

1998

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Recommended Citation

Andrew Geier *Credit Reporting Agencies Have a Duty to Go Beyond Original Sources When Reinvesting Credit Report Inaccuracies*, 10 Loy. Consumer L. Rev. 27 (1998).

Available at: <http://lawcommons.luc.edu/lclr/vol10/iss1/5>

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investors. Following this trend, the court found that the investors bore the risk of loss, thus negating the need to proceed to the second step of the *Democratic* test.

Therefore, the court rejected the APCC's challenge to the book valuation method for the same reason it accepted the BOCs' challenge to the FCC's fair market method: the shareholder bore the risk of loss so the shareholder should reap the benefits. Finally, the court rejected the APCC argument that the FCC required a transfer of pay-phone

assets from regulated to unregulated books, stating that the Order instead only required that pay-phone assets not be accounted in separate affiliates.

In sum, the court sought to preserve the legislative intent of the Act while abiding by the express language of § 276. It interpreted the legislative intent to be the promotion of fair competition within the area of pay-phone service while it adhered to the language of providing PSPs with fair compensation for each call they serviced. In accordance with these

goals, the court remanded the issues of: (1) the interim and permanent rates for access code and 800 calls; (2) requiring only large IXCs to pay full compensation in the first interim year; (3) failing to provide interim compensation for 0+ and inmate calls; and (4) assigning fair market value for pay-phone assets transferred from BOCs to separate affiliates.

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Credit Reporting Agencies Have a Duty to Go Beyond Original Sources When Reinvestigating Credit Report Inaccuracies

By Andrew Geier

In *Cushman v. Trans Union Corp.*, 115 F.3d 220 (3d Cir. 1997), the United States Court of Appeals for the Third Circuit reversed and remanded the district court's judgment that, as a matter of law, Trans Union Corporation ("TUC") met its obligations under the Fair Credit Reporting Act ("FCRA") when it relied solely on the creditors' original information in determining the accuracy of a consumer's credit information. The court held that the FCRA requires a credit reporting agency to go beyond its original sources of credit information when reinvestigating inaccuracies in a credit report after the consumer informs the agency of those inaccuracies.

Credit Cards Falsely Obtained

Jennifer Cushman ("Cushman") was a college student in Vermont in the summer of 1993 when an

unknown person applied for and obtained credit cards in her name from American Express ("Amex"), Citibank Visa ("Citibank"), and Chase Manhattan Bank ("Chase"). This person obtained the credit cards by providing the credit grantors with Cushman's name, address, social security number, and other identifying information. Cushman was unaware of the existence of these cards until the following year when a bill collector informed her that TUC had published a credit report showing that she was delinquent in her payments on the cards. By that time, the unknown person had accumulated charges of approximately \$2,400 between the three cards.

Cushman informed TUC that she had neither applied for, nor used, the cards and suggested that someone had fraudulently obtained them. TUC responded by contacting Amex and Chase to determine whether Cushman's verifying information

(such as her name and social security number) in TUC's report matched the information that they had. Amex and Chase confirmed that their information was the same. Additionally, TUC discovered that Cushman had not opened a fraud investigation with the credit grantors. Since she had not begun a fraud investigation and the verifying information matched, TUC left the information on Cushman's credit report. However, since TUC was unable to contact Citibank, it deleted the Citibank delinquencies from the report.

TUC sent Cushman an updated copy of the report containing the Amex and Chase delinquencies. Upon receiving the report, Cushman wrote a letter to TUC contesting the delinquencies still contained in the report and offered to sign affidavits explaining that these delinquencies were not hers. In response to the letter, TUC performed a reinvestigation that was identical to its first

investigation. However, TUC did not change the content of the report because Amex and Chase reconfirmed the verifying information. In addition, in April of 1995, TUC was able to contact Citibank regarding the contested delinquencies and Citibank's information matched TUC's. TUC then reinserted the Citibank delinquency into Cushman's credit report and notified Cushman of the reinsertion.

