



THE FCRA

Turns Threats to Ruin a Credit Rating into a Powerful Consumer Remedy

Collectors force consumers to pay disputed debts by reporting the consumer's refusal as a delinquent payment to credit reporting agencies. Consumers, valuing their good credit more than the amount in dispute, pay up despite their legitimate claims.

Practitioners are now discovering that 1996 amendments to Fair Credit Reporting Act (FCRA) allow consumers to turn these tactics against the creditor and give the consumer the upper hand. A simple letter to the credit reporting agency disputing the credit information puts the creditor on the defensive, often potentially subjecting it to a federal court action for actual, statutory and punitive damages and attorney fees if it does not correct the error on the credit report.

FCRA Liability for Creditor Continuing to Report Inaccurate Information

The FCRA requires creditors and others who report information to credit reporting agencies to re-investigate that information whenever a consumer files a dispute regarding that information with the credit reporting agency.¹ For example, an elderly consumer is talked into a buying "energy efficient" replacement windows for her home. The greatly overpriced windows are poorly installed, and there is no energy savings, and the consumer refuses to continue installment payments on the windows.

Despite the legitimate grounds for the non-payment, in the past consumers would be coerced into paying because they wanted to avoid negative information on their credit report. But now under the FCRA, the consumer can request in writing a credit reporting agency that lists this debt on the consumer's credit report to investigate the validity of the debt because of the fraud and deception involved. The credit reporting agency in turn forwards to the creditor the dispute and requests the creditor's reinvestigation.

One Well-Placed Letter May Do the Trick

From this point forward, the creditor, referred to as a furnisher in the FCRA, may be liable to a consumer for its failure to participate in that reinvestigation pro-

cess as required by the statute. A number of consumer attorneys have developed a specialty of suing creditors who fail to do so, and the ease of success in these cases has forced creditors increasingly to take the re-investigation seriously. Initiating a reinvestigation of inaccurate information with the consumer reporting agency can be an effective method to get a creditor to clear up its mistakes. It also strengthens the consumer's case in any litigation against the creditor on the underlying dispute.²

Because information about a consumer often is included in the files of multiple reporting agencies, resolving an error in the files of one agency may be ineffectual unless the files of other agencies are corrected as well. Thus consumers should dispute information with all agencies that report it.³

Also Send a Letter to the Creditor

While the FCRA requirement is that the consumer dispute the report with the reporting agency, which then requests the furnisher to reinvestigate, it is prudent to also have sent a letter to the creditor, since this strengthens the consumer's claim for punitive damages under the FCRA when the creditor also fails to properly re-investigate the same dispute when notified of it by the reporting agency.

In addition, although reporting agencies are supposed to forward to the creditor all information about the dispute, reporting agencies often do not. This may raise potential liability both for the reporting agency and the furnisher of information to the reporting agency.

Reporting Agency Must Then Notify Creditor of Obligation to Re-Investigate

After a consumer initiates a reinvestigation of inaccurate or incomplete information by submitting a dispute to a reporting agency, the agency must notify any person who furnished any of the disputed information within 5 days and must include all relevant information provided by the consumer.⁴ If the agency receives additional information before the furnisher completes its own investigation, that information too must be sent to the furnisher.

In practice, reporting agencies communicate disputes to creditors using a Consumer Dispute Verification form, known as a CDV or a “611 notice.” An automated version of the form, communicated entirely electronically, is known as an ACVD. The CDV was designed by an industry task force under the auspices of the Associated Credit Bureaus.⁵ The CDV uses standardized dispute codes to communicate the nature of the dispute. Receipt of the CDV triggers a 30 to 45 day period for the creditor to conduct its own investigation and to report back results to the agency.⁶

Consumer counsel report that CDVs are often communicated alone, without supporting documentation, thus ignoring the DCRA requirement that all relevant information about the dispute also be communicated. A consumer’s careful detailing of a specific dispute, fashioned to make detection and correction easy, may

at best be relegated to a generalized code.⁷ In addition, dispute codes are not uniformly applied among the major consumer reporting agencies, so the same information disputed in the same manner by a consumer may be categorized differently by different reporting agencies. In addition, reports have surfaced that creditors in their dealings with consumer counsel deny receipt of a CDV and are unaware

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of the possibility that the reporting agency sent an ACVD electronically.

