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#### Employee Applicant Confuses FCRA Employer Notice Requirements in Adverse Use of Credit Report

*John D. Reinke v. Cargill, Inc.*, 2011 U.S. Dist. LEXIS 66313 (E.D. Wis. June 21, 2011)

- **Facts:** Plaintiff claimed that Defendant Cargill, Inc. ("Cargill") violated his rights under the FCRA when it rescinded an offer of employment based on information obtained from a consumer report. Plaintiff began working as a temporary employee at Cargill and applied three months later for a permanent position. Upon receiving the application, Cargill obtained Plaintiff's consumer report that contained personal financial, credit and other private information including his conviction record. The consumer report inaccurately stated that the Plaintiff was convicted of intentional homicide when in fact he was convicted of reckless homicide. Cargill mailed the Plaintiff a conditional offer letter stating that it had obtained a consumer report on him, and enclosed a copy of the consumer report and a statement of the Plaintiff's rights under the FCRA. The letter did not identify from which reporting agency the report came or any information on how to contact the agency. It also did not state that Cargill could rescind its offer of employment or take any other adverse action on his employment based on the consumer report. In the days that followed, Cargill rescinded its offer of employment to Plaintiff. Plaintiff filed suit, claiming among other allegations, (1) that Cargill failed to notify Plaintiff that it may take adverse action on the Plaintiff's employment status based on informa-

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tion contained in the report; (2) that Cargill failed to identify the person or agency that provided the consumer report, and (3) that Cargill failed to provide information about how Plaintiff could contact the person or agency that provided the report. Cargill filed its partial motion to dismiss all 3 of these claims. The court agreed and granted Cargill's motion in its entirety.

- **Motion to Dismiss Response Requirements.** If a defendant seeks a motion to dismiss, the plaintiff must support in its response to the motion any and all claims it seeks to advance at trial. Any allegation not supported in plaintiff's response to defendant's motion to dismiss is waived. Accordingly, because Plaintiff did not respond to Cargill's motion to dismiss on the three claims, the court found that Plaintiff waived his right to have those claims go forward in the litigation. **Note:** *Regardless of this ruling, the Court nevertheless found it important to address the merits of Cargill's motion.*
- **Pre-Adverse Action Notice Requirements.** Pursuant to [§ 1681b](#), before taking an adverse action based on an applicant's consumer report, the employer must provide the applicant with (1) a copy of the report, and (2) a description in writing of the applicant's rights under the FCRA. If the employer fails to provide the applicant with either of these two items, either willfully or negligently, the applicant may file a private suit against the employer.
- **Post-Adverse Action Notice Requirements.** Pursuant to [§ 1681m\(a\)\(1\)-\(2\)](#), if an employer takes adverse action against the applicant by refusing to hire him, the employer must provide the applicant with: (1) notice of the adverse action; (2) the contact information for the consumer reporting agency that furnished the report and a statement that the reporting agency did not make the decision to take adverse action; and (3) notice of the consumer's rights to obtain a free copy of the report and to dispute the accuracy or completeness of any information. If the employer fails to provide the applicant with any of this information, the applicant may file grievances only with federal agencies or officials identified by the FCRA. The applicant may not file a private suit against the employer. **Note:** *The Court noted that in granting Cargill's motion, Plaintiff appeared to confuse pre-adverse action notice requirements and post-adverse action notice requirements under the FCRA, alleging that Cargill did not follow post-adverse action notice requirements in the pre-adverse action stage. Accordingly, even when taking all inferences in favor of Plaintiff, the Court found that the disputed claims failed as a matter of law.*

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### **Furnisher Complies With its Investigation Duties When Notified Directly by a Consumer Reporting Agency**

***Glen Llewellyn v. Allstate Home Loans, Inc. d/b/a Allstate Funding, et al., 2011 U.S. Dist. LEXIS 63607 (D. Co. June 16, 2011)***

