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Client Alert

September 2017

Eleventh Circuit Holds FCRA Only Requires Agencies to Report "Information That Is Not False"

On August 24, 2017, the Eleventh Circuit refused to hold that a credit reporting agency willfully violated the Fair Credit Reporting Act (FCRA) when it reported technically accurate information.[1] In its opinion in *Pedro v. Equifax, Inc.*, the Eleventh Circuit examined two different interpretations of the FCRA's requirement that credit reporting agencies follow reasonable procedures to assure "maximum possible accuracy" of reported information.[2] While acknowledging that the more stringent requirement constitutes a better reading of the FCRA, the court concluded that compliance under either interpretation could not be found objectively unreasonable.[3] Going forward, the decision provides justification for credit reporting agencies operating under the less-stringent interpretation; it may also permit agencies to rely on similar FCRA interpretations to the extent that they have been adopted by multiple courts and have a foundation in the statutory text.

Case Background

In *Pedro*, plaintiff Kathleen Pedro was listed as an authorized user on her parents' credit card account, which later went into default.[4] As an authorized user, plaintiff "never assumed and had no financial responsibility for any debts on that card."[5] Nevertheless, defendant TransUnion LLC, a consumer reporting agency, listed the account on plaintiff's credit report—with a notation that she was an authorized user of the account. Defendant also included the account when calculating plaintiff's credit score, which in turn lowered plaintiff's credit score. Plaintiff complained about her affected credit, and the credit card issuer removed her from the account; accordingly, defendant added a notation on plaintiff's credit report that the account relationship had been terminated, but defendant did not remove the account from her credit report until the credit card issuer requested removal.[6]

Plaintiff filed a complaint alleging that defendant willfully violated the FCRA's provision requiring a consumer reporting agency to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."[7] She claimed that it was inaccurate to list the credit card on plaintiff's credit report, because it implied that she was liable on the account when she was not.[8] Defendant moved to dismiss, arguing that plaintiff could not establish a willful violation of the FCRA because it followed "an objectively reasonable interpretation" of the FCRA.[9] The lower court granted the motion to dismiss, holding that it was not objectively unreasonable for the consumer reporting agency to read the FCRA to permit reporting of information about accounts on which the consumer is an authorized user. Plaintiff appealed.[10]

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[1] *Pedro v. Equifax, Inc.*, No. 16-13404, 2017 WL 3623926 (11th Cir. Aug. 24, 2017).
[2] *Id.*
[3] *Id.*
[4] *Id.* at *1.
[5] *Id.*
[6] *Id.*
[7] *Pedro*, 2017 WL 3623926, at *1; 15 U.S.C. §§ 1681e(b), 1681n.
[8] *Pedro*, 2017 WL 3623926, at *1.
[9] *Id.* at *2.
[10] *Id.*

Eleventh Circuit Opinion

A credit reporting agency knowingly or recklessly violates the FCRA if it takes an action that "is not only a violation under a reasonable reading of the statutes terms, but shows that the company ran a risk of violating the law substantially greater than the risks associated with a reading that was merely careless."[11] Where a reporting agency adopts a reading of the FCRA that is "not objectively unreasonable based on the text of the Act, judicial precedent, or guidance from the administrative agencies," its action "falls well short of raising the unjustifiably high risk of violating the statute necessary for reckless liability."[12] Based on this, the court noted that if defendant adopted an interpretation of the FCRA that was not objectively unreasonable, it would decline to consider defendant's subjective intent.[13]

Plaintiff alleged that defendant willfully violated Section 1681e(b) of the act, which states that "[w]henever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure *maximum possible accuracy* of the information concerning the individual about whom the report relates."[14] In order to determine whether defendant's interpretation of that section of the FCRA was "objectively unreasonable," the court reviewed other courts' interpretations of the same.

