



[FCRA NEWSLETTER](#) • July 28, 2010 • [STRASBURGER & PRICE, LLP](#)

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Ninth Circuit Holds that the FCRA Allows a Prevailing Plaintiff to Recover Non-Taxable Costs

***Grove v. Wells Fargo Fin. Cal., Inc.*, 606 F.3d 577 (9th Cir. 2010)**

Facts: Plaintiff sent dispute letters to Defendant Wells Fargo claiming that Defendant was inaccurately reporting Plaintiff's automobile loan as delinquent to the consumer reporting agencies ("CRAs"). After Defendant failed to change the reported information, Plaintiff filed suit against Defendant under the Fair Credit Reporting Act ("[FCRA](#)"). Just before trial, the parties settled, and Defendant agreed to direct the CRAs to delete the disputed information, and further agreed to pay Plaintiff \$20,000 plus costs and attorney's fees. The district court denied Plaintiff's request for non-taxable costs after reasoning that it lacked discretion to award same. Plaintiff appealed, and the Ninth Circuit reversed and held the district court had discretion to award non-taxable costs.

- **Attorneys' Fees and Costs.** The issue before the Court was whether the expense-shifting provision of the FCRA authorized district courts to award costs that otherwise would be considered non-taxable under [28 U.S.C. § 1920](#). Because the phrase "reasonable attorney's fees" includes certain litigation expenses and the FCRA provides for "reasonable attorney's fees," the Court concluded that district courts "have discretion to award non-taxable costs to prevailing parties under the FCRA and that the district court erred in concluding otherwise."

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Court Grants Defendant’s Motion for Summary Judgment, Finds that Creditor Conducted a Reasonable Investigation of Plaintiff’s Dispute

Howard v. Pinnacle Credit Servs., LLC., 2010 U.S. Dist. LEXIS 62739 (N.D. Ga. June 24, 2010)

Facts: Plaintiff alleged that Pinnacle Credit Services (“Pinnacle”), a debt collector, failed to properly investigate her dispute in violation of § [1681s-2\(b\)](#) of the [FCRA](#). Plaintiff’s claims relate to a Bank of America credit card account that was opened by Plaintiff’s daughter. At some point after opening the account, Plaintiff claims that without her knowledge or permission, her daughter added her to the account. The daughter then filed for bankruptcy and the creditor looked to Plaintiff to satisfy the balance. The account was put into default and eventually sent to Pinnacle for collection. Plaintiff retained counsel who then disputed the Pinnacle account with the CRAs. The dispute letter simply stated that the debt was disputed and that an investigation was necessary, without providing any other information. The CRAs then communicated Plaintiff’s dispute to Pinnacle as follows: “Consumer states inaccurate information. Provide or confirm completed ID and account information.” After Pinnacle reviewed its records regarding Plaintiff’s account, it verified that the information was reporting accurately. Pinnacle moved for summary judgment claiming that its investigation was reasonable, the Court agreed and granted the motion.

- ***Furnisher Investigation.*** Section 1681s-2(b) states: “After receiving notice...of a dispute with regard to the completeness or accuracy of any information provided by a person to a CRA, the person shall – (A) conduct an investigation with respect to the disputed information; (B) review all relevant information provided by the CRA...; (C) report the results of the investigation to the CRA;” Section 1681s-2(b) generally requires credit information furnishers to conduct a reasonable investigation upon receiving notice of a dispute.
- ***Furnisher Investigation.*** Whether a defendant’s investigation is reasonable is a factual question normally reserved for trial; however, summary judgment is proper if the reasonableness of the defendant’s procedures is beyond question. Here the Court found that the evidence established that Pinnacle reviewed all of the information contained in its files (Plaintiff’s name, address, SSN, date of birth, and telephone number) along with the dispute from the CRAs. Based on Pinnacle’s action and considering the scant information received regarding the nature of Plaintiff’s dispute, the Court found that Pinnacle conducted a reasonable investigation.

Court Rules on Plaintiff’s Fee Petition Following Jury Verdict in Favor of Plaintiff in FCRA Lawsuit

Naill v. Lincoln Mortgage, LLC, et al., 2010 U.S. Dist. LEXIS 56464 (W.D. Va. June 7, 2010)

Facts: The jury returned a verdict in favor of Plaintiff and against Defendant under the [FCRA](#) for \$1,000 in compensatory damages and \$25,000 in punitive damages. Plaintiff filed a motion seeking an award of costs and attorney’s fees, to which Defendant filed an opposing motion. The court granted in part and denied in part, Plaintiff’s motion.

