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Practice Pointers: When Bankruptcy and Consumer-Protection Statutes Collide

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Fair Credit Reporting in the Shadow of Bankruptcy

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The Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 et seq., requires credit bureaus (or "credit reporting agencies"), as well as creditors, debt collectors, and other furnishers of consumer credit data (collectively, "furnishers"), to report consumer credit information accurately, completely, and in a non-misleading manner. Should they fail to do so, the statute creates a mechanism for consumers to dispute any inaccurate information contained in their credit reports. This is an important safeguard for consumers, as the Federal Trade Commission has estimated approximately one in five consumers have experienced erroneous information in their credit reports.[1] When credit reporting agencies or other furnishers of consumers credit data are alerted of these errors, but fail to properly investigate and correct inaccurate information, consumers may seek redress in the courts. As described below, however, consumer plaintiffs must turn their corners squarely in asserting statutory violations.

When a consumer files for bankruptcy protection, the rights and obligations of credit reporting agencies and furnishers are modified and are likely to be modified further as the consumer reaches various milestones in his or her case (such as dismissal, confirmation of a plan, or a discharge of debts). Should the credit reporting agency or furnisher fail to properly account for these milestones in its reporting, the debtor may have claims not only under the FCRA, but for contempt of the discharge inunction, breach of the plan of reorganization, or violation of state-law consumer protections statutes. As a result, consumer reporting agencies and furnishers alike should not only be vigilant in their commitment to accuracy, but should also

[1] See https://www.ftc.gov/news-events/press-releases/2013/02/ftc-study-five-percent-consumers-had-errors-their-credit-reports. See also https://www.ftc.gov/news-events/press-releases/2015/01/ftc-issues-follow-study-credit-report-accuracy.

be mindful not to conflate compliance with the FCRA with their obligations towards consumer debtors.

A. Basics for the Putative Plaintiff: Pleading Under the Fair Credit Reporting Act.

When a credit reporting agency or furnisher is notified that information contained in a consumer's credit report is inaccurate, incomplete, or otherwise misleading, the credit reporting agency or furnisher is required to investigate the claim and make any necessary corrections. 15 U.S.C. § 1681e (consumer reporting agencies), § 1681s-2 (furnishers). A credit reporting agency or furnisher that negligently fails to comply with these obligations may be held liable to the consumer for actual damages, costs and reasonable attorneys' fees. 15 U.S.C. § 1681n. Willful violators of the FCRA are also subject to punitive damages. 15 U.S.C. § 1681o.

In order for consumers to maximize their potential remedies, they must notify the applicable consumer reporting agencies that the information contained their credit reports is inaccurate. Although the FRCA permits consumers to directly notify furnishers of inaccurate information in his or her credit report, see 15 U.S.C. § 1681s-2(a)(8), the "consumer has no private right of action if the furnisher does not reasonably investigate the consumer's claim after direct notification." Alcala v. Popular Auto, Inc., 828 F.Supp.2d 437, 439-440 (D.P.R. 2011).[2] This nuance has tripped up many a plaintiff. See, e.g., In re Zinn, No. 13-14270-LSS, 2017 WL 218417, at *4 (Bankr. D. Md. Jan. 17, 2017) ("nowhere have [the plaintiffs] alleged that they reported the dispute to one or more credit agencies or that an agency notified either [furnisher] of the alleged inaccuracies").[3]

[2] Rather, the statutory scheme reserves enforcement of such violations to federal and state governmental authorities. See 15 U.S.C. § 1681s-2(c).

[3] See also Chiang v. MBNA, 634 F. Supp. 2d 164, 174 (D. Mass. 2009), aff'd, 620 F.3d 30 (1st Cir. 2010) (case dismissed where consumer provided notice to consumer reporting agency, but agency failed to notify furnisher); Comunale v. Home Depot, U.S.A., Inc., 328 F. Supp. 3d 70, 80 (W.D.N.Y. 2018) ("Plaintiff fail[ed] to allege that any of the unidentified credit reporting agencies referred to in his Complaint rendered notice of a credit dispute to