**Facts:** Plaintiff brought a FCRA claim and Outrageous Conduct claim against Defendants Ocwen Loan Servicing, LP ("Ocwen") and its parent company, Nomura Credit and Capital, Inc. ("NCCI") because of their negative credit reporting of Plaintiff's mortgage payment history to the consumer reporting agencies ("CRAs"). Plaintiff refinanced a mortgage loan, but the company servicing the original loan, Ocwen, did not receive the refinancing proceeds intended to pay off the loan. When Plaintiff understandably stopped making monthly payments on the original loan, Ocwen understandably began treating the original loan as in default and started reporting negative information to the CRAs. Plaintiff's FCRA claims under § 1681s-2(b) alleged that Ocwen furnished inaccurate credit information to the CRAs and failed to conduct a reasonable or timely investigation after receiving notice from the CRAs that Plaintiff had disputed the credit information. Ocwen and

NCCI filed their motion for summary judgment, claiming that such FCRA claims should be dismissed because they accurately reported the loan as being in default (because Ocwen was never paid), and that Ocwen's investigation complied with the statute. The Court agreed.

- **Furnisher Duty.** Ocwen's duty under § 1681s-2(b) to conduct an investigation was not triggered until it was notified by a CRA of a dispute regarding information previously furnished to the CRA -- not when Plaintiff contacted Ocwen disputing the information. **Note:** *The Court found as a matter of law that when Ocwen was notified directly by the CRA of a dispute, it conducted an investigation in compliance with § 1681s-2(b)(1)(A).*
- **Actual Damages Required.** A plaintiff pursuant to § 1681o(a) may recover his actual damages caused by a defendant's negligent violations of the FCRA. Where a plaintiff fails to meet his burden of showing actual damages caused by a FCRA violation, summary judgment is appropriate. **Note:** *In granting Ocwen's motion, the Court found that any decline in Plaintiff's creditworthiness was not caused by Ocwen's reporting but instead on Plaintiff defaulting on sixteen mortgage loans, that Plaintiff was still afforded significant credit during the relevant time period, and that there was no evidence that Plaintiff was ever denied credit during the relevant time period.*
- **Emotional Distress Damages.** A plaintiff's own testimony can be sufficient in itself to establish emotional damages under the FCRA, but the testimony must contain more than conclusory allegations of harm and causation. Actual damages under the FCRA may include humiliation and embarrassment, even if the consumer suffered no out-of-pocket losses. **Note:** *Plaintiff's declaration detailed severe physical, emotional, and psychological conditions he was experiencing during the general time period at issue. The Court noted, however, that during this same time period Plaintiff defaulted on sixteen mortgage loans which destroyed his business and livelihood. In light of these facts, the Court concluded that Plaintiff's unsupported statements attributing these medical conditions to Ocwen's conduct were too conclusory to show that Ocwen caused Plaintiff's emotional harm.*
- **Colorado Outrageous Conduct Claim.** Plaintiff's Outrageous Conduct claim against Ocwen and NCCI alleged that Defendants "engaged in extreme and outrageous conduct by knowingly providing false credit information to several credit bureaus." Under Colorado law, the elements of the tort of outrageous conduct are: (1) the defendant engaged in extreme and outrageous conduct; (2) recklessly or with the intent of causing the plaintiff severe emotional distress; and (3) causing the plaintiff severe emotional distress.
- **Colorado Outrageous Conduct Claim.** The level of outrageousness required is extremely high and must go beyond all possible bounds of decency and must be considered as "atrocious and utterly intolerable in a civilized society." While the Court found that Ocwen's inactivity following certain phone calls by Plaintiff could amount to negligence, it would serve as no basis for a claim of Outrageous Conduct.

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## FCRA Does Not Preempt Defamation Claim Against Furnisher

***Baker v. Gen. Elec. Capital, Corp.*, 2011 U.S. Dist. LEXIS 48626 (M.D. Ga. Mar. 30, 2011)**

**Facts:** Plaintiff filed suit against Defendant alleging violations of multiple sections of the [FCRA](#) and credit defamation. In 2005, Plaintiff's husband opened an account that was financed by Defendant. Plaintiff was added as an authorized user to the account and her husband then filed for Chapter 7 bankruptcy in August 2009. The account was discharged in December 2009. Beginning in September 2009, Defendant and three collection agencies attempted to collect on the subject account from Plaintiff. Despite the fact that Plaintiff disputed the account and provided documentation of the bankruptcy records to Defendant, Defendant continued to report the account as belonging to Plaintiff, charged off, and delinquent. Defendant filed a motion to dismiss Plaintiff's claim for credit defamation claiming that [§ 1681t\(b\)\(1\)\(F\)](#) preempted Plaintiff's claim. The Court denied Defendant's motion.

