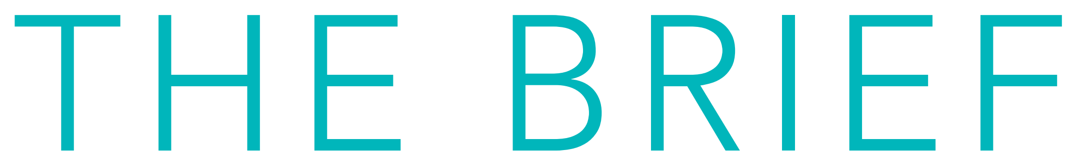

THE BRIEF

FINANCIAL SERVICES LITIGATION QUARTERLY

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FCRA CHANGES ON THE HORIZON? ACCURACY ON LEGAL MATTERS MAY SOON BE REQUIRED

Congress amended the Fair Credit Reporting Act ("FCRA" or "Act") in 1996 to impose accuracy duties on both furnishers of credit data and credit reporting agencies ("CRAs").

The heart of these duties is reflected in three provisions intended to assure the "maximum possible accuracy" of credit data. First, a CRA must ensure the "maximum possible accuracy" of information relating to a consumer by following reasonable procedures.[1] Second, when a consumer disputes the completeness or accuracy of an item of information contained in the consumer's file, a CRA is required to conduct a "reasonable reinvestigation."[2] If the CRA finds the information item to be inaccurate, incomplete or unverifiable, then the CRA must either delete or modify the information as appropriate, and then notify the consumer.[3] Third, when a consumer disputes the completeness or accuracy of information provided by a furnisher to a CRA, the Act requires the furnisher to investigate the disputed information.[4] Consumers have a private right of action to challenge the reasonableness of a CRA's and/or a furnisher's reinvestigation, in addition to the procedures used by a CRA in preparing a consumer report.

Unfortunately, the accuracy of some information, such as the validity of a debt (and, therefore, the accuracy of a trade line), is

[1] 15 U.S.C. § 1681e(b).

[2] *Id.* § 1681i(a)(1)(A).

[3] *Id.* § 1681i(a)(5).

[4] *Id.* § 1681s-2(b).

not always clear cut. Faced with enforcing an accuracy obligation with respect to consumer debts, courts draw a distinction between factual and legal inaccuracies. In most jurisdictions, a consumer suing a CRA or a furnisher for an accuracy violation may recover for a *factual* inaccuracy, but not a legal inaccuracy.

Lately, some courts and the Consumer Financial Protection Bureau ("CFPB") have concluded that the legal-factual distinction is unworkable and not based on the text of the FCRA. In two recent opinions, the Second Circuit departed from the legal-factual distinction in favor of an "objectively and readily verifiable" test.[5] The CFPB, on the other hand, looks ready to propose a rule that would require furnishers and CRAs to investigate both factual and legal disputes.

CREDIT REPORTING AGENCIES UNDER THE FCRA

A consumer suing a CRA must, as a threshold matter, allege an inaccuracy.[6] The inaccuracy requirement has been held repeatedly to mean that a plaintiff must plead a factual inaccuracy rather than a legal inaccuracy.[7] Six circuit courts of appeal have either explicitly or implicitly adopted the legal-factual distinction. And with the exception of the DC District Court, district courts in all other circuits have done the same. Put differently, courts have consistently held that CRAs are not required to resolve legal disputes about the validity of the debts they report.[8]

Courts have justified the legal-factual distinction in a number of ways. The most common theme is that CRAs lack the qualifications necessary to opine on the legitimacy of legally disputed debts.[9] Some courts find it equally problematic that a consumer suing a CRA for inaccurately reporting a debt is collaterally attacking the legal validity of their debt. The creditor, which is in a better position than the CRA to assess the validity of the debt, can be absent from an action against a CRA and, therefore, unable to contest the validity of the debt in the collateral FCRA action.[10] Finally, multiple courts have concluded that, in some cases, the daunting cost of analyzing legal issues outweighs the possible harm the information may cause to consumers.[11]

FURNISHERS UNDER THE FCRA

The legal-factual distinction has been extended by some jurisdictions to include claims against furnishers.[12] Courts in eight judicial circuits have

[5] *See Mader v. Experian Info. Sols.*, Inc., 56 F.4th 264, 269 (2d Cir. 2023); *Sessa v. TransUnion, LLC*, 74 F.4th 38, 42 (2d Cir. 2023).

[6] *See, e.g., Mader*, 56 F.4th at 269 ("Thus, to prevail on a section 1681e claim against a consumer reporting agency, it is necessary for a plaintiff to establish, among other things, that a credit report contains an inaccuracy."); *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 890 (9th Cir. 2010) (same for 15 U.S.C. § 1681i).

[7] *See, e.g., DeAndrade v. TransUnion LLC*, 523 F.3d 61, 68 (1st Cir. 2008); *Leboon v. Equifax Info. Servs., LLC*, No. 18-1978, 2019 WL 3230995, at *5 (E.D. Pa. July 17, 2019); *Fuller v. TransUnion, LLC*, No. 21-cv-03148, 2023 WL 4764594, at *5 (D. Md. July 26, 2023); *Perry v. Toyota Motor Credit Corp.*, No. 1:18-cv-00034, 2019 WL 332813, at *5 (W.D. Va. Jan. 25, 2019); *Estrada v. Experian Info. Sols., Inc.*, No. 21-CV-00114, 2023 WL 3102575, at *7–8 (W.D. Tex. Apr. 26, 2023); *Parish v. Equifax Info. Servs., LLC*, No. 4:20-CV-259, 2021 WL 4137520, at *2 (S.D. Tex. Mar. 22, 2021); *Hyde v. TransUnion, LLC*, No. 2:21-cv-230, 2023 WL 2816029, at *4 (W.D. Mich. Feb. 3, 2023); *Denan v. TransUnion LLC*, 959 F.3d 290, 295–96 (7th Cir. 2020); *Rydholm v. Equifax Info. Servs. LLC*, 44 F.4th 1105, 1109 (8th Cir. 2022); *Carvalho*, 629 F.3d at 892; *Crews v. Experian Info. Sols., Inc.*, No. 21-02103, 2022 WL 2177674, at *1 (C.D. Cal. May 31, 2022); *Wright v. Experian Info. Sols., Inc.*, 805 F.3d 1232, 1241–42 (10th Cir. 2015); *Sherfield v. TransUnion, LLC*, No. CIV-19-001, 2019 WL 3241176, at *2 (W.D. Ok. July 18, 2019); *Losch v. Nationstar Mortgage LLC*, 995 F.3d 937, 944 (11th Cir. 2021); *Solus v. Regions Bank*, No. 1:19-CV-2650, 2020 WL 4048062, at *4 (N.D. Ga. July 17, 2020)

[8] *See, e.g., Wright*, 805 F.3d at 1242; *Solus*, 2020 WL 4048062, at *4.

[9] *See, e.g., Wechsler v. TransUnion, LLC*, No. 21-3085, 2022 WL 1173008, at *4 (E.D. Pa. Apr. 20, 2022); *Jones v. City Plaza, LLC*, No. 1:19-CV-924, 2020 WL 2062325, at *4 (M.D.N.C. Apr. 29, 2020); *Rydholm*, 44 F.4th at 1109; *Schuh v. Am. Express Bank, FSB*, No. 17-24345-Civ, 2018 WL 3751467, at *4 (S.D. Fla. May 3, 2018).

