Consumer Finance Monitor (Season 4, Episode 21): A Deep Dive into the Fair Credit Reporting Act Issues Arising From Use of the Consumer Data Industry Association (CDIA) Compliance Condition Codes for Disputed Account Information Furnished to Consumer Reporting Agencies

Speakers: Chris Willis, Stefanie Jackman, Joel Tasca

Chris Willis:

Welcome to the Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. I'm your host Chris Willis and I'm the co-practice leader of Ballard Spahr's Consumer Financial Services Group and I'll be moderating today's program. For those of you who want even more information, don't forget about our blog, consumerfinancemonitor.com. We've hosted the blog since 2011, almost 10 years now. So there's a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those of us in the industry. So to subscribe to our blog or to get on the list for our webinars, just visit us at ballardspahr.com. And if you like our podcast let us know. Leave us a review on Apple podcast, Google, or wherever you get your podcast.

Chris Willis:

Now today we're going to talk about a very narrow, but very interesting and important issue under the Fair Credit Reporting Act, dealing with flagging accounts as disputed when they've been the subject of a dispute by the customer. And this is important because there are a lot of disputes filed under the Fair Credit Reporting Act with furnishers and with the credit reporting agencies. So there's a specific provision of the Fair Credit Reporting Act that we're going to be talking about today.

Chris Willis:

And I'm joined by two of my partners who are veterans of the Fair Credit Reporting Act who have massive experience in not only defending private litigation under the FCRA, but also in dealing with regulatory investigations under the same statute. So my two guests and partners are Stefanie Jackman who's a partner in our Atlanta office and Joel Tasca who's a partner in our Las Vegas office, both members of our Consumer Financial Services Litigation Group. So guys, welcome to the podcast. And Joel, let me start with you. Why are we even having this conversation about dispute flagging? I mean, I know there's tons of disputes that go on under the Fair Credit Reporting Act, but why is this something we need to spend our time talking about?

Joel Tasca:

Thanks Chris. So one of the reasons we're talking about it is because this issue of marking a tradeline is disputed has increasingly become a subject of private litigation. And FCRA litigation, as everyone knows, remains one of the most prolific areas of consumer litigation and a lot of that FCRA litigation is against furnishers. So furnishers need to be paying attention to all potential litigation risks that they face in these FCRA cases and this is definitely one of them. Now by way of background and as probably all of our listeners likely know, an FCRA claim against a furnisher requires that there be something inaccurate or materially misleading in the consumer tradeline. And one inaccuracy that we see plaintiff's increasingly asserting is the issue

that we're discussing here is that the tradeline is inaccurate because the consumer previously disputed certain information on the tradeline and the tradeline doesn't properly reflect the fact that the consumer is disputing that information.

Joel Tasca:

And so consumers in some of these cases have complained when there's no dispute notation at all on the tradeline And some case law has developed that speaks to that theory, but plaintiff's counsel have gotten even more nuanced in their theories on this issue. And so even when a consumer dispute is notated on the tradeline, plaintiffs will complain that the tradeline is still inaccurate or misleading because the dispute was not notated properly. And what I mean by that is they will complain that the furnisher used the wrong compliance condition code and that gets into these codes XB, XC, XH that we're talking about, which all have slightly different meanings.

Joel Tasca:

And the consumer will say, "You used the wrong one." And so although you know that the tradeline is disputed, you didn't use the proper dispute code and therefore the tradeline is misleading. So the lesson there is that you need to pay attention as a furnisher to the use of these codes because it can have consequences in litigation. So private litigation is certainly one of the reasons that we're talking about this today, but there are other reasons such as I know the CFPB has begun to ask questions about this particular issue and for more on that I'll toss it over to Stefanie.