- **Preemption.** The FCRA contains two preemption provisions. The earlier provision, [§ 1681h\(e\)](#), preempts common law torts based on disclosures required under several provisions of the FCRA unless the defendant reported the information with malice or willful intent to injure the consumer. The later enacted preemption provision, [§ 1681t\(b\)\(1\)\(F\)](#), preempts only state law claims with respect to furnishers of information based on duties regulated under [§ 1681s-2](#).
- **Preemption.** District Courts have taken three main approaches when interpreting these two preemption sections. The first approach – the theory of “total preemption” – operates so that [§ 1681t\(b\)\(1\)\(F\)](#) preempts all state law claims against furnishers. The second approach – the “temporal” approach – holds that state law claims against a furnisher of information that arose after the furnisher received notice of a dispute is barred by [§ 1681t\(b\)\(1\)\(F\)](#), but preemption of state law claims that arose before the furnisher received notice of a dispute is governed by [§ 1681h\(e\)](#). The courts that follow the third approach – the “statutory” approach – holds that [§ 1681t\(b\)\(1\)\(F\)](#) applies to state statutory law claims, while [§ 1681h\(e\)](#) applies to state common law claims.
- **Preemption.** The Court found an inherent conflict between [§§ 1681h\(e\) and 1681t\(b\)\(1\)\(F\)](#). Section 1681h(e) has an exception to preemption if the defendant is found to have reported consumer information with malicious or willful intent to injure the consumer, while [§ 1681t\(b\)\(1\)\(F\)](#) contains no such exception. The Court also interpreted the plain language of [§ 1681t\(b\)\(1\)\(F\)](#) to exclude common law causes of action finding that the phrase “requirement or prohibition ... imposed under the laws of any State” intended to capture only State statutory law. Therefore, because Defendant did not assert preemption under [§ 1681h\(e\)](#), Plaintiff's state common law claim for credit defamation was not preempted.

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## Discussing an Employment Applicant's Financial Issues with Co-Workers is not a Permissible Purpose

***K.H. Jane Doe v. Nicole Saftig, City of New Berlin, et al.*, 2011 U.S. Dist. LEXIS 50713 (E.D. Wis. May 11, 2011)**

**Facts:** Plaintiff claimed that Defendant police officer Nicole Saftig (“Saftig”) violated her rights under the FCRA, as well as under other federal and state statutes, when she disclosed Plaintiff's credit

information without a permissible purpose. During the employment screening process, Saftig approached various police department personnel and discussed Plaintiff's credit information including information that Saftig had completed the background investigation, that Plaintiff told her that during the background check they would find out she had a loan or was in debt because of her stomach surgery in Mexico, that she was to have the procedure redone and that insurance did not cover the procedure, which put Plaintiff in debt. After completing a second interview, and upon completion of the investigatory process, the police department hired Plaintiff. Some time later, Plaintiff ended her employment due to what she claimed, in part, was the alleged stress caused by Saftig's disclosure of her credit information to other police department personnel. Saftig filed her motion for summary judgment, claiming that Plaintiff did not have a cause of action under the FCRA because Saftig did not qualify as a CRA and that Saftig had a permissible purpose under [§ 1681b\(a\)](#). The Court disagreed and denied the motion as to the FCRA claim.

