

Bankruptcy and Public Records

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Public Records vs. Tradelines

One of the frequent areas of contention in FCRA litigation is in regard to the Public Records information reported by the bureaus. This forms the basis of many consumer claims against the CRAs. It is important to understand the differences, as well as the similarities, between these cases and those involving creditor-furnishers.

In a typical credit report, there will be distinct sections containing 'Tradeline', 'accounts' or creditor information. This section of the report is where the CRAs place the payment histories of the loans, credit card accounts and other debts which are reported by their customer subscribers – banks, mortgage companies, auto lenders and others. In most instances, this is also where the CRAs publish the information reported by debt collectors. ALL of this information is reported by the subscribers. The role which the CRAs have reserved for themselves for these sections is very passive. They report whatever their customers tell them.

In contrast, there is a separate section of a consumer's credit report that contains the public records information. There are three types of public records reported – bankruptcy filings, monetary judgments against the consumer, and governmental tax liens. Unlike their role with credit tradelines, the CRA role in obtaining the public records data is not passive. This information is systematically gathered by the CRAs,

through subcontractors they pay. These subcontractors receive instructions from the CRAs on what records to search and what data to gather. For example, Equifax pays its spinoff subsidiary, Choicepoint, to gather its public records data. Choicepoint has purchased many of the smaller companies that Equifax has previously contracted with to provide such services.

The public records vendors are instructed by the CRAs and gather the information they request. This is done through different means. In the not too distant past, and in many cases still today, the vendors obtained physical copies of the underlying records and then manually entered the relevant data mined from each into the format required by the CRAs. Today, more frequently the data is obtained electronically, either online or at the site of the governmental record, for example the court clerk's offices. To gather bankruptcy data, the vendors download new filings from the ECF systems daily and somewhat automatically. They do not examine paper records. For judgments and tax liens, the vendors will gather the data online if it is available. However, many if not most State court systems still do not offer full records access in this manner. Thus for some court systems, the vendors must obtain the judgments and lien records live and in person from the clerk's offices. However, this is also done in different ways. In some instances, the vendors will bring a laptop computer to the courthouse and enter the data from the courthouse computer terminal. In other instances, they will obtain paper copies of the documents and take them in-house for the electronic data entry.

The bankruptcy data is gathered according to the instructions of the CRAs. These instructions limit the detail of the data gathered and then reported. Each CRA demands the following: bankruptcy court, case number, chapter, debtor name, debtor social

security number, debtor address, total liabilities, total assets, total discharged, total exempted debts, and disposition. This is all. They do not obtain the names of creditors or amounts of their debts that are discharged. As a result, the CRAs do not gather much of the information by which it court more conclusively determine whether the 'tradeline' data reported by its subscribers is accurate.

Bankruptcy Fact Patterns

There are a number of FCRA claims that arise as a result of inaccurate public records data. The first area to consider is for bankruptcy reportings. What follows is a description of some of the common claims. Some of these are developing and require some thought, preparation and possibly co-counsel assistance so that the CRAs do not use a newcomer or *pro se* case to create bad law.

1. *You have the wrong consumer, I never filed bankruptcy* – Certainly the easiest claims are those in which the consumer has no responsibility in any way for the information reported. Very often, a bankruptcy will show up on a consumer's report even though they did not file. This can occur with an error in the coding that a creditor-furnisher reports an account to the CRA. A bank may mistakenly report a debt as included in bankruptcy, which could be factually incorrect. This will then show u in the 'tradeline' rather than as a public record. Alternatively, a bankruptcy case may be reported for a consumer where the CRA has itself mistakenly matched the case to the wrong consumer. Either way, the error will be nearly fatal to the innocent consumer's attempts to use or obtain credit. It will be scored as a bankruptcy if either of these show up in the credit file. The most likely reason that a

bankruptcy public record would be reported for a non-filing consumer is because the CRA would have mixed or combined the record between two different, but similarly identified consumers.