[10] *See, e.g., Carvalho*, 629 F.3d at 891–92; Jones, 2020 WL 2062325, at *4; Denan, 959 F.3d at 295 ("[F]urnishers shoulder this burden [of accurately reporting liability]: they assumed the risk and bear the loss of unpaid debt, so they are in a better position to determine the legal validity of a debt.").

[11] *See, e.g., Rydholm*, 44 F.4th at 1109 (rejecting an attempt to require CRAs to "wade into individual bankruptcy dockets to discern whether a debt survived discharge" because cost would outweigh potential harm); *Wright*, 805 F.3d at 1241 (finding that "the costs to the CRAs of employing individuals trained in American tax law to examine every [notice of federal tax lien] outweighs the potential harm to consumers like Mr. Wright.").

[12] *See, e.g., Chiang v. Verizon New England Inc.*, 595 F.3d 26, 38 (1st Cir. 2010); *Van Veen v. Equifax Info.*, 844 F. Supp. 2d 599, 605 (E.D. Pa. 2012); *Shulman v. Lendmark Fin.*, C/A No. 3:21-1887, 2022 WL 16700301, at *5 (D.S.C. Sept. 6, 2022); *Roberts v. Carter-Young, Inc.*, No. 1:22-cv-1114, 2023 WL 4366059, at *4–5 (M.D.N.C. July 6, 2023); *Ostiguy v. Equifax Info. Servs., LLC*, No. 5:16-CV-790, 2017 WL 1842947, at *5 (W.D. Tex. May 4, 2017); *Spencer v. Specialized Loan Servicing, LLC*, No. 3:19-cv-1536, 2021 WL 4552548, at *7 (N.D. Tex. Sept. 1, 2021); *Zahran v. Bank of Am.*, No. 15 C 1968, 2016 WL 826402, at *4 (N.D. Ill. Mar. 3, 2016); *Johnson v. Sheffield Fin.*, No. 4:19-cv-616, 2020 WL 3546900, at *4 (E.D. Ark. June 30, 2020); *Erenthal v. Experian Info. Sols., Inc.*, No. CV-20-2785, 2021 WL 941404, at *2 (C.D. Cal. Feb. 26, 2021); *Hunt v. JPMorgan Chase Bank, Nat'l Ass'n*, 770 F. App'x 452, 458 (11th Cir. 2019) (per curiam).

extended the legal-factual distinction to claims against furnishers. The "collateral attack" rationale that certain courts have found persuasive in the CRA context of course does not apply when the furnisher is a party to the FCRA claim.[13] But a considerable number of courts have held that furnishers are, like CRAs, not qualified to resolve "matters that turn on questions that can only be resolved by a court of law."[14]

FINDING THE LINE BETWEEN LEGAL AND FACTUAL

The prototypical example of a legal dispute falling outside the scope of FCRA is a contest over the legal validity of a debt.[15] Such disputes can take a variety of forms, including claims that a debt is time-barred,[16] that a mortgage underlying a negative credit item had been fraudulently obtained,[17] that a debt has been assigned,[18] or that collection of a debt has been suspended.[19]

Factual inaccuracies that typically survive motions to dismiss or for summary judgment include the amount a consumer owes, what day a consumer opened an account and what day a consumer incurred a payment.[20] Other factual inaccuracies have included whether a creditor had the wrong debtor,[21] whether a debt instrument had been terminated,[22] whether a debt had been discharged by a bankruptcy court[23] and whether a debt settlement agreement existed.[24]

The uncertainties of applying the legal-factual distinction arise on the margins. *Cornock v. TransUnion, LLC*[25] offers a helpful illustration. In *Cornock*, the court observed that "Cornock's challenge to the debt to MBNA could be called 'factual' in the sense that, as he suggests, he did not sign the credit card application as a matter of fact."[26] The court continued, however, that Cornock's challenge to the debt "could also be called 'legal' in the sense that, as Trans Union suggests, he claimed that he therefore had no liability as a matter of law while MBNA claimed otherwise based on alleged payments to it out of an account he jointly held."[27]

The lower court opinions in *Chuluunbat v. Experian Information Solutions, Inc.*[28] also demonstrate the difficulties in applying the legal-factual standard. *Chuluunbat* involved seven consolidated FCRA cases, each involving a plaintiff with a credit card debt that had been purportedly sold and assigned to another company.[29] For two of the cases, the district court "determined that whether the creditors owned the debts was a question of law."[30] For one of the cases, "the court instead decided that ownership of a debt was a mixed question of law and fact."[31] And for the four others, "the court eschewed a rigid distinction between law and fact."[32] Cases like *Cornock* and *Chuluunbat* have led courts and regulators to call into question the soundness of the distinction.

[13] *See, e.g., Saunders v. Branch Banking & Trust Co. of VA*, 526 F.3d 142, 150 (4th Cir. 2008) ("[C]laims against furnishers such as BB&T do not raise [concerns about collateral attacks] because the furnisher is the creditor on the underlying debt."); *Hrebal v. Seterus, Inc.*, 598 B.R. 252, 269–70 (D. Minn. Jan. 25, 2019) (denying in part summary judgment and questioning whether the 1st Circuit's decision to extend the legal-factual distinction to the furnisher context was correct); *Gross v. CitiMortgage, Inc.*, 33 F.4th 1246, 1253 (9th Cir. 2022); *Denan*, 959 F.3d at 295.

[14] *Van Veen*, 844 F. Supp. 2d at 605; see also *Chiang*, 595 F.3d at 38; *Ritz v. Nissan-Infiniti LT*, No. 20-13509, 2023 WL 3727892, at *6 (D.N.J. May 30, 2023), *appeal docketed sub nom. Ritz v. Equifax Info. Servs. LLC*, No. 23-2181 (3d Cir. July 6, 2023).

[15] *See, e.g., Denan*, 959 F.3d 290.

[16] *See, e.g., Barsky v. Experian Info. Sols., Inc.*, No. 4:15-CV-1017, 2016 WL 4538526 (E.D. Mo. Aug. 30, 2016).

[17] *See, e.g., DeAndrade*, 523 F.3d 61.

[18] *See, e.g., Chuluunbat v. Experian Info. Sols.*, Inc., 4 F.4th 562 (7th Cir. 2021).

[19] *See, e.g., Humphrey v. TransUnion LLC*, 759 F. App'x 484 (7th Cir. 2019).

[20] *See Chuluunbat*, 4 F.4th at 568.

[21] *See, e.g., Crews*, 2022 WL 2177674.

[22] *See, e.g., Hurst v. Equifax Info. Servs., LLC*, No. 20-CV-1366, 2021 WL 5926125 (W.D. Tex. Dec. 15, 2021). *But see Estrada*, 2023 WL 3102575, at *7–8 (finding that plaintiff failed to show a factual inaccuracy where defendant received statements from all parties, unlike in *Hurst*, meaning that defendant "would have needed to adjudicate between Plaintiff and Conn's by gathering evidence and determining evidentiary credibility.").

[23] *See, e.g., Losch*, 995 F.3d 937; *Campbell v. Equifax Info. Servs., LLC*, No. 4:18-cv-53, 2019 WL 1332375 (S.D. Ga. Mar. 25, 2019).