- **Permissible Purpose.** Contrary to Saftig's position, the FCRA's permissible purpose statute found at [§ 1681b\(f\)](#) applies to users of credit reports as well as CRAs and subjects them to potential liability for actual damages, attorneys' fees, and costs. Congress amended the FCRA in 1996 which included the adding of § 1681b(f). The Court, therefore, found that based on this amendment, the FCRA imposes liability for using or obtaining a consumer report in violation of the FCRA, not simply for releasing or disseminating a report.
- **Permissible Purpose.** There are three requirements that a plaintiff must establish to prevail on a claim of improper use or acquisition of a consumer report: (1) there was a "consumer report" within the meaning of the statute; (2) the defendant used or obtained it; and (3) the defendant did so without a permissible statutory purpose.
- **Permissible Purpose.** The FCRA provides several exhaustive "permissible purposes" including "using the information for employment purposes" under [§ 1681b\(a\)\(3\)\(B\)](#). The Court noted that while this provision may appear to protect Saftig because Plaintiff's consumer report was obtained and used for an employment purpose, the act alleged in this case - Saftig's discussion of Plaintiff's financial issues with coworkers - was not included in the list of enumerated permissible purposes. Because of this, it was an impermissible purpose and Saftig would therefore be liable for using a consumer report for this purpose under the FCRA.

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### **ClosetMaid's Failure to Provide Stand-Alone Disclosure Forms for Job Applicants is Enough to State a Claim Under the FCRA**

***R. Cathy Reardon v. ClosetMaid Corporation, 2011 U.S. Dist. LEXIS 45373 (W.D. Pa. Apr. 27, 2011)***

**Facts:** Plaintiff brought this FCRA action against Defendant, ClosetMaid Corporation ("ClosetMaid"), claiming that ClosetMaid had a standard practice of disqualifying applicants for employment on the basis of consumer reports in violation of the FCRA. Specifically, she alleged that ClosetMaid relied upon information in consumer reports obtained from LexisNexis without obtaining the appropriate disclosures from employment applicants. She also alleged that ClosetMaid failed to provide employment applicants a reasonable time to dispute the information contained in the consumer reports prior to refusing to hire them. Plaintiff moved for class certification. After a hearing, the court found that Plaintiff had stated a claim under the FCRA and that class should be certified.

- **Permissible Purpose.** Pursuant to [§ 1681a\(h\)](#), credit reports may be issued to employers for "employment purposes." An employment purpose is defined as a purpose relating to the evaluation of "a consumer for employment, promotion, reassignment or retention as an employee."
- **Notice Requirements.** Pursuant to [§ 1681b\(b\)\(4\)](#), prior to procuring a consumer report on an applicant for employment, an employer must: (1) provide a clear and conspicuous disclosure from each applicant for whom a consumer report may be procured; and (2) obtain the applicant's authorization, in writing. Plaintiff argued that ClosetMaid's disclosure forms were not stand alone documents as required under the statute, but was a part of an application form that contained multiple disclosures and releases. **Note:** *The Court found Plaintiff's argument "novel" and found it was enough to state a claim under the FCRA.*
- **Notice Requirements.** The FCRA further requires that an employer provide an applicant with advance notice of the employer's intention to deny employment on the basis of information contained in the credit report. Plaintiff argued that ClosetMaid was required to provide her at least five (5) business days to dispute the derogatory information in her credit report. Although the FCRA is silent as to the amount of time an employer is required to provide an applicant with notice prior to refusing to hire her on the basis of derogatory credit information, Plaintiff relied on an informal advice letter issued by the Federal Trade Commission ("FTC") in 1997, which stated that the FTC considered five (5) days notice to be a reasonable time period as required by the statute (which ClosetMaid did not satisfy). **Note:** *The Court stated that the FTC informal advice letter was worthy of "respect," and while five (5) days may not be required as a matter of law, the Court found that in its class certification analysis, a jury could find that Plaintiff was entitled to more time than she was given. The Court was careful to also note that this finding was without prejudice as to ClosetMaid's right to raise the same issues in a motion for summary judgment at a later time.*

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### Plaintiff's FCRA Claim for Failure to Issue an Adverse Action Notice Dismissed

**Neals v. Mortg. Guar. Ins. Corp., 2011 U.S. Dist. LEXIS 53183 (W.D. Pa. Apr. 6, 2011)**

**Facts:** Plaintiff filed a class action complaint against Mortgage Guaranty Insurance Corporation ("MGIC") claiming that MGIC has a policy and practice of denying private mortgage insurance ("PMI") to persons on short term disability leave, including women on maternity leave, in violation of the [Fair Housing Act](#) and the [Equal Credit Opportunity Act](#). Plaintiff also claimed that MGIC violated [§ 1681m](#) of the [FCRA](#) by failing to issue notice of its adverse action taken against her in connection with her loan application. Plaintiff's claims related to her mortgage application for which she claimed the Defendant discriminated against her on the basis of her sex and familial status when it declined to issue PMI to her lender while she was on maternity leave. Defendant moved for dismissal of Plaintiff's FCRA claim on the grounds that the FCRA does not provide a private right of action for claims under § 1681m. The Magistrate Judge agreed and recommended that Plaintiff's FCRA claim be dismissed.