The following September, Cushman disputed the delinquencies directly with the credit grantors, Amex, Citibank, and Chase. She provided each creditor grantor with a handwriting sample for them to compare to the signature on the credit card application. All three credit grantors decided that the cards had been fraudulently obtained. TUC subsequently deleted the negative information concerning the three credit grantors from Cushman's report. Regardless, Cushman brought suit against TUC alleging negligent and willful failure to reinvestigate the disputed delinquencies in her credit report. She alleged violations of the Vermont Fair Credit Reporting Act ("VFCRA"), VT. STAT. ANN. Tit. § 2480a, FCRA, 15 U.S.C. §§ 1681i(a), 1681n, 1681o, and defamation. TUC moved for summary judgment on these claims, but the district court denied its motion. After the close of Cushman's case, the court granted judgment to TUC as a matter of law for each claim, and Cushman appealed to the Third Circuit.

Cushman's Claim Under § 1681i(a) of the FCRA Was Valid

FCRA § 1681i(a) provides that if a consumer disputes the accuracy of an item in her file, and she informs the credit reporting agency of that dispute, then the consumer reporting

agency must reinvestigate the disputed information unless it has a reason to believe that the dispute is frivolous or irrelevant. If a credit reporting agency violates § 1681i(a), the consumer may have a private right of action for negligent and willful noncompliance under §§ 1681n and 1681o, and may be allowed to recover actual damages, attorney's fees, costs, and if the noncompliance is found to be willful, punitive damages.

TUC contended that Cushman did not have a private right of action under §§ 1681n or 1681o because she did not have a valid claim under § 1681i(a). TUC claimed that her only available relief was under §§ 1681i(b) and (c). These sections provide that, if a dispute is not resolved under § 1681i(a), a consumer can submit a statement describing the dispute which the credit reporting agency must include in the consumer's credit report. In reversing the district court, the court of appeals rejected TUC's claim that Cushman had no available relief under § 1681i(a) stating that §§ 1681i(b) and (c) presume that a reasonable reinvestigation had been conducted but that the dispute had not been resolved. Cushman, the court noted, alleged that a reasonable reinvestigation had not taken place at all. The court explained that a consumer who alleges that no reasonable reinvestigation has occurred has a separate claim under § 1681i(a). Consequently, the appellate court found that Cushman had a valid claim for negligent and willful failure to reinvestigate.

Court Considered Claim for Negligent Failure to Reinvestigate

Having decided that Cushman had a valid claim under § 1681i(a), the court turned to the issues of TUC's obligations under that section and

Cushman's burden of proving TUC's negligent noncompliance. The court of appeals again reversed the district court by rejecting TUC's contention that § 1681i(a) requires a reporting agency to do more than confirm the accuracy of the disputed information with the credit grantors who were the original sources of the information. In rejecting this contention, the court relied on decisions from the Seventh and Fifth Circuit Courts of Appeal.

The Seventh Circuit held that a credit reporting agency that has been informed of a potentially inaccurate consumer's credit report is different from one that has not received notice. *See Henson v. CSC Credit Servs.*, 29 F.3d 280, 286-287 (7th Cir. 1994). If the credit reporting agency is notified of a potential inaccuracy, it should conduct a thorough investigation.

Additionally, the Fifth Circuit held that in a reinvestigation of the accuracy of credit reports pursuant to § 1681i(a), a credit reporting agency must bear some responsibility for evaluating the accuracy of the information obtained. *See Stevenson v. TRW Inc.*, 987 F.2d 288 (5th Cir. 1993). The Third Circuit noted that the *Stevenson* court rejected the exact argument made by TUC that a consumer must resolve the dispute with the creditor. The court agreed that the burden to reinvestigate is upon the credit reporting agency, not the consumer.