Stefanie Jackman:

Yeah. Thanks Joel. That's another reason, in addition to the litigation we've been seeing and as Joel pointed out the significant uptick in FCRA claims over the years. This is an area of perennial interest to the CFPB. The CFPB conducts FCRA compliance specific exams. It's a focal point of many of their investigations. We've seen a long line of consent orders that talk about the importance of FCRA compliance with regard to the accuracy and integrity of information that you're furnishing as well as the way that you are intaking, identifying, investigating, and then responding both to indirect and direct disputes.

Stefanie Jackman:

We see the CFPB, in most exams, have, even if the exam isn't focused on FCRA and maybe it's more of a servicing exam or even a fair lending exam. Sometimes we can see the FCRA creep in. It's also an area where, from some recent experience that I've had, I think the bureau their teams are continuing to learn about what is the complex world of credit reporting, FCRA compliance, what it means, how it looks at different institutions, how they interface through metro too, how they have set up their direct dispute response processes. So it's an opportunity to really help, I think, educate if you are dealing with an exam that's focusing on these areas or an enforcement investigation, it's an opportunity to educate them on what you're doing, why you're doing it, how it's consistent with the requirements of the law, beneficial to consumers, and so forth.

Stefanie Jackman:

But another thing you have to be very careful about if you're furnishing is also what you say to consumers about it or what you don't say. What are your deletion practices? These are all things that the bureau asks about and really are attentive to. So while we're not talking about the entire world of FCRA compliance today within all of these different buckets, if you will, that I've said the bureau could look at, this dispute coding issue, this dispute resolution issue can come into play, whether through accuracy and integrity questions and concerns or dispute management and outward communications with respect to resolution at the state.

Chris Willis:

Okay. Thanks, Stephanie. And so like Joel and Stefanie, you both talked about something that sounds like it's going to become kind of complex about different dispute codes for different circumstances. And I'm sure we're going to dive into that technical detail in just a second, but before we get into that, is there some guidance on just the threshold question of when a furnisher needs to notate at all that there's a dispute on an account? Joel, could you address that just to get us started?

Joel Tasca:

Sure, Chris. What courts have said about that topic is that a furnisher needs to note that a debt is disputed if the trade line would be materially misleading without the disputed notation, which is not really that helpful, but the courts have given us a little more guidance than that and what they say is that the way in which a tradeline could be misleading without the disputed notation is that if that notation is not there and there is a potentially meritorious dispute, a reader of the consumer's credit report could be left with the impression that the only explanation for the negative reporting is the consumer's financial irresponsibility and that there's no possibility that there's actually a bonafide dispute that the consumer has over the debt. And so from that, the sort of buzzwords that they've used is furnishers need to note that there is a dispute if the dispute is bonafide or another way they've put it is if the dispute is not meritless.

Joel Tasca:

So that's maybe marginally more helpful, but still, it doesn't give a lot of specific guidance on when that situation arises. So there needs to be an arbiter of whether a dispute is bonafide or has merit or is meritless. And who is that arbiter? And the courts have said that the furnisher is in the best position to determine whether the dispute is in fact bonafide. And there definitely have been cases in which courts have held that furnishers made the right call, that the furnisher correctly concluded that the underlying dispute was completely meritless and so it was okay for the furnisher to omit any disputed notation in the tradeline after it completed its investigation.

Joel Tasca:

But from a litigation avoidance perspective, and Stefanie and I have had many conversations about this, these cases are not particularly comforting. A consumer is almost always going to take the position that his or her dispute was bonafide. And so the failure of the furnisher to apply the disputed notation can get the furnisher into a lawsuit. So I think that to sum up there, I think the best practice is to error on the side of notating the tradeline as disputed if there's any conceivable possibility that that dispute could be considered one that has merit.

Chris Willis:

Got it. And that, honestly Joel, sounds like a very manual process and not one that lends itself to sort of an across the board or automated kind of determination. Am I hearing you right on that?

Joel Tasca:

Absolutely. I think each dispute has to be taken up on its own and needs to be considered. Individual determination has to be made on whether the dispute in fact is bonafide or has merit.

