A brief history of the FCRA and the potential for new litigation after Dodd-Frank

*By Jonathan D. Jerison and Bradley A. Marcus**

The Fair Credit Reporting Act took effect in April 1971. That made the FCRA one of the earliest national consumer protection laws, along with the 1968 Truth in Lending Act. Since then, the FCRA has been amended several times, most recently by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203.

While litigation under FCRA has been perennially problematic for financial services companies throughout its legislative history, this latest set of changes lays the groundwork for regulatory changes that portends a fresh round of litigation.

Looking back, the FCRA was enacted to protect consumers from the dissemination of erroneous information concerning them, including information on creditworthiness and general reputation. Recognizing that the banking system is dependent on fair and accurate credit reporting, Congress intended FCRA to rectify the effect of inaccurate consumer credit reports, and bolster the public's confidence in the banking system.

FCRA regulates both "consumer reporting agencies" and "consumer reports."

- A CRA is "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties."
- A "consumer report" is "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." Consumer reports include not only credit reports but also reports issued for use in insurance underwriting, verification of employment, check verification, and other consumer-oriented business purposes.

A consumer credit report is one of the most important pieces of a consumer's financial profile. The recent credit crunch has caused credit reports to be highly scrutinized, and consumers and their advocates have aggressively targeted credit reporting errors. This article traces FCRA from its beginnings, which focused almost exclusively on the dissemination and use of credit and other consumer reports, to its present central role in the financial services industry, and concludes by considering Dodd-Frank's effects on FCRA's future.

Legislative debate over a law awkwardly captioned "A Bill to Protect Consumers Against Arbitrary or Erroneous Credit Ratings, and the Unwarranted Publication of Credit Information" reflected Congress's desire for higher standards in the credit reporting industry. Ultimately, three dominant themes emerged from the debate: confidentiality, accuracy, and currency of information. Of the three principal themes, the desire to combat inaccurate and misleading information was seen as the overarching concern, characterized by one member of Congress as "the most serious problem in the credit reporting industry."

Prior to FCRA, a consumer had few remedies available to correct an inaccurate or misleading credit report. Although a possible avenue of redress was an action of defamation for injuries to one's reputation resulting from dissemination of incorrect information, it was difficult for consumers to prevail because of issues such as the running of the statute of limitation if the consumer did not discover the inaccuracy in time, and the difficulty of proving actual malice and actual damages if the consumer prevailed.

FCRA replaced these ineffective common-law remedies with a mechanism to detect and correct errors in credit reports and provided the ability to redress such injuries, including injuries to reputation, by allowing a plaintiff to recover for negligence instead of the much higher standard of actual malice.

FCRA also made criminal sanctions applicable to those who obtain consumer information under false pretenses, and a few courts interpreted the criminal provision as creating an implied civil cause of action for improperly obtaining a report. But the law did not otherwise apply directly to users of consumer reports or furnishers of information to credit bureaus. The Federal Trade Commission was made the primary enforcement agency for FCRA for non-banks. The FTC and the banking agencies enforce FCRA through powers such as cease-and-desist orders, consent decrees, and civil penalty orders.

Early litigation surrounding FCRA largely centered on CRAs' failure to reinvestigate items disputed by a consumer. In contrast to other statutes such as TILA, FCRA did not provide a minimum dollar amount of statutory damages, and the private right of action generally only applied to CRAs, not to users or furnishers. Therefore, the original act engendered relatively little private litigation.

1996 amendments

The first major revision of FCRA occurred in 1996, when Congress enacted the Consumer Credit Reporting Reform Act. The Reform Act "was driven largely by consumer dis-

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satisfaction with two related areas: inaccuracies in credit reports and difficulties in correcting them." The Reform Act also clarified the obligations of CRAs to investigate disputes and correct inaccurate information, imposing a concomitant obligation — and potential liability — on furnishers of information to respond promptly when a credit bureau notified the furnisher of a consumer dispute.

The law also obligated furnishers to provide accurate information to consumer reporting agencies in the first instance, but provided for only administrative, not private, enforcement of that obligation. Balancing this increase in obligations, the Reform Act clarified the law concerning sharing of credit reports among affiliates and the use of prescreened credit reports to solicit new customers, and broadly preempted state law concerning consumer reporting and information-sharing in a manner that greatly restricted state regulation of FCRA-related subject matter.