[24] *See, e.g., Hopkins v. I.C. Sys., Inc.*, No. 18-2063, 2020 WL 2557134 (E.D. Pa. May 20, 2020).

[25] 638 F. Supp. 2d 158 (D.N.H. 2009).

[26] *Id.* at 163.

[27] *Id.*

[28] 4 F.4th 562 (7th Cir. 2021).

[29] *Id.* at 565.

[30] *Id.* at 566.

[31] *Id.*

[32] *Id.*

RECENT DEVELOPMENTS

Courts skeptical of the legal-factual distinction have advanced three criticisms. First, courts have noted that the distinction is found nowhere in the text of the FCRA—Congress did not explicitly exempt legal inaccuracies from the duties imposed on CRAs and furnishers.[33] Second, courts have observed that the legal-factual distinction is unworkable in practice because there is sometimes no clear line between a factual issue and a legal issue in the context of consumer debt.[34] Third, because nearly all disputes about the validity of debts can be characterized in some way as legal in nature, a broad application of the factual-legal distinction could foreclose claims that Congress seems to have wanted consumers to be able to pursue.[35] Just because there are legal documents involved, or the dispute centers around a legal proceeding, does not make an issue purely legal.[36]

In 2023, the Second Circuit began retreating from the legal-factual distinction, in *Mader v. Experian Information Solutions, Inc.*[37] There, in defining when information is subject to claims of inaccuracy, the Court focused on whether the information is "objectively and readily verifiable."[38] *Mader* did not abandon the legal-factual distinction entirely, but instead held that the "bespoke attention and legal reasoning required to determine the post-bankruptcy validity of Mader's debt means that its status is not sufficiently objectively verifiable to render Mader's credit report 'inaccurate' under the FCRA."[39] The Court observed though that its holding "does not mean that credit reporting agencies are never required by the FCRA to accurately report information derived from readily verifiable and straightforward application of law to facts."[40]

The Second Circuit soon after clarified in *Sessa v. TransUnion, LLC*[41] that "there is no threshold inquiry under the FCRA as to whether any purportedly inaccurate information is legal or factual in nature."[42] Rather, the Court reiterated the holding in *Mader* that whether something is "inaccurate" for FCRA purposes turns on whether it is "objectively and readily verifiable."[43]

The *Mader/Sessa* formulation has not been followed by any court outside of the Second Circuit. Only one court has been asked to adopt the Second Circuit's rule in *Sessa*, and that court declined to do so.[44] However, the Second Circuit's conclusion that there is no threshold legal-factual distinction was likely welcome news to the CFPB. The CFPB filed an amicus brief in *Sessa*, arguing that CRAs should have the same obligations for legal inaccuracies that they do for factual inaccuracies. The CFPB's support for this position mirrors the concerns about the legal-factual distinction referenced above. In two subsequent amicus briefs, *Milgram v. Chase Bank USA, N.A.*[45] and *Gross v. CitiMortgage, Inc.*,[46] the CFPB extended its argument to claims against furnishers. In these briefs, the Bureau noted that there is no basis for the distinction in the text of the FCRA and no evidence that Congress intended to limit

[33] *See, e.g., Wechsler*, 2022 WL 1173008, at *4; *Gross*, 33 F.4th at 1253; *Amorah v. Equifax Info. Servs., LLC*, No. 19-CV-7534, 2020 WL 6565220, at *2 (N.D. Ill. Nov. 9, 2020).

[34] *See, e.g., Gross*, 33 F.4th at 1253; *Chuluunbat*, 4 F.4th at 567; *Cornock*, 638 F. Supp. 2d at 163.

[35] *See, e.g., Losch*, 995 F.3d at 946–47; *Hurst*, 2021 WL 5926125, at *7–8 ("[T]here should be some hesitancy in over-applying the dichotomy between legal and factual inaccuracies in the context of a motion for judgment on the pleadings."); *Cornock*, 638 F. Supp. 2d at 163–64 ("Each of these disputes had both a factual component…and a legal component…").

[36] *See, e.g., Hurst*, 2021 WL 5926125, at *7 ("The mere fact that her dispute involves a contract in some respect does not make all disputes legal in nature as argued by the CRA Defendants.").

[37] 56 F.4th 264 (2d Cir. 2023).

[38] *Id.* at 269.

[39] *Id.* at 270.

[40] *Id.*

[41] 74 F.4th 38 (2d Cir. 2023) (per curiam).

[42] *Id.* at 43.

[43] *Id.* at 43–44.

[44] *Cunningham v. TransUnion, LLC*, No. 2:22-cv-3331, 2023 WL 6823182, at *3 (S.D. Ohio Oct. 11, 2023).

[45] 72 F.4th 1212 (11th Cir. 2023) (per curiam).

[46] 33 F.4th 1246 (9th Cir. 2022).

the duties of CRAs to solely factual inaccuracies.[47] In fact, the CFPB asserted that the use of the phrase "maximum possible accuracy" in 15 U.S.C. § 1681e(b) evidences an intent by Congress to hold CRAs "to a higher standard than mere technical accuracy."[48] Further, according to the CFPB, determining whether an issue is factual or legal in nature is often a difficult exercise.[49] The CFPB also argued that the factual-legal distinction creates opportunities for CRAs and furnishers to skirt their obligations under the FCRA by simply classifying every dispute as legal in nature.[50] As for furnishers specifically, the CFPB argued in *Gross* and *Milgram* that even if a legal-factual distinction should exist in the CRA context, furnishers are in a categorically better position to determine the validity of a debt than CRAs, and so the distinction should not be extended to claims against furnishers.

Consistent with its stances in *Sessa*, *Milgram*, and *Gross*, the CFPB last fall took the first steps in propounding a potential new rule by submitting proposals to the Small Business Advisory Review Panel for Consumer Reporting Rulemaking. One proposal would eliminate the legal-factual distinction and require CRAs and furnishers to investigate both legal and factual disputes.[51]

Unsurprisingly, the CFPB's proposal received considerable pushback from small businesses. Many expressed concerns in the Review Panel's final report regarding the additional costs they would incur.[52] These costs could include hiring outside counsel, hiring additional in-house legal staff or a potential increase in the number of FCRA claims brought by consumers.[53] Other commenters noted that their staffs do not possess the necessary training or educational background to handle legal disputes and voiced fears that eliminating the legal-factual distinction would result in employees engaging in the unauthorized practice of law. Others opined that smaller businesses with financial constraints or fewer in-house lawyers might be disproportionately harmed.[54] Others still suggested that eliminating the legal factual distinction would result in furnishers and CRAs aggressively deleting tradelines, causing downstream effects in consumer credit markets.[55]

In its recommendation, the Panel recommended that the CFPB clarify that it "is not proposing to require [CRAs] or furnishers to distinguish between disputes involving legal matters and other disputes for purposes of the FCRA's dispute obligations" and is instead proposing that all disputes be reasonably investigated pursuant to the

[47] *See* Br. of Amici CFPB et al. in Supp. of Plaintiff-Appellant at 14, *Sessa*, 74 F.4th 38 (No. 22-87) [hereinafter Brief for the CFPB, *Sessa*]; Br. of Amicus Curiae CFPB in Supp. of. Plaintiff-Appellant at 17, *Milgram*, 72 F.4th 1212 (No. 22-10250) [hereinafter Brief for the CFPB, *Milgram*]; Br. of Amicus Curiae CFPB in Supp. of Plaintiff-Appellant at 10, *Gross*, 33 F.4th 1246 (No. 20-17160) [hereinafter Brief for the CFPB, *Gross*].