Chris Willis:

Okay. Got it. So Stefanie, now I guess we're ready to dive into the technical detail of this. Joel mentioned earlier in the podcast that the CAA manual has several different dispute codes that might be used to denote a dispute. So can you talk to our audience about what are the different coding options and when you're supposed to use which one of them?

Stefanie Jackman:

Yeah. I'm happy to. And there's an exhibit in the CDI guidelines, exhibit eight in the credit reporting resource guide that sets forth all the compliance condition codes that are supposed to be used in order to manage the dispute flag process. And for these two in particular XC and XH, they come into play in the direct dispute context. So when the dispute doesn't go to the credit bureau, but comes directly to your organization and involves something with the account that's being furnished and whether it's accurate, correct, et cetera, however you're defining direct disputes within the FCRA. It arises from the requirements set forth in the FCRA at 1681S-2A3. That is the duty to provide notice of dispute. And that provision says if the completeness or accuracy of any information furnished by any person to a credit reporting agency is disputed to such person,

to that furnisher, of the information by a consumer, the person may not furnish the information to any consumer reporting agency without notice that such information is disputed by the consumer.

Stefanie Jackman:

So what that means is when the dispute first comes in, in the direct context, you, as the recipient furnisher of the dispute use what's called the XB, b as in boy, code. And that code is saying that the account has been disputed by the consumer directly to the data furnisher under the FCRA and that you're conducting your investigation. So that's how you're complying with 1681S-2A3. Once you complete your investigation, you are supposed to update and the CDIA guidelines give you two codes that you can use, XC as in cat, XC. And that is to indicate that the FCRA direct dispute investigation has been completed by you, the furnisher, and that the consumer disagrees with the results of your investigation.

Stefanie Jackman:

There's another code XH, which is different in that it says the account was previously in dispute. The data furnisher has completed its investigation. But it doesn't have that added provision about the consumer disagrees with the outcome. So companies sometimes wrestle with, "Am I supposed to use the XC code? Should I use the XH code?" Some companies aren't using any of those codes and it just stays in an XB status. I think there's some challenges there. The good news is in the direct dispute context, there's no private right of action under the FCRA, but the CFPB knows that and this is one of their areas that is always front and center when they're looking at your FCRA compliance practices. Why is that? Because they often find, at least in their mind, that the way you're handling direct disputes isn't perhaps in alignment with how you're handling indirect, where the credit bureau is really running the show.

Stefanie Jackman:

And sometimes I find that not only is it not aligned, but it's not in, again, the Bureau's view, compliant with the FCRA. So you're not going to get sued here, but that gives you some cover. And as a result, sometimes companies have been using XB, for instance, the code you put on when the dispute comes into you through a direct dispute channel. And then it never gets updated. So I've had this happen that the bureau comes in, sees this dispute XB code, and then sees it reported in your next push and your next push and your next push. Sometimes they see it reported seven, eight months in a row. That gets questions about, did you really take eight months to resolve the dispute? The FCRA requires that these be investigated and responded to within 30 days. And if you can't do that, you have to delete the tradeline, right?

Stefanie Jackman:

So it can engender questions. And then this bureau might want you to update it to use XC or XH. Why? Why should we be worried about that? Because we don't know how the credit bureau has used this information. We don't get access to their algorithms. We don't know how they score or factor in an account that has an active dispute status versus a resolve dispute status. So that's number one, why it's important to use these update posts anyway. But then within the two, it can be difficult. And we don't know how the bureaus used them within their algorithms. Sometimes we get some insights, but does XC where the consumer disputes it somehow factor in differently than XH? I don't know. Then we also get questions about, "Well how do we know if the consumer disagrees? How do we know whether to use XC or XH?"

