

2002

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Recommended Citation

Ann M. Grefe *FTC v. Gill: A Step toward Deterring Illegal Practices of Credit Repair Organizations*, 15 Loy. Consumer L. Rev. 57 (2002).
Available at: <http://lawcommons.luc.edu/lclr/vol15/iss1/4>

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FTC v. Gill: A Step Toward Deterring Illegal Practices of Credit Repair Organizations

Ann M. Grefe*

I. Introduction

In recent years, consumers have increasingly relied on their credit for purchasing goods and services.¹ In turn, consumers and businesses rely on credit reports throughout the application process for credit cards, housing, checking accounts, insurance, and employment.²

The increasing reliance is problematic because incorrect information is reported, and often consumers do not understand how to correct or even obtain their reports.³ The large number of erroneous credit reports that go undetected and undisputed by consumers reflects this lack of consumer awareness.⁴ A recent study by the United States Public Interest Research Group showed that seventy percent of credit reports contained mistakes of some kind and twenty-nine percent contained serious errors that could result in the denial of credit.⁵

In the early 1980s, controversial Credit Repair Organizations

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¹ James P. Nehf, *A Legislative Framework for Reducing Fraud in the Credit Repair Industry*, 70 N.C. L. REV. 781, 782 (1992) (discussing the development of the CRO industry and surrounding legislative framework).

² Nehf, *supra* note 1, at 783.

³ Nehf, *supra* note 1, at 798.

⁴ Jon Golinger & Edmund Mierzwinski, *Mistakes Do Happen: Credit Report Errors Mean Consumers Lose* (March 1998) at <http://www.uspirg.org/reports> (last visited Nov. 12, 2002).

⁵ *Id.*

("CROs") emerged to answer consumer demand for information and assistance regarding credit.⁶ However, the often unethical and fraudulent activity of these heavily advertised CROs resulted in injury to many already financially disadvantaged consumers.⁷ In 1996, Congress responded by enacting the Credit Repair Organizations Act ("CROA") making the unethical and fraudulent activities of CROs illegal.⁸

In *Federal Trade Commission v. Gill*, the United States District Court for the Central District of California and the Ninth Circuit Court of Appeals recently addressed the illegal practices of one CRO.⁹ The *Gill* decision, where a circuit court for the first time addresses the enforcement of the CROA, reflects the extremely low tolerance of most courts for CROs using illegal practices to take advantage of consumers.¹⁰

This note discusses the development of the statutory framework regulating the use of consumer credit information and the practices of CROs. Next, this note examines *FTC v. Gill*, in which the appellate court permanently enjoined the defendants from providing credit repair services and found them individually liable for their illegal practices. Finally, this note addresses the need to supplement extensive damage awards, like those in *Gill*, with preventative consumer education.

II. The Development of the Statutory Scheme Regulating CROs

The Fair Credit Reporting Act of 1970 ("FCRA") regulates how credit bureaus maintain and provide credit information for consumer transactions.¹¹ In addition, it establishes consumers' rights regarding their credit reports.¹² Under the FCRA, credit bureaus must

⁶ Nehf, *supra* note 1, at 798.

⁷ Nehf, *supra* note 1, at 798-99.

⁸ Credit Repair Organizations Act, Pub. L. No. 104-208, 110 Stat. 3009-455 (1996) (codified at 15 U.S.C. §§ 1679-1679i (2001)).

⁹ *FTC v. Gill*, 71 F. Supp. 2d 1030 (C.D. Cal. 1999), *aff'd*, 265 F.3d 944 (9th Cir. 2001) [hereinafter *Gill I*].

¹⁰ *FTC v. Gill*, 265 F.3d 944 (9th Cir. 2001) [hereinafter *Gill II*].

¹¹ Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1136 (1970) (codified as amended at 15 U.S.C. §§ 1681-1681t (2001)).

