Consumer Protection through Litigation:
Overview and the FCRA

Leonard A. Bennett
Consumer Litigation Associates, P.C
Newport News, Virginia 23601
(757) 930-3660
lenbennett@clalegal.com

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What is Consumer Litigation?

- A) Interaction between businesses providing of loans, goods and services for personal, household or family purposes
- B) Sale of goods or services: e.g. Automobile transactions
- C) Consumer financing
- D) Debt collection
- E) Credit reporting and privacy
- F) Defective products not causing personal injury and Warranty litigation

A MENAGERIE OF SIXTEEN SELECTED CONSUMER PROTECTION LAWS (UCC 2 and UCC 9)

- Article 2, UCC
  - Imposes express and implied warranties in the sale of goods.
- Article 9A, UCC
  - Governs exercise by second party of rights in collateral.
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<td>General prohibitions of unfair or deceptive trade practices.</td>
<td>FTC Holder Rule requires credit contract language allowing consumer to assert defenses and claims against holder. 16 C.F.R. § 433.2.</td>
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A MENAGERIE OF SIXTEEN SELECTED CONSUMER PROTECTION LAWS
(Odometer Act)

  - Mandates odometer disclosure in vehicle sales.
  - National Highway Traffic Safety Administration, Department of Transportation -- Odometer disclosure requirements, 49 CFR Part 580.
  - National Highway Traffic Safety Administration, Department of Transportation -- Rulemaking procedures, 49 CFR Part 553.
  - National Highway Traffic Safety Administration, Department of Transportation -- Civil and criminal penalties, 49 CFR Part 578.

A MENAGERIE OF SIXTEEN SELECTED CONSUMER PROTECTION LAWS
(TILA)

  - Requires disclosure of terms of certain consumer loans.
  - Federal Reserve System -- Consumer leasing (Regulation M), 12 CFR Part 213.
  - National Credit Union Administration -- Organization and operation of Federal credit unions, 12 CFR Part 701.

A MENAGERIE OF SIXTEEN SELECTED CONSUMER PROTECTION LAWS
(HOEPA)

  - Imposes additional regulation of "high cost" mortgage loans.
  - Federal Reserve System -- Truth in Lending (Regulation Z), 12 CFR Part 226 (See § 226.32).
A MENAGERIE OF SIXTEEN SELECTED CONSUMER PROTECTION LAWS (ECOA)

  - Prohibits some forms of credit discrimination and imposes certain disclosure requirements on lenders.
  - Comptroller of the Currency, Department of the Treasury — Fair housing home loan data system, 12 CFR Part 27.
  - Farm Credit Administration — Nondiscrimination in lending, 12 CFR Part 626.
  - Federal Deposit Insurance Corporation — Fair housing, 12 CFR 338.
  - Office of Thrift Supervision, Department of the Treasury — Nondiscrimination requirements, 12 CFR Part 528.

A MENAGERIE OF SIXTEEN SELECTED CONSUMER PROTECTION LAWS (FDCPA)

  - Basic federal law regulating debt collectors.

A MENAGERIE OF SIXTEEN SELECTED CONSUMER PROTECTION LAWS (FCRA) (FACTA) (CROA) (GLB)

  - Basic statute regulating all aspects of credit and other consumer reporting.
  - Governs entities that purport to offer credit repair services.
  - Key Federal statute authorizing, in part, important privacy regulations.
  - No private rights of action per se, but basis for important consumer-protection regulation.
A MENAGERIE OF SIXTEEN SELECTED CONSUMER PROTECTION LAWS
(RESPA)

  - Regulation of mortgage closings.
  - Bars affiliated "kickbacks"
  - Disclosure obligations
  - "QWR" – Qualified Written Request dispute and information procedure
    - Must be addressed to designated address and in written form
    - Two-step response
    - No adverse credit reporting in interim

Consumer Litigation Perspectives

- Private Attorney General
- Fee-Shifting
- Federal Court
- Attorney Resources and Community
  - NACA
  - NCLA Publications
  - Unselfish colleagues

The FCRA
What The Statute Regulates:
Three Statutes

- The accuracy, preparation, and correction of credit reports.
- Access to credit reports and privacy.
- Adverse actions based on credit reports.