Stefanie Jackman:

And these are all valid considerations. I think the position of CDIA would be that if you follow the guidance in their manual on how to use compliance condition codes. So if you've completed the investigation, you can put XH on. Unless you know the consumer disagrees. If that's the case then you need to use XC. So how would you know that? Well, I mean, the consumer could write you back or call you and continue to express disagreement. They could submit a new dispute. And that probably, maybe not always, but probably, gets routed to your repeat dispute or even frivolous dispute channels if there isn't new information and things like that, but it's just to be mindful of, is there evidence that the bureau could point to that would suggest the coding is not correct?

Stefanie Jackman:

And how does that factor in how they're ultimately viewing your facility with the compliance codes, the CDIA guidelines, the metro two requirements. In an ideal world, there's an XB that then someday turns into XH or XC and you have a policy or some kind of process for how you determine what that code will be. Are you just going to use XH on everything? Are you going to do XH unless? Are you just going to assume the consumer disputes it, if you didn't agree with the nature of their dispute? And you operate accordingly, we should all be good, right? This was working for a little while, but especially during the COVID, it was happening before, but especially during COVID, there's been a lot more attention being paid to credit reporting. There's been concern about things remaining in a dispute status.

Stefanie Jackman:

Somehow I made a direct dispute on a student loan a long time ago that I don't remember at all that then came back and showed up when I was attempting to refinance a house and just the way that, that came into the process required a more expensive type of appraisal. So furnishers are getting a lot of questions and there's been this push towards, "Well, wait. Do we have to leave this on forever? Some of our customers don't want it on forever.' In my instance, this was years ago. It's probably been on there a decade. I don't know how that's impacting my credit score. I know I had to pay more for an appraisal. So furnishers are hearing things like that as a result of things consumers are doing that then they're being told maybe are more expensive or just pausing questions about things that have been seen in their credit reports.

Stefanie Jackman:

And sometimes that can be a continuation of a dispute code for a period of time. So companies are starting to think about, "Can I develop a process where I can remove these codes?" The FCRA does not provide a mechanism by which you can remove it. And these codes seem to indicate that you either say, "We've completed it forevermore or we've completed it and the consumer disagrees." So there's been a lot of attention paid there and some companies are starting to develop some processes and procedures that actually allow for the removal of a dispute code after a period of time. We'll see how those fair, but they're doing that to try to meet consumer needs and consumer concerns on age disputes that have been resolved, but it's an evolving area and it'll be interesting to see how the bureau responds to it. And then to Joel's point, and I think it'll probably something he touches on in a minute, are there ways for these things to jump into the context of the indirect, right, and potential private litigation around this issue?

Chris Willis:

Well on that note Joel, let me ask you. Has there been any litigation over the appropriate dispute code to use, among the options that Stefanie was just talking about?

Joel Tasca:

Thanks, Chris. So yes. We are seeing litigation over which is the appropriate code to use in different circumstances. We have not seen many reported cases on this topic at this point. All of the cases that I know about at this point are at the district court level, but I have a feeling that as these theories gain traction among the plaintiff's bar, I think that we're going to see more cases and I think that this issue will eventually percolate up to the appellate level. But at this point, we have a few noteworthy district court cases, which I think can give us a little bit of guidance and we can also glean where the questions are arising and some of these are going to echo a few of the points that Stefanie raised. The first case that I think is noteworthy is one that's called Wood versus Credit One Bank from the Eastern district of Virginia in 2017.

Joel Tasca:

And there the furnisher had a policy that contained no directive for ever using the XC code, which as Stefanie explained, that's the one that says the investigation has been completed, but the consumer disagrees with the result of that investigation. So the furnisher there had no occasion on which you would ever use an XC code. And as a result of the furnisher investigated a dispute and the consumer still disputed the tradeline even after that investigation, the furnisher had no way of really informing

the CRA that there was in fact a continuing dispute. And not surprisingly, the court in Wood held that, under the facts there, using the XD code was materially misleading because the consumer had informed the furnisher multiple times after the initial investigation that the consumer still disputed the information. So as Stefanie alluded to, this was a case where investigation took place.