¹² *Id.*

follow reasonable procedures to maintain credit information as accurately as possible.¹³ Nevertheless, because the FCRA does not require complete accuracy from credit bureaus, the burden is on consumers to monitor their credit reports and dispute erroneous or obsolete information according to FCRA procedures.¹⁴

Unaware of their rights under the FCRA, consumers were targeted by proactive CROs offering to correct inaccuracies on their credit reports.¹⁵ CROs advertised heavily in print and electronic media, thus becoming the most visible form of credit assistance.¹⁶ CROs claimed that all negative information could be removed from a credit report, regardless of its accuracy.¹⁷

CROs removed accurate as well as inaccurate information in a variety of ways. Some CROs advised their clients to create new credit histories by obtaining new employee numbers from the IRS.¹⁸ Others would negotiate with creditors by offering partial payment in return for the removal of negative credit information from their clients' credit reports.¹⁹ CROs would inundate the credit bureaus with dispute letters, triggering an overwhelming number of investigations under the FCRA.²⁰ These tactics were effective because credit bureaus must remove any legitimately challenged item that they cannot verify within thirty days.²¹ Thus, even accurate items were often deleted until they could be verified.²²

In response to these tactics, credit bureaus began to refuse CRO dispute letters by categorizing them as frivolous or irrelevant.²³

¹³ See 15 U.S.C. § 1681(b) (2001).

¹⁴ Nehf, *supra* note 1, at 798.

¹⁵ Nehf, *supra* note 1, at 798.

¹⁶ Nehf, *supra* note 1, at 799.

¹⁷ Nehf, *supra* note 1, at 799. For example, the defendants in *Gill* advertised that "there literally is nothing a consumer can possibly have on a credit report that we cannot remove and we can remove it legally." *Gill II*, 265 F.3d at 944.

¹⁸ *Sannes v. Jeff Wyler Chevrolet, Inc.*, No. 97-C1930, 1999 U.S. Dist. LEXIS 21748, at *11 (S.D. Ohio Mar. 31, 1999).

¹⁹ *Id.*

²⁰ Nehf, *supra* note 1, at 800. This was also the practice used by defendants in *Gill*. See *Gill II*, 265 F.3d at 952.

²¹ Nehf, *supra* note 1, at 800. See 15 U.S.C. § 1681i (2001).

²² Nehf, *supra* note 1, at 800.

²³ Nehf, *supra* note 1, at 801.

Making this determination, however, still required time-consuming and costly investigation.²⁴ Credit bureaus then tried refusing to investigate CRO dispute letters on the grounds of consumer privacy, but CROs had usually obtained written authorization from their clients.²⁵

CROs often directly abused consumers by charging high fees disguised by payment plans for services that were never provided or available elsewhere for free.²⁶ When consumers tried to cancel or discontinue these services and get their money back, the CRO often continued to charge them anyway.²⁷

In response, Congress designed the CROA to protect the public from the unfair and deceptive business practices of credit repair services and to provide information to prospective buyers of those services.²⁸ The CROA primarily addresses CROs, but also prohibits misleading statements regarding consumer credit by any person.²⁹ Furthermore, CROs must inform consumers of their statutory rights to obtain their credit reports and to dispute erroneous information.³⁰ In addition, it prohibits any payment until services are fully performed,³¹ requires a written contract for all services,³² and requires an option to cancel the contract within three days.³³ The CROA creates a cause of action for both the FTC and individuals providing for the recovery of actual and punitive damages.³⁴ In addition, injunctive or equitable relief may be sought³⁵ because any violation of the CROA is also an unfair or deceptive act of

²⁴ Nehf, *supra* note 1, at 801.

²⁵ Nehf, *supra* note 1, at 802.

²⁶ Nehf, *supra* note 1, at 800.

²⁷ See, e.g., *In re Nat'l Credit Mgmt. Group*, 21 F. Supp. 2d 424, 435 n.22 (where the defendant CRO used a "phone check" to repeatedly debit client accounts).

²⁸ See 15 U.S.C. § 1679b (2001).

²⁹ 15 U.S.C. § 1679b(a).

³⁰ 15 U.S.C. § 1679c (requiring that consumers are informed of their rights as guaranteed by the FCRA, 15 U.S.C. § 1681).

³¹ 15 U.S.C. § 1679b(b).

³² 15 U.S.C. § 1679d.

³³ 15 U.S.C. § 1679e.

³⁴ 15 U.S.C. § 1679h.

