The Fair Credit Reporting Act, Consumer's Rights and the Employment Relationship

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II. The Fair Credit Reporting Act, Consumer's Rights and the Employment Relationship

A. What is the Fair Credit Reporting Act, and why is it relevant to the employment relationship?

The Fair Credit Reporting Act ("FCRA") was passed in 1970 to protect individual consumers as well as the integrity of the consumer credit industry. The FCRA regulates those who collect information about consumers (i.e., "consumer reporting agencies"), those who provide information about consumers to consumer reporting agencies (i.e., "furnishers of information"), and those who seek information from reporting agencies (i.e., "users of information.") Most Americans incorrectly consider the term "consumer reports" to be synonymous with "credit reports" in the sense of the credit score and accompanying report available on each person from the big three reporting agencies, Equifax, Transunion, and Experian. The reality, however, is that while all credit reports may be consumer reports, not all consumer reports are credit reports, and consumer reports can take a wide variety of forms and contain a wide variety of information.

In recent years, special consumer reporting agencies have been formed to gather information about the types of health insurance claims we file, the kinds of traffic tickets we have received, the scope of the public information available about us, and nearly everything else. Consumer reporting agencies have been created to capitalize on the explosion of online commerce by gathering and analyzing information on consumers who purchase goods or services online. Information collected for such commercial purposes falls under the definition of consumer reports if it meets certain criteria, and arguably

these types of reports and information affect us in more serious ways than our credit scores.

The fact is that in one way or another, consumer reports affect literally every aspect of our lives. The need for statutes such as the FCRA has only increased as technology has grown more sophisticated and the ability to analyze every aspect of our habits and customs has grown more intrusive. There are literally hundred of thousands or millions of pieces of information stored about each individual in one place or another. Such massive volumes of information would have been useless just ten years ago; to modern software and marketing prowess, however, the billions and billions of pieces of information stored on consumers forms a treasure trove of data waiting to be analyzed, scrutinized, and studied in detail.

Prudent employers therefore have many reasons to be interested in the consumer reports of current and prospective employees. Employers who choose to use and access this sort of information have special responsibilities imposed upon them from a number of common law and statutory sources, however. Federal law protects certain types of information obtained from certain sources. Additionally, there are many intersections between the FCRA and other employment statutes such as the Americans with Disabilities Act, which can trap the unwary employer. The background and legal framework to the FCRA, the varieties and types of consumer reports available on the market today, the extent to which such consumer reports may be used for employment purposes, and the special degree of care that must be used by employers making use of consumer reports, constitutes the focus of these materials.

B. What are consumer reports?

A consumer report is defined in various places in the Act as (1) information (2) communicated by a consumer reporting agency that bears on a consumer's (3) creditworthiness, (4) character, (5) reputation, (6) credit standing or capacity, (7) personal characteristics or (8) mode of living. See, 15 U.S.C. §1681a(d). Note that in order to qualify as a consumer report, information need only relate to one of these factors. Information does not need to come with the words "consumer report" stamped across the front to qualify. A wide variety of information relating to one of these factors can qualify as a consumer report—and trigger all the requirements of the FCRA—so long as it meets certain criteria.

1. Information reported by a person or a company based upon that person or company's first hand experiences or transactions with the consumer is not a consumer report.

Any information obtained during a consumer's direct interactions with an individual does not qualify. For example, a retail store's disclosure of its own ledger experience with a customer does not qualify as a consumer report. See, DiGianni v. Stern's, 26 F.3d 346 (2d Cir. 1994); Porter v. Talbot Perkins Children's Services, 355 F. Supp. 174 (S.D.N.Y. 1973). Similarly, a bank's report on its experiences with a consumer will not qualify as a consumer report. Smith v. First National Bank, 837 F.2d 1575 (11th Cir. 1988).

The information must relate solely to the interaction with the consumer however; any additional information included will disqualify the report from this exception. For

example, if a retailer cancels a consumer's line of credit based in part on information it obtained from its direct interaction with a consumer and in part on information obtained from another source, any report issued by the retailer as a result could well qualify as a consumer report. (Bear in mind that the other requirements of a consumer report would need to be met—for example, the retailer would still need to be a consumer reporting agency).

