

FAIR CREDIT REPORTING ACT RECENT DECISIONS

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The business of relationships.

Gorman v. Wolpoff & Ambramson, LLC; MBNA America Bank, N.A.*

FACTS/BACKGROUND

- Gorman disputed a charge for a satellite television system purchased with an MBNA credit card because he was dissatisfied with the purchase.
- Gorman refused to pay the charge and MBNA eventually reported Gorman's account as "charged off" to the credit agencies.
- MBNA's reporting had a negative impact on Gorman's credit.

* 584 F.3d 1147 (Oct. 2009)

Gorman, Con't.

CLAIMS BASED ON FCRA § 623(b)(1)(A) :

- MNBA failed to adequately investigate Gorman's challenge to the credit card charge.
- In reporting the delinquency to credit agencies without also reporting Gorman's ongoing dispute MBNA furnished "incomplete or inaccurate" credit information in violation of the FCRA.

Gorman, Con't.

HOLDING; 9TH Circuit found that:

- MBNA's investigation was reasonable because it had reviewed its internal account files and contacted the subject vendor several times to check for fraud and Gorman had not provided any detailed information regarding the nature of the dispute.
- MBNA's failure to indicate to the credit agencies that the subject charge was disputed was sufficient evidence that MBNA may have furnished "incomplete or inaccurate" credit information.
- Consumer had no private right of action under FCRA to proceed against credit card issuer for its initial failure to notify; however, consumer did have a private right of action to challenge issuer's subsequent failure to notify CRAs after receiving notice of dispute.

Smith v. Ohio Savings Bank*

FACTS/BACKGROUND

- Ohio Savings Bank provided Ms. Smith with an automobile via a loan and security agreement executed in her name only.
- Plaintiff's husband filed for bankruptcy and named the automobile as an asset.
- OSB transmitted a report to national credit reporting agencies suggesting that her credit report profile should be updated to reflect bankruptcy.
- OSB ignored its own policy and procedure manual, which prohibited bankruptcy notations on the credit reports of non-filing spouses.
- OSB added the notation “paid or paying as agreed” to the credit report and eventually removed the bankruptcy notation.

* 2008 WL 2704719 (D.Nev.) (July 2008)

Smith, Cont.

CLAIMS

- OSB violated FCRA § 1681s-2 by intentionally or negligently reporting inaccurate information to a credit reporting agency, and
- by failing to investigate and correct inaccurate information once placed on notice by Smith.
- OSB misrepresented Smith's credit report profile and impaired her ability to obtain loans.

Smith, Cont.

HOLDING- District of Nevada (Defendants and Plaintiff's Motion for Summary Judgment Denied)

- [A reasonable jury could conclude that] bankruptcy references misled potential creditors into believing that Smith had filed for bankruptcy, and that such an inaccurate representation violated the FCRA's standard of reasonableness.
- The fact that OSB ignored its own policy prohibiting notation of spousal bankruptcy filing raises a singular issue of fact regarding the reasonableness of the investigation.

Wenner v. Bank of America*

FACTS/BACKGROUND

- According to plaintiffs' second amended complaint, plaintiffs had a checking account with BOA, which they set up to automatically make a monthly electronic transfer of \$2564.63 to Chase Home Finance (“Chase”) for their mortgage payment.
- BOA's electronic bill pay service ensured protection of its customers in the case of unauthorized transfers, and provided overdraft coverage through cash advances charged to plaintiffs' BOA credit card
- On or about December 28, 2005, a \$2,600.00 charge appeared on plaintiffs' BOA credit card, apparently to cover a transfer from their closed BOA bank account.
- Plaintiffs informed the CRAs of the dispute and requested investigations of the negative reports.
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* 637 F.Supp.2d 944 (June 2009)

Wenner, Cont.

CLAIMS

- BOA continued to report plaintiffs as delinquent to CRAs without also informing the CRAs of the dispute over the transfer and debt. (FCRA § 1681s-2(b))
- BOA failed to reasonably investigate the validity and accuracy of the debt. (FCRA § 1681s-2(b))
- Allege willful violations seeking attorneys' fees, actual or statutory and punitive damages
- State law defamation claim also brought under Kansas Consumer Protection Act (KCPA)

Wenner, Cont.

MOTION TO DISMISS

- BOA filed a motion to dismiss alleging that (1) FCRA § 1681s-2(b) private cause of action is precluded and (2) Wenner failed to satisfy elements of defamation.

Wenner, Cont.

HOLDING (District of Kansas; Motion to Dismiss Granted in Part, Denied In Part)

- FCRA claim survives because while FCRA § 1681s-2(a) (failure to reports accurate information) does not provide a private cause of action, § 1681s-2(b) (failure to adequately investigate) does.
- Defamation claims arising from defendants' conduct in furnishing information after notice the claims are preempted by § 1681t(b)(1)(F)
- However, to the extent the claims arise out of defendants' publication of alleged defamatory statements to others, the claims are not preempted.
- State defamation claim under KCPA is plausible.