Furnisher Must Conduct a Reasonable Investigation

Furnishers, after a reporting agency notifies them that information they provided is disputed, must conduct their own investigation of the accuracy and completeness of that information, reporting back to the reporting agency promptly.⁸ The FCRA does not specify standards or procedures for the investigation, although one court has held that the reinvestigation must be reasonable.⁹ The investigation’s adequacy is a question of fact for jury determination.¹⁰ Inadequate investigation is actionable if it involves negligent or willful behavior.¹¹

The goal of the reinvestigation procedure is to help assure that consumer reports are accurate – reporting agencies are required to maintain reasonable procedures to assure maximum possible accuracy of consumer reports.¹² Technical accuracy is not enough. A report should not be misleading, out of date, or incomplete, even if true in the narrowest sense.¹³ The standard for accuracy is not *sui generis*. The omission of a material fact constitutes misrepresentation under common law and deception under the FTC Act.¹⁴ The furnisher’s investigation of disputed information can not serve either the general purposes of the FCRA or

the specific purposes of the reinvestigation procedures unless the creditor provides fully accurate information to the extent it is reasonably available.

The failure to conduct any investigation will be a negligent, and more likely a willful, FCRA violation. Similarly, it should be a FCRA violation for a creditor to check a box on the CDV indicating that the disputed information has been verified, without conducting an underlying investigation.

The furnisher’s investigation must be a good faith effort to provide accurate information, not simply *pro forma*. The investigation’s exact nature depends on how the dispute is framed and what information is available to the furnisher. The furnisher should consider information sent by the reporting agency and evaluate any inconsistencies. Communications the consumer sent the creditor should be checked against the creditor’s internal records.¹⁵ Sometimes a creditor’s own records will be inconsistent and require reevaluation.

One court expressly analogized the furnisher’s reinvestigation obligation with that required by a reporting agency.¹⁶ Both are required to investigate the consumer dispute and to record the current status of the disputed information (or delete the item from its files).¹⁷ Cases under this part of the Act¹⁸ require agencies to conduct “reasonable” investigations and hold that agencies must reconsider information challenged by the consumer or that it knows or should know is unreliable.

Limited Time Period for Creditor to Investigate and Provide Results to Reporting Agency

Reinvestigations conducted by reporting agencies and initiated by a consumer’s dispute must be completed within 30 days of receipt of the dispute, with one 15-day extension allowed if during the original 30 days the consumer forwards additional relevant information. Furnishers thus have to act quickly enough to permit the reporting agency to meet its deadline, normally having to reinvestigate and respond to the reporting agency within 15 to 20 days of their receipt of the CDV. State law may set a smaller number of days for the agency to respond.¹⁹

At the end of the reinvestigation period, disputed information must be deleted if it cannot be verified or corrected or modified in light of the reinvestigation. The agency may not extend the period to accommodate its procedures because it has not received a response from the furnisher of the information. If the reinvestigation is not completed in time, the disputed information must be deleted.²⁰ If it is reinserted into the consumer’s file later, perhaps after the agency has obtained verification from the furnisher, the consumer must be notified of the reinsertion.

Both Reporting Agency and Creditor Liable for Actual, Statutory and Punitive Damages and Attorney Fees

Failure to comply with the statutory provision of reinvestigation within the required time subjects the reporting agency to possible actual damages and attor-

ney fees if the action is negligent.²¹ Willful failure can lead to punitive damages.²²

The creditor too may be liable for failing to meet its deadline. The failure to make a timely response

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should mean that the disputed information is deleted from future consumer reports, and that the likelihood of actual damages is diminished. But any furnisher who negligently fails to comply with any of the FCRA requirements is liable to the consumer for any actual damages, statutory damages of not less than \$100 and not

more than \$1000, and for punitive damages, as well as for costs and attorney's fees.

