Consumer Finance Monitor (Season 5, Episode 35): The Third Circuit's decision in Bibbs v. Trans Union: What it means for Fair Credit Reporting Act litigation

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Dan McKenna:

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, Dan McKenna, a partner here at Ballard, that specializes in consumer financial services, litigation and compliance. 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, and there's a lot of relevant industry content there. We also regularly host webinars on the subjects of interest to those in the industry. To subscribe to our blog or to get on the list for webinars visit us at ballardspahr.com. If you like our podcast, let us know, leave us a review on Apple Podcasts, Google, or wherever you get your podcasts.

Today, I'm joined by Abigail Pressler. Abigail is one of our newest members at Ballard. She's a regulatory of council. Prior to joining us at Ballard, Abigail served as general counsel at NCB Management Services Inc, where she oversaw audit, compliance, legal, HR, and quality assurance. I know that you already know her because Abigail is very well known in the industry for her expertise in debt collection and related issues. We are here today to talk about something very near and dear to our hearts, our collective hearts, mine and Abigail, and that is the Fair Credit Reporting Act. Fair Credit Reporting Act litigation has been on the rise. In fact, that doesn't really do it justice. It's been exploding and probably more so than any other statute out there.

Really, whenever one new theory works, we are immediately seeing hundreds of copycat lawsuits filed across the country or demands being sent to our clients. That's what we want to talk about today. Or more accurately, a specific type of copycat case that's been reaping havoc across the country over the past year, pay status cases. Very recently, our industry was dealt a very satisfying, positive result in pay status cases by the Third Circuit, in a case called Bibbs v. TransUnion. It has huge impact on pay status cases in the Third Circuit, and we hope elsewhere, but it also has major impact on FCRA litigation more broadly. It's a tool that FCRA defendants need to have in their arsenal. Let's begin with some background and understand what the case is about.

Abigail, do you mind?

Abigail Pressler:

Thank you for having me. I'm really excited about this case. It's got a pretty interesting background and definitely has some major implications that I think could help anybody who's struggling with these FCRA copycat cases. This case, Bibbs v. TransUnion, is actually a consolidation of three different cases that started out in Pennsylvania District Court. They're all based on very similar fact patterns and very similar claims brought by an attorney who the judges here noted actually had 80 nother cases of similar facts and circumstances in the jurisdiction. This is a common issue they're seeing, and they really wanted to take action to get this issue settled, once and for all.

The three plaintiffs here fell behind on their student loans and when they failed to pay their lender, closed the accounts, transferred them to a new entity and updated their credit report trade lines to say that the accounts had been closed and

transferred and that the account balance, for their purposes, was $0. They also noted or maintained the negative pay status saying that the account had been more than 120 days past due. That's what was an issue here in this case. I think it's worth noting here that the way that this was reported is exactly what Metro 2 recommends you do in this situation, and that's something we see in a lot of these FCRA cases where people follow the Metro 2 guidelines, but they get sued anyway, because people just don't understand what the rules are or they don't like how it looks. We're going to get to that, because the Third Circuit addresses it.

All right. Going back to the beginning, here's how this all came into the court. These three plaintiffs were represented by the same attorney who sent letters to TransUnion disputing their student loan debt trade lines. He disputed specifically the status saying that the accounts were more than 120 days past due, the pay status. TransUnion initiated investigations and timely responded, verifying the accuracy of the information that was on the report. They included an explanation that the accounts had been closed and paid, and that pay status represents the last known status of the account at the time they were closed and paid. That is exactly what Metro 2 recommends you do in this situation. TransUnion also included definitions and rating keys to help the consumer try to understand what was in the report of the results of the investigation.

Regardless, the attorney filed suit on behalf of his three plaintiffs and they made the same complaints. The first complaint was that TransUnion failed to maintain reasonable procedures to assure maximum possible accuracy of the information it reported. This is a standard that's specifically required by the FCRA. The second claim, of course, was that they had failed to conduct a reasonable investigation and failed to permanently delete or modify the information that plaintiffs believed to be inaccurate. They did not plead any kind of specific harm such as denial of credit or being offered credit at an unfairly high rate, because of what was on the report, they just made general claims that were all familiar with about how the inaccurate information would mislead lenders, lower their credit scores, and generally cause mental anguish and humiliation.

TransUnion responded to each of these with a motion for judgment on the pleadings. Very aggressive litigation strategy here, but this is a claim we see all the time and the Metro 2 guide is clear on this issue. They argued that plaintiffs could not prevail under law, first, because the information was in fact accurate. Second, because they had failed to plead any kind of actual damages. They didn't say what had happened to them. The district court agreed in each of these cases. They said, "First of all, we have got to look at this pay status thing in context. Plaintiff, you're just looking at this and saying, "Well, it says more than 100 days past due, but it doesn't say that it is, or that it was so somebody reading the report might get confused and mistakenly think that this is a current status, that they currently owe the lender this, and they are currently past due, when in fact this is historical information about what happened in the past."