[48] Brief for the CFPB, *Sessa*, at 14.

[49] *Id.* at 15–20 ("[T]he district court's reliance on a distinction between factual and legal inaccuracy…will prove unworkable in practice and undermine the purpose of the statutory regime."); Brief for the CFPB, *Milgram*, at 22–24 ("The same dispute could be characterized as either factual or legal or both."); Brief for the CFPB, *Gross*, at 17–19 ("As a result of the difficulty in cleanly distinguishing legal and factual issues, even in the context of CRA reinvestigations, judges have sometimes rejected a formal legal/factual distinction.").

[50] *See* Brief for the CFPB, *Sessa*, at 19.

[51] CFPB, Small Business Advisory Review Panel for Consumer Reporting Rulemaking: Outline of Proposals and Alternatives Under Consideration 15 (Sept. 15, 2023), https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-rule-sbrefa_outline-of-proposals.pdf.

[52] Final Report of the Small Business Review Panel on the CFPB's Proposals and Alternatives Under Consideration for the Consumer Reporting Rulemaking 31 (Dec. 15, 2023), https://files.consumerfinance.gov/f/documents/cfpb_sbrefa-final-report_consumer-reporting-rulemaking_2024-01.pdf.

[53] *Id.* at 31–32.

[54] *Id.* at 32.

[55] *Id.*

FCRA's requirements regardless of their characterization.[56]

WHAT THE FUTURE MAY HOLD

A rule eliminating the legal-factual distinction could have significant consequences for borrowers and lenders alike. Such a rule would likely increase the number of cases brought by consumers against furnishers and CRAs under the FCRA. Plaintiffs would be able to proceed by alleging almost any inaccuracy, not just those that are *factual* in nature, and potentially including those requiring technical legal determinations.

Absent a distinction between legal and factual inaccuracy, run of the mill collection suits could increase the stakes for creditors. A collection suit could result in a domino effect, whereby a consumer that prevails against a losing creditor then sues the creditor under FCRA, using the ruling in the collection case as evidence of the furnisher's unreasonable investigation or that the disputed debt was unverifiable, incorrect or incomplete. On the back foot in a subsequent action under the FCRA, the furnisher would be exposed to potential liability for attorneys' fees, costs and/or punitive damages, all remedies that are available under the FCRA but which are not typically available in a typical collections case.

Furnishers and CRAs could respond to the increased exposure by not furnishing or reporting contested debts. In effect, out of caution, some (perhaps many) valid debts could go unreported, which could lead to less informed and unwittingly riskier credit decisions. That would of course lead to pricing changes in the consumer credit markets.

Depending on the form of any proposed rule, and depending on the size and nature of their businesses, furnishers and CRAs could be forced to implement significant changes to their business models and operating procedures. Even if the CFPB does not move forward with proposing a new rule, furnishers and CRAs should monitor whether other jurisdictions are persuaded to adopt the Second Circuit's more consumer-friendly "objectively and readily verifiable" information test.

[56] *Id.* at 49.

NOTEWORTHY

ELEVENTH CIRCUIT AGREES THAT ACTUAL DAMAGES ARE NOT REQUIRED TO RECOVER FCRA STATUTORY DAMAGES FOR WILLFUL MISCONDUCT

Based on a "willful" violation of the Fair Credit Reporting Act ("FCRA"), consumers can recover, among other damages, either (1) actual damages or (2) statutory damages of no less than $100 and not more than $1000. Some district courts have found that FCRA plaintiffs must have suffered actual damages (i.e., some proven injury or loss) in order to recover under the statutory damages option. However, several federal circuit courts have held that the FCRA's statutory damages option does not require a showing of "actual damages." Agreeing with these other circuits, the Eleventh Circuit is the most recent to weigh in on this question in *Santos v. Healthcare Revenue Recovery Grp., LLC*, 90 F.4th 1144 (11th Cir. 2024).

In *Santos*, two consumers brought a putative class action against defendants, which included Experian Information Solutions. The plaintiffs alleged that Experian willfully violated the FCRA when it sent out incorrect credit reports for more than 2.1 million consumers. The reports were incorrect due to a misadjusted technical setting that caused all consumer reports at issue to display inaccurate "dates of status" or "payment level dates." Plaintiffs sought statutory damages under FCRA section 1681n(a)(1)(A) and argued that they were not required to prove any actual damages to avail themselves of this recovery option. Experian, however, contended that statutory damages in fact requires some proven injury or loss. Specifically, Experian argued on summary judgment that plaintiffs must prove they were denied credit and incurred actual damages as the result of Experian's alleged conduct. Relying on an Eleventh Circuit case from 1991, *Cahlin v. General Motors Acceptance Corporation*, the district court agreed with Experian, but denied summary judgment based on evidence that plaintiffs suffered actual damages.

When the plaintiffs sought to certify a class, Experian again advanced its actual-damages argument, this time contending that it showed that class issues did not predominate, as required to certify a class under Federal Rule of Civil Procedure 23(b)(3). Experian argued putative class members would be forced to prove individually that they were actually damaged by Experian's willful FCRA violation, meaning that individual proof of damages would predominate over the common class questions. The district court agreed with Experian, explaining it would have to engage in an individual and highly factual determination on a person-by-person basis, thus precluding class certification. On appeal, the Eleventh Circuit disagreed.

The Eleventh Circuit performed a statutory construction analysis of section 1681n(a)(1)(A). It reasoned that the option to recover statutory damages did not require any proven injury or loss. Unlike the option to recover actual damages, which has a "causal element that link's…damages…'sustained…*as a result*'" of the consumer reporting agency's willful conduct, recovering the statutory range of damages lacks such a causal-element requirement. Additionally, Congress specifically included "or" between the first and second damages recovery options, signaling that the FCRA provides two distinct recovery alternatives. Further, in comparing section 1681n(a)(1)(A) with the FCRA as a whole, the FCRA has a separate cause of action for negligent violations, but the negligent-violation provision lacks the statutory-damages option in 1681n(a)(1)(A). The Eleventh Circuit found this difference buttressed the point that the FCRA "allows for statutory damages without proof of actual damages where the consumer reporting agency commits more serious [i.e., willful] violations." The title of the second option, "Minimum Civil Liability for Willful Noncompliance," also suggested that it was created to impose minimum liability even if a consumer failed to meet the requirements for actual damages under the first option. Finally, this interpretation was consistent with the court's interpretation of similar language in other federal statutes, such as the Truth in Lending Act. The Eleventh Circuit also found it was not bound by its 1991 decision of *Cahlin v. General Motors Acceptance Corporation*, which held that section 1681n(a)(1)(A) required proof of actual damages, because Cahlin was decided before the FCRA's 1996 revisions that added the statutory damages option.

The Eleventh Circuit now joins the Seventh, Eighth, Ninth and Tenth Circuits in holding that plaintiffs are not required to prove actual damages in order to pursue statutory damages under the FCRA.