Finally, the law significantly expanded the private right of action under FCRA by providing for a minimum recovery of $100 for each willful violation.

2003 amendments

FCRA was revised again in 2003, culminating in passage of the Fair and Accurate Credit Transactions Act ("FACTA"). Although the law addressed many issues, the focus of consumer advocates' concern was skyrocketing identity theft. Industry pressed for revisions of FCRA because the broad preemptions in the Reform Act were set to expire and several states had enacted or were considering restrictions that were subject to preemption, such as sharing among affiliates and prescreened credit solicitations.

To fight the emerging crime of identity theft, FACTA strengthened consumers' control of and access to their credit information, allowing consumers to: i) block the reporting of information reflecting the use of stolen information; 2) require lenders to verify their identity before issuing credit; and 3) receive an annual free copy of their credit report, in part in order to assist them in detecting fraudulent transactions made in their name. (*For more regarding FACTA, see the March 16 issue, p. 15.*)

Rise in consumer credit litigation

In the 40 years since FCRA was enacted, litigation has skyrocketed. The Mortgage Bankers Association called the potential for FCRA litigation a "crisis" in 2006, with exposure for violation of the "firm offer" requirement of FCRA's prescreening rules possibly in the trillions of dollars. Although the firm-offer cases were ultimately resolved in the industry's favor, the increase in cases involving consumer credit has been particularly rapid since the economic and credit crisis that began in 2007. The U.S. Supreme Court's 2009 Year-End Report on the Federal Judiciary noted that "cases involving consumer credit, such as those filed under [FCRA,] increased 53 percent."

Aside from the firm-offer cases, the two biggest drivers of FCRA litigation have been furnishers' failure to reinvestigate disputed data and FACTA card-receipt truncation. The Reform Act triggered the reinvestigation cases, as it created direct liability for furnishers of credit information for failure to properly reinvestigate disputes. This opened the door for plaintiffs to bring causes of action against an entirely different set of defendants.

Plaintiffs also have taken advantage of FACTA's provision barring businesses (primarily retail merchants) from printing debit or credit card expiration dates and more than the last five digits of a card number of receipts. With statutory damages under FACTA of $100 to $1,000 per willful violation, along with punitive damages and attorney's fees, plaintiffs' counsel has sought to certify class actions under this truncation provision. Recently, the 9th U.S. Circuit Court of Appeals in *Bateman v. American Multi-Cinema, Inc.*, — F.3d —, 2010 WL 3733555 (9th Cir. 09/27/10), affirmed the suitability of class actions with respect to this issue.

Other FCRA litigation

New FCRA-related litigation issues arise regularly:

- A collateral effect of data breaches, for example, which are themselves increasing, is the inadvertent disclosure of consumer credit information.
- Proposed legislation would make it unlawful for an employer to base an adverse employment decision on a consumer credit report.
- Consumer advocates have also urged restricting the use of credit-report information in setting insurance rates or denying coverage.

These trends all point to continued expansion of FCRA-related litigation. As discussed below, the Dodd-Frank reform legislation creates the potential for litigation based on violations of new regulations as well as new legislation.

If successful, this litigation could be very expensive for defendants. Unlike some other consumer credit-protection statutes in the credit industry, there are no class-action liability caps under FCRA, leading to the possibility of outsized damages awards.

Regulatory changes portend litigation

The Dodd-Frank Act makes only a few substantive changes in FCRA, but it changes the regulatory environment in ways that may prove significant. Under Dodd-Frank, primary responsibility for issuance of most of the regulations under the FCRA provisions that require rulemaking will shift from the FTC and the federal bank regulators (for larger institutions) to the new Consumer Financial Protection Bureau, which "goes live" on July 21, 2011.

Specifically, Dodd-Frank gives the CFPB wide-ranging powers to prohibit "unfair, deceptive, or abusive act or practice[s]" in connection with a wide variety of consumer financial products or services, including credit-reporting activities. No agency currently has such general rulemaking powers with respect to FCRA, and the act's reach may be extended as much by regulatory as by legislative action.

At the same time, FCRA enforcement for non-banks, including CRAs, remains with the FTC. This creates possible conflict between the FTC's case-by-case enforcement priorities and the broad regulatory outlook of the CFPB. ❑

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