2. In order to be a consumer report, the information must be furnished for a natural person, acting in his or her capacity as a consumer and not as a businessperson.

The term "consumer" is defined in the FCRA as an individual; corporations and other business entities do not qualify. Furthermore, the person must be acting in their role as an individual and not as a business person or self-employed person. As for sole proprietors, S-corporations and other small business, reports on individuals operating these companies are also likely to be viewed as outside the scope of the FCRA, as long as the reports focus on the individual in his or her official capacity as a business and do not focus on the individual in his or her role *as a consumer*. See, Cambridge Title Co. v. Transamerican Title Ins. Co., 817 F.Supp. 1263 (D.Md. 1992), affirmed, 989 F.2d 491 (4th Cir. 1993).

In Cheatham v. McCormick, 100 F.3d 956 (6th Cir. 1996) the Plaintiff applied for a license from the Tennessee Interstate Commerce Commission to operate a dinner train from Nashville, Tennessee. One of his competitors hired a private investigator to conduct a background investigation, and then shared the report with numerous

individuals involved in the licensure decision-making process. The District Court granted summary judgment to the Defendant, on the grounds that the report issued was not a consumer report, as it dealt only with Mr. Cheatham in his official capacity as a business man. See also, Ippolito v. WNS, Inc., 864 F.2d 440 (7th Cir. 1988)(holding that the FCRA applies to reports issued for consumer purposes, not for business purposes, and evaluating prospective franchisees does not fall within the purview of the FCRA); Matthews v. Worthen Bank & Trust, 741 F.2d 217 (8th Cir. 1984)(holding that a credit report on a prospective lessee of commercial real estate was not subject to the FCRA).

Along those lines, it stands to reason that if information that is otherwise not a consumer report—because it focuses solely on an individual's small company—is collected, used, or expected to be used for personal reasons, that information then becomes a consumer report. Professional licenses and other requirements of self-employment, however, do implicate consumer reports as will be discussed below, because items such as professional licenses attach to the consumer and not to the business.

3. In order to be a consumer report, the information must be furnished by a consumer reporting agency.

The FCRA defines a consumer reporting agency as "any person which, for monetary fees, dues, or in a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers, for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing

or furnishing consumer reports." See, 15 U.S.C. §1681a(f). The FCRA defines the term "person" broadly enough to include individuals, partnerships, corporations, trusts, estates, cooperatives, and associations, as well as governmental entities or any other entity.

(a) Investigations of employee misconduct by the employer itself will not qualify the employer as a consumer reporting agency.

Note, however, that while the class of persons who can be a consumer reporting agency is wide, no amount of investigation and analysis of an employee by the employer itself can qualify the employer as a consumer reporting agency. If an employer investigates an employee and then provides the information to a consumer reporting agency, the employer will be a "furnisher of information" under the FCRA but they will not be a consumer reporting agency. It still important to remember that although employers who choose to conduct their own investigations may not violate the terms of the FCRA, they may well run afoul of common-law protections of individual privacy. Employers also have a duty to report accurate and complete information, lest they run afoul of state defamation laws.

Furthermore, if the employer becomes a furnisher of information under the FCRA it takes upon itself a duty to reinvestigate information when notified of a dispute by a consumer reporting agency. Failure of an employer to adequately reinvestigate information it provided to a consumer reporting agency upon notice of a dispute by the consumer makes the employer liable to the employee for all of the statutory penalties provided for in the FCRA.

4. What types of information do not constitute a consumer report?

Certain basic information will not qualify a report as a consumer report. A report limited solely to the consumer's name and address does not constitute a credit report because it does not bear on any of the seven factors. (Otherwise telephone books would be consumer reports, right?) Even if the list adds social security numbers, date of birth or other identifying information, it does fall within the purview of the FCRA. Trans Union Corp. v. Fed. Trade Comm'n, 81 F.3d 228 (D.C. Cir. 1996).

Reports on individuals that contain solely public records information may not be consumer reports, unless they include public information such as arrest records or records of civil or criminal proceedings. Ley v. Boron Oil Co., 419 F.Supp. 1240 (W.D. Pa. 1976). A question arises as to whether this would mean that the sort of information typically found in the land records of cities and counties would qualify as consumer reports. While the information is, in every way, public, it may contain judgments and other information, and ownership of real property certainly reflects on an individual's credit standing or capacity.