- **Attorney's Fees.** Defendant opposes Plaintiff's motion on the grounds that the record failed to separate time spent on the prevailing claim versus time spent on non-prevailing claims; that some of Plaintiff's charges were duplicative and involved non-compensable travel time; and, that Plaintiff's counsel's \$425 hourly rate was unreasonable.
- **Attorney's Fees.** In calculating an award of attorney's fees under the FCRA, the court is to perform a lodestar calculation by multiplying the number of reasonable hours spent on the case by a reasonable hourly rate. The court is then to subtract fees for hours spent on unsuccessful, unrelated claims before awarding some percentage of the remaining amount based on the degree of success the Plaintiff enjoyed. According to the controlling authorities in this circuit, the burden rests with the fee applicant to establish the reasonableness of the attorney's hourly rate.
- **Attorney's Fees.** Fees are not unreasonably duplicative merely because two attorneys may be working on the case. The court overruled Defendant's objections based on duplication of counsel's efforts.
- **Attorney's Fees.** With respect to the reasonableness of an attorney's hourly rate, the question is not what other attorneys in the market believe is reasonable, what other lawyers believe the moving lawyer is worth, or even what the lawyers believe they are worth to themselves. If the court were to adopt this approach, the market would inflate with every application for an award of fees, and the proverbial foxes would be guarding the chicken house. Affidavits submitted by Plaintiff indicate that the most recent fee awards in this geographic area have been \$375 per hour. To this court, that rate was and remains at the top end of the scale charged by lawyers either in the Charlottesville or Harrisonburg Divisions. Plaintiff's counsel's rate of \$425 per hour seems far above the prevailing market rate. Therefore, Plaintiff's counsel will be compensated at a rate of \$375 per hour.

District Court Denies Defendants' Motion to Dismiss, Finding Consumer's Allegations of FACTA Violations Sufficient

Desousa v. Anupam Enters., 2010 U.S. Dist. LEXIS 56332 (M.D. Fla. May 20, 2010)

Facts: Plaintiffs filed a one-count purported class action complaint alleging that Defendants Rightway Foodmart ("Rightway") and Citgo Petroleum Corporation ("Citgo") violated FACTA. Plaintiffs allege that they made purchases with Defendants using their credit cards, and Defendants printed Plaintiffs' full account numbers on the receipts provided to Plaintiffs in violation of [§ 1681c\(g\)\(1\)](#). Defendants filed motions to dismiss under [Rule 12\(b\)\(6\)](#), which the Court denied.

- **FACTA.** Section 1681c(g)(1), which requires truncation of credit card and debit card numbers except for the last five digits on receipts, only applies to a "person that accepts credit cards or debit cards for the transaction of business."
- **Failure to State a Claim.** The Court denied Citgo's motion to dismiss because Plaintiffs sufficiently pled that FACTA applied to Citgo. Whether Plaintiffs will be able to demonstrate that Citgo is "a person that accepts credit cards or debit cards for the

transaction of business” within the meaning of FACTA will be determined at summary judgment or trial.

- **Failure to State a Claim.** The Court denied Rightway’s motion to dismiss because Plaintiffs sufficiently pled that Defendants “willfully violated and continue to violate FACTA’s requirements”

Court Denies CRA’s Motion for Summary Judgment as Factual Disputes Exist Making Summary Judgment Inappropriate

Reeves v. Equifax Info. Servs., LLC, 2010 U.S. Dist. Lexis 50241 (S.D. Miss. May 20, 2010)

Facts: Plaintiff filed suit against Equifax alleging that it had violated various sections of the [FCRA](#) in the handling of his credit information and improperly providing same to third parties. Specifically, Plaintiff’s allegations related to several medical collection accounts which had been removed and subsequently reinserted onto his consumer report. The accounts actually belonged to another consumer who had a similar name and social security number (“SSN”). The SSNs were identical matches for seven of the nine numbers with the last two merely transposed. Plaintiff had previously settled a lawsuit with Equifax related to those accounts and as part of the settlement Equifax agreed stop reporting the collection accounts on Plaintiff’s consumer report. Approximately two years after settlement, the collection accounts reappeared on Plaintiff’s Equifax report. Additionally, Plaintiff’s credit file reflected several inquiries related to credit transactions of other consumers. Plaintiff and Equifax moved for summary judgments, which the Court denied.