The court stated that a credit reporting agency does not have to investigate beyond the original source of a consumer's credit information when there is no indication that there may be an inaccuracy in the report. The cost of requiring an agency to do more would outweigh the potential benefits. However, once an agency is informed about a potential inaccuracy, a more thorough investigation is appropriate because the agency only incurs the cost of reinvestigating one

piece of disputed information. The court reasoned that since credit reporting agencies reap the benefits of collecting and disseminating consumer credit information, they should also bear the responsibility of ensuring the accuracy of that information. This responsibility, which is imposed on credit agencies by § 1681i(a), requires a reinvestigation that does more than shift the burden back on the consumer to dispute inaccuracies with the credit grantors.

The court cited two factors that determine the credit reporting agency's duty to go beyond the original source of the credit information. The first factor is whether the consumer has alerted the agency that the source may be unreliable, or if the agency itself knows or should know that the source is unreliable. The second factor to consider is the cost of verifying the accuracy of the source compared to the possible harm the inaccurate information may cause the consumer. The court stated that these factors are to be considered by the finder of fact.

Looking at the facts in the record, the court found that a reasonable jury could have rendered a verdict for Cushman. The court stated that a jury could find that TUC should have known that the credit grantors were unreliable to the extent that they had not been informed by Cushman of the possibility of fraud. Further, based on the fact that TUC pays investigators \$7.50 per hour and expects them to conduct ten investigations per hour, a jury could also find that seventy-five cents per investigation was too little for TUC to spend when compared with Cushman's possible damages.

Consequently, the court reversed and remanded the district court's grant of summary judgment with respect to Cushman's claim for negligent noncompliance with § 1681i(a).

Claim for Willful Failure to Reinvestigate Remanded

In addition to her claim for negligent noncompliance under § 1681i(a), Cushman claimed willful noncompliance under that section and sought punitive damages under § 1681n. To prove willful noncompliance, the court stated that Cushman

"[B]ased on the fact that Trans Union Corporation pays investigators \$7.50 per hour and expects them to conduct ten investigations per hour, a jury could also find that seventy-five cents per investigation was too little for TUC to spend when compared with [the consumer's] possible damages."

must prove either that TUC adopted its reinvestigation policy knowing that it violated rights guaranteed to consumers under the FCRA, or that TUC acted in reckless disregard of whether its policy violated those rights. If Cushman could prove one of these, she could prove damages under § 1681n.

Since the district court had concluded that Cushman had not even made a case for negligent noncompliance with § 1681i(a), it did not consider whether she had shown TUC's noncompliance to be willful. The court stated that it believed Cushman had produced sufficient evidence to allow a reasonable jury to

conclude that TUC's noncompliance was willful. Since the district court was more familiar with the factual issues involved in the case, the court remanded this claim to the district court for further consideration.

Cushman Claimed Violations of the VFCRA

In determining whether Cushman was entitled to the protections of the VFCRA, the court had to determine whether she resided in Vermont. The court relied on the definition of "residing" provided in Vt. Stat. Ann. Tit. 9, § 2480a(1). This section defines "residing" as living in a particular area, but not necessarily as having the intent to make that area a permanent home. The court stated that Cushman had lived in Vermont throughout most of the period of her dispute with TUC. This provided a sufficient basis for a jury to consider whether Cushman had "resided" in Vermont for purposes of determining the applicability of the

VFCRA protections.

Having determined that Cushman might be eligible for the VFCRA protections, the court considered her claim that TUC violated the Vermont statute by not promptly notifying her of the reinsertion of the Citibank delinquency on her credit report. *See* VT. STAT. ANN. Tit. 9, § 2480d(f). A TUC employee testified at trial that TUC notified Cushman of the reinsertion through her attorneys. However, Cushman argued that this notification took place during discovery so the notification was not sufficiently prompt as required under the statute. The court stated that it was unable to consider Cushman's

claim because the record did not reflect when her attorneys received the notification from TUC. Therefore, the court reversed and remanded this issue to the district court.

