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present in this case. Winkler had no reason to believe that the bakery would modify the proofer in such a dangerous manner and had no actual knowledge of other bakeries in the industry making similar alterations.

### **Winkler's warnings adequate**

The court held that both the instruction manual warning and the warning on the proofer itself were adequate. Thus, the court concluded that Winkler was entitled to rely on the bakery to pass along its warnings.

The threshold question is whether the "warnings made the product safe at the time it left the manufacturer's control." *Ferguson*, at 1226-27. Winkler met the threshold by including two warnings regarding reaching into the moving machine.

*Editor's Note:* The Supreme Court of the United States denied writ of certiorari on October 21, 1996. *Ferguson v. Winkler GMBH & Co. KG*, 117 S. Ct. 360 (U.S., Oct. 21, 1996) (No. 96-289).

## ***Acquisition of credit report did not violate Fair Credit Reporting Act (FCRA)***

*by Patrick McGovern*

In *Korotki v. Attorney Services Corp., Inc.*, 931 F. Supp. 1269 (D. Md. 1996), the United States District Court for the District of Maryland held that the acquisition of a credit report to obtain an alternate address at which to serve legal papers did not violate the Fair Credit Reporting Act ("FCRA").

### **Credit report provides address**

The plaintiff, Abraham Korotki ("Korotki"), entered into a real estate development contract with Baltimore County. As part of the project, Baltimore County awarded a contract to Angelozzi Brothers, Inc. ("Angelozzi") to install roads and utility mains at the development site. While the construction was underway, Angelozzi submitted an invoice for \$6,000 to Korotki for compaction services it had performed. Korotki refused to pay, claiming that Angelozzi's original contract with Baltimore County required

Angelozzi to perform the services and that Angelozzi had failed to appropriately perform the work.

Angelozzi then hired a law firm, Thomas, Ronald & Cooper ("TRC"), to collect the disputed debt. An attorney at the firm, Schmitt, enlisted the aid of Attorney Services Corporation ("ASC") to post the development property with a notice of a mechanic's lien. Instead of posting the notice on the development property, however, ASC posted it at Korotki's personal residence. By the time anyone discovered the mistake, the 90-day notice period for establishing the mechanic's lien had expired.

Schmitt then instructed ASC to serve Korotki personally with the mechanic's lien papers. However, ASC was unable to serve Korotki at the addresses which ASC had available. At that point, ASC, without any specific authorization from Korotki or Schmitt, requested a credit report from Equifax seeking to obtain an alternate address for

Korotki. ASC transmitted a copy of the report to Schmitt, who claimed that neither he nor his law firm used the report for any purpose.

### **Violation of FCRA alleged**

After learning that ASC had obtained his credit report, Korotki filed suit against ASC, Schmitt, and TRC, alleging willful and negligent violations of the FCRA, 15 U.S.C. § 1681, the Maryland Consumer Credit Reporting Agencies Act ("CCRAA") and invasion of privacy. Korotki did not allege that any of the defendants actually used the credit report for any purpose. The defendants, in turn, filed motions for summary judgment.

In deciding the defendants' motions for summary judgment, the district court addressed four issues: 1) whether the credit report ASC obtained was a "consumer report" to which the FCRA applies; 2) if the credit report was a consumer report, what did the FCRA require of the

defendants; 3) whether the defendants failed to comply with those requirements; and 4) whether the defendants were liable under the plaintiff's state law claims.

### **Court finds FCRA applicable**

The court first reviewed the definition of a "consumer report" as provided in 15 U.S.C. § 1681a(d). The court noted that the definition hinged upon whether the motive of the credit reporting agency in attaining the report was proper under the statute, e.g., whether the report became a factor in establishing the consumer's eligibility for credit, insurance or employment. In this case, the report by Equifax included a copy of the FCRA and information about Korotki's assets and liabilities. Based on this evidence, the court found that when Equifax collected credit information on Korotki, it believed that the information would be used for a proper purpose under the FCRA. Thus, the court considered the report a consumer report, as defined in the statute, and found the FCRA applicable to its use.

Once finding that the FCRA applied to Korotki's situation, the court examined the statute's legislative history. The court explained that Congress intended the statute to protect consumers from inaccurate or arbitrary information in a consumer report, while allowing the free flow of information about a consumer. Korotki alleged that the main purpose of the statute is the protection of a consumer's privacy. The court rejected this contention, noting that Congress balanced privacy concerns against the

informational needs of the business community in enacting the statute.

Under the statute, a consumer reporting agency may furnish a consumer report without the consumer's authorization to a third party who meets one of the five purposes listed in § 1681b(3). The court viewed two of these purposes as pertinent to the case at bar: 1) the agency has reason to believe that the party seeks the information in connection with a credit transaction involving the consumer and 2) the party otherwise has a legitimate business need for the information in connection with a transaction involving the consumer. In addition, the court concluded that users of credit information, as well as consumer reporting agencies, must comply with § 1681b.