³⁵ 15 U.S.C. § 45(l).

commerce, in violation of the Federal Trade Commission Act (“FTCA”).³⁶

III. Discussion of *FTC v. Gill*

The defendants’ behavior in *FTC v. Gill* illustrates some common illegal practices of CROs. In *Gill*, the FTC brought charges against Keith Gill and Richard Murkey for their credit repair services, offered through the Law Offices of Keith Gill, an attorney.³⁷ Gill and Murkey advertised their credit repair services through radio broadcasts, newspapers, telemarketing, and personal meetings.³⁸ They represented that by employing various methods they could legally remove anything from credit reports without paying the money rightfully due to the creditors.³⁹

Murkey performed initial consultations with prospective clients.⁴⁰ Although he provided no services in the initial consultations, the defendants requested advance payment of twenty-five to fifty percent of the total estimated costs of credit repair and established a payment schedule that did not depend on the completion of any services.⁴¹

After collecting information from clients, the defendants never inquired about the accuracy of the client’s report.⁴² They simply inundated credit bureaus with letters disputing information on the clients’ credit reports.⁴³ These letters were drafted in the clients’ names and sent without their prior approval.⁴⁴ In addition, the defendants directed their clients to forward all correspondence with credit bureaus to the law offices of defendant Gill.⁴⁵ Regardless of whether this process resulted in the removal of negative items on the credit report, the defendants continued to bill their clients and ignore

³⁶ 15 U.S.C. § 1679h(b).

³⁷ *Gill II*, 265 F.3d at 953.

³⁸ *Id.* at 950.

³⁹ *Id.* at 951.

⁴⁰ *Id.* at 952.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

client complaints.⁴⁶

The defendants stipulated to a preliminary injunction, ordering them to comply with the CROA and to cease making claims that they can repair credit reports containing accurate information.⁴⁷ The order also restrained the defendants from requiring payment for uncompleted credit services or making misrepresentations to credit bureaus and consumers.⁴⁸

In violation of the preliminary injunction, Gill and Murkey renamed their business the “Credit Restoration Corporation of America” and continued to bill their original clients and offer the same illegal services to new clients.⁴⁹ In response, the court granted the FTC’s motion for summary judgment, holding that the defendants’ deceptive advertisements violated both the CROA and the FTCA.⁵⁰ The court also held that the prepayment for these credit services and misrepresentations to credit bureaus violated the CROA.⁵¹ The court granted the FTC’s request for a permanent injunction, and found the defendants individually liable to the FTC in the amount of \$1,335,912.14.⁵² The defendants appealed, and for the first time, a circuit court addressed the CROA.⁵³ The Ninth Circuit Court of Appeals affirmed the decision and found that the holding and damages were appropriate.⁵⁴

IV. The Ninth Circuit’s Decision Is Consistent with the Purpose of the Credit Repair Organizations Act

A. Untrue and Misleading Representations About Credit Repair Services

Gill and Murkey violated the CROA and the FTCA by

⁴⁶ *Gill II*, 265 F.3d at 952.

⁴⁷ *Id.* at 953.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Gill I*, 71 F. Supp. 2d at 1049.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Gill II*, 265 F.3d at 944.

⁵⁴ *Id.*

making untrue and misleading representations regarding their credit repair services. The CROA prohibits any person from “mak[ing] or us[ing] any untrue or misleading representation of the services of the credit repair organization.”⁵⁵ The FTCA forbids material representations likely to mislead reasonable consumers under the circumstances.⁵⁶

When examining representations under either statute, the court is not limited to express claims but may consider the overall net impression of the representation.⁵⁷ For example, the emphasis on the word “approved” throughout an advertisement by a CRO created the misleading net impression that customers would receive pre-approved credit cards regardless of their credit.⁵⁸ Using this test, the Ninth Circuit held that Murkey made untrue public statements, the most important being the claim that he could legally remove any negative information from credit reports.⁵⁹ The court also held that Murkey’s representations were misleading because they created the net impression that the removal of negative credit information would be permanent.⁶⁰ Therefore, his representations violated the CROA.⁶¹

The defendants did not dispute that they made representations or that those representations were material under the FTCA.⁶² They claimed only that the representations were not likely to mislead consumers.⁶³ The defendants’ misrepresentations created a net impression likely to lead reasonable consumers to believe that Gill and Murkey could permanently and legally remove any negative information from credit reports.⁶⁴ The court correctly applied the net impression standard to conclude that the defendants violated the

⁵⁵ 15 U.S.C. § 1679b(a)(3) (2001).

⁵⁶ *In re Nat’l Credit Mgmt.*, 21 F. Supp. 2d at 441.

⁵⁷ *See Gill II*, 265 F.3d at 956 (applying the net impression standard to both the CROA and the FTCA).

⁵⁸ *In re Nat’l Credit Mgmt.*, 21 F. Supp. 2d at 444.