In this situation, the analysis would probably turn the identity of the party collecting the information and that party's reasons for doing so. That analysis, in turn, takes us directly to 15 U.S.C. § 1681a(d). This section provides that if a reporting agency expects an end user to use a report for a purpose listed in the FCRA or if the agency collected the information in the report for a listed purpose, the report is a consumer report even if the user applies the report to a different purpose than the consumer reporting agency anticipated. Yang v. GEICO, 146 F.3d 1320 (11th Cir. 1998).

5. Investigative consumer reports.

The FCRA creates a separate category of consumer reports called "investigative consumer reports." Investigative consumer reports, as defined in the statute, rely on personal interviews of the neighbors, friends, or associates of the consumer being investigated.

The new FACT Act excludes reports that would otherwise qualify as consumer reports if the following criteria are met: (1) the communication is made to an employee in connection with an investigation of suspected misconduct relating to employment, or compliance with state, federal, or local law, the rules of a self-regulating organization (such as the NYSE) or any pre-existing written policies of the employer; (2) the communication is not made for the purposes of investigating credit worthiness; and (3) the information is not provided to any person except the employer or its agent, the government, a self-regulating organization, or as otherwise required by law.

Additional disclosure requirements apply to investigative consumer reports. An employer seeking to obtain such a report must provide the subject of the investigation with notice of his or her rights under the FCRA, and upon written request by the subject of the investigation the employer must make a complete written disclosure of the nature and scope of the investigation requested.

C. What qualifies as a "consumer reporting agency?"

A consumer reporting agency is defined as any person who, for monetary fees, dues, or on a cooperative basis, regularly assembles or evaluates credit or other information about consumers for the purposes of furnishing consumer reports to third

parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports. See, 15 U.S.C. §1681c(f).

It is important to bear in mind this broad definition at all times. A consumer reporting agency can be any entity that engages in the collection or dissemination of consumer reports. Some examples of federal case law are as follows.

1. Merely furnishing information to consumer reporting agencies will not qualify the furnisher of information as a consumer reporting agency.

This is an important point, and one that cannot be overstated. Three separate classes of persons are regulated by the FCRA: (1) consumer reporting agencies; (2) furnishers of information, and (3) those who seek information from consumer reporting agencies. Numerous published decisions—most of them resulting from lawsuits filed by *pro se* plaintiffs—extrapolate on the fact that a furnisher of information is not a consumer reporting agency, and is not normally liable to the consumer for faulty information it furnishes to a consumer reporting agency without certain qualifying events, such as notice by a consumer reporting agency to the furnisher of information that a consumer disputes the information provided by the furnisher. See, Mitchell v. First Nat. Bank, 505 F.Supp. 176 (M.D. Ala. 1981).

2. In order to be a consumer reporting agency, the entity must have commercial goals.

In Porter v. Talbot Perkins Children's Services, 355 F.Supp. 174 (S.D.N.Y. 1973) two parents who were denied the right to adopt a child sued the adoption agency under the FCRA for damages arising as a result of the agency's refusal to release copies of

reports relating to their rejected application. The court granted the defendant's Motion to Dismiss, pointing out that the agency did not have as its purpose commercial goals. An additional interesting point to this case is the court's reasoning that because states have an important interest in the adoption of children—and hence in the investigations and other procedures that accompany the adoption of children—it could not be presumed that Congress intended to preempt this interest by imposing a federal disclosure law over state adoption proceedings.

3. Federal agencies are not consumer reporting agencies under the FCRA.

A former Federal Bureau of Investigation employee brought an action against the FBI and others in Ollestad v. Kelley, 573 F.2d 1109 (9th Cir. 1978) seeking to obtain the release of FBI records relating to him and his termination. The court found that because the FBI did not gather information on Mr. Ollestad for the purposes of furnishing consumer reports to third parties, the FBI was not a consumer reporting agency, and the FCRA did not apply.