Part 1 - What Is A Credit Report

(d) Consumer report.--(1) In general.--The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency regarding a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for:
(A) credit or insurance to be used primarily for personal, family, or household purposes;
(B) employment purposes; or
(C) any other purpose authorized under section 1681b of this title.
(2) Exclusions.--Except as provided in paragraph (3), the term "consumer report" does not include--

What is a Credit Report

The term "file", when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored.
How Do They Get the Report?

- Entities who obtain or use credit reports are "Users" under the FCRA 15 USC 1681b.
- Their access to the report is called an "inquiry," "pull," or "access."
- Requests are sent over the internet or through dedicated terminals.
- Reports can come back as printed documents or data which is used by Creditor's computers in their own "proprietary" scoring models.

Where Does the Data Come From?

(a) Duty of furnishers of information to provide accurate information

(1) Prohibition

(A) Reporting information with actual knowledge of errors

A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or consciously avoids knowing that the information is inaccurate.

(B) Reporting information after notice and confirmation of errors

A person shall not furnish information relating to a consumer to any consumer reporting agency if:

(i) the person has been notified by the consumer, at the address specified by the person for such notices, that specific information is inaccurate; and

(ii) the information is, in fact, inaccurate.

(2) Duty to correct and update information

A person who--

(A) regularly and in the ordinary course of business furnishes information to one or more consumer reporting agencies about the person's transactions or experiences with any consumer; and

(B) has furnished to a consumer reporting agency that the person determines is not complete or accurate

shall promptly notify the consumer reporting agency of that determination and provide to the agency any corrections to that information, or any additional information, that is necessary to make the information provided by the person to the agency complete and accurate, and shall not thereafter furnish to the agency any of the information that remains not complete or accurate.

15 USC 1681s-2

Where Does the Data Really Come From?

- All data comes in on tape or is burst over T1 lines.
- Data is generally reported on a monthly basis.
- Tapes are reused.
- Historical data tapes are never saved.
- ORA's may maintain audit trails, but these are difficult to get and read.
- Investigation of disputes occurs in boiler-rooms by near minimum wage employees, pushing between 12-38 reinvestigations per hour.
- Virtually all disputes are received, reduced to a two digit code, transmitted, and responded to with a two digit code.
- Policies dictate the outcome of your client's reinvestigation, not the content of the letter.
Where Does Your Client Get His Consumer File?

Agencies Must Provide the File On Demand for $9 or Free After Adverse Action. 15 USC 1681g
15 USC 1681j

- (a) Information on file, report recipients (26 U.S.C. § 7805(b))

Every consumer reporting agency shall, upon request, and subject to section 1681h(a)(1) of this title, clearly and accurately disclose to the consumer:

1. All information in the consumer's file at the time of the request, except that nothing in this paragraph shall be construed to require a consumer reporting agency to disclose to a consumer any information concerning credit scores or any other risk scores or predictors relating to the consumer.

2. The sources of the information; except that the sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed:

Provided, That in the event an action is brought under this subchapter, such sources shall be available to the plaintiff under appropriate discovery procedures in the court in which the action is brought.

Differences Between Consumer Statutes

- FCRA
  - Consumer Must Show intent
  - Furnishers Get One Free Bite
  - Consumer Must Show Damages or Willful Misconduct
  - Numerous Depositions Required
  - Sophisticated Defendants & Attorneys

- TILA/FDCPA/ECOA
  - Strict Liability
  - Defendants Must Get It Right First Time
  - No Damages Required
  - Most Claims Can Be Established Through Defendant
  - Less Sophisticated Defendants & Attorneys

Part 2 – Industry Players and their relationships.

- Bureaus/CRA’s
- Resellers.
- Users.
- Furnishers.
- Scoring entities.
- Public Record Vendors.
- Consumers.
Part 3 – Statutory claims that you will bring under the FCRA.

- Substantive remedies.
  - 1681b.
  - 1681e(b)
  - 1681i
  - 1681s-2
- Gateway Remedies
  - 1681n – Willfulness
  - 1681o – Negligence.

Part 4 – Classic Fact Patterns That Give Rise to FCRA Claims.