Premium Mortgage v. Equifax*

FACTS/BACKGROUND

- Mortgage lender brought putative class action on behalf of itself and similarly situated mortgage lenders, asserting nine state-law claims against several consumer credit reporting agencies and an intermediate “reseller” of consumer information relating to the defendants' sale of mortgage “trigger leads,” which indicated individuals that had expressed a desire to obtain a loan, to third-party lenders.
- Western District of New York granted credit agencies motion to dismiss.
- Mortgage lenders appealed.

* 583 F.3d 103 (October 2009)

Premium Mortgage, Cont.

CLAIMS

- State law claims of misappropriation of trade secrets, fraud, unfair competition, tortious interference with contractual or prospective business relations, breach of contract of which class members were intended beneficiaries, and unjust enrichment.

Premium Mortgage, Cont.

- The Court of Appeals affirmed the decision of the district court held that plaintiffs' common-law claims of misappropriation of trade secrets, unfair competition, and unjust enrichment were preempted by FCRA § 625(b)(1)(A).
- Other claims not pre-empted were properly dismissed for failure to state a claim upon which relief could be granted.

Nelson v. Chase Manhattan Mortgage Group*

FACTS/BACKGROUND

- Nelson became a co-signatory with Anthony Proietti (“Proietti”) on a mortgage loan.
- Proietti declared bankruptcy and Nelson continued to pay the amounts due on the mortgage in a timely manner.
- Chase reported the bankruptcy to the credit agencies for both co-signers and Nelson subsequently experienced difficulty in obtaining financing.
- Upon notice from Nelson, Chase apologized and stated that it would have the notation removed from Nelson’s file but Nelson continued to have credit problems.

* 282 F.3d 1057 (March 2002)

Nelson, Cont.

CLAIMS; MOTION TO DISMISS

- Chase violated FCRA 1681s-2(a) by furnishing the notification of bankruptcy filing in the first place; and
- Thereafter, violated FCRA 1681s-2(b) by failing to adequately investigate and remedy its initial error.
- Chase filed a motion to dismiss on the basis that the FCRA did not provide Nelson with a private cause of action. Lower court granted motion to dismiss.

Nelson, Cont.

HOLDING (9th Cir. reversed lower court's grant of motion to dismiss)

- FCRA 1681s-2(a) does not provide a private cause of action for consumers against furnishers.
- However, FCRA 1681s-2(b) does provide a private cause of action against furnishers, because with opportunity to investigate, furnisher was already provided with a chance to save itself from liability.

Myshrall v. Key Bank*

FACTS/BACKGROUND

- Myshrall bought motorcycle with loan from Key Bank
- Myshrall was injured and sought coverage from Key Bank's disability insurance.
- Myshrall and Key Bank negotiated a voluntary repossession of the motorcycle and Myshrall surrendered the motorcycle to Key Bank.
- Myshrall's credit report from TRW showed not only that Myshrall had defaulted on the motorcycle loan, but that Myshrall had defaulted on two additional loans with Key Bank, loans that he had never taken.
- Despite Key Bank's admission that the default information on the additional loans was incorrect, it never corrected the errors.

* **802 A.2d 419** (July 2002)

Myshrall, Cont.

CLAIMS

- Myshrall sought damages under state law to compensate him for financial harm to his business caused by the inaccurate credit reports based on theories of negligence, slander, breach of fiduciary duty, and breach of contract. Myshrall also requested punitive damages.
- FCRA claim alleging that Key Bank improperly obtained his credit report during the course of this litigation.

Myshrall, Cont.

MOTION FOR SUMMARY JUDGMENT

- Maine Superior Court granted Key Bank's motion for summary judgment.

Myshrall, Cont.

HOLDING—Summary Judgment on all Claims Affirmed.

- FCRA gives furnishers of credit information qualified immunity from state law causes of action “in the nature of defamation, invasion of privacy, or negligence” except in instances of malice or willful intent to injure.
- Myshrall’s common law claims for damages resulting from Key Bank’s were dismissed because he failed to show evidence of malice.
- Obtaining credit report for the purposes of litigation constituted a legitimate business need.

FTC Advanced Notice of Proposed Rule Making; Mortgage Acts and Practices

- Authority: Appropriations Act of 2009
- Content:
 - Deceptive Acts & Purchases
 - Unfair Acts & Practices
 - Mortgage Advertising & Marketing
 - Mortgage Origination & Underwriting

FTC Advanced Notice of Proposed Rule Making; Mortgage Acts and Practices

- Content, Cont.
 - Loan Terms & Disclosure
 - Mortgage Appraisals
 - Mortgage Servicing

Mortgage Assistance Relief Services; Proposed Rule

- Federal Trade Commission moved to protect distressed homeowners from the promoters of bogus foreclosure rescue and mortgage modification services by proposing a new rule that would forbid companies to charge up-front for these services. Instead, companies could only collect payment after providing services.