D. Consumer reports can only be provided for the specific reasons outlined by the FCRA; these reasons are known as "permissible purposes" and a consumer report furnished for any other reason is a violation of the FCRA.

The FCRA enumerates certain specific purposes for which a consumer report can be released. These enumerated reasons are the *only* reasons a consumer report can be released, and a report released for any other reason is a violation of federal law. The list

is fairly long and many of them are not relevant to the employment context. A handful that are, and a brief description of each, is provided below.

1. Consumer reports may be used for employment purposes.

Suffice it to say here that it is completely acceptable for an employer to use a consumer report for purposes of hiring, firing, promotion, and reassignment of an employee, subject to certain restrictions which will be discussed below. Please note that it is not acceptable to pull the credit report of a former employee.

Employers using consumer reports must follow four main steps in using the consumer reports. Those steps, which are discussed below, are (1) written disclosure to the consumer that a consumer report will be obtained; (2) written authorization of the consumer in advance of obtaining the report; (3) certification by the employer to the consumer reporting agency that the employer has a mechanism in place for complying with the FCRA; and (4) certification to the consumer reporting agency that if adverse action is taken against the employee based on the consumer report, a copy of the report and a notice of the consumer's rights will be provided to the employee.

Additional care must also be used in the handling and disposal of consumer reports, as will be discussed below.

2. A consumer report may be released in response to a court order.

No big surprise here; a court order will do the trick every time. Under previous versions of the federal rules of civil procedure, the question arose whether an attorney issued subpoena is truly an order of the court. Eventually, Federal R. Civ. Pro. 45(a)(3),

was amended to specifically include attorney-issued subpoenas as orders of the Court, making defiance of an attorney-issues subpoena an act in defiance of a Court order exposing the violating party to contempt sanctions.

Note that actions pending in state courts may not be sufficient to compel the production of a consumer report from a reporting agency. While the question is well settled under federal law, the answer will vary from state to state. In Virginia, for example, an Attorney General Opinion letter dated October 22, 1998 concludes that an attorney issued subpoena *duces tecum* does not constitute a "proper judicial order" under Va. Code §58.1-3 for purposes of obtaining confidential information about the transactions, property, income, or business of any Virginia taxpayer. While the scope of the opinion letter relates only to official Virginia tax records, the question is very much open as to whether the same reasoning would apply to consumer reports.

3. A consumer report may be released with the consumer's written instruction or permission.

Under any and all circumstances, a consumer report may be obtained with the written instruction or permission of the consumer. Note that employers are required to obtain written permission from the consumer in order to access consumer reports in any event.

4. "Identifying information" from consumer reports may be released to the government.

Government agencies are entitled to basic identifying information contained in consumer reports. Without an otherwise permissible purpose, the information available

to the government agency is limited to the consumer's name, current and former addresses and current and former employers.

These restrictions no longer apply to consumer reports sought for national security reasons, however. Section 505 of the U.S.A. Patriot Act eased the FBI's access to consumer reports by amending 15 U.S.C. § 1881u. Under the amended FCRA, the FBI is given special secret access to information from consumer reporting agencies for counterintelligence purposes. Neither the consumer nor any other creditor is to be informed that the FBI accessed a consumer's information.

If the FBI were to access a consumer's information and the consumer reporting agency were to then communicate that fact to a third party, such a violation would almost certainly be actionable under the FCRA, with the attaching penalties of statutory, actual, and punitive damages, as well as costs and attorney's fees.

5. Consumer reports may be used in connection with the underwriting of insurance involving the consumer.

Specialty consumer reporting agencies exist that track the filing of insurance claims, the dollar value of settlements, and the medical damages claimed by claimants in insurance cases. There are also specialty consumer reporting agencies that track health insurance related claims filed by individuals. This area is fraught with peril for employers, and it is important to note several things here. First, while it is acceptable for consumer reporting agencies such as the Medical Information Bureau to gather healthcare related information on consumers for use by insurers, any use of health-related information by an employer is strictly forbidden by the ADA. Second, the ADA

prohibits employers contemplating offering employment to an employee from inquiring with any third party (i.e., a consumer report agency, in this context) for answers to any questions it cannot ask the employee directly before hiring the employee. (Examples of information the employer cannot ask a prospective employee directly include asking about individual's status as disabled, the individual's worker's compensation history, etc., as well as requiring the individual to undergo a medical examination, among other restrictions.)