The court disagreed with that. They said, "You cannot take this out of context. You have to look at all the information in the trade line. If you do, you'll see the information saying that it was closed, that it was transferred, there's $0 balance. How could a creditor reading all of this information reasonably come to the conclusion that the information was inaccurate or that this was something that was still currently past due? It's very clear it's closed." In doing this, the court applied a reasonable creditor standard. What would a reasonable creditor, how would they interpret this information? They said, "Looking at it all together, it's pretty clear what's going on. We don't think a reasonable creditor is going to think that this is a current obligation."

These cases were dismissed by the Pennsylvania courts and plaintiffs appealed to the Third Circuit. I think this is where things get interesting. Dan, I'll let you talk about the Third Circuit opinion, but I did a little digging on this. As I said, in the judge's opinions from Pennsylvania, they noted that this particular attorney had filed 80 similar cases in the Eastern district of Pennsylvania, alone. That's not counting cases he may have filed in other jurisdictions. At least 35 of these were on track to be told, pending the results of this Third Circuit decision. This is something that the Pennsylvania judges really wanted to address, because they were just overwhelmed by the volume of these cases and, likely, frustrated by the fact that they're challenging something that is accurate and in line with Metro 2 reporting guidelines. That's something we see across the board.

That is what's behind these cases getting consolidated before the Third Circuit, is the fact that they had similar facts. You've got this attorney filing all the same cases for all these different plaintiffs. They're on hold, pending the results. They wanted to bundle these to take care of them all in one go.

Dan McKenna:

Thanks, Abigail. I'm going to jump in and talk a little bit about the appeal, but before I do, I think you just hit on something that is really important in two ways. That is the volume of the cases that were pending in Pennsylvania federal courts, or elsewhere in the Third Circuit, mostly brought by the same council. But I have to note, there were a bunch of copycats out there too. There's two things I want to highlight. One, when the lawyers for the plaintiff started to see some of the writing on the wall, with the early motion practice, they very quickly tried to pivot on these claims to argue that there are two separate types of claims. One, claims that involve a creditor who was paid, but continued to show historical default information. Two, a creditor who transferred or sold that account and continued to report or show historical, default information. Plaintiffs were insistent that there was a discrepancy or a disparity or a difference between those types of cases, because the facts underlying the closing of the account, or transfer of the account, is different.

Fortunately, the courts have largely rejected that discrepancy or that difference, because at the core, the information that is being reported is still accurate and still has to be reviewed holistically. Although, the Bibbs court, on appeal, only addressed one of those instances, I think it did a nice job of addressing it in a general enough way that it covers both of those instances. The other issue I want to raise, before we move on to how the appellate court addressed this, is the importance in litigation of remembering that judges are people and that they need to and want to understand the universe of the issues around them and like to, when they can, take a practical approach. This is a great example of what could have been a missed opportunity if council just went in there and argued the facts and the law, without informing the courts of the hundreds of other cases.

Bit of a shameless plug here. We are defending dozens, many dozens of these cases in the Third Circuit. We're involved in a lot of the early litigation and motion practice. In fact, have one of the issues up on appeal. I raised that, because as a result of consolidating, as a result of council working together despite having different clients and informing the different judges about these things, the courts in the Third Circuit took it upon themselves to deal with these issues together. There was a settlement conference that involved a hundred or so of these cases before the same judge. There were real efforts, by the court, to tackle this in practical ways, because counsel made the court aware of all of these similar cases. I agree that it was a frustrating experience. I think that you're right, Abigail, when you raise that. I tend to think that judges are tired of the Fair Credit Reporting Act in general. Sometimes that doesn't play out very well for the defendants, to be candid, but it's important to make sure that the judges are aware of the issues that are going on practically, and not just legally.

With that tangent now done, let's talk about what the Third Circuit did. The primary argument being made in the courts below was that when you're considering accuracy, credit reports have to be reviewed as a whole. The entire credit report has to be considered. Consumers cannot contend that one entry, read in isolation, is wrong or misleading, if that entry is not misleading, when it's read in context of the entire report. Let me be clear, when I say entire report, I mean the entire submission or report as it pertains to a single creditor, not the consumer's entire report. It's a pretty clear and easy, logical argument. A consumer cannot point to one entry furnished by one furniture and say, "That's wrong," when read, in context with everything else they've furnished, it's clear that's not wrong.