It is worth reiterating, therefore, that prior to commencing any action the consumer should: (a) first notify the consumer reporting agency of the dispute; (b) confirm that the consumer reporting agency notified the furnisher; and (c) plead those facts in his or her complaint. See 15 U.S.C. § 1681s-2(b); Ausar-El v. Barclay Bank Delaware, No. PJM-12-0082, 2012 WL 3137151, at *3 (D. Md. July 31, 2012). So long as these preliminary elements are met, the furnisher's liability will turn on whether the information reported was inaccurate, Deandrade v. Trans Union LLC, 523 F.3d 61, 65-67 (1st Cir., 2008), and if so, the nature and extent of the furnisher's response. See Hernandez v. Wells Fargo Bank, N.A., No. 13-CV-13047-ADB, 2015 WL 4480839, at *3 (D. Mass. July 22, 2015) (furnisher liability turns not only on inaccuracy of information, but also on inadequacy of furnisher's investigation and response).

Specifically, the FRCA requires that the furnisher: (i) conduct an investigation of the disputed information; (ii) review all relevant information provided by the consumer reporting agency; (iii) report the results of the investigation to the consumer reporting agency; and, (iv) if the investigation finds that the information is incomplete or inaccurate, then: (a) report those results to all other consumer reporting agencies that compile and maintain files on consumers on a nationwide basis and, (b) promptly modify, delete, or block the reporting of that information to to consumer reporting agencies. 15 U.S.C. § 1681s-2(b).

A consumer reporting agency, in turn, is required to maintain "reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. § 1681e. Accordingly, a consumer's complaint against a furnisher (or consumer reporting agency) should identify any inaccurate information contained in the credit

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Defendants regarding the subject account"); Campbell v. Wells Fargo Bank, N.A., 73 F. Supp. 3d 644, 651 (E.D.N.C. 2014) ("plaintiffs have not plausibly alleged in the [complaint] that they notified a consumer reporting agency of a dispute about their line of credit account").

report, explain why that information is inaccurate,[4] provide sufficient detail of the notice given, and articulate any deficiencies in the furnisher's or consumer reporting agency's response. See generally Hillis v. Trans Union, LLC, 969 F. Supp. 2d 419, 421 (E.D. Pa. 2013) ("'inaccurate' information, in the FCRA context, refers to information that either is factually incorrect or creates a misleading impression").

Finally, in addition to asserting claims through the traditional civil litigation process, consumers might also consider contacting a governmental agency to assist them in enforcing compliance with the FCRA (i.e., correcting their credit report!). The Federal Trade Commission and Consumer Financial Protection Bureau each have oversight over the FCRA, although the Consumer Financial Protection Bureau in particular has a straightforward and streamlined process for handling consumer complaints, which may be lodged here: https://www.consumerfinance.gov/complaint/#credit-reporting.

B. Advising the Furnisher: Reporting Credit Information of Consumer Debtors.

The filing of a bankruptcy petition creates special concerns for consumer reporting agencies and furnishers of consumer credit information, as the specter of the automatic stay may create uncertainty concerning one's rights and obligations in reporting delinquencies. For starters, the FRCA is clear that the fact of a bankruptcy is fair game for a credit report for 10 years from the date of filing (although most other adverse information must be removed after 7 years). See 15 U.S.C. § 1681c(a). Indeed, some courts have held that the failure to note that a debtor is in bankruptcy could be misleading under the FCRA. Compare Wylie v. TransUnion, LLC, No. 3:16-cv-102, 2017 WL 835205, at *7 (W.D. Pa. Mar. 2, 2017) ("failure to mention that

[4] There is some dispute among courts about the appropriate measure of inaccuracy. The First Circuit has emphasized that the inaccuracy must be factual. See Chiang v. Verizon New England Inc., 595 F.3d 26, 35 (1st Cir. 2010). Other courts have indicated that technically factual information may nonetheless be "materially misleading" if the consumer has a "potentially meritorious" dispute over the enforceability of the debt. Hrebal v. Seterus, Inc., 598 B.R. 252, 269–270 (D. Minn. 2019).

the account is subject to the bankruptcy proceedings . . . might have rendered the report misleading"), with Barry v. Experian Information Solutions, Inc., No. 2:16-cv-09515, 2018 WL 3341785, at *6 (S.D.W. Va. July 6, 2018) ("courts have rejected the proposition advanced by [the debtor] that the failure to report that an account is included in a Chapter 13 bankruptcy proceeding is incomplete for purposes of the FCRA").