ELEVENTH CIRCUIT ESTABLISHES NEW STANDARDS FOR OBJECTIONS TO CLASS ACTION SETTLEMENT AGREEMENTS

In *Ponzio v. Pinon*, 87 F.4th 487 (11th Cir. 2023), the Eleventh Circuit for the first time established procedural guidelines for courts entertaining objections to proposed class action settlement agreements. Plaintiff Pinon was among several named plaintiffs who sued Mercedes-Benz USA and Daimler in the United States District Court for the Northern District of Georgia, alleging the defendants

sold vehicles with defective "590 Mars Red" paint that blistered and peeled. The plaintiffs reached a nationwide settlement with defendants and sought to certify a settlement class and obtain preliminary approval of the proposed class settlement.

However, a different group of named plaintiffs had sued the defendants for the same paint defects in another class action filed in the United States District Court for the District of New Jersey. The two plaintiff groups disagreed about the fairness of the proposed settlement in the Georgia case.

The New Jersey case plaintiffs therefore sought leave to intervene in the Georgia case and continue the hearing for preliminary approval, contending that the settlement left 80 percent of the putative class members without any benefits. The judge in the Georgia case rejected the intervention request and preliminarily approved the class settlement. The district court ultimately held a fairness hearing in which the New Jersey case plaintiffs appeared as objectors. In approving the settlement, which included a $4.8 million award to class counsel, the district court disagreed with the New Jersey case plaintiffs' position that the settlement failed to benefit most class members.

The New Jersey case plaintiffs appealed the class settlement approval to the Eleventh Circuit. Noting that it had "never

provided a detailed explanation of what burden…is borne by" class settlement objectors, the Eleventh Circuit took the opportunity to provide certain parameters. Under Fed. R. Civ. P. 23(e)(5)(A), the court ruled that objectors must state their objection grounds with specificity by providing "sufficient specifics to enable the parties to respond to them and the court to evaluate them." It also explained that factual objections "must not be conclusory." Additionally, once proper objections are lodged, the settlement's proponents then have the burden to show that the objections "do not affect the settlement's fairness, reasonableness, or adequacy."

The Eleventh Circuit then rejected the New Jersey case plaintiffs' objections and affirmed the district court's settlement approval. First, the court disagreed that 80 percent of the class was categorically ineligible for settlement benefits because the objectors' calculation: (a) did not account for class members who had not experienced (and would not experience) vehicle paint defects; (b) failed to recognize that some class members would choose not to file a claim or would fail to meet the settlement recovery requirements; (c) ignored the settlement benefit for class members with older or higher-mileage vehicles; and (d) included wide mathematical fluctuations that were not grounded in the evidence.

Second, the Eleventh Circuit was unpersuaded that the district court had "ignored a number of red flags and committed a series of legal errors." For example, the district court's 58-page order and the transcript of the fairness hearing belied the claim of a "summary adjudication." Further, the district court did not abuse its discretion in weighing the competing settlement valuation evidence submitted from the settlement proponents and objectors, which included supplemental evidentiary and briefing submissions. Nor did the district court ignore certain fairness factors, such as the likelihood of success at trial, when the New Jersey case plaintiffs had a significant number of claims dismissed early in the litigation.

Third, the court discounted arguments that class counsel was inadequate because they were derivative of the already-rejected contention that most of the class would obtain no relief. Fourth, the record supported that the settlement was not a disfavored "coupon" settlement because it involved direct cash payments to class members. The court also disagreed with arguments that the settlement was secured via collusion given that it was negotiated at an arms-length formal negotiation with a neutral mediator who submitted a declaration about the mediation process.

SIXTH CIRCUIT ENFORCES "RIGOROUS ANALYSIS" REQUIREMENT FOR CERTIFICATION OF RULE 23(C)(4) ISSUES CLASSES

The Sixth Circuit warns at the outset of its decision in *Weidman v. Ford Motor Co.*, 86 F.4th 723 (6th Cir. 2023), that class actions are a "significant departure" from "our constitutional tradition of individual litigation." To curb possible abuses of that device, it explained, courts must subject a motion for class certification to "rigorous analysis," and plaintiffs must offer "[s]ignificant" evidentiary proof that the requirements of numerosity, commonality, typicality and adequacy are satisfied. *Id.* at 726. The Court then proceeded to demonstrate how demanding those requirements are, holding that the district court had not applied the rigorous analysis required, vacating the certification of Rule 23(c)(4) classes, and remanding the case "for more searching consideration." *Id.*

In *Weidman*, the district court certified statewide classes to address three issues concerning an alleged brake defect in pickup trucks purchased from 2013 to 2018: (1) whether the brakes were defective, (2) whether the defendant knew of the defect before the accident and (3) whether knowledge of the defect would be material information for a buyer. After the defendant's motion for reconsideration was denied, it was granted leave for interlocutory review of the certification decision under Rule 23(f). *Id.* at 726–27.

On appeal, the Sixth Circuit found that the district court's analysis was faulty because it did not make clear that any of the three certified issues could be answered "in one stroke," as required for commonality. *Id.* at 727 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). The Circuit Court first found that commonality for those issues could be established only if the *same* defect affected all those model years from 2013 to 2018. The defendant provided evidence that it had made "key changes" to the brake design in 2016, and argued that those changes would have addressed the alleged defect. If that was true, only some of the trucks would have the defective brakes, and so there would be no commonality for the three issues.

In granting certification, the district court did not find that plaintiff established that all the trucks would have the same defect, but merely found that a reasonable jury could find that that was true. *Id.* at 729. The Circuit Court held that was not sufficient, and that Rule 23 meant the district court "must evaluate whether each of the four Rule 23(a) factors is *actually* satisfied, not merely that the factors are properly *alleged*." *Id.* (emphasis added). In criticizing the district court's failure to analyze the effect of the defendant's evidence on Rule 23's requirements, the Court stated that the district court's failure to consider whether that evidence *actually* defeated commonality before certifying the classes was an abuse of discretion. *Id.* at 728–29.

The Sixth Circuit's insistence in *Weidman* that a class-action plaintiff not just allege, but actually establish that the requirements of Rule 23 are satisfied follows the trend in federal courts, dating back at least to *Wal-Mart*, of rigorously policing class actions. In part, those efforts have been motivated by the practical fact that class actions may put undue pressure on defendants to settle. *E.g., In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (referring to settlements "induced by a small probability of an immense judgment in a class action 'blackmail settlements'"). The Sixth Circuit's concerns about how class actions deviate from "our constitutional tradition of individual litigation" offers a different rationale for strictly applying Rule 23's requirements before certifying a class.

SECOND CIRCUIT CLARIFIES SCOPE OF CAFA'S "SECURITY-RELATED" EXCEPTION

The Class Action Fairness Act ("CAFA") provides a form of federal diversity jurisdiction f or class actions that involve 100 or more class members, an aggregate amount in controversy greater than $5,000,000 and "minimal diversity," i.e., where at least one plaintiff and one defendant are citizens of different states. CAFA contains several exceptions to its general rule, one of which is for "security-related" class actions, i.e., ones that solely involve claims "that relate[] to rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security…" 28 U.S.C. § 1332(d)(9). In *Krasner v. Cedar Realty Tr., Inc.*, 86 F.4th 522 (2d Cir. 2023), the Second Circuit determined that the exception applied to claims that "necessarily depend on" proving breaches of duties created by a security.

