Will Credit Bureaus Continue to Escape Justice? Part 1: Why Consumers Suffer

In the Dirt: A Real Estate Legal Update

By Elizabeth Lum on December 3, 2024

On August 7, in *Frazier v. Equifax Information Services, LLC,* the United States Court of Appeals for the Seventh Circuit affirmed a lower court's decision to grant summary judgment to defendant Equifax, a consumer credit reporting agency (CRA), in a case brought under the Fair Credit Reporting Act (FCRA). The ruling was affirmed because the defendant's consumer report and file of plaintiff's credit history did not contain inaccuracies or cause the denial of plaintiff's mortgage loan application.

In *Frazier*, the plaintiff alleged that she followed the proper credit report dispute procedures to correct inaccurate information in her credit report. Equifax corrected most of the information in her report, but still reported multiple delinquent payments on a closed mortgage. The court ruled in favor of Equifax's motion for summary judgment because a third-party vendor, CreditLink, created the tri-merge credit report, not Equifax. Furthermore, the court agreed that it was the plaintiff's high debt-to-income ratio ("DTI") that caused the mortgage loan denial and reasoning that the credit information provided in the tri-merge report would not lead a reasonable person to believe the plaintiff was actually delinquent on an account that had already been closed.

Congress enacted FCRA in 1970 to help protect consumers from unfair credit reporting practices, ensure consumers' credit reports are as accurate as possible, promote efficiency in the banking system, and protect consumer privacy. CRAs—including Equifax, Experian, and Transunion (the "Big 3")—have long been the arbiters of a system used to investigate and evaluate the credit worthiness, credit capacity, and general character and reputation of individual consumers.

To safeguard consumer interests, FCRA provides a private right of action for injured consumers. To prevail on a FCRA claim, a plaintiff must first file a dispute with a CRA to give notice of the inaccurate credit information. The CRA has 30 days to investigate the dispute and report its findings. If the CRA provides incorrect or misleading information after the dispute and investigation, the consumer may file a FCRA claim and must prove the CRA prepared an inaccurate consumer report or kept inaccurate information in a consumer's file. Under FCRA, a CRA may be held liable for damages, including emotional damages, if it willfully or negligently reports false, inaccurate, or misleading information in a consumer's credit report or file. Damages may be actual, punitive, and/or attorney fee related.

Consumers face a daunting challenge when raising FCRA claims because the Big 3 seem to have blanket immunity when it comes to inaccurate and/or misleading consumer credit reports. Courts have repeatedly held that tri-merge reports, which consist of one consolidated credit report from separate Big 3 reports, cannot alone establish liability in a FCRA claim. Though all mortgage companies use tri-merge reports, other companies use these reports for prospective insureds, renters, employees, and more.

The holding in *Frazier* is damaging to consumers because it minimizes CRAs' duty and requirement to report accurate credit information, even though this information and its resulting score are impactful. The court did not touch on what type of mortgage loan the plaintiff was attempting to obtain or the qualifying factors to achieve approval, though a mention of the DTI ratio indicates the plaintiff may have been trying to get approved for a Federal Housing Administration (FHA) loan. The court also disregarded the multiple false delinquent mortgage payments lowering the plaintiff's credit score, which necessitated the FHA loan, in turn leading to larger monthly payments, an additional FHA funding fee, and student loans to be calculated at a higher penalty. Together, this likely led to the mortgage denial.

It seems CRAs will continue to have much higher protections than consumers, in contradiction to the purpose of FCRA. Consumers will continue to be victims unless there is a serious change to consumer credit laws and legal advocates better understanding the mortgage industry's guidelines and rules.