### **Defendants had legitimate purpose to obtain credit report**

The court explained that Korotki would have to show that the defendants lacked a permissible purpose in obtaining the credit report to prove a violation of the FCRA. The court found that the only purpose the defendants had was to obtain an alternate address at which to serve Korotki. According to the court, this purpose did not violate the FCRA because the defendants possessed a legitimate business need for the information in connection with a business transaction involving the consumer. The court reasoned that the defendants had a permissible business purpose related to obtaining information in connection with a credit transaction involving a consumer even under the

narrowest interpretation of § 1681b(3). Correspondingly, the court found evidence to suggest that Korotki entered the transaction personally, as a consumer. For these reasons, the court granted summary judgment in favor of the defendants.

### **Same standard for users**

In rendering its decision, the court also articulated a standard for courts to determine whether a user has shown that he or she possesses a permissible purpose under § 1681b. The court explained that the standard should be the same one which applies to a consumer reporting agency: a user must have a reasonable belief that a permissible purpose exists. Applying this standard, the court found that Angelozzi, as a user, possessed a reasonable belief that a business transaction occurred involving Korotki. Accordingly, the court held that Angelozzi was not liable under the FCRA.

### **Other arguments rejected**

Korotki advanced several other arguments in support of his FCRA claim, all of which the court ultimately rejected. First, Korotki alleged that ASC did not have a permissible purpose under the FCRA because no one asked ASC to collect the debt. The court rejected this argument, holding that no material distinction existed between the services for which Schmitt hired ASC and the attempt to collect the debt.

Next, Korotki argued that if the court ruled in favor of the defendants, such a ruling would allow any

claimant asserting a monetary claim to obtain a person's consumer report without violating the FCRA. Rejecting this assertion, the court explained that a monetary claim is distinguishable from collecting a debt because the latter involves a credit transaction.

Third, Korotki argued that ASC could have obtained the additional address at which to serve Korotki by running a less intrusive credit check. Again, the court rejected this argument, noting that the FCRA does not limit an authorized user's

access to credit information.

Finally, the court rejected Korotki's argument that the acquisition of his credit report was frivolous because the notice period for the mechanics lien had expired. The court held that Schmitt acted reasonably in his client's interest and that Korotki failed to present any evidence of bad faith.

In addition to his claim under the FCRA, Korotki brought state law claims pursuant to the CCRAA and common law invasion of privacy.

With respect to Korotki's CCRAA

claims, the court found that the FCRA and the CCRAA are virtually identical. Thus, given the court's dismissal of the FCRA claim, the court concluded that the defendants did not violate the CCRAA either. Finally, with respect to Korotki's claim of invasion of privacy, the court held that because the FCRA authorized the defendants' actions, a finding of an invasion of privacy would be inconsistent with the FCRA, and thus, preempted by the FCRA.

## *Batch code obliteration violates trademark and unfair competition laws by causing "likelihood of consumer confusion"*

by Catherine Moore

In *John Paul Mitchell Systems v. Pete-N-Larry's Inc.*, 862 F. Supp. 1020 (W.D.N.Y. 1994), the Federal District Court for the Western District of New York found that a retailer's obliteration of batch codes from bottles of hair care products resulted in consumer confusion sufficient to constitute a potential violation of the Federal Trademark Act of 1946 and New York's unfair competition laws.

### **Hair care products sold without authorization**

John Paul Mitchell Systems ("JPMS"), the manufacturer of the Paul Mitchell line of hair care products, authorizes the distribution of its products exclusively to professional hair salons and stylists. JPMS limits product availability to ensure that consumers have the opportunity to seek professional advice for questions concerning the appropriate selection and proper usage of Paul Mitchell products. JPMS maintains that the quality of its product suffers if consumers do not have access to

professional consultations. Consequently, JPMS does not authorize the sale or distribution of Paul Mitchell products to retail stores.

The defendants, Pete-N-Larry's Inc. and several other retail stores, admitted that they sold Paul Mitchell products without authorization. The plaintiffs, JPMS and its regional distributor, alleged that the defendant retailers wrongfully obtained the products and physically obliterated the batch codes from the bottles "in concert with numerous, diverse, and unknown others." Batch codes are required by federal and state laws and are necessary to identify specific products in the event of a product recall. JPMS contractually prohibits its authorized distributors from selling Paul Mitchell products "to any person they know or have reason to suspect intends to sell the product to someone else."

JPMS further alleged that the defendant retailers denied access to professional consults to those consumers who purchased Paul Mitchell products. Additionally, JPMS contended that the defendant retailers failed to make such consumers the "conspicuously" aware that