Krasner arose out of the merger of the issuer of a security (Cedar) with another defendant (Wheeler) that was alleged to have deprived plaintiff Krasner and other stockholders of rights under a contract between Cedar and its stockholders ("Articles Supplementary"). Krasner alleged that by agreeing to the merger, Cedar, its CEO and its Board of Directors breached the Articles Supplementary and their fiduciary duties to the stockholders. He further alleged that by acquiring Cedar, Wheeler tortiously interfered with the stockholders' contractual rights and aided and abetted the Board's breach of its fiduciary duties. Krasner filed a class action in New York state court and the defendants removed. The district court granted Krasner's subsequent motion to remand, holding that CAFA's numerosity requirement had not been met, and also suggested that the claims "appear[ed] to fall within" CAFA's exception. *Id.* at 525. Defendants then appealed.

The Second Circuit concluded that there was no federal jurisdiction because the case "solely involves…a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security." *Id.* Because the claims against Cedar clearly related to securities, the Court's analysis focused on whether the tortious interference and aiding and abetting claims against Wheeler "related to" securities as well. To determine that, the Court first noted that CAFA's various exceptions "generally promote the adjudication of state-specific issues in state courts." *Id.* at 529–30. The Court then concluded plaintiff's claims against Wheeler "relate[] to" state-law fiduciary duties and contract obligations "created by" the plaintiff's securities, since those claims required proof of breach of the Articles Supplementary and proof of a breach of fiduciary duty "grounded in [plaintiff's] securities." *Id.* at 530.

In so holding, the Court rejected the defendants' argument that the claims against Wheeler could not be "related to" the securities at issue because he was not a party to those securities or the Articles Supplementary. It noted that the statutory text did not require the defendants to be parties to the relevant securities, but rather focused on "the source of the right that the plaintiff's claim seeks to enforce." *Id.* at 531 (quoting *Greenwich Fin. Servs. Distressed Mortg. Fund 3 LLC v. Countrywide Fin. Corp.*, 603 F.3d 23, 29 (2d Cir. 2010)). The Court also rejected the defendants' argument that Krasner's claims against Wheeler arose out of state common law, not the securities, holding that it is sufficient that a relationship between Krasner and Cedar created by the securities "gave rise to" the claims against Wheeler. *Id.*

As the Second Circuit noted, courts "must beware adopting a reading of the covered securities exception that risks sweeping in 'any and all claims that relate to any security.'" *Id.* at 530. However, by adopting an interpretation of "relates to" that extends CAFA's security-related exception to claims against parties that have no direct connection to the securities involved, the Court may have come close to crossing that line. While the Court itself clearly regarded its reading of "relates to" as sufficiently limited so as to ensure that it "is neither so broad as to negate CAFA's purpose nor so narrow as to atextually read the phrase out of the statute," *id.* at 531, the true test will be the extent to which resourceful plaintiffs will be able to use that interpretation to avoid litigating their class claims in federal court.

NINTH CIRCUIT HOLDS FCC DECLARATORY RULING BARS TCPA LIABILITY FOR UNSOLICITED "ONLINE FAXES"

The Hobbs Act, 28 U.S.C.A. § 2342, gives Courts of Appeal exclusive jurisdiction to "enjoin, set aside, suspend (in whole or in part), or to determine the validity of" final orders issued by, among other bodies, the Federal Communications Commission ("FCC"). The Hobbs Act has long been used to prevent federal district courts from offering their own interpretations of provisions of the Telephone Consumer Protection Act ("TCPA") that have been the subject of FCC final orders. For instance, until vacated by the DC Circuit in *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018), the FCC's interpretation

of "automatic telephone dialing system" in the TCPA foreclosed any district court from offering its own interpretation of that term. In *True Health Chiropractic, Inc. v. McKesson Corp.*, No. 22-15710, 2023 WL 7015279 (9th Cir. 2023), the Ninth Circuit held that the Hobbs Act binds district courts with respect to the type of fax systems that are subject to the TCPA's restrictions on unsolicited faxes.

The case arose from a district court decision decertifying a TCPA class of individuals who received unsolicited faxes. The district court held that it was bound under the Hobbs Act by *In the Matter of Amerifactors Fin. Grp., LLC*, 34 F.C.C. Rcd. 11950 (2019), a declaratory ruling in which the FCC stated that an "online fax service" is one that receives faxes "sent as email over the Internet." An online fax service is thus not a "telephone facsimile machine," which the TCPA defines as "equipment which has the capacity…to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper." As a result, the TCPA's prohibition on unsolicited faxes sent to "telephone facsimile machines" does not apply to those sent through an online fax service. *Id.* at 11950–51. The plaintiff had no viable methodology for distinguishing between class members who received unsolicited faxes through a telephone facsimile machine, rather than an online fax service, and so the class could not be certified.

On appeal, the Ninth Circuit agreed that under the Hobbs Act the district court was bound by *Amerifactors*. 2023 WL 7015279, at *2. The Court rejected the plaintiffs' arguments that *Amerifactors* did not qualify for deference under the Hobbs Act. It first held that that ruling was an "order" from the FCC because the body that issued it—the FCC's Consumer and Governmental Affairs Bureau—had been delegated the authority to issue declaratory rulings in "matters pertaining to consumers and governmental affairs." 47 C.F.R. § 0.141. Further, the Court held that that order was "final" because it "fix[ed] some legal relationship as a consummation of the administrative process." 2023 WL 7015279, at *2 (quoting *US W. Commc'ns Inc. v. Hamilton*, 224 F.3d 1049, 1054 (9th Cir. 2000)). Finally, the Court also held that *Amerifactors* applied retroactively to the faxes at issue (which had been received in 2009 and 2010). *Id.* (citing *Reyes v. Garland*, 11 F.4th 985, 991 (9th Cir. 2021)).

True Health Chiropractic's treatment of the Hobbs Act is significant, given that *Chevron* deference is under consideration by the Supreme Court. If *Chevron* is rolled back or significantly constrained, the Hobbs Act's legislative deference may be the natural fallback position for parties litigating against the backdrop of federal regulations. However, it is likely too early to know exactly how courts will receive arguments that rely on

the Hobbs Act. For instance, just a few months after the Ninth Circuit issued its decision, the Fourth Circuit decided *Career Counseling, Inc. v. AmeriFactors Fin. Grp., LLC*, 91 F.4th 202 (4th Cir. 2024), which also concerned the status of online fax services. The plaintiff there also argued that *Amerifactors* was not entitled to deference under the Hobbs Act. The Fourth Circuit held that it need not address that issue, and instead held that the plain text of the TCPA prohibits only the sending of unsolicited advertisements to conventional "stand-alone fax machines," but not to "online fax services." *Id.* at 209. As this suggests, it is still uncertain how, precisely, the Hobbs Act might shape litigation in the future.

ABSENT CLASS MEMBER HAS NO SUBSTANTIAL INTEREST IN INTERVENING IN CASE AFTER CLASS CERTIFICATION DENIED, SAYS SIXTH CIRCUIT

It is not uncommon for absent class members to seek to intervene in a class action, either to address perceived deficiencies in the named representative's ability to represent the class or because of dissatisfaction with the representative's prosecution of the case. A recent Sixth Circuit decision holds that an absent class member's ability to intervene is limited, once class certification is denied.