⁵⁹ *Gill II*, 265 F.3d at 955-56.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Gill I*, 71 F. Supp. 2d at 1039 (holding that although the defendants did not use the word “permanently,” the net impression implied that the removal of negative credit items would be permanent).

CROA and the FTCA.⁶⁵

B. Payment Structure and Misrepresentations to Credit Bureaus

Under the CROA, CROs cannot receive any payment until services are rendered in full.⁶⁶ In *Gill*, the defendants required a large down payment of twenty-five to fifty percent of an estimated total before any services were rendered.⁶⁷ In addition, the subsequent payment plan was not timed with the completion of any service or part of the service.⁶⁸ This payment structure clearly violated the CROA.⁶⁹

The CROA also requires CROs to exercise reasonable care to avoid making any untrue or misleading statements to credit reporting agencies.⁷⁰ The defendants in *Gill* never conducted reasonable inquiry as to the accuracy of the information they disputed and therefore did not know that their letters to the credit bureaus were untrue or misleading.⁷¹ Therefore, the defendants violated the CROA by their misrepresentations to credit bureaus and their payment structure.⁷²

C. A Combination of Remedies

Violations of the CROA render the guilty party liable for remedies available under either the CROA or the FTCA.⁷³ The FTCA allows for injunctive relief and any other appropriate equitable relief.⁷⁴ The CROA allows for actual and punitive damages.⁷⁵ Members of organizations found to violate the FTCA and CROA are also subject to individual liability for the business actions of the

⁶⁵ *Gill II*, 265 F.3d at 956.

⁶⁶ 15 U.S.C. § 1679b(b) (2001).

⁶⁷ *Gill II*, 265 F.3d at 952.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ 15 U.S.C. § 1679b(a)(1) (2001).

⁷¹ *Gill II*, 265 F.3d at 952.

⁷² *Id.* at 957.

⁷³ *See* 15 U.S.C. § 1679h.

⁷⁴ 15 U.S.C. § 45(l).

⁷⁵ 15 U.S.C. § 1679g.

organization.⁷⁶

Under the FTCA, injunctive relief is appropriate when there is a “cognizable danger of recurring violation.”⁷⁷ The court looks at the totality of the circumstances when deciding whether a permanent injunction is appropriate.⁷⁸ Violations that are frequent and systematic rather than isolated make a court more willing to issue injunctive relief.⁷⁹

In *Gill*, the defendants made systematic misrepresentations to consumers and credit bureaus.⁸⁰ Even after stipulating to a preliminary injunction, the defendants continued their illegal operations under a new name, evidencing a desire to continue an illegal operation.⁸¹ The frequent and systematic violations of the CROA, FTCA, and the preliminary injunction demonstrated the substantial likelihood of future violations, making a permanent injunction appropriate.⁸²

The CROA provides for recovery of any amount paid by consumers to the credit repair organization.⁸³ Additionally, the CROA incorporates any of the remedies necessary for complete justice available under the FTCA, including restitution.⁸⁴ In *Gill*, there was no record of the fees paid by clients; therefore, the court ordered the defendants to pay to the FTC \$1,335,912.14 in restitution under the FTCA, a projection based on amounts deposited into their bank accounts.⁸⁵

Murkey and Gill were held individually liable for their business actions.⁸⁶ An individual who has control or knowledge of activities within a CRO can be held individually liable.⁸⁷ Even

⁷⁶ *Gill I*, 71 F. Supp. 2d at 1046.

⁷⁷ *Id.* at 1047.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Gill II*, 265 F.3d at 957.

⁸¹ *Id.*

⁸² *Id.*

⁸³ 15 U.S.C. § 1679g(a)(1)(B) (2001).

⁸⁴ *Gill II*, 265 F.3d at 958.

⁸⁵ *Gill I*, 71 F. Supp. 2d at 1048-49.

⁸⁶ *Gill II*, 265 F.3d at 958.

⁸⁷ *In Re Nat'l Credit Mgmt.*, 21 F. Supp. 2d at 461.

individuals running companies with over 200 employees have been held to have sufficient control or knowledge to justify individual liability.⁸⁸ In *Gill*, the defendants themselves made contacts with clients and performed the services.⁸⁹ Therefore, they had sufficient control and knowledge of the activities of their organization to subject them to individual liability.⁹⁰

V. Although the Harsh Penalties in *Gill* Will Deter Some CROs, Consumers Still Need Education as Protection

The Ninth Circuit penalized the defendants to the full extent allowed by the CROA and the FTCA by awarding injunctive relief and monetary damages with individual liability.⁹¹ This holding is a step toward deterring illegal behavior by CROs. When these organizations realize the significant financial risk posed by harsh penalties for illegal practices, taking advantage of consumers will no longer be an attractive option.