- **FCRA.** Section 1681m (a) provides that "if any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall – (1) provide oral, written, or electronic notice of the adverse action to the consumer." The Court found that Plaintiff's claim for an alleged notice violation under § 1681m was barred because the FCRA does not provide a private right of action for that claim.

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## **Pleas of Insanity and Old Age Cannot Save Plaintiff's Claim From the FCRA's Statute of Limitations**

***Andresakis v. Capital One Bank (USA) N.A.*, 2011 U.S. Dist. LEXIS 29886 (S.D.N.Y. Mar. 23, 2011)**

**Facts:** *Pro se* Plaintiff filed a lawsuit against Defendant Capital One Bank (USA) N.A. ("Capital One") alleging that Capital One supplied false information to a CRA resulting in Plaintiff's inability to obtain a mortgage. Plaintiff's claims were based on the [FCRA](#). Capital One moved to dismiss Plaintiff's claims as barred by the FCRA's statute of limitations, which was granted by the court.

- **Statute of Limitations.** The FCRA requires that any "action to enforce any liability created under this subchapter...be brought...not later than the earlier of ... 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or...5 years after the date on which the violation that is the basis for such liability occurs." [15 U.S.C. § 1681p](#). Plaintiff argued that his FCRA claims is not time barred because he discovered the facts that supported his claim in 2009 or, in the alternative, the Statute of Limitations should have been tolled. The Court held that there was no basis for Plaintiff to argue that he discovered the FCRA violation within the two year statute of limitations. The latest that Plaintiff could allege a violation is when he was allegedly denied a mortgage in November 2006. Plaintiff did not file suit until 2009, more than two years later. Since Plaintiff failed to allege a possible FCRA violation within the statute of limitations, his FCRA claim must be dismissed as a matter of law.
- **Statute of Limitations.** In the alternative Plaintiff sought to toll the running of the statute on the grounds of his age, disability or infirmity. The Court rejected this argument holding that Plaintiff failed to allege sufficient facts to toll his claims under [New York CPLR § 208](#), which provides for tolling on the grounds of a "disability because of infancy or insanity."

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## **A Request for Reinvestigation Without a Dispute of Information is not Enough to Trigger CRA's Duty**

***Gagliardi v. Equifax Info. Servs, LLC*, 2011 U.S. Dist. LEXIS 10634 (W.D. Pa. Feb. 3, 2011)**

**Facts:** Columbia Gas of Pennsylvania ("Columbia"), Plaintiff's gas provider, terminated Plaintiff's gas service for non-payment of past due invoices totaling \$1,487.70. Columbia sent Plaintiff a denial letter stating that he failed to meet its credit guidelines based on a credit score obtained from Equifax and further stated that he was required to pay the past due amount plus an additional deposit and fees if he wanted to restore the gas service to his residence. Plaintiff filed the above referenced lawsuit against Columbia and Equifax on November 2, 2009. Plaintiff settled his claims with Columbia Gas and then filed an amended complaint against Equifax alleging violations of the [RICO Act](#), the [FCRA](#), and Pennsylvania state law. In response, Equifax filed a Motion for Summary Judgment.

- **RICO Act.** The only instance of racketeering activity alleged by Plaintiff was the letter he received from Columbia stating that Plaintiff failed to meet its credit guidelines. The Court granted summary judgment on this issue because Plaintiff did not allege at least two acts of racketeering as required by [18 U.S.C. § 1961\(5\)](#), and because there was no evidence that Equifax played a role in Columbia's decision to discontinue gas service.

