2000

FTC Orders Trans Union to Stop Selling Consumer Credit Info

Troy Stark

Follow this and additional works at: http://lawecommons.luc.edu/lclr
Part of the Consumer Protection Law Commons

Recommended Citation
Available at: http://lawecommons.luc.edu/lclr/vol12/iss4/6

This Consumer News is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola Consumer Law Review by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.
FTC Orders Trans Union to Stop Selling Consumer Credit Info

After nearly eight years of litigation, the Federal Trade Commission (hereinafter “FTC” or “Commission”) has ordered Trans Union Corporation, the Chicago-based credit reporting agency, to stop selling consumer credit information to target marketing companies. The decision, called “a victory for personal financial privacy,” should significantly curtail the ability of marketers to obtain sensitive financial information regarding potential customers. For consumers, the decision could mark a decrease in the number of unsolicited offers received in the mail and over the telephone. To more fully understand the impact this decision could have on consumers, it is necessary to examine the context and background of the FTC’s ruling.

In 1970, Congress passed the Fair Credit Reporting Act (hereinafter “FCRA” or “Act”) in response to growing public concern over the privacy and importance of personal financial data. Under the FCRA, credit bureaus are allowed to receive credit information on millions of consumers from their creditors and then compile that information in extensive databases. The data is then formatted into an individual credit report, which shows all the credit information reported to that credit bureau about a particular person. The information available in a credit report, called a “consumer report” under the Act, can include the types of loans a consumer has, whether any accounts are delinquent, when an account was opened, the amount of credit available, and other very
specific, highly sensitive information.

Under the FCRA, credit bureaus are allowed to furnish these reports to people wishing to extend credit, evaluate a potential employee, underwrite an insurance risk, determine license eligibility, or any other "permissible purpose." Accordingly, credit reports are usually only sold to credit grantors, insurance companies, and employers seeking to evaluate the economic well being of potential customers and employees. There is a significant risk that consumers could be substantially prejudiced by the release of inaccurate information to these typical inquirers. Therefore, credit bureaus must continually update and verify the information they provide.

Currently, there are three major credit-reporting agencies in the United States: Experian (formerly TRW), Equifax, and Trans Union. While all three credit bureaus collect the same type of information on consumers, Trans Union is the only one to make individualized data available to target marketers. While Experian and Equifax do sell data to marketers, the information they release is composite data based on zip codes and geographical areas, rather than the person-specific data sold by Trans Union.

Specifically, Trans Union sells a variety of customized lists to target marketers, which include names, addresses, and other demographic information of consumers based on specific criteria submitted by the marketer. One product, which Trans Union calls the Master File, allows target marketers to order lists of consumer names, addresses, and telephone numbers based on specific types of credit accounts held by consumers. For example, a credit-grantor specializing in consolidation loans could obtain a list of all consumers who have an account open with a finance company or other "last resort" lender, as those consumers are more likely to respond to credit offers. Other Trans Union products allow marketers to obtain lists of customers based on estimated income, the amount of equity available in a
The FTC opinion stated that Trans Union sells these lists through a subsidiary company named Performance Data. According to the opinion, the lists produced by Performance Data are very popular with target marketers. In fact, the company’s 1997 sales totaled more than $34 million, or nearly two percent of all sales generated in the target marketing industry. According to the FTC, it was Trans Union’s widespread practice of distributing this highly sensitive information, which was supposed to be collected for credit, insurance and employment purposes, that led the agency to take legal action against the company.

Accordingly, the FTC filed an administrative complaint against Trans Union in 1992, alleging that Trans Union violated the FCRA. The complaint alleged that the lists Trans Union provides to marketers constitute “consumer reports,” which can only be released for the purposes authorized under the FCRA, namely for firm credit offers, employment inquiries, and insurance underwriting.\(^5\)

The administrative law judge (hereinafter “ALJ”) initially assigned to the case entered a summary decision in favor of the FTC on September 20, 1993. In that opinion, the ALJ concluded that Trans Union’s lists constitute consumer reports under the FCRA and that target marketing is not a valid purpose authorized by the Act. Thus, by selling those lists to purpose authorized by the Act. Thus, by selling those lists to target marketers, Trans Union violated the Act. Trans Union appealed the ALJ’s holding to the FTC appeals board, but the decision was upheld.\(^6\)

Unsatisfied, Trans Union took the case to the United States Court of Appeals for the District of Columbia, which has jurisdiction over appeals from administrative agencies like the FTC. Trans Union contested the decision on a number of factual and legal grounds. De-
spite Trans Union’s arguments, the appellate court agreed with the Commission that target marketing is not a valid basis upon which to release consumer credit information. However, the court also held that it was inappropriate to summarily rule that Trans Union’s lists were "consumer reports" under the FCRA. Accordingly, the case was remanded to the FTC to answer the factual question of whether Trans Union’s marketing lists are technically "consumer reports" as that phrase is defined under the Act.

Consequently, the case was sent back to the FTC, which assigned the case to a second ALJ. In 1998, a two-month trial was held to evaluate evidence regarding whether Trans Union’s marketing lists constitute "consumer reports" under the Act. After hearing the evidence, the ALJ issued an order concluding that Trans Union was, in fact, distributing "consumer reports" without an authorized purpose and was therefore violating the Act. The ALJ’s opinion did not, however, end there.