As a general matter, the prudent course of action for furnishers informed of a customer's bankruptcy filing is to report the filing (including chapter) to the credit reporting agencies. This is consistent with guidelines published by the Consumer Data Industry, Inc., which some courts have looked to as a benchmark for reasonableness under the FCRA. See, e.g., Grossman v. Barclays Bank Delaware, No. CIV.A. 12-6238 PGS, 2014 WL 647970, at *10 (D.N.J. Feb. 19, 2014).[5] The consumer reporting agency should then update the customer's credit report to reflect the filing and applicable chapter of the bankruptcy. If the bankruptcy case is subsequently dismissed or withdrawn by the debtor, the consumer reporting agency must update the report to reflect the fact that the case has been withdrawn. 15 U.S.C. § 1681c(d). Note that voluntary withdrawal does not mean that the bankruptcy will be removed from the credit report. Rather, the credit report may continue to reflect the bankruptcy filing for 10 years from the date of withdrawal.[6]

Courts also generally hold that the automatic stay does not bar furnishers from continuing to report a debtor's account balance, including delinquencies, after the filing of a Chapter 7 petition. See In re Franklin, No. 09-13399-JMD, 2017 WL 3701214, at *7 (Bankr. D.N.H. Aug.

[5] Also compare Nissou-Rabban v. Capital One Bank (USA), N.A., 285 F. Supp. 3d 1136, 1150 (S.D. Cal. 2018) ("Plaintiff's Metro 2 violation, standing alone, can support a claim under the FCRA"), with Jones v. Experian Info. Sols., Inc., No. 1:11-CV-826, 2012 WL 2905089, at *5 (E.D. Va. July 16, 2012) ("mere fact that [furnisher] failed to consult an advisory external source, such as the CDIA Resource Guide, is of no consequence when its investigation otherwise reflects a careful and thorough inquiry into the consumer credit dispute").

[6] https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf

24, 2017) ("a majority of courts hold that the postpetition reporting of overdue or delinquent payments to credit reporting agencies, without intent to harass or coerce payment, is not a *per se* violation of the automatic stay"); In re Porcoro, 565 B.R. 314, 327 (Bankr. D.N.J. 2017) (same).[7] Cf. Polvorosa v. Allied Collection Serv., Inc., No. 216CV1508JCMCWH, 2017 WL 29331, at *3 (D. Nev. Jan. 3, 2017) ("reporting delinquencies during the pendency of a bankruptcy or during a bankruptcy's automatic stay is not itself a violation of the FCRA").

The furnisher's obligations become muddier, however, when reporting account balances and payment history in Chapter 13 or individual Chapter 11 cases. The confirmation of a plan of reorganization creates questions about the proper metrics for debt reporting, namely whether the furnisher must report the status of the debt in reference to the debtor's prepetition contractual obligations or in reference to the debtor's modified contractual obligations under the confirmed plan.

For example, in Barry v. Experian Information Solutions, Inc., 2018 WL 3341785 (S.D.W. Va. July 6, 2018), the debtor had modified her payment obligations to a creditor in her Chapter 13 plan. Although the debtor was making the payments required under the confirmed plan, the creditor continued to report delinquencies in reference to the debtor's prepetition obligations. The debtor brought suit under the FCRA. The court granted summary judgment to the creditor, reasoning that a confirmation order does not change the legal status of the debt and, as such, reporting the status of the prepetition debt was not inaccurate.