The strongest cases of furnisher liability arise when the creditor has clearly been informed of its error and failed to make corrections. A consumer is in a strong position when the creditor is informed in writing of a dispute, with appropriate details of the error and of the importance of an accurate credit record to the consumer, and when a copy of the dispute given to the reporting agency is also given to the creditor.²³

Both the furnisher and the consumer reporting agency have an obligation to reinvestigate a disputed item and to correct and update inaccurate items (or to cause them to be deleted). Sometimes it is not clear which party has failed to conduct an adequate investigation, or that the blame resides with only one or the other. In such cases one should consider adding the agency as a co-defendant in a suit against a furnisher.

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¹ 15 U.S.C. § 1681s-2(b). See National Consumer Law Center, Fair Credit Reporting Act § 12.2.3.2 (4th ed. 1998 and Supp.).

² See Bruce v. First USA Bank, 103 F.Supp.2d 1135 (E.D. Mo. 2000).

³ See National Consumer Law Center, Fair Credit Reporting Act § 9.4.5.3 (4th ed. 1998 and Supp.).

⁴ 15 U.S.C. § 1681I(a)(2), discussed at National Consumer Law Center, Fair Credit Reporting Act § 9.4.5.1 (4th ed. 1998 and Supp.).

⁵ This is similar to the Metro 2 format used to furnish information to the agencies in the first instance.

⁶ See 15 U.S.C. §§ 1681s-2(b)(2) and 1681I(a)(1).

⁷ In litigation against a furnisher for failing to adequately investigate, the omission of relevant information provided by the consumer to the agency, as part of the agencies notice to the furnisher, presumably could be the basis of a cross claim by the furnisher against the reporting agency.

⁸ 15 U.S.C. §§ 1681s-2(b)(2) and 1681I(a)(1).

⁹ See Bruce v. First U.S.A. Bank, 103 F.Supp.2d 1135 (E.D. MO. 2000).

¹⁰ *Id.*

¹¹ 15 U.S.C. §§ 1681n and o.

¹² National Consumer Law Center, Fair Credit Reporting Act § 9.10.3 (4th ed. 1998 and Supp.).

¹³ National Consumer Law Center, Fair Credit Reporting Act § 9.10.3.2 (4th ed. 1998 and Supp.).

¹⁴ National Consumer Law Center, Unfair and Deceptive Acts and Practices § 4.2.14 (4th ed. 1997 and Supp.).

¹⁵ Bruce v. First U.S.A. Bank, 103 F.Supp.2d 1135 (E.D.MO. 2000).

¹⁶ Bruce v. First U.S.A. Bank, 103 F.Supp.2d 1135 (E.D.MO. 2000).

¹⁷ 15 U.S.C. § 1681I(a).

¹⁸ Discussed at National Consumer Law Center, Fair Credit Reporting Act § 9.4.4.3 (4th ed. 1998 and Supp.).

¹⁹ *Id.*

²⁰ National Consumer Law Center, Fair Credit Reporting Act § 9.4.6 (4th ed. 1998 and Supp.).

²¹ 15 U.S.C. § 1681n. See National Consumer Law Center, Fair Credit Reporting Act § 12.2.1 (4th ed. 1998 and Supp.).

²² 15 U.S.C. § 1681o. See National Consumer Law Center, Fair Credit Reporting Act § 13.4.1 (4th ed. 1998 and Supp.).

²³ When pleadings are filed, an allegation that notice of a dispute was sent to the consumer reporting agency and received by the creditor avoids the unwarranted but common motion to dismiss based on the failure to plead a necessary element of the statutory scheme. See NCLC, Fair Credit Reporting Act § 12.2.3.2 (4th ed. 1998 and Supp.).