Joel Tasca:

And after that, the consumer notified the furnisher in a number of ways by both direct disputes and indirect disputes through the CRAs that the consumer did not agree with the result of the investigation and because the furnisher there did not have a policy that directed it to add the XC code, it just went on and on without noting that the consumer still disputed the tradeline. So the court, as I mentioned, it found there as a matter of law that, that was materially misleading. The court also found that it was a jury question as to whether having a policy of never using the XC code would be enough for a willful FCRA violation.

Joel Tasca:

And of course, willful violations open a furnisher up to statutory damages. So I think that the lesson from the Wood case is probably that you need to have some circumstances in which an XC code will be used and it can't be ignored entirely. A couple other cases again are reminiscent of an issue that Stefanie flagged, which is how do you know if after the investigation is completed, how do you know if the consumer still disputes the tradeline? And this came up in a couple of cases with different results. The first case is Gissler versus Pennsylvania Higher Education Assistance Agency.

Joel Tasca:

It's a 2017 case. There the furnisher used the XH code saying nothing about whether the consumer still disputes the tradeline. So the furnisher their used to the XH code after its investigation was complete and the consumer claimed that the furnisher should have used the XC code to note that the consumer still had a continuing dispute. And the furnisher argued there that it didn't need to use the XC code because the consumer, unlike in the Wood case, never notified the furnisher after the completion of the investigation that the consumer still disagreed with the reporting. And the court there in Gissler held that there was a genuine issue of distributed fact as to whether the tradeline with the XH code was misleading. And the court explained that a furnisher can't, as a matter of law, just necessarily assume that the consumer agrees with its conclusion.

Joel Tasca:

And whether that assumption was reasonable in that case, the court decided would be a fact question. And so the consumer in that case was able to get the claim to a jury. Now coming out the opposite way was a 2020 case of the Eastern district of Michigan called Foster. There the court held, as a matter of law, that it was not inaccurate for the furnisher to change the codes to XH rather than the XC, when the consumer never notified the furnisher after its investigation that the consumer still disputed the tradeline. And so I think the takeaway here is again, based on Wood, make sure there's some policy in place for use of the XC code in some capacity and then Gissler and Foster demonstrate that it's really a gray area as to what the assumption should be on the part of the furnisher as to whether the consumer still disputes the accuracy of the tradeline and thus whether the furnisher should be using the XC as opposed to the XH code. So that's still an open question in the case law.

Chris Willis:

Thanks, Joel. So like Stefanie, given all of that, all the considerations you mentioned and the litigation that Joel was mentioning just a moment ago, what do you think are the best practices for furnishers when they consider how to code these disputed accounts?

Stefanie Jackman:

Well Chris, I think it really hearkens back from what I was saying before about however your organization decides to navigate some of the ambiguities that are presented in the CDIA guidelines around these codes and what they mean and how will you know which one to use, you have to settle on a policy and approach and use it consistently, across all of the accounts when

this issue arises. At a minimum, I do think you should have your dispute codes evolve in the direct context. It should not stay in XB for six months because that's just going to result in questions. And what happens if you actually haven't been responding in a timely manner? It's basically planting a big red flag to the CFPB saying, "Ask me questions about this and I will tell you that I am not timely responding." That's a worst case scenario. They may still find that out, but you don't need to make it easy by never updating the XB code.

Stefanie Jackman:

Updating the XB code can also help with your compliance oversight to make sure these direct disputes are moving and moving within 30 days of when they're received and so forth. One other question I've had from people is, "What if I receive a direct dispute that I'm also able to investigate and respond to on the same day? Which actually happens frequently because a number of them might be repeat, it might be fairly simple, it's not a complex dispute. It could be that you actually agree with it. Maybe it's identity theft, whatever. "Do I have to do the XB and then go turn it to XC?" No. I think in that instance you're okay to just put the resolution code. The credit bureau is still going to see that this is a disputed account, but I do think that if it comes in on day one and you can't get to it until day two, in an ideal world you would have a process that that XB code goes on the minute it's coming into your organization and recognized within your organization as a direct dispute.