This led to a secondary argument, which is how you define the reader of that information. The defendants, on appeal, argued that a reasonable creditor standard should apply. They argued that the issue is whether or not a creditor could be misled by this information. Remember, the claim being brought was not necessarily that this was inaccurate, but in fact, that this was potentially misleading. Abigail, and I will talk in a little bit about the big influx of potentially misleading cases. The argument, by the defense, was that a creditor couldn't be misled by this information.

Now, plaintiffs objected to that standard. They argued that even if a creditor, a reasonable creditor or a normal creditor or a big bank was not misled, other less sophisticated users of credit reports could be. Focusing on the maximum possible accuracy requirement, the Third Circuit noted that a reasonable creditor would include all users of information and not just sophisticated creditors. While that comment seems to reject plaintiff's argument, the Third Circuit, nevertheless, ruled that the phrase 'reasonable creditor' didn't accurately reflect the FCRA's intent because entities other than creditors are allowed to access and rely on credit reports.

Thus, the Third Circuit created a new standard, the "reasonable reader" standard, which it defined as, and now I'm quoting the Third Circuit, "Running the gamut to include sophisticated entities, like banks, and less sophisticated entities like landlords." I mean no slight to landlords. That's what the Third Circuit said. The court then ruled that even under the reasonable reader standard, the accuracy of the information has to be determined from the entirety of the credit report. A person cannot hyper focus on a single data point and claim it is wrong or misleading if that issue is clearly not wrong or misleading, when read in the context of the entire report.

In so doing, the Third Circuit made a really interesting determination. This is something that I think is going to play out in a lot of different, positive ways for the defense bar. That is, that the reasonable reader standard is objective. It is not a subjective standard. That means that the court could conclude that the data was not misleading or wrong, under a reasonable standard, right now at the pleading stage and no discovery was needed. The court, ultimately, thus, affirmed the grants of the motions to dismiss and motions for judgment on the pleadings, ruling that under the reasonable reader standard, the data furnished was not inaccurate or potentially misleading when it's read in context of the entire report. Needless to say, that was an awesome result for the defense.

There are other cases pending in the Third Circuit that we anticipate will mirror Bibbs or simply adopt Bibbs. While we wait for that to happen, and after that happens, the Third Circuit's rulings should have broader and larger implications. That, is what Abigail and I would like to talk about a little bit next. Abigail, what do you think are the broader and larger implications of the two issues that the Third Circuit hit on in Bibbs?

Abigail Pressler:

This case definitely has potential to have broader applications. Even though it's focusing on credit reporting agencies, the same logic is going to apply to data furnishers as well. You've got to look at all of the information and context, you can't just pick and choose little pieces. One of the really exciting things I like about this case is that the court said, "Sure, could it have been clearer? Could they have done a better job if they had said this or that?" The court said, "Maybe, but that doesn't matter. All that matters is that the information that is reported is accurate and clear, as it is. It doesn't matter if you can think of a better way to say it, or argue this way or that way, it doesn't matter. As long as it's clear, on its face, it's good enough."

I think that's going to head off a lot of litigation at the pass or certainly bolster defenses from debt collectors, who are going to struggle with these, because a lot of the FCRA claims that we are seeing against furnishers are challenging language, no matter what you say, and also challenging language that is consistent with Metro 2 guidelines. Now, they're going to be able to say, "Look, this information is what Metro 2 tells me to say. Could it be clearer? Maybe, but that doesn't matter, because it's clear enough for a reasonable reader to understand."

Dan McKenna:

Abigail, I'm going to jump in, if you don't mind. You hit on two thoughts that I think are critically important, and I just want to highlight them. If that's okay? First, you accurately pointed out that this decision is focused on the credit reporting agencies, but it clearly should, and I think has to, apply equally to furnishers. Now I'll note that a similar decision in favor of furnishers is also up on appeal before the Third Circuit, so I suppose it's possible the Third Circuit says there's a different rule, but it

certainly isn't logical or likely. I think that's a great point. Folks defending furnishers and the furnishers out there need to know about this option, need to know that this should be applying to them and they should be arguing it does.

The second point that you made is equally important, and that is, sufficiently clear is enough to avoid misleading. The argument that it could have been better, that someone could have said it a little bit differently, or that it could have been articulated in a way that was more clear, doesn't make it misleading. Sufficiently clear, really is becoming the standard now, by the Third Circuit to avoid a misleading claim. Those are two critical and huge points.

I want to raise another one and get your thoughts on it, Abigail. That is, what's the impact there then on the significant uptick of misleading cases? Here's what I mean by that. FCRA cases are the second most filed lawsuit in the country. We are seeing a significantly larger percentage of those cases being misleading cases, as opposed to inaccurate cases. As you know, the problem with those cases is defining misleading. Now that the court has given us this sufficiently clear guidance, what do you think the impact there is?