6. Consumer reports may be used in connection with government licenses or other benefits.

15 U.S.C. § 1681b allows government entities to use consumer reports when used in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental entity, where that governmental entity is required by law to consider an applicant's financial responsibility or status.

E. Consumer reports used for employment purposes.

1. What counts as "employment purposes" under the FCRA?

Earlier we noted the importance of the FCRA in the hiring and firing of employees. The importance of the statute extends beyond the hiring and firing stages of employment, however. The FCRA itself defines "employment purposes" as "evaluating a consumer for employment, promotion, reassignment, or retention as an employee." Wiggins v. Phillip Morris, Inc., 853 F. Supp. 470 (D.D.C. 1994).

The use of consumer reports for purposes of professional licensing, for example, has been held to be within the scope of employment purposes. In Hoke v. Retail Credit

Corp., 521 F.2d 1079 (4th Cir. 1975) the court ruled that a personal report obtained by the Texas Board of Medical Examiners to aid it in adjudicating a physician's application for a license was a consumer report. Again, as alluded to previously, while professional licenses may well be used for business purposes, they attach to the consumer in his or her official capacity as a consumer and not to the business, and reports obtained as part of an investigation into an individual's fitness for a professional license are therefore consumer reports.

2. What steps does an employer using consumer reports need to take in order to comply with the FCRA?

Section 604(b) of the FCRA sets forth the specific duties of users of consumer reports in the employment context.

(a) Written Disclosure to the consumer.

The employer must use a separate written disclosure that a consumer report may be obtained. This disclosure must be in a stand-alone document—placing the disclosure in the middle of an employment application or other information will not work.

(b) Prior written authorization from the consumer.

Prior to obtaining the consumer report, the employer must obtain written authorization from the prospective or current employee. Again, this must be in a separate stand-alone document.

(c) Certification to the consumer reporting agency.

The employer must certify to the consumer reporting agency that the above steps have been followed, and that the information obtained will not be used in violation of any federal or state equal opportunity law or regulation.

(d) Adverse action certification.

The employer must also certify that if any adverse employment action is taken based on the consumer report, that a copy of the report and a summary of the consumer's rights will be provided to the consumer. A sample stand-alone document listing the consumer's rights is available from the Federal Trade Commission's website and the standard form can be used. The website for the FTC is found at www.ftc.gov.

3. What other steps does an employer need to take?

(a) Prior to taking adverse action.

The FTC has opined that prior to taking adverse employment action based upon a consumer report, the employer must provide the employee with notice of the adverse action, a copy of the report, the name, address, and telephone number of the consumer reporting agency, a statement that the agency did not take the adverse employment action, notice that a free copy of the consumer report is available within 60 days, and notice of the consumer's right to dispute the accuracy of anything contained in the consumer report.

F. Internal investigations by third parties and consumer reports.

Earlier we touched upon one of the most salient examples of consumer reports—i.e., a law firm hired to conduct an internal investigation of a sexual harassment complaint. Any such investigation and report bears all the hallmarks of a consumer

report, and the stringent guidelines set up for consumer reports must be followed. Prior to the recent changes made the FACT Act, great controversy arose regarding the employer's duty to conduct a prompt and fair investigation of allegations of sexual harassment and the employer's duty to the individual investigated under the FCRA. This controversy appears to have been put to rest by the FACT Act, but a brief recitation of the historical basis of the controversy will be illustrative.

G. Recent developments regarding the employer's duty to investigate allegations of sexual harassment.

1. Background

Most commentators on the FCRA have commented at some point on the scope and breadth of the Federal Trade Commission's Opinion Letters interpreting the FCRA, and with good reason. FTC staff opinion letters seem to have caused a good bit of mischief in recent years, not the least of which was the now-notorious "Vail letter" of 1999. Although the FTC is authorized to issue formal advisory opinions, it has not done so with regards to the FCRA. What it has done, however, is issue hundreds of informal opinion letters by FTC employees in response to letters from consumer reporting agencies, consumers, attorneys representing both, and other interested parties. These letters do not carry official weight, and nor does the Official Commentary of the FTC staff published at 16 C.F.R. Part 600. Moreover, some of the opinion letters read a breadth and scope into the FCRA that at times seemed unsupported from the statute itself.