The named plaintiff in *Grainger v. Ottawa County*, 90 F.4th 507 (6th Cir. 2024), sought to represent a class of property owners whose properties were sold to recover unpaid property taxes. Defendants were Michigan counties that sold the properties and allegedly failed to return to the property owners sale proceeds that exceeded the amount of delinquent property taxes. Similar claims had been made in a prior class action. The district court held that the statute of limitations for the class representative's individual claims was tolled during the prior class action under *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 1974, and so his individual claims were timely. But the statute of limitations for the claims he sought to assert on behalf of the class were not tolled under *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018), and were untimely. The district court therefore denied certification of the class claims. Three days after the denial of certification, an absent class member moved to intervene permissively and as of right under Rule 24. The district court denied the motion and the absent class member appealed.

Intervenors in the Sixth Circuit seeking to intervene as of right must show that: 1) the motion is timely, 2) the proposed intervenor has a substantial legal interest in the subject matter of the case, 3) the proposed intervenor's ability to protect their interest may be impaired in the absence of intervention, and 4) the parties already before the court cannot adequately protect the proposed intervenor's interest. *Id.* at 5. The Sixth Circuit in *Grainger* held that the absent class member failed to meet the second and third elements of this test (it did not address the first and fourth elements). The absent class member had argued that "pursuing his claim as a class action" met the second element's "substantial legal interest" test. The court rejected this argument, stating that "we have never held that a proposed intervenor has a substantial interest in the procedural mechanism by which litigation proceeds." *Id.* at 6. The logical endpoint for the absent

class member's arguments, said the court, would be "'multiple bites at the certification apple' for class counsel." *Id.* at 6 (citing *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 827 (7th Cir. 2011)). Hence, seeking to intervene simply to carry on litigation through the class action mechanism would not, without more, be a substantial legal interest justifying intervention as of right.

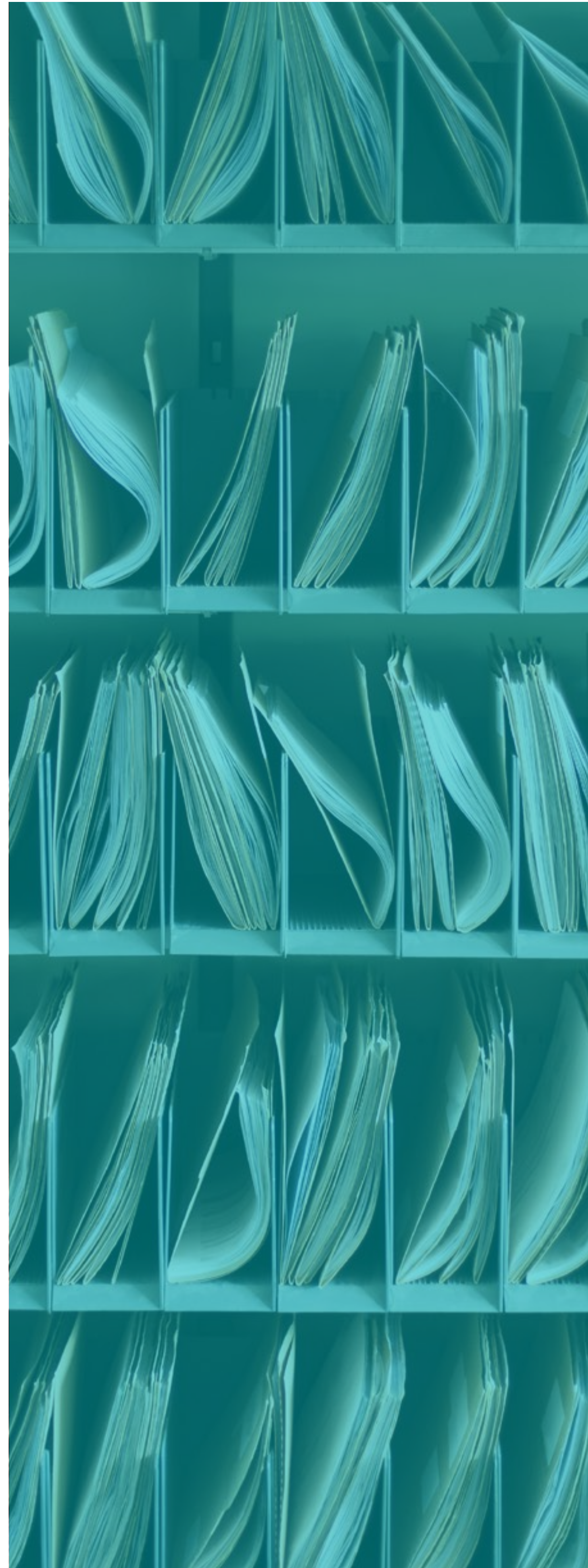
The court also held that the third element—an interest impaired without intervention—was not met. Denial of certification turned the underlying case into an individual one, which would have no preclusive effect on the absent class member's claims. *Id.* at 516–17. The absent class member was free to press his own claims, either individually or in a class action, in separate litigation. *Id.* at 516.

The court likewise affirmed the district court's denial of permissive intervention. Permitting intervention would delay resolution of the remaining individual claim and would prejudice other defendant counties that had been dismissed because they had no relation to the named plaintiff's claims. *Id.* at 518.

Grainger establishes somewhat of a brightline rule regarding when an absent class member may intervene in a class action, at least in instances where certification is denied because of a deficiency in the named representative's ability to represent the class. To be sure, the holding is perhaps more limited than defendants would like insofar as the ruling turned on denial of certification, a usually rather late stage of litigation. Class representative deficiencies often emerge earlier in the process and are addressed and remedied in advance of class certification, in which case *Grainger*'s holding will be of more limited value for defendants. And the ruling of course allowed the absent class member to pursue a new class action. But the decision gives more certainty to the determination of when a given class action may be "over."

NINTH CIRCUIT RULES ON THE REQUIREMENTS FOR STATUTORY STANDING UNDER THE WASHINGTON PRIVACY ACT

Washington's privacy statute, the Washington Privacy Act ("WPA"), codified at Wash. Rev. Code Ch. 9.73, protects against, among other things, the unlawful recording of telephone conversations. Many of the provisions in the WPA were enacted decades ago, and so courts must sometimes decide whether new technology—which might have been unimaginable when the WPA was enacted—can be used without violating the statute. *Jones v. Ford Motor Co.*, 85 F.4th 570 (9th Cir. 2023), presents one such case. In it, the Ninth Circuit held that the mere fact that a car "infotainment" system automatically downloads texts and call logs from a plaintiff's cellphone does not necessarily give that plaintiff a claim under the WPA.



In *Jones*, one of the plaintiffs owned a car with a system that allowed occupants to use their cellphones hands-free. That system was alleged to automatically download, copy and store the call logs and text messages of any cellphone connected to it. Once stored, access to those texts and calls logs requires special hardware and software that is generally available only to government entities and certain private investigative services; they cannot be accessed or deleted by the car owner. Plaintiffs filed suit against the car manufacturer (Ford) in state court, alleging that a text they exchanged had been downloaded through that system and stored in the car's system in violation of the WPA. Ford removed and moved to dismiss. *Id*. at 572–73.