Aside from arguing that its lists are not consumer reports, Trans Union also argued on remand that the Act is unconstitutional, which would make a violation of the Act a moot point. Trans Union challenged the Act’s constitutionality by arguing that it violated Trans Union’s right to free speech and was too vague to survive constitutional muster under the Fifth Amendment’s due process clause. The ALJ disagreed and upheld the constitutionality of the Act. Once again, Trans Union appealed to the FTC appeals board, which issued the opinion currently under consideration.

After extensive argument and briefing, the FTC issued its opinion and final order on March 1, 2000. Pursuant to FTC procedural rules, the appeals board reviewed the ALJ’s decision under a de novo standard. Upon review of the trial record, the Commission agreed with the ALJ’s opinion and ordered Trans Union to stop distributing its lists to target marketing entities. Since the
appellate court already determined that releasing credit reports to target marketing groups was not a valid purpose under the Act, the Commission was only required to decide whether the lists released by Trans Union were “consumer reports” and whether the Act was constitutional.

The Commission concluded that Trans Union’s lists meet this definition because the information contained therein reveals information bearing on consumer creditworthiness and that lists are often used by authorized parties to make firm offers of credit. A major factor in the Commission’s holding was the fact that the information contained in Trans Union’s marketing lists is often the same information used by authorized companies. Accordingly, Trans Union was held to be in violation of the Act.

After determining Trans Union violated the Act, the Commission considered the constitutionality of the Act. Trans Union challenged the Act’s validity on two grounds: first, that the FCRA violated Trans Union’s right to free speech under the First Amendment and, second, that the Act’s definition of “consumer report” is void under the Fifth Amendment’s due process clause by virtue of its vagueness. The Commission decided both of these issues in favor of the Act’s constitutionality.

Initially, the FTC noted that Trans Union’s target marketing lists constitute “commercial speech” under First Amendment case law. As such, the Commission noted that any restrictions imposed by the FCRA on commercial speech need only withstand an intermediate level of scrutiny. Under that standard, the FTC found that there is a substantial governmental interest in affording privacy to consumer credit information, that the FCRA substantially advances that interest, and that there is a reasonable fit between the restrictions imposed and advancing the interest in question. Accordingly, the Commission held that the FCRA does not violate Trans Union’ First Amendment rights.
Furthermore, the FTC decided that the Act is not unconstitutionally vague under the Fifth Amendment’s due process clause. According to Fifth Amendment due process jurisprudence, to be unconstitutionally vague, a statute must fail to provide sufficient notice to parties subject to its regulations and must arguably allow arbitrary and discriminatory enforcement of its provisions. The FTC determined that the Act does meet these requirements and is not unconstitutionally vague. In so holding, the FTC affirmed the ALJ and severely curtailed Trans Union’s ability to sell consumers’ sensitive financial information.

Accordingly, the Commission’s decision will undoubtedly have a great impact on consumer privacy. The Chicago Tribune noted that Trans Union’s practice of distributing consumer credit information “may be indirectly responsible for many of the credit-card solicitations consumers receive in the mail.” Now that the lists will no longer be available, consumers may see a decline in the number of unsolicited phone calls and mail advertisements they receive. In fact, the FTC’s Associate Director of Financial Practices, David Medine, called the decision “a strong statement that invasions of privacy by large database companies will not be tolerated.” Moreover, amendments to the FCRA in 1997 created a $2,500 penalty for every violation of the Act, which should serve as a significant deterrent against any further sales by Trans Union.

Trans Union, however, indicated that it will also appeal the FTC’s latest decision to the D.C. Circuit Court of Appeals. Though the decision did not come as a surprise to the company, Richard Longtin, one of Trans Union’s attorneys, contends that “[t]he facts don’t support the commission’s ruling.” Furthermore, the company apparently disagrees with the Commission’s holding that the Act meets the vagueness standards required by the Fifth Amendment’s due process clause. According to Longtin, the company’s “problem with [the statute] is
[that] the definitions are vague” and do not adequately inform companies of the regulations to which they may be subject.\textsuperscript{17} Thus, the ultimate outcome in this case will be left, once again, to the appellate court. For the time being, however, Trans Union must stop selling marketing lists or face substantial monetary penalties.\textsuperscript{18}

Despite Trans Union’s intent to appeal the decision, the FTC’s decision marks a definite victory for consumer privacy. After more than eight years of litigation, Trans Union is running out of options and may eventually be forced to stop distributing sensitive consumer data, a practice its competitors stopped years ago.\textsuperscript{19} This decision clearly defines the FTC’s position on the privacy of consumer credit information and signals the Commission’s intent to fight abuses of the FCRA whenever they arise. That should be good news for consumers being inundated with unsolicited mail and telephone calls.

\textbf{Endnotes}

1. See FTC Brings the Hammer Down on Trans Union Sales of Credit Info, \textit{Credit Risk MGMT. Rep.}, Mar. 8, 2000, at 1.


3. See In re Trans Union Corp., F.T.C. No. 9255, slip op. at 1 (Mar. 1, 2000). Unless otherwise noted, the statements made in this article are based on information contained in the FTC’s opinion in the Trans Union matter.


5. See Trans Union, F.T.C. No. 9255 at 7.

6. See id. at 2.
7. See id. at 2-3.

8. See Trans Union Corp. v. FTC, 81 F.3d 228 (D.C. Cir. 1996).


12. See id. at 53 (citing Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)).

13. See James, supra note 2.


15. See id.


18. See id.

19. See James, supra note 2.

20. See id.