Cushman next claimed that, under the VFCRA, TUC did not provide her with a description of its reinvestigation procedures as required by Vt. Stat. Ann. Tit. 9 § 2480d(g)(5). The court found that the evidence in the record supported Cushman's claim and ruled that this claim should stand.

Court Remanded Defamation Claim

Cushman's final claim against TUC was a state law claim for defamation. The district court had dismissed this claim because Cushman had not produced the required evidence of malice, and because the FCRA preempted her state law claim for defamation except

where "malice with willful intent to injure" is proven. 15 U.S.C. § 1681h(e). The court stated that the district court failed to address this issue. Accordingly, the court remanded Cushman's defamation claim, reasoning that, since it had remanded the issue of whether Cushman was entitled to punitive damages for her claim of willful noncompliance with § 1681i(a), it would also remand this issue to the district court to make another finding of "willfulness" with respect to her defamation claim.

Finally, the court considered the district court's alternate basis of dismissal of Cushman's defamation claim. The district court had dismissed Cushman's defamation claim on the alternate basis that she had not produced any evidence of publication. The court used the law of the forum state, Pennsylvania, when

considering this issue because neither party had argued that Vermont law applied. Under Pennsylvania law, a claim for defamation must be supported by evidence that the information was communicated to at least one person other than the person defamed. Disagreeing with the district court, the appellate court determined that a jury could find that the information had been published for two reasons. First, a TUC employee testified at trial that the allegedly defamatory information was communicated to Citibank and Chase. Second, Cushman was originally informed of the allegedly defamatory information through a bill collector and the jury could find that this information had been published to him. Consequently, the court also reversed and remanded the district court's alternate ruling on Cushman's defamation claim.

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PPO Did Not Violate Antitrust Laws by Canceling Contract with Area Hospital

By Thomas O'Connor

In *Doctor's Hospital of Jefferson, Inc. v. Southeast Medical Alliance, Inc.*, 123 F.3d 301 (5th Cir. 1997), the United States Court of Appeals for the Fifth Circuit affirmed a district court decision granting the motion for summary judgment made by Defendant preferred provider organization ("PPO"), Southwest Medical Alliance, Inc. ("SMA"), and Defendant hospital, Jefferson Parish Hospital Service District No. 2 ("East Jefferson"). Plaintiff, Doctor's Hospital of Jefferson, Inc. ("DHJ"), claimed that Defendants violated 15 U.S.C. §§ 1-2 of the Sherman Act when SMA accepted East Jefferson into its PPO and contemporaneously dropped DHJ from its PPO. The district court granted the motion after finding that Plaintiff did not have proper standing to bring an antitrust

suit; the appellate court affirmed, but on alternate grounds. The appellate court found that although Plaintiff had standing to bring an antitrust claim by alleging that Defendants had injured Plaintiff's position in the marketplace, Plaintiff was unable to show that it suffered an antitrust injury, and therefore summary judgment was proper.

East Jefferson Joined SMA, and DHJ's Membership Was Simultaneously Terminated

DHJ and East Jefferson are located next door to each other in suburban New Orleans and shared a number of the same doctors. East Jefferson was the more established of the two hospitals as it opened in 1968, 16 years earlier than DHJ, and

had more than four times the bed space of DHJ. In 1988, DHJ and a number of other hospitals established SMA, a not-for-profit PPO. SMA was organized by dividing its member hospitals into two tiers: (1) member hospitals which receive seats on SMA's board of directors and (2) hospitals on contract to provide services which retain no ownership of SMA. At the time SMA was established, DHJ began in the more prestigious of the two tiers, as a member hospital. However by 1991, after briefly dropping out of SMA, DHJ was reaffiliated as a member in the second tier.

As the number of patients served by SMA and the revenues earned by SMA members grew, DHJ attempted to get back into the potentially more profitable first tier. However, SMA