2. *While my co-signer filed bankruptcy, I did not* - In theory, these cases should be less common than in the past. They sometimes occur when there are two consumers responsible for a single account and only one of the two files for bankruptcy. It is especially a problem after a divorce, where both ex-spouses are obligated on a debt. In the past, creditors used the METRO format to organize and forward their account data to the CRAs. This now-outdated format did not permit a creditor to report a different status on an account for different consumers. If the debt were current and the non-filing consumer continued to pay the debt despite the co-obligor's bankruptcy, there was no means by which to report the account with the filer as included in bankruptcy at the same time as reporting the account as current for the other consumer. At least not by automated means. These claims were being heavily litigated as individual cases and the settlement value had developed to a substantial range. However, several attorneys in South Carolina filed a class action and were able to obtain certification. They then settled the case for nothing but attorneys fees (\$15 million). As a result of objections made to the settlement that were sustained, including this author's, the CRAs agreed to correct the problem, though no cash was ever paid to the class. The style of the case was *Clark v. Experian, et als*. Thus, cases like these are often referred to as "*Clark*" cases. The CRAs now attempt to report a bankruptcy status only for

the consumer who actually filed bankruptcy. In addition, the CRAs are continuing in their attempts to force all of their subscribers to report their data using the more current METRO 2 format. Now, creditor-furnishers have a means to report the account differently, but there is no assurance that they will do so.

3. *I filed bankruptcy, so why is that balance and chargeoff status still reported? -*

When a consumer files and completes a Chapter 7 bankruptcy, all of their debts are discharged, unless otherwise excluded or exempted. (The author recognizes that this may simplify things a bit, but further details can be reserved for a different session). As explained above, a bankruptcy will be reported within the consumer report in two places. In the *Public Records* section of a report, the CRA will list some of the details of the filing that it obtains from the bankruptcy court's docket. A bankruptcy may also be reported in a public record for a judgment which is discharged in the bankruptcy. The second section of the consumer report which would include a bankruptcy notation is the *account information* or *tradeline* section. The prior balance and status will remain. After they obtain confirmation that the consumer has filed and completed a bankruptcy, the CRAs do not make any effort to update or correct the tradeline or collection accounts to reflect the discharge. And because many furnishers simply stop reporting after a bankruptcy, the "chargeoffs", balances owing, collection accounts and judgments will continue to damage the consumers credit even as they slowly attempt to rise out of the prior bankruptcy. Even more often, creditors often

report the bankruptcy discharge status at dates which are more recent than the bankruptcy public record. This appears as a second bankruptcy or otherwise damages the consumer's credit score. This problem, as with many other bankruptcy FCRA cases, is caused by the CRAs' refusal to reconcile the information contained within the two separate sections of its reports.

4. *Why haven't you updated my Report?* Another problem, and one even more damaging for judgments and tax liens, is the inadequate procedures followed by the CRAs to update and note discharge dates for bankruptcy cases.

Judgment and Tax Lien Fact Patterns

For judgments and tax liens, the problems can be just as serious. The following fact patterns are recurring:

1. *It's not me!* – A not so distant cousin of the 'mixed file' cases occurs when the CRA reports a judgment or a tax lien for one consumer on the credit report of an otherwise innocent other. This is because of the CRA ambition not to let any derogatory data go unassigned. If the CRA receives a reported judgment for a "John Smith, at 100 Main Street, Newport News, Virginia, 23607" and cannot find such a consumer in its files, it may well then place it on the record of "John Smith, at 1250 Main Street, Newport News, Virginia 23606." This is especially true when the social security number is not contained within the court record. Ironically, with the recent (and long overdue) media attention on identity theft, there is a growing effort to remove these private details from the court's records, especially online. This move, certainly necessary, will leave the CRA with two choices – (1.) don't report the judgment to any credit file,

because it does not know to whom it applies, or 2. guess. The CRAs will continue to choose the later. Also, sometimes a consumer who is listed as a registered agent or corporate officer for service is reported as the actual defendant and thus personally burdened with the judgment against the corporate defendant.