The district court granted Ford's motion to dismiss. Under Wash. Rev. Code Ann. § 9.73.060, a "person claiming that a violation of this statute has injured his or her business, his or her person, or his or her reputation" may be entitled to actual or statutory damages. The district court held that the plaintiffs failed to allege an injury to their person, business or reputation, and so failed to state a claim for damages under the WPA. *Id*. at 573. On appeal, plaintiffs sought to have the case remanded to state court for lack of Article III standing, arguing that Ford had admitted that the district court lacked subject-matter jurisdiction when it argued in its motion that plaintiffs failed to plead a statutory injury.

The Ninth Circuit rejected that argument and affirmed. The Court explained that while the plaintiffs treated the issues of concrete injury required for Article III standing and the injury required for statutory standing under the WPA as identical, they in fact are different. With respect to the Article III standing issue, the Court held that because the WPA codifies substantive common-law rights against the invasion of privacy, a violation of the WPA constitutes a concrete injury sufficient for Article III standing. The district court, therefore, had subject-matter jurisdiction over the case. *Id*. at 574.

That concrete injury, however, was not sufficient to confer statutory standing. The Court held that stating a claim under the WPA requires more than just a *violation* of the WPA. Rather, it requires a plaintiff to allege that "a violation of [the WPA] has injured his or her business, his or her person, or his or her reputation." *Id*. at 574 (quoting Wash. Rev. Code § 9.73.060). The Court reasoned that because statutes must be read so that no part is rendered superfluous, the fact that Wash. Rev. Code § 9.73.060 allows a claim for damages only if a violation caused an *injury* to one's *person*, *business* or *reputation* shows that a violation *alone* is not sufficient to allow a plaintiff to sue for damages under the WPA.

Jones is in agreement with several district courts that have similarly held that a mere violation of the WPA, while sufficient for Article III standing, is insufficient to allow a plaintiff to assert a claim for damages under the WPA. *Jones* thus highlights the difference between a privacy-protection statute like the WPA, the scope of which is limited by the requirement that a plaintiff do more than allege a statutory violation to state

a claim, and more expansive statutes that require a lower threshold for statutory standing. *See, e.g.*, Cal. Penal Code § 637.2(a) (under California's Invasion of Privacy Act, "[a]ny person who has been injured by a violation of this chapter" may seek statutory damages or treble actual damages).

THIRD CIRCUIT DECLINES TO EXPAND INFORMATIONAL INJURY DOCTRINE TO COVER UNCLEAR OR MISLEADING DISCLOSURES

The Supreme Court has held that the nondisclosure of information can sometimes constitute a concrete injury—the so-called "informational injury doctrine." *See Pub. Citizens v. DOJ*, 491 U.S. 440, 448–49 (1989); *FEC v. Akins*, 524 U.S. 11, 13–14 (1998). Recently, courts have been forced to reconcile these informational injury cases with the Supreme Court's rulings in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) and *Spokeo, Inc. v. Robbins*, 578 U.S. 330 (2016). In *TransUnion* and *Spokeo*, the Supreme Court introduced a test to determine whether a plaintiff alleging intangible harms has satisfied the particularized and concrete injury-in-fact element of Article III standing. Intangible injuries resulting from a statutory violation must bear a "'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American Courts." *TransUnion LLC*, 141 S. Ct. at 2204 (citing *Spokeo, Inc.*, 578 U.S. at 341 (2016)). In *Huber v. Simon's Agency*, 84 F.4th 132 (3d Cir. 2023), the Third Circuit declined to expand the informational injury doctrine to confer standing on a plaintiff when there was disclosure of information but disclosure was insufficiently clear.

In *Huber*, the plaintiff claimed that a medical debt collection letter issued by Simon's Agency ("SAI") was "false, deceptive, or misleading" in violation of the Fair Debt Collection Practices Act ("FDCPA"). The letter included two money amounts, one labeled "Amount" and a second marked "Various Other Accts Total Balance." Plaintiff was unsure whether she needed to add these two amounts together or simply pay the latter amount. *Huber*, 84 F.4th at 141–42. The district court granted the plaintiff summary judgment holding that plaintiff had standing under the informational injury doctrine. The district court determined that "the dissemination of misleading information should be viewed as a species of informational harm—at least where that misleading information influences a plaintiff's credit or management of their debt." *Id.* at 143. This downstream-consequences requirement was satisfied, and plaintiff therefore had standing under the doctrine, because she suffered two types of financial consequences as a result of her confusion.

On appeal, the Third Circuit affirmed that plaintiff had standing, but under the "more traditional path prescribed by the Supreme Court in *TransUnion*" rather than under the informational injury doctrine. *Id.* at 146. In *Kelly v. RealPage,*

Inc., 47 F.4th 202 (3d Cir. 2022), the Third Circuit held that to establish an informational injury a plaintiff must (1) be denied information to which she is legally entitled by statute and (2) that denial must cause some adverse consequences related to the purpose of the statute. *Kelly*, 47 F.4th at 212. Here, plaintiff never alleged an omission of information that she was entitled to under the FDCPA. Rather, she sought to extend the informational injury doctrine to include information that was disclosed, but not *clearly and effectively*. *Huber*, 84 F.4th at 146. The Third Circuit rejected this attempt to broaden the doctrine—plaintiff's position "would vitiate the concrete injury requirement in almost any case involving information." *Id.*

However, the Third Circuit found that plaintiff did have Article III standing because her injury bore a close relationship to the harms remedied by the tort of fraudulent misrepresentation. *Id.* at 148. Traditionally, for fraudulent misrepresentation, the harm suffered must be physical, monetary, or cognizably intangible such as reputational or emotional damage—not intangible like mere confusion. *Id.* at 148–49; *see also, e.g., Perez v. McCreary, Veselka, Bragg & Allen, P.C.*, 45 F.4th 816, 825 (5th Cir. 2022) ("We thus join several of our sister circuits in holding that the state of confusion, absent more, is not a concrete injury"). Rather, a plaintiff must adequately plead some form of consequential action or inaction resulting from her confusion.[1] *Huber*, 45 F.4th at 149; *see also, e.g., Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 998 (11th Cir. 2020) ("The plaintiffs seek to recover for representations that they contend were misleading or unfair, but without proving even that they relied on the representations, much less that the reliance caused them any damages."). Because plaintiff's confusion here had led her to consult a financial advisor and not pay down her debts, she had satisfied this requirement. *Huber*, 45 F.4th at 149.

The Third Circuit declining the invitation to expand the informational injury doctrine appears in line with the holding in *Spokeo* that a mere statutory violation will not, without a concrete injury, confer Article III standing. *Spokeo, Inc.*, 578 U.S. at 341.

[1] Concurring in part and dissenting in part, Judge Rendell disagreed with this additional step. Rather, she argued that the historical analogue analysis should end after an analogue is found, without consideration of individualized harm or the extent of injury. In rebutting this, the majority observed that Judge Rendell conflated statutory standing and Article III standing. A particular plaintiff still must suffer an individualized and concrete injury to have Article III standing, regardless of whether Congress has legislated to protect a discrete interest.

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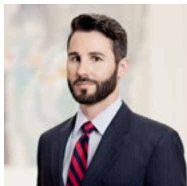

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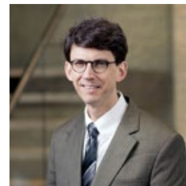

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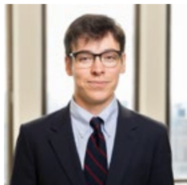

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