- ***Disputed by Consumer.*** When a CRA is notified pursuant to [15 U.S.C. § 1681s-2\(a\)\(3\)](#) that information furnished to the CRA "is disputed by the consumer," [15 U.S.C. § 1681c\(f\)](#) requires the CRA to "indicate that fact in each consumer report that includes the disputed information." Thus, in order to establish that Equifax violated § 1681c(f), Plaintiff needed to show (1) that Columbia furnished disputed information to Equifax; and (2) that Columbia notified Equifax that the information being furnished was in dispute. Plaintiff failed to provide evidence of either element.
- ***Investigative Report.*** [Section 1681d](#) contains provisions governing requests for, and the preparation of, investigative consumer reports as defined in [15 U.S.C. § 1681a\(e\)](#). Plaintiff provided no evidence to suggest that he was the subject of an investigative consumer report. The most that can be inferred from the letter he received from Columbia is that Equifax may have communicated factual information concerning Plaintiff's credit score to Columbia. Plaintiff could not show that an investigative consumer report was created and therefore failed to establish a violation of § 1681d.
- ***Reasonable Procedures.*** [Section 1681e\(b\)](#) requires a CRA preparing a consumer report to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." In order to establish an actionable violation of § 1681e(b), Plaintiff must show that: (1) a consumer report prepared by Equifax contained inaccurate information about him; (2) the inaccuracy was attributable to Equifax's failure to "follow reasonable procedures to assure maximum possible accuracy of the information" contained in the consumer report; (3) he sustained an injury; and (4) his injury was caused by Equifax's inclusion of the inaccurate information in the consumer report. Pursuant to the terms of the settlement agreement reached between Plaintiff and Equifax in a prior lawsuit, Plaintiff verified that his credit disclosure was true, accurate and complete as of March 2009. Further, Plaintiff testified in his deposition that he had not received any credit-based denial letters subsequent to Columbia's letter. Plaintiff could not demonstrate that Equifax prepared a consumer report containing inaccurate information about him. Even if he were able to make such a showing, the Court held that he would be unable to establish that his injuries were caused by Equifax's conduct due to Plaintiff's failure to provide any evidence that the Equifax report was the reason for Columbia's decision to terminate Plaintiff's gas service.
- ***Consumer Disclosure.*** [Section 1681g](#) requires a CRA, at the request of a consumer, to "clearly and accurately disclose" "[a]ll information in the consumer's file at the time of the request," including "[t]he sources of the information" and "[a] record of all inquiries received by the agency during the 1-year period preceding the request that identified the consumer in connection with a credit or insurance transaction that was not initiated by the consumer." Plaintiff alleged that Equifax violated § 1681g by failing to produce its alleged communications with Columbia. However, a representative from Equifax testified that Equifax had no record of inquiries into Plaintiff's credit history initiated by Columbia. The Court held that Equifax is not legally required (and cannot be expected) to disclose information that does not exist.
- ***Trained Personnel.*** [Section 1681h](#) requires CRAs to retain "trained personnel" possessing the knowledge necessary to explain the information that is disclosed to consumers. Plaintiff claimed that Equifax violated § 1681h because of the alleged difficulties Plaintiff experienced while trying to speak directly with Equifax personnel by telephone. Even though Equifax



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provided a phone number to Plaintiff to use if he had questions about his credit disclosure, Plaintiff obtained and used a different phone number. The Court held that no reasonable trier of fact could conclude that Equifax violated § 1681h(c) because Plaintiff failed to produce any evidence that he contacted the trained personnel employed by Equifax.

- **Reinvestigation.** Plaintiff alleged that Equifax failed to reinvestigate dispute credit information under [15 U.S.C. § 1681i\(a\)\(1\)\(A\)](#). A CRA has no statutory duty to conduct a reinvestigation prior to being notified that information contained in a consumer's credit file is disputed. Plaintiff never disputed the completeness or accuracy of an item of information contained in his credit file. Instead, he simply asked Equifax to reinvestigate its records in order to determine whether Columbia was mistaken regarding the involvement of Equifax in the decision to terminate his gas service. The Court held that since Plaintiff could not show that he disputed an item of information contained in his credit file, he could not establish that Equifax had a duty to reinvestigate.

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