- Basic inaccuracies as to payment history.
- Mixed files.
- Ownership disputes and joint users.
- ID Theft.
- Impermissible Access
  - Spouses
  - Insurance
  - Account reviews.
- Internally inconsistent data.
- Double entries.
- Re-aged accounts.
- Failure to note disputes.
- Obsolete data.
Part 5 – Reinvestigation

- Reinvestigations trigger the best forms of liability and damages under the FCRA.
- Give you the opportunity to choose and shape the cases you want to file.
- Allow you to better identify the targets of your lawsuit.

How Does Data Get Corrected?

- Client sends a request to the CRA/Repository/Credit Reporting Agency.
- Client does NOT! Send the dispute to the furnisher except as a courtesy.
- CRA independently "reinvestigates" the information and corrects as need.
Understand the reinvestigation process.

- CRA’s do not independently investigate, and instead rely on furnishers.
- Reinvestigations are outsourced, and recorded in dispute logs – no live witness.
- E-Oscar handles almost all disputes.
- Data Conformity – “Make our data look like your data”
- Limited Access to total data available to Furnishers.
- Items are automatically confirmed, or deleted by furnishers based on policies, not personalities.
  - Police reports.
  - Specific creditors.
  - Affidavits.
  - ACDV Deletions.

Understand your audience.

- **Jury** – Reinvestigations create a bond between your client and the jury.
- Judge – Every judge recognizes a “red flag” letter, its legal consequences, and potential jury value.
- CRA’s boiler-room operator – Will ignore all reasonable arguments and documents.
- Furnisher’s boiler-room operator – Will never see the actual letter or documents, even if you forward them to the furnisher.
- Opposing Counsel – Well written letters will deny him access to some arguments.

Understand purpose of your letter.

- To provide all necessary information to establish the elements of your 1681i or 1681s-2b case.
- To provide all information that would cause a reasonable juror to scratch his/her head at why this was not removed.
- To set up the Furnisher to sell out the CRA’s.
- To set up the CRA to sell out the furnisher.
Some Evidentiary Concerns.

- DO NOT SIGN THE LETTER YOURSELF!!
- Don’t become a witness.
- Client must countersign all attorney letters.
- Send via return receipt request.

Hit the high points and don't dwell on irrelevancies.

- Avoid whining; the jury won't like it and the CRA's have already heard it all.
- Be direct, write in plain English, avoid statutory citations, think about how the jury instructions will read.
- Provide sufficient detail to heighten the duty of the CRA. Details like names, phone numbers, e-mail addresses and contact information add to the credibility and duty of the CRA.
- Treat the reinvestigation as a layman’s brief in support of removal of tradeline. Attach all appropriate exhibits.

Include relevant documents – They are for the jury, not the CRA’s.

- The credit report itself.
- Account statements.
- Correspondence from the creditor.
- Court papers if available.
- Proof that the client doesn't owe the money.
- Provide exemplars and notaries where appropriate.
- Save some documents for follow ups.
Exemplars and signatures are essential in cases of identity theft.

- Invite the CRA to perform a comparison on its own.
- Send the falsified documents if you have them.
- Demand that all information be forwarded.
- Invite further correspondence.
- Demand to see documents and process under 1681(a)(7).
- Ask for explanations and why the item was not removed.

Carbon Copy your furnisher if appropriate.

- Who is your target?
- Don’t fill out fraud affidavits if your client doesn’t know the facts – lay out the facts and have the reinvestigation sworn to and notarized.
- Respond to correspondence with an appropriate letter: Would a reasonable person take this or respond?
- Send by return receipt request.
- Demand a personal contact or phone number.

Part 6 – Damages, Damages, Damages.
Follow Up on Disputes

- File suit when
  - Client has true emotional distress damages.
  - Client has suffered embarrassment, humiliation, or physical symptoms.
  - Client has been denied credit, insurance, or a job.

Filing Cases

- Cases should be filed in Federal Court.
- Join the CRA’s and Furnishers
- Common law claims may be preempted.
  - Pre-dispute, common law claims will likely be valid.
  - Post dispute claims are likely preempted or immunized.
- Be prepared to litigate.