2. The Supreme Court decisions: Farragher and Ellerth.

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) and Farragher v. City of Boca Raton, 524 U.S. 775 (1998) established that employers hoping to limit or avoid liability for the acts of its supervisory employees needed to take two steps: one, to make a reasonable response to charges of harassment; and, two, to take preventive or corrective steps to cure the wrong if the allegations were supported. The case law that followed these decisions confirmed that employers taking swift and decisive action in response to allegations of harassment could at least limit their *respondeat superior* liability for a manager's wrongdoing and perhaps avoid it altogether. Barrett v. Applied Radiant Energy Corp., 240 F.3d 262 (4th Cir. 2001).

3. The FTC issues the "Vail letter" and touches off a conflagration.

In 1999, an FTC staff attorney issued an advisory letter in response to an inquiry from an attorney named Judy Vail. The Vail Letter, as it quickly became known, advised that third party investigators hired to perform investigations of misconduct in the workplace were consumer reporting agencies under the FCRA and, as a result, any report issued by any such investigator was likely to be deemed an investigative consumer report.

The implications were great. How could employers use this fantastic new opportunity provided by the Supreme Court to limit their own liability, while at the same time complying with the requirements of the FCRA? In order to comply with the FCRA, it must be remembered, the subject of the investigation would need to be given advance notice of the investigation, of the allegations against him or her, and provided with copies of any statements taken during the investigation. Additionally, because the FCRA

requires furnishers of information to conduct a full and fair re-investigation of the information provided to a consumer reporting agency if the consumer disputes the report, employers could, in theory, have been required to re-interview every single person interviewed by the original consumer reporting agency. In short, compliance with the FCRA and simultaneous performance of a prompt and fair investigation of allegations of harassment seemed mutually incompatible. Moreover, the logic of the Vail Letter seemed certain to apply to other workplace scenarios, such as allegations of disability related discrimination or racial discrimination.

4. The FACT Act puts the issue to rest.

These issues were laid to rest with the FACT Act, which took effect on March 31, 2004. The FACT Act made it clear that investigations regarding suspected violations of the law were not consumer reports; in addition, investigations of suspected company violations were not consumer reports. It should still be noted, however, that if an investigation gathers information pertaining to an individual's creditworthiness, credit standing, or credit capacity, the restrictions of the FCRA still apply.

Despite the joyful estimations of some commentators, it is doubtful that worker's compensation claims will ever be considered within the scope of the exclusion. Even if they were excluded, however, it should be kept in mind at all times that the ADA precludes inquiry into worker's compensation filings.

H. Employer's liability for consumer reports and consumer information.

1. The employer as "furnisher" of consumer information and as "user" of consumer information.

As noted earlier, employers who provide information to consumer reporting agencies or use information from consumer reporting agencies for employment purposes do not themselves become consumer reporting agencies. They are, however, "furnishers of information" and/or "users of information" in the parlance of the FCRA, and certain obligations do attach as a result of that status.

2. The FCRA and other statutes impose liability on employers who are users of consumer information.

Employers who qualify as users of information—i.e., any employer who makes use of consumer reports for employment purposes—are required to take the steps outlined above with regards to notifying the employee and obtaining consent in writing. Failure to do so is actionable under the private right of action created by the FCRA.

Additional requirements are imposed with regard to the handling and disposal of consumer information, however. These requirements are discussed in the following pages.

3. The FCRA imposes liability on furnishers of consumer information only after they have received notice of a dispute from the consumer reporting agency.

Upon notice from the consumer reporting agency that a consumer has disputed the information an employer furnished, the employer is under a duty to conduct an investigation of the information and then report the results of that investigation to the consumer reporting agency. 15 U.S.C. § 1681s-2(b)(1). In the recent landmark case of

Johnson v. MBNA America Bank, 357 F.3d 426 (4th Cir. 2004) the Fourth Circuit explained exactly what sort of steps might be involved in this investigation.