Abigail Pressler:

I think this is going to have a huge impact, because the primary reason that misleading claims are trending is that you can make that argument in any situation. You can always suggest a different way of expressing information, but the court, again, is saying that doesn't matter as long as it's sufficiently clear. I think that's going to really help us defend against these vague, misleading, it could have been better type cases. The fact that they made this an objective standard that can be decided as a matter of law is really going to help us take care of these challenges before getting into costly discovery. That takes the threat of fees, cost to defend, motion practice discovery ... If we can resolve this quickly, as TransUnion did, as a matter of law, then that's really going to take the thread of fees down a notch. It's going to take it off the table for these plaintiffs' attorneys.

Dan McKenna:

Abigail, I think that's a really thoughtful point. You brought up an issue that is the biggest issue out there, in my opinion, the objective standard and the sufficiently clear issue articulated by the Third Circuit. I litigate these cases all the time. As you know, a major driver of resolution in these cases is plaintiffs' fees. You regularly see these cases where consumer has suffered no harm, or claims emotional distress and purports to be able to get past summary judgment on emotional distress only. The driver then becomes plaintiff's fees, because no matter how small the award they get in a jury trial, they're going to be awarded their fees. That really shouldn't be the way that these cases are decided. That really shouldn't be how businesses are complying with the Fair Credit Reporting Act. It's not designed to pay plaintiffs' bills or pay, rather, plaintiffs' council's bills. It is designed to protect consumers.

Our clients who are complying with it in the ways that you mention Metro 2, or other ways ... Our clients who are complying with the expectations of the Fair Credit Reporting Act should be able to stand up and defend their practices without fear of this pressure. What I really like about this aspect of the decision is it gives us an early basis to challenge it. You mentioned early on that it's aggressive filing a motion at the pleading stage. I should point out that some of these cases were motions for judgment on the pleadings because the defendants had to include information in their answers, like what their credit report actually showed, to be able to make these challenges. But the fact that it's objective, as you mentioned, and the court is looking at sufficiently clear, as opposed to maybe there's a better way, allows defendants to now nip in the bud the attorney fee issue at an early stage. The beauty of that is you do it enough and we start to right size Fair Credit Reporting Act litigation.

Abigail Pressler:

If I can just add, one of the things that has been very frustrating for furnishers, in particular, is getting challenged for reporting exactly as Metro 2 instructs them to do. Part of that is just an education issue with opposing counsel and consumers. I think TransUnion's attempt to give that extra information, in the report of the results, is definitely helpful, but the Third Circuit's

opinion is helpful as well, because it is validating that the information that Metro 2 suggested be reported in this situation is sufficiently clear. Anyone who's reporting what Metro 2 guidelines say they should, in a particular situation, should be able to make the same argument by pointing to Metro 2 and saying, "This is sufficiently clear."

Dan McKenna:

I agree with you. The hurdle that we run into is the plaintiff's bar points to Metro 2 when you're not complying with it and say, "It's the standard in the industry." When you are complying with it, we'll say, "But it's not the Fair Credit Reporting Act." Where you see that a lot is in how your marking disputes, how you're designating disputes in future reporting, et cetera. That said, you're absolutely right, that we are now able to leverage industry standards, Metro 2 guidance, a whole host of different things to challenge these cases at the pleading stage, particularly in this issue.

I think it's important for us to recap, if that's okay. The Third Circuit has thus ruled that there is a reasonable reader standard and that that reasonable reader standard is objective and not subjective. However, when evaluating that, on an objective standard, you must look at the data as a whole. Abigail hit on the practical application of that and some really interesting points that we want to flesh out for a final time. First, this ruling, though specific on credit reporting agencies, really should also apply to furnishers. Furnishers out there, you've got to be thinking about this. You need to be using this in litigation.

Second, the objective standard of reasonable reader gives opportunity for early challenges as a matter of law. It really takes the threat of fees. The common settlement motivator off the table. Next, the standard should help against a growing volume of misleading cases being filed, because sufficiently clear should be enough to avoid misleading. The argument that it could have been better is moot. Those are really important challenges. I encourage all of you to use all of those weapons in defending your cases, particularly the objective standard and the sufficiently clear issue.

If you have any additional questions or you want to talk about this issue any further, I encourage you to reach out to Abigail Pressler or me, Dan McKenna. Please though, make sure that you visit our website, www.ballardspahr.com, where you can subscribe to the show in Apple Podcasts, Google, Spotify, or your favorite podcast platform. Please don't forget to check out our blog, Consumer Finance Monitor, for daily insights of the financial services industry. If you have any questions or suggestions for the show, please email podcasts@ballardspahr.com. Stay tuned each Thursday for a new episode.

Thank you so much for listening. Thank you, Abigail, for your thoughtful comments.