- **Statute of Limitations.** To establish a right of relief under [§ 1681i](#), a consumer must demonstrate that a CRA did not reinvestigate free of charge and either record the current status of the disputed information or delete the item from the file in a manner prescribed by [§ 1681i\(a\)\(5\)](#) within the statutory period. To establish a claim under this section, the consumer must show that he notified the CRA directly of a dispute within the relevant time under the statute of limitations. Equifax offered testimony that it had not received a dispute from Plaintiff in more than five years, and therefore any claimed violation of § 1681i was barred by limitations. By contrast, Plaintiff testified that his attorney had disputed the accounts with Equifax within two years of filing the lawsuit. The Court found that whether or not the allegations of contact were credible was not for it to decide and denied Equifax’s motion for summary judgment.
- **Permissible Purpose.** Plaintiff also claimed that Equifax violated [§ 1681e\(a\)](#) by permitting several companies to obtain his consumer report without a permissible purpose as outlined in [§ 1681b](#). To establish a cause of action for violation of § 1681e(a) a plaintiff must show: (1) that the CRA made the disclosure to a person it did not have reason to believe had a statutorily authorized purpose for obtaining the report; and, (2) that the CRA failed to maintain reasonable procedures to prevent the improper disclosures. Section 1681b states that a CRA may furnish a consumer’s report to a person “whom it has reason to believe intends to use the information in connection with a credit transaction involving the consumer....” Equifax claimed that Plaintiff could not show that Equifax made the disclosure to a person it did not have reason to believe had a statutorily authorized purpose for obtaining the report, or that Equifax failed to maintain

reasonable procedures to prevent improper disclosures. However, Plaintiff produced evidence of numerous incidents of Equifax providing credit information to companies with which Plaintiff had no business relations, and could not likely have had any interest in access to Plaintiff's credit file. Therefore, at a minimum the Court found that there was a factual dispute about this claim, making summary judgment inappropriate.

- **Economic Damages.** As a result of the inaccurate information included on his credit file, Plaintiff claimed that he was denied credit by American General Finance ("American General") when his wife applied for credit in his name with Southern Wholesale Furniture ("Southern Wholesale"). To demonstrate that Plaintiff was not denied because of inaccurate information, Equifax's representative testified that the report in question contained no derogatory information, and an American General representative testified that the denial was not related to information contained on Plaintiff report, but rather was a result of a fraud alert on Plaintiff's file coupled with an inability to verify Plaintiff's identity. That testimony was contradicted by testimony from Plaintiff, Plaintiff's wife, and a representative from Southern Wholesale indicating that Plaintiff was on the phone with his wife during the transaction and gave her permission to apply for credit in his name, thereby verifying his identity to American General. Southern Wholesale's representative also disputed the American General representative's recitation of the incidents leading up to the credit denial. Therefore, the Court found that whether Plaintiff suffered damages as a result of this transaction was fraught with factual disputes, and denied Equifax's summary judgment on that issue.
- **Emotional Distress.** To support an award for mental or emotional distress there must be evidence of genuine injury, such as the evidence of the injured parties' conduct and the observations of others. Further, to establish intangible loss, the Court requires "a degree of specificity which may include corroborating testimony or medical or psychological evidence in support of the damage award." Plaintiff claimed that evidence of his emotional distress could be derived from his alleged inability to concentrate at work. Equifax claimed that Plaintiff had offered no corroborating evidence to support this claim. However, the Court found that Plaintiff had specifically identified at least three co-workers with knowledge of his problems at work and thus, a direct factual dispute existed as to this claim.
- **Willful Noncompliance.** To establish willful noncompliance under [§ 1681n](#), a consumer must show that the defendant acted in reckless disregard of its FCRA obligations. Reckless is "conduct violating an objective standard action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known." Thus to establish a reckless violation, Plaintiff must prove that Equifax acted in a manner that made it highly probable that harm would follow. Equifax argued that a "single, inadvertent" mistake caused the problem which allowed Plaintiff's information to be confused with another consumer, which did not constitute a reckless violation. However, the Court found that this would be for a jury to decide because a reasonable fact-finder could well conclude that such a mistake and the continued mingling and reporting of incorrect information in the two credit files was reckless.

- **Preemption.** The Court found that Plaintiff's state law claim for libel was preempted by the FCRA. Under [§ 1681h\(e\)](#), "no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting information against any CRA... except as to false information furnished with malice or willful intent to injure such consumer." Here the Court found that Plaintiff had not proffered evidence that Equifax acted willfully or maliciously to harm him. In fact, Plaintiff testified that he had no evidence that Equifax acted recklessly towards him or intentionally tried to harm him. Accordingly, Plaintiff's claim for libel couldn't survive summary judgment.