Although the Johnson cases did not deal with employment, the same reasoning applies to the employment scenario. Ms. Johnson was a legally authorized user of her husbands MBNA America Visa card. When her husband ceased payments on the account, Ms. Johnson was reported to the three major credit reporting agencies as being in default. When she disputed this information with the consumer reporting agencies, each one dutifully notified MBNA America of the dispute, in the process triggering the required investigation.

MBNA America then checked its computerized database, verified that its own database listed Ms. Johnson as a co-obligor on the account, and confirmed the information to all the consumer reporting agencies. What MBNA failed to realize, however, was that its own database was incorrect, and that Ms. Johnson was in fact not a co-obligor on the account. Ms. Johnson sued MBNA under the FCRA and obtained a jury verdict of $90,300. MBNA appealed the verdict, arguing that it had met its obligations to conduct an investigation by merely checking its database.

The Fourth Circuit disagreed, holding that MBNA had a duty to conduct a "reasonable investigation" which "clearly requires some degree of careful inquiry" into the records and information *underlying* the database entries. In determining what constitutes a reasonable inquiry, the Fourth Circuit held, the jury had properly balanced the cost to MBNA of maintaining and verifying hard copy paper records versus the potential harm to Ms. Johnson if they did not.

The importance of this decision for employers providing information to consumer reporting agencies should be obvious. Employers will need to maintain all notes, employee reports, and other investigatory indicia for any situation which the employer communicates to a consumer reporting agency.

4. Absent a dispute from a user that is communicated to a consumer reporting agency that in turn informs the furnisher of information, there is no furnisher liability under the FCRA.

It should be noted here that the scenario only applies to instances where the consumer reporting agency informs the employer or furnisher of information that all or a part of the information shared by the employer has been disputed by a consumer. Absent a "notice of dispute" from a consumer reporting agency, there is no liability directly to the employee under the FCRA. This means, of course, that where a consumer directly disputes the incorrectness or incompleteness of any information directly with the furnisher, there is no duty to reinvestigate.

There may be liability to the FTC or to another entity with the authorization to enforce the terms of the FCRA, however. Moreover, informed consumers may well notify the furnisher of information at the same they notify the consumer reporting agency as part of their positioning the case for litigation. It would not be wise, therefore, to disregard a dispute of the accuracy or completeness of information simply because it comes from the consumer and not from the consumer reporting agency. At a minimum, such correspondence should be maintained, and efforts made to ensure that all documentation is in order in the event a formal notice of a dispute does come.

5. Considerations as a result of the proof model.

Because the issue will inevitably arise as to what constitutes a dispute such that the employer is liable, employers who are also furnishers of information should keep careful track of correspondence received from the consumer reporting agencies to which they furnish information. Any inquiries from consumer reporting agencies that are clearly notices of a dispute should be followed up, in writing, with a query as to whether the inquiry is a dispute or not.

Moreover, a careful paper trail should be kept and preserved for at least two years for each case in which an employer furnishes information to a CRA. Following the guidelines of Johnson, this paper trial should consist of all documentation used in making the decision to terminate the employee, unless the decision was made as a result of an internal investigation as outlined above.

I. Restrictions on protected information.

1. Background.

It is important to bear in mind that the FCRA places limitations on the use and dissemination of certain classes of information. Moreover, the confidentiality provisions of the ADA and other laws must also must be consulted, as the FCRA itself states that "No provision of this subsection shall be construed as altering, affecting, or superseding the applicability of any other provision or Federal law relating to medical confidentiality." See, 15 U.S.C. §1681b(g)(6).

2. Types of information protected under the ADA.

The ADA guarantees that any medical information an employer may possess about an employee pertaining to a disability will be treated as confidential. Any medical information must be kept in separate medical files, and must be treated as confidential. 42 U.S.C. § 12112(d)(3)(B). There are only three narrow exceptions to this confidentiality requirement: supervisors and managers may be informed regarding necessary work restrictions or accommodations; first aid and medical personnel may be informed if necessary; and government officials investigating compliance with these requirements shall be provided relevant information on request.