Stefanie Jackman:

And ideally that'll be the day it is received because you have 30 days from the date it comes into your mail room, not from the time that it makes its way through your inner office mail into the team that is responsible for it and they open it and scan it and think about it. It's the day it comes in from the US Postal Service or email or whatever the vector is through which it's delivered. Moving forward in deciding whether you're going to do C or H, I think you need to have a position. Some companies decide they're just going to do XC and try to assume and defend the assumption that the consumer disputed it. You haven't heard otherwise. So that's what you're going to do to give the consumer the maximum protection, unless that consumer calls you in, like I did when I was mentioning what I have at over the last year in refund and says, "I don't dispute this or I no longer continue to dispute it." Then is the time that, "Sure. Okay."

Stefanie Jackman:

Then you could change it to XH. You could talk about if it's removal, whatever your policy is, but some companies default to XC. Some companies use XH, but as Joel said, we're starting to see litigation it's in the indirect context, but it can inform also how the bureau would encounter this in the direct dispute context about, is that appropriate? Do you have consumers that indicate they continue to disagree? Does the same consumer send you repeat disputes on the same issue? Should that warrant a change to XC? I don't know what it means to the credit bureaus if I have an XH versus an XC. But what I do know is that they created those two different codes for two different circumstances so I'm going to presume there must be some reason for that because it'd be a lot easier to just have one. And then finally, if you are going to have a circumstance, let's say you adopt XC.

Stefanie Jackman:

We're going to give the consumer the benefit of the doubt. It's going to be easier from a compliance perspective and we think if it's challenged, we can defend it, that we're giving the consumer the maximum protection. That unless they tell us otherwise, we'll assume they dispute it, but we're getting a lot of complaints about that being re-reported month after month after month. If you're not getting complaints about it, I would say, just do that. But if you're getting complaints and some companies are, you could develop a process where perhaps, as part of your response to the consumer on the direct dispute, you invite them to let you know if they have any other issues or if they disagree, but you give them some indication that they need to tell you that they agree or don't agree and how to do that.

Stefanie Jackman:

And if after some reasonable period of time, and I really don't think it's a month or two. I mean, I think we're really thinking about like six months here, given that the FCRA never tells you, you can remove this code, but there is, I perceive, pressure on

the industry to do that from their customer base and possibly also credit bureaus. So we're looking maybe at six months, you could remove it, if you haven't heard from that consumer. They haven't filed a follow-up dispute on that account. They haven't otherwise communicated with you, but there's some challenges that are built into that as well from a compliance perspective because going back to what I started with, whatever you decide to do it has to be something that you can maintain consistently across all of your accounts. Joel, I don't know if you have any additional best practices that you might think about sharing as well.

Joel Tasca:

Thanks, Stefanie. I think you covered everything. We talk about these issues all the time, as you know, and I think that was a comprehensive summary.

Chris Willis:

Well I want to thank both of you for sharing your expertise on today's podcast and trying to shed some light on this very difficult and ambiguous issue under the Fair Credit Reporting Act and under the metric to credit reporting resource guide. So I'm sure it's something we'll be continuing to monitor and probably talk about again in the future. And of course, I'd also like to thank our listeners for listening in to today's podcast. For all of you, be sure to visit our website ballardspahr.com or you can subscribe to the podcast in Apple podcasts, Google, Spotify, or your favorite podcast platform. And don't forget to check out our blog, consumerfinancemonitor.com for daily insights about the financial services industry. If you have any questions or suggestions for our podcast, just email us at podcast@ballardspahr.com and stay tuned each Thursday for a great new episode. Thank you all for listening.