defenses that help reduce FCRA exposure. And while the current leadership of the CFPB has signaled a relaxed government presence on these issues, time will tell if that stance changes or if the states take the lead to enforce FCRA's furnishing-related requirements. We will continue to monitor these issues in the days and weeks ahead.

FOOTNOTES

[1] *See* 15 U.S.C. § 1681s-2.

[2] CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT, Pub. L. No. 116-136, 134 Stat. 281 (2020).

[3] *See* 15 U.S.C. § 1681s-2(a)(F) (subsection entitled “Reporting information during COVID-19 pandemic”).

[4] *See id.* § 1681s-2(a), (b).

[5] *Id.* § 1681s-2(a)(F)(i)(I). A subject accommodation must be granted between January 31, 2020 and the later of: (1) July 25, 2020, or (2) 120 days after termination of the national emergency. *Id.* § 1681s-2(a)(F)(i)(II).

[6] *Id.* § 1681s-2(a)(F)(ii).

[7] *See* Profiles, Inc. v. Bank of Am. Corp., No. SAG-20-0894, 2020 WL 1849710, at *4 (D. Md. Apr. 13, 2020).

[8] *See id.* § 1681n (willful violation), § 1681o (negligent violation).

[9] *See* 15 U.S.C. § 1681*o*.

[10] *See id.* § 1681n.

[11] *See id.*

[12] *See id.* § 1681s.

[13] *Id.* § 1681s(a).

[14] *See id.* § 1681s-2(c).

[15] *See id.*

[16] *See id.* § 1681s-2(b) (setting forth the duties of furnishers upon notice of a consumer dispute).

[17] *See* Hunt v. JP Morgan Chase Bank, Nat'l Ass'n, 770 F. App'x 452, 457-58 (11th Cir. Apr. 25, 2019) (affirming dismissal of FCRA claims against furnisher for failure to plead notification elements); Chandler v. Peoples Bank & Tr. Co. of Hazard, 769 F. App'x 242, 248 (6th Cir. 2019) (affirming dismissal of FCRA claims because plaintiff failed to plead “a threshold showing of inaccuracy or incompleteness” (internal quotation marks omitted)).

[18] 15 U.S.C. § 1681t(b)(1)(F) (preempting state law claims “relating to the responsibilities of persons who furnish information to the [CRAs]”); *id.* § 1681h(e) (preempting claims “in the nature of defamation, invasion of privacy, or negligence”, except “as to false information furnished with malice or willful intent to injure”).

[19] *See* Scott v. First S. Nat'l Bank, 936 F.3d 509, 522 (6th Cir. 2019) (state common law claims preempted); MacPherson v. JPMorgan Chase Bank, N.A., 665 F.3d 45, 47-48 (2d Cir. 2011) (state statutory and common law claims preempted); Dickman v. Verizon Commc'ns, Inc., 876 F.Supp.2d 166, 175 (E.D.N.Y. 2012) (N.Y. Gen. Bus. Law § 349 claim preempted).

[20] Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57 (2007).

[21] *Id.* at 69.

[22] *See* Fuges v. Sw. Fin. Servs., Ltd., 707 F.3d 241, 248-49 (3d Cir. 2012) ("A company cannot be said to have willfully violated FCRA if the company acted on a reasonable interpretation of FCRA's coverage.").

[23] *See* Spokeo, Inc. v. Robins, 578 U.S. ---, 136 S.Ct. 1540, 1547-48 (2016).

[24] 15 U.S.C. § 1681s-2(d).

[25] *See id.* § 1681s(a).

[26] *See* Consumer Financial Protection Bureau, Statement on Supervisory and Enforcement Practices Regarding the Fair Credit Reporting Act and Regulation V in Light of the CARES Act (Apr. 1, 2020).

[27] *Id.*

[28] *See* 15 U.S.C. § 1681s(c).

[29] *See id.*

[30] *See id.* § 1681s(c)(2), (4).

KEY CONTACTS

ROBERT W. SPARKES, III
PARTNER

BOSTON
+1.617.951.9134
ROBERT.SPARKES@KLGATES.COM