Courts have offered two definitions of the FCRA's "maximum possible accuracy" requirement. Several cases, including actions to which defendant was a party, have ruled that this standard requires only that credit reporting agencies report "technically accurate" information: information that is not false.[15] In contrast, other courts have held that "maximum possible accuracy" requires that credit reporting agencies report information that is both technically accurate and not misleading or incomplete.[16] This interpretation employs a plain reading of the words *maximum*, *possible* and *accuracy* to conclude that in addition to being true, reported information must not be misleading.[17] The court noted that this is the better reading of the FCRA; however, the court acknowledged that it "cannot say that reading the Act to require only technical accuracy was objectively unreasonable."[18]

Despite its assertion that the more stringent interpretation of the FCRA was its preferred interpretation, the court reluctantly noted that the "technically accurate" approach does have "a foundation in the statutory text and a sufficiently convincing justification to have persuaded multiple courts to adopt it."[19] Based on this, the court determined that defendant could have reasonably interpreted the FCRA to require only that it report information that is technically accurate. The court further held that under this approach, defendant complied with the FCRA because when it reported that plaintiff was an authorized user on the account, that information was true.[20] Finally, the court took note of plaintiff's failure to cite any authority that "might have warned TransUnion away from the view it took"—implying that the existence of some authority applying a more stringent interpretation of the FCRA may have rendered defendant's adopted interpretation objectively unreasonable.[21]

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[11] *Id*. at *3 (citing *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69 (2007)).
[12] *Id*.
[13] *Id*.
[14] *Pedro*, 2017 WL 3623926, at *3; *see also* 15 U.S.C. §§ 1681e(b), 1681n (emphasis added).
[15] *Pedro*, 2017 WL 3623926, at *4 (citing *Heupel v. Trans Union LLC*, 193 F.Supp.2d 1234, 1240 (N.D. Ala. 2002); *Grant v. TRW, Inc.*, 789 F.Supp. 690, 692 (D. Md. 1992); *McPhee v. Chilton Corp.*, 468 F.Supp. 494, 497–98 (D. Conn. 1978)).
[16] *Id*. at *3 (citing *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 415 (4th Cir. 2001); *Pinner v. Schmidt*, 805 F.2d 1258, 1261, 1263 (5th Cir. 1986); *Koropoulos v. Credit Bureau, Inc.*, 734 F.2d 37, 40 (D.C. Cir. 1984)).
[17] *Id*. at *4.
[18] *Id*. at *4.
[19] *Id*. at *4 (citing *Safeco*, 551 U.S. at 69-70).
[20] *Id*. at *4.
[21] *See Pedro*, 2017 WL 3623926, at *5.

Implications

The Eleventh Circuit's opinion bolsters credit reporting agencies' reliance on a less stringent interpretation of the FCRA's requirement that they follow reasonable procedures to assure the maximum possible accuracy of reported information.[22] The "technically accurate" interpretation of the statute provides a more concrete sense of boundaries: where information is objectively true, it may be reported. While some jurisdictions may continue to prefer that reported information not be misleading or incomplete—often a more subjective analysis—the *Pedro* opinion demonstrates why it is not objectively unreasonable for any credit reporting agency to adopt a "technically accurate" reading of the FCRA's "maximum possible accuracy" requirement. Finally, the court's determination that a reading of the FCRA was not objectively unreasonable when it was one of multiple competing interpretations of the FCRA's requirements may have implications beyond Section 1681e(b): such an analysis may protect credit reporting agencies' adopted reading of any section of the FCRA. However, agencies should be wary in jurisdictions where courts apply a more stringent interpretation to the FCRA provision at issue; the *Pedro* opinion seems to suggest that such authority may make it objectively unreasonable for agencies to adopt a different reading of the same provision.[23]

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[22] *See also Bailey v. Equifax Info. Servs., LLC*, No. 13-10377, 2013 WL 3305710, at *6 (E.D. Mich. July 1, 2013) (holding that it is not inaccurate to list authorized user information on a credit report).

[23] *See Pedro*, 2017 WL 3623926, at *5.