Conversely, in Aulbach v. Experian Info. Sols., Inc., 251 F. Supp. 3d 1281 (N.D. Cal. 2017), the court reached the opposite conclusion. Recognizing the widespread disagreement, even among judges within the same district, the court explained: "Chapter 13 confirmation does

[7] But see Matter of Sommersdorf, 139 B.R. 700, 701 (Bankr. S.D. Ohio 1991) ("Such a notation on a credit report is, in fact, just the type of creditor shenanigans intended to be prohibited by the automatic stay.").

not merely change the debtor's obligation as a common sense matter. It also changes the legal status of the obligation." Id. at 1286. In so holding, the court relied on guidance from the Consumer Data Industry as well as the language in § 1322(b)(2) of the Bankruptcy Code, which provides that a "plan may ... modify the rights of holders of secured claims . . . or of holders of unsecured claims."

The split in authority on this issue creates compliance problems for furnishers and credit reporting agencies. Although furnishers and credit reporting agencies may have solid arguments in defense of continued reporting of the original obligation, the safest course of action for avoiding litigation altogether would seem to be reporting compliance in reference to the confirmed plan. This includes reporting payments received during the plan and an appropriate reduction of the amount outstanding. If a case is dismissed, the furnisher can revert to the prepetition amount, subject of course to any payments made during the case.

Conversely, if the debtor is successful in obtaining a discharge (regardless of the chapter), furnishers and credit reporting agencies should ensure that the credit report does not give the false impression that the debt is still due and owing. Because a discharged debt still technically exists, the report may be updated to show either a zero-dollar balance or that the actual outstanding balance outstanding with a notation that the debt has been discharged. A furnisher (or credit reporting agency) that fails to update a consumer's credit information consistent with the debtor's discharge, so as to create the misleading impression that debtor is still personally liable, may find itself liable under the FCRA.

C. **Beyond the FRCA: Common Liability Problems for Plaintiffs and Defendants.**

Compliance with the FRCA, however, does not provide a safe harbor from all potential attacks by the debtor. See In re Zine, 521 B.R. 31, 39-40 (Bankr. D. Mass. 2014) ("technically

accurate credit reporting does not, by itself, immunize the act from the discharge injunction."). Specifically, mere accuracy will not provide a safe-harbor for furnishers who attempt to use credit reporting in a coercive manner against discharged debtors. Id. (citing Pratt v. Gen. Motors Acceptance Corp. (In re Pratt), 462 F.3d 14, 19 (1st Cir. 2006)).

Courts have also held that regardless of what the FCRA requires with respect to discharged debts, the failure to update a credit report to reflect a discharge may be a violation of the discharge injunction created by § 524 of the Bankruptcy Code.[8] See, e.g., In re Torres, 367 B.R. 478, 487–88 (Bankr. S.D.N.Y. 2007) ("credit report that continues to show a discharged debt as 'outstanding,' 'charged off,' or 'past due' is unquestionably inaccurate and misleading, because end users will construe it to mean that the lender still has the ability to enforce the debt personally against the debtor").

Establishing a discharge violation requires the application of a different standard than that imposed under the FCRA. Rather than showing a negligent investigation, for example, the debtor must meet the standard for civil contempt. Until very recently, the standard in the First Circuit for contempt of the discharge injunction was that the creditor: "(1) had notice of the discharge, (2) intended the actions that constituted the violation of the discharge injunction, and (3) acted in a way that improperly coerced or harassed the debtor." Bates v. CitiMortgage, Inc., 844 F.3d 300, 304 (1st Cir. 2016) (citations omitted). In Taggart v. Lorenzen, no. 18-489, (S. Ct. June 3, 2019), however, the Supreme Court rejected a similar standard applied by the Oregon Bankruptcy Court (as well as the subjective good faith belief standard applied by the Ninth Circuit). Instead, the Supreme Court adopted a new standard: "A court may hold a creditor in

[8] "A discharge in a case under this title . . . operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." 11 U.S.C. 524(a)(2).

civil contempt for violating a discharge order where there is not a 'fair ground of doubt' as to whether the creditor's conduct might be lawful under the discharge order." In other words, the question is whether the creditor's reading of the discharge order was objectively unreasonable.