Unfortunately, CROs by nature do not require significant startup capital and are highly mobile, keeping the risk of offering illegal services very low, even with stiff penalties.⁹² In addition, relatively few victims receive compensation under the current system, which shows the breadth of the problem and the relative ineffectiveness of litigation alone. For example, National Credit Management Group, one CRO shut down by litigation brought by the FTC, averaged 5000 weekday and 1500 weekend calls, and collected payment from over 200,000 people.⁹³ However, the suit against them represented only 280 clients of the 200,000 affected.⁹⁴ Although the FTC represents the interests of all of consumers, reliance on the records provided by a CRO found to conduct deceptive and illegal practices makes actual restitution unlikely for all or even most of those consumers directly affected.

⁸⁸ *In Re Nat'l Credit Mgmt.*, 21 F. Supp. 2d at 431.

⁸⁹ *Gill II*, 265 F.3d at 957-58.

⁹⁰ *Id.* at 958.

⁹¹ *Id.*

⁹² Nehf, *supra* note 1, at 799.

⁹³ *In re Nat'l Credit Mgmt. Group*, 21 F. Supp. 2d at 442 & n.31.

⁹⁴ *Id.*

In many ways, CROs are an avenue for individuals to get rich quick by selling consumers services and information that they can easily get for free. Therefore, even the CROs that follow the law are, in a sense, taking advantage of consumers who are simply unaware of their options. The current laws are being strongly enforced in an attempt to control illegal practices of CROs. Nevertheless, CROs are still taking advantage of consumers, and many consumers are still unaware of their credit rights.

The FTCA and the CROA, as applied by the Ninth Circuit, will deter the illegal behavior of some CROs. If consumers know their credit rights, however, they will choose not to purchase from a CRO that misrepresents credit services, offers illegal services, or charges for free services.

It is wishful thinking, however, to expect consumer education to come from CROs themselves. Although the CROA requires CROs to inform prospective clients of their credit rights,⁹⁵ chances are that CROs conducting illegal practices are unlikely to do so.

Fortunately, CROs are not the only source of information and assistance for consumers regarding their credit. Free information is available from the FTC,⁹⁶ as well as the large credit bureaus.⁹⁷ However, consumers are constantly bombarded with advertising and information, especially regarding their credit, and educating consumers about their credit rights is a difficult endeavor.

Even with the resources available to consumers regarding credit, illegal CROs are still taking advantage of many consumers. Until there are more effective ways to heighten consumer awareness of credit rights, the only way to impact this expansive problem is to continue imposing the harshest possible penalties for violations of the CROA and FTCA, as the court did in *Gill*.

VI. Conclusion

The court in *FTC v. Gill* correctly awarded damages to the

⁹⁵ 15 U.S.C. § 1679c (2001).

⁹⁶ See <http://www.ftc.gov/ftc/consumer.htm> (last modified Sept. 25, 2002); see also <http://www.consumer.gov/index.htm> (last modified Nov. 7, 2002) (providing various resources for consumers, sponsored by the federal government).

⁹⁷ See <http://www.equifax.com> (last visited Nov. 12, 2002); <http://www.transunion.com> (last visited Nov. 12, 2002); <http://www.experian.com/consumer/index.html> (last visited Nov. 12, 2002).

FTC to the full extent provided for by the FTCA and the CROA.⁹⁸ The defendants, through deceptive advertising, misrepresented credit repair services in violation of the FTCA and CROA.⁹⁹ They also set up a payment structure independent of the completion of services and made untrue representations to credit bureaus, violating the CROA.¹⁰⁰ The court appropriately granted a permanent injunction and money damages, and found Gill and Murkey individually liable.¹⁰¹

The stiff penalties imposed in *Gill* are a step toward deterring illegal practices of CROs. Nevertheless, litigation should be supplemented by consumer education to help consumers protect themselves. Until consumers become more aware of their credit rights, their only protection will be the punishment of illegal CROs to the fullest extent allowed by the statutes, as the court did in *Gill*.

⁹⁸ *Gill I*, 71 F. Supp. 2d at 1046-47, *aff'd*, 265 F.3d at 958.

⁹⁹ *Gill II*, 265 F.3d at 958.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*