2. *But, I won the case!* – There are two problems that too often occur with the way in which a CRA reports judgments. Sometimes the CRA will reverse the parties. The Plaintiff consumer ends up having a judgment reported as if he or she was the defendant. Even more often, the CRA may report details of the judgment incorrectly. The CRA may report a dismissal or defense verdict as a judgment. Often they may misreport of the amount, or fail to properly show a setoff or other detail. The more complicated the judgment or court ruling, the more likely the CRA is to misreport it.
3. *The judgment/lien has been satisfied!* – After judgment is taken or a lien filed, but then paid and satisfied it is very common (more likely than not) for the CRA to fail to report the update. This is because its vendors have more difficulty searching for satisfactions and releases, or checking appeals and vacated judgments. Many courts provide or make available copies of satisfaction notices, or offer a report which lists recent ones. However, vendors do a very inconsistent job in gathering and reporting these updates.
4. *There is only one judgment.* – Most collection lawsuits occur in courts that are not of record and may not be collectible by garnishment or as a lien on real estate in that venue or jurisdiction. Accordingly, the judgment creditor will

often 'docket' or register the judgment from one court into a second court.

When this occurs, the CRA vendors will pick up both as if they were independent judgments. Whether or not this could be 'technically accurate', the reporting is certainly incomplete.

Public Records Claims under Sections 1681e(b) and 1681i

Unlike creditor account inaccuracies, with public records problems, the consumer has a strong argument that the CRA did not follow reasonable procedures to assure maximum possible accuracy, even prior to receiving a consumer's dispute. The CRA actually obtains the public records data on its own and the inaccuracy could have been discovered within the public record. Thus, if the inaccuracy is sufficiently obvious, the consumer can pursue claims under 15 U.S.C. Section 1681e(b) before a dispute. However, as with all FCRA cases, the action will be much stronger after making a detailed dispute.

When a consumer makes a dispute regarding a bankruptcy, judgment or tax lien, if its is other than a claim that tradelines or judgments should be reported as discharged because of Chapter 7 bankruptcy, the CRA will send a ACDV to its public records vendor. The author notes that he and many others apparently, often overlooks the fact that the vendor is also a 'furnisher' and is governed by Section 1681s-2 and subject to remedy for violating Section 1681s-2(b). The vendors and the CRAs each accept this fact and defend accordingly.

However, if the dispute is that tradelines or judgments should reflect a discharged status, then the CRAs very often do not ever contact the creditors or the vendors. Their internal manuals instruct the CRA employees to examine the dates of a bankruptcy

already reported by the CRA as a public record and to update specific accounts which the consumer identifies if the dates support the dispute. If there are many such accounts, the CRA employees, who are evaluated on their speed, will often fail to correct the entire list or report. If the consumer makes a general dispute (e.g. "Please update all of the accounts in my report"), the CRA will send a response refusing to investigate unless the consumer lists specific items and accounts.

CLAIMS AGAINST THE CRA FOR FAILING TO UPDATE CREDIT FILE
AFTER BANKRUPTCY DISCHARGE.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

JANE CONSUMER,

Plaintiff,

v.

CIVIL ACTION NO.

EQUIFAX INFORMATION SERVICES, L.L.C.,

SERVE: Beverley L. Crump, Registered Agent
11 South 12th Street
Richmond, Virginia 23219,

Defendant

COMPLAINT

COMES NOW the Plaintiff, JANE CONSUMER, (hereafter collectively the "Plaintiff") by counsel, and for her complaint against the Defendant, she alleges as follows:

PRELIMINARY STATEMENT

1. This is an action for actual, statutory and punitive damages, costs and attorney's fees brought pursuant to 15 U.S.C. §1681 *et seq* (Federal Fair Credit Reporting Act).

JURISDICTION

2. The jurisdiction of this Court is conferred by 15 U.S.C. §1681(p) and 28 U.S.C. §1367. Venue is proper before this Court as the registered or statutory agents of all defendants are located within the Richmond division.

3. The Plaintiff is a natural person and resident of the State of Virginia. She is a "consumer" as defined by 15 U.S.C. §1681a(c).

4. Upon information and belief, EQUIFAX INFORMATION SERVICES, L.L.C. (“Equifax”) is a foreign limited liability company authorized to do business in the State of Virginia through its registered offices in Richmond, Virginia. Upon information and belief, Equifax is a “consumer reporting agency”, as defined in 15 U.S.C. §1681(f). Upon information and belief, Equifax is regularly engaged in the business of assembling, evaluating, and disbursing information concerning consumers for the purpose of furnishing consumer reports, as defined in 15 U.S.C. §1681(d) to third parties.