Although it remains to be seen how this new standard will be applied to furnishers or credit reporting agencies, it seems likely that in determining whether the discharge injunction was violated courts in the First Circuit will continue to consider whether the actions at issue "had a coercive effect upon the debtor." Lumb v. Cimenian (In re Lumb), 401 B.R. 1, 7 (B.A.P. 1st Cir. 2009). "An action is coercive where it is 'tantamount to a threat,' or places the debtor 'between a rock and hard place' in which he would lose either way." Id. (quoting Jamo v. Katahdin Fed. Credit Union (In re Jamo), 283 F.3d 392, 402 (1st Cir.2002) and Diamond v. Premier Capital, Inc. (In re Diamond), 346 F.3d 224, 227-228 (1st Cir. 2003)). "Additionally, alleged violative acts need not be viewed in isolation, but also should be considered under the totality of the circumstances to discern whether they evidence a pattern of coercive behavior." In re Zine, 521 B.R. at 38.

In the context of credit reporting, it is important to distinguish between the mere failure of a creditor to remove a discharged debt from a credit report, e.g., In re Irby, 337 B.R. 293, 297 (Bankr. N.D. Ohio 2005) (no discharge violation), and intentionally leaving a discharged debt on a credit report "to induce a debtor to make payments on an account." In re McKenzie-Gilyard, 388 B.R. 474, 487 (Bankr. E.D.N.Y. 2007) (potential discharge violation). Although the line may be fuzzy in cases of a failure to update, the line is clear and bright when it comes to affirmative conduct in derogation of the discharge. For example, in In re Zine, supra, the furnisher sent inaccurate information to the credit reporting agency, called the debtor on multiple occasions, and sent the debtor delinquency notices. Suffice to say, in finding that the furnisher

had violated the discharge injunction, the bankruptcy court was not impressed by the furnisher's argument that the delinquency notices contained a boilerplate disclaimer advising the consumer to ignore the communication if its debt had been discharged.

There are limits, however, on the debtor's ability to look beyond the FCRA for causes of action. Most notably, the FCRA specifically preempts state laws to the extent they "relat[e] to the responsibilities of persons who furnish information to consumer reporting agencies." 15 U.S.C. § 1681t(b)(1)(F).[9] As a result, courts have rejected attempts by consumers to hold furnishers liable under state consumer protection statutes such as Mass. Gen. Laws ch. 93A, § 2. See, e.g, Catanzaro v. Experian Info. Sols., Inc., 671 F. Supp. 2d 256, 262 (D. Mass. 2009). Credit reporting agencies, on the other hand, may have some exposure, but it is limited to situations involving "false information furnished with malice or willful intent to injure." 15 U.S.C. § 1681h. See Hindle v. Toyota Motor Credit Corp., No. CV 18-11306-FDS, 2018 WL 6033484, at *4 (D. Mass. Nov. 16, 2018) (dismissing ch. 93A claim where no evidence of malicious intent).

[9] The FRCA does, however exclude various state credit reporting requirements from its preemptive scope. See generally 15 U.S.C. § 1681t. See, e.g., M.G.L. c 93, §§ 54A(a), 59(d)-(e); Me. Rev. Stat., tit. 10, § 1316.2; N.J. Rev. Stat., § 56:11-37.10(a)(1); Vt. Stat., tit. 9, § 2480c(a)(1). That does not necessarily mean, however, that the consumer has a right to enforce those requirements. For example, the FRCA does not preempt a Massachusetts statute requiring furnishers to follow reasonable procedures to ensure that the information reported to a consumer reporting agency is accurate and complete. M.G.L. c 93, § 54A(a). Although another subsection of the statute, § 54A(g), provides for a cause of action arising from the failure to comply with § 54A(a), the FCRA does not explicitly save § 54A(g) from preemption. Thus, some courts have rejected private causes of action to enforce § 54A(a) notwithstanding the fact that it is not preempted. See, e.g., Lance v. PNC Bank, N.A., No. 15-10250-FDS, 2015 WL 5437090, at *4 (D. Mass. Sept. 15, 2015); Kuppserstein v. Bank of Am., Nat'l Ass'n, No. CV 14-13766-GAO, 2015 WL 4601704, at *3 (D. Mass. July 31, 2015). But see Catanzaro v. Experian Info. Sols., Inc., 671 F. Supp. 2d 256, 261 (D. Mass. 2009) (concluding that cause of action pursuant to § 54A(g) was not preempted).