Court Denies Plaintiff's Motion for Summary Judgment, Holding that the Reasonableness of Defendant Furnisher's Investigation was a Question for the Jury

***Nykoriak v. GMAC LLC*, 2010 U.S. Dist. LEXIS 46420 (E.D. Mich. May 12, 2010)**

Facts: Plaintiff filed suit against Defendant GMAC LLC ("GMAC") after GMAC repossessed and sold Plaintiff's vehicle. Plaintiff alleged that GMAC incorrectly reported the "high balance" Plaintiff owed on the vehicle to the CRAs. Plaintiff filed a motion for summary judgment on his claims, including under [§§ 1681s-2\(a\) & 2\(b\)](#) of the [FCRA](#) and under Michigan's Uniform Commercial Code [§ 440.9611](#). GMAC filed a motion to dismiss all of Plaintiff's claims. The Court dismissed all but Plaintiff's § 1681s-2(b) claim.

- **Failure to State a Claim.** The Court dismissed Plaintiff's claims under § 1681s-2(a) because that section of the FCRA does not create a private right of action for the consumer.
- **Furnisher Duty to Investigate.** Pursuant to § 1681s-2(b), Plaintiff must prove that GMAC did not conduct a reasonable investigation and that the amount GMAC reported to the CRAs was inaccurate. Plaintiff produced a letter from GMAC which purportedly showed a different high balance than what GMAC reported to the CRAs. The Court determined that the reasonableness of GMAC's investigation of Plaintiff's dispute into the "high balance" was a question for the trier of fact to resolve.

District Court Dismisses Employer's Claims for Contribution and Indemnification Against CRA Because No Such Rights Exist Under the FCRA

***Boatner v. ChoicePoint Workplace Solutions, Inc.*, 2010 U.S. Dist. LEXIS 44264 (D. Or. May 6, 2010)**

Facts: Plaintiff's job offer with Defendant Bowen Property Management ("Bowen") was rescinded after Bowen received an investigatory consumer report that allegedly contained inaccurate information provided by Defendant ChoicePoint Workplace Solutions, Inc., a LexisNexis company ("Lexis"). Plaintiff sued Bowen and Lexis under the [FCRA](#), and Bowen asserted cross-claims against Lexis for contribution and indemnification. Lexis moved to dismiss under Rule 12(b)(6), which the Court granted.

- **Failure to State a Claim.** The Court found that the FCRA contained no implicit right to contribution or indemnification because there is no indication that Congress wanted to

create such a right. The FCRA is not intended to benefit Bowen, a user of consumer credit information.

- **Failure to State a Claim.** There is no federal common law right to indemnification or contribution in this case because the FCRA “does not implicate a uniquely federal interest and does not delegate any rights to the courts to create remedies.”

Court Grants Motion for Summary Judgment Because No Reasonable Investigation by CRAs Would Have Uncovered the Alleged Inaccuracy in the Consumer’s Credit Report

***Nnebe v. Bank of America*, 2010 U.S. Dist. LEXIS 32858 (D. N.J. Feb. 17, 2010)**

Facts: Plaintiff filed suit against defendants Bank of America, FIA Card Services, Sovereign Bank, Trans Union, Experian Information Solutions, Equifax Information Services, ER Solutions and United Recovery Systems stemming from the treatment of an alleged overcharge on her credit card. Plaintiff’s claims were based on violations of the [FCRA](#), [FDCPA](#), and New Jersey’s Consumer Credit Reporting Act (the “NJCCRA”). Plaintiff also brought claims of defamation, invasion of privacy and negligence. Plaintiff’s claims originated from an online cell phone purchase. Plaintiff believed that the phone’s price was \$630.01 even though her Bank of America credit card statement reflected a charge of \$839.96. Plaintiff refused to pay the difference and the remaining balance was subsequently charged off as bad debt. Eventually, all of Plaintiff’s claims were dismissed except for her claims against Trans Union, Experian, and ER Solutions (a debt collection agency). Trans Union, Experian, and ER Solutions filed motions for summary judgment, which were granted by the Court.

- **FCRA.** Specifically, Plaintiff alleged that Trans Union and Experian reported “unauthorized” Bank of America charges on her consumer report. The Court held that as CRAs, Experian and Trans Union were under no duty outside their regular investigatory procedures to research the accuracy and completeness of the information received from Bank of America. Even assuming that the Bank of America charges were unauthorized, the Court held that no reasonable investigation by the CRAs would have allowed them to discover the error. The Court further held that Experian and Trans Union could not be liable for defamation, invasion of privacy, or negligence as the information they disseminated was true and accurate to the extent of their knowledge.
- **FDCPA.** Plaintiff failed to show that ER Solutions violated any provision of the FDCPA. ER Solutions provided detailed records of the entirety of their collection efforts. Plaintiff was unable to show that ER Solutions failed to follow the safeguards required in the FDCPA. Further, similarly to Experian and Trans Union, the Court held that ER Solutions could not be held liable for defamation, invasion of privacy or negligence as the information it disseminated was true and accurate.



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