FACTS

5. As of November, 2002, the Plaintiff had filed a Chapter 7 bankruptcy and completed and obtained a full discharge.

6. The Plaintiff included the following items and accounts from her Equifax credit file(s) within her bankruptcy discharge:

- a. Seven unsatisfied judgment (“judgments”);
- b. Six unpaid collection accounts (“collection accounts”);
- c. Consumer Finance account.
- d. Newport News Shipbuilding Employees Credit Union account;
- e. Sherman acquisition account;
- f. Wachovia account; and
- g. Wards/MWCC account.

7. On or about July 9, 2003, the Plaintiff mailed a letter to Defendant which disputed the manner in which Equifax was reporting each of the above accounts or items. Specifically, she disputed that the judgments and collection accounts did not reflect that these debts were discharged. She also disputed the date on which Equifax was reporting the other accounts to

have become subject to the bankruptcy.

8. Equifax received the Plaintiff's disputes, but failed to conduct the investigation and make the corrections required by 15 U.S.C. §1681i.

9. On August 20, 2003, Defendant responded to the Plaintiff's dispute letter and produced a new report which evidenced that Equifax had failed to make the corrections necessary to make its report and file accurate.

10. Equifax obtained and had direct access to the docket, file and creditors matrix for the Plaintiff's bankruptcy. It obtains all of its "public records" bankruptcy information on its own. However, it obtains the "tradeline" or account information and has no internal procedures to check and compare the consistency of the data it obtains in these two means. In fact, it accepts and allows information from its customers/furnishers to trump the information it obtains directly from the files of the bankruptcy court.

FIRST CLAIM FOR RELIEF AGAINST EQUIFAX

11. The Plaintiff realleges and incorporates paragraphs 1 through 17 above as if fully set out herein.

12. Equifax violated 15 U.S.C. §1681e(b) by failing to establish or to follow reasonable procedures to assure maximum possible accuracy in the preparation of the credit reports and credit files they published and maintains concerning the Plaintiff.

13. As a result of this conduct, action and inaction of Equifax, the Plaintiff suffered damage by loss of credit, loss of the ability to purchase and benefit from a credit, the mental and emotional pain and anguish and the humiliation and embarrassment of credit denials.

14. The conduct, action and inaction of Equifax was willful, rendering the defendant liable for punitive damages in an amount to be determined by the Court pursuant to 15 U.S.C. §1681n. In

the alternative, the were negligent entitling the Plaintiff to recover under 15 U.S.C. §1681o.

15. The Plaintiff is entitled to recover actual damages, statutory damages, costs and attorney's fees from Equifax in an amount to be determined by the Court pursuant to 15 U.S.C. §1681n and/or 15 U.S.C. §1681o.

SECOND CLAIM FOR RELIEF AGAINST EQUIFAX

16. Plaintiff realleges and incorporates paragraphs 1 through 25 above as if fully set out herein.

17. Equifax violated 15 U.S.C. §1681i(a) on multiple occasions by failing to delete or correct inaccurate information in the Plaintiff's credit file after receiving actual notice of such inaccuracies and conducting a reinvestigation, by failing to maintain reasonable procedures with which to filter and verify disputed information in the Plaintiff's credit file, and by failing to conduct a reasonable investigation.

18. As a result of this conduct, action and inaction of Equifax, the Plaintiff suffered damage by loss of credit, loss of the ability to purchase and benefit from credit, the mental and emotional pain and anguish and the humiliation and embarrassment of the credit denials.

19. The conduct, action and inaction of Equifax was willful, rendering each liable for punitive damages in an amount to be determined by the Court pursuant to 15 U.S.C. §1681n. In the alternative, it was negligent entitling the Plaintiff to recover under 15 U.S.C. 1681o.

20. The Plaintiff is entitled to recover actual damages, statutory damages, costs and attorney's fees from Equifax in an amount to be determined by the Court pursuant to 15 U.S.C. §1681n and 1681o.

WHEREFORE, Your Plaintiff demands judgment for compensatory, statutory and punitive damages against Defendants, jointly and severally for declaratory and injunctive relief; for her attorneys fees and costs; for pre-

judgment and post-judgment interest at the legal rate, and such other relief the Court does deem just, equitable and proper.

TRIAL BY JURY IS DEMANDED.

JANE CONSUMER,

By _____
Of Counsel

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