Under 42 U.S.C. § 12112(d)(4)(B), an employer may also conduct medical examinations as part of an employee health program, and "may make inquiries into the ability of an employee to perform job-related functions," but such health information is subject to the same confidentiality requirements as any other health information the employer may have. The restrictions on the dissemination of an employee's health information are such that even other employees or supervisors are not permitted access to this information, unless they fall under one of the listed narrow exceptions.

(a) Definition of protected health care information.

For purposes of the FCRA, medical information is broadly defined at 15 U.S.C. § 1681a(i) as "information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer," that relates to the individual's health, provision of health care, or payment for the provision of health care.

The FCRA addresses the disclosure of medical information specifically at 15 U.S.C. § 1681b(g). 15 U.S.C. § 1681b(g)(6) states that "No provision of this subsection

shall be construed as altering, affecting, or superseding the applicability of any other provision of Federal law relating to medical confidentiality." Therefore, restrictions on the disclosure of medical information under the FCRA will only add to those found in the ADA and elsewhere. Under no circumstances will the FCRA negate restrictions codified under the ADA and permit disclosure of medical information prohibited under the ADA. Moreover, any disclosure specifically permitted elsewhere is not preempted by the FCRA. 15 U.S.C. § 1681b(g)(3) specifically states that certain authorized activities are not consumer reports under the FCRA, namely disclosure in connection with the business of insurance or annuities, any disclosure permitted under HIPAA or under 15 U.S.C. § 6802(e), or "as otherwise determined to be necessary and appropriate, by regulation or order."

An employer also may make use of any form or other method of eliciting information that is likely to cause disability-related health care information to be disclosed as part of any background check performed by the employer, which would include consumer reports. 29 C.F.R. § 1630.14(b).

(b) Case law.

The leading case examining these issues is Cossette v. Minnesota Power & Light, 188 F.3d 964 (8th Cir. 1999). Diane Cossette was working part-time for Minnesota Power & Light. She injured her back while working at another part-time job and suffered a 10.5% permanent partial disability. Id. at 966. But she was able to continue working in M P & L's call center. When she sought to transfer to a different department as an office services clerk, M P & L hired an outside clinic to determine Cossette's ability to perform

the duties of this position. Id. at 967. The clinic determined that she had a lifting restriction of twenty to thirty-five pounds. Id. When Joseph Burton, the supervisor of the department into which Cossette was transferring, learned of this, he disclosed this to her prospective co-workers. Id.

A year later Cossette was being considered for a part-time position as a letter carrier for the U.S. Postal Service. Upon learning of this, Burton informed the Postal Service of Cossette's lifting restrictions. Id. The Postal Service did not hire Cossette; she later learned from a letter carrier that her rejection was the result of an unfavorable reference from M P & L. She filed disability discrimination charges against both the Postal Service and M P & L with the EEOC. She then sued M P & L for, among other things, disclosing medical information protected under the ADA to her co-workers at M P & L, and to the Postal Service in violation of the ADA. The district court granted M P & L's motion for summary judgment, but was reversed on appeal.

In regard to Burton's disclosure of Cossette's medical information to the Postal Service, the court held that the "facts establish a submissible case of illegal disclosure of confidential medical information under 42 U.S.C. § 12112(d)(3)-(4)." Id. at 969. The court disagreed with the district court's holding that Cossette would be unable to recover because she was not disabled within the meaning of the ADA. The court based its holding on the plain language of the statute and the fact that it makes little sense to require someone to prove they have a disability in order to prevent their employer from inquiring into whether they have a disability. Id. at 969. Since there was also an issue of material fact with respect to whether Burton's disclosure led to the Postal Service's

adverse hiring decision, and since the delay in being hired caused her damages, the court reversed the District Court's summary judgment ruling.

It also reversed the summary judgment ruling on the issue of Burton's disclosure of protected medical information to Cossette's co-workers. Here, the court held that Cossette's claim that this caused her co-workers to treat her "in a condescending and patronizing manner falls short of an 'adverse employment action' that would be required to establish a prima facie case of disability discrimination under 42 U.S.C. § 12112(a)." *Id.* at 971. However, the court still reversed and remanded and ordered the district court to determine whether this constituted an illegal disclosure under 42 U.S.C. § 12112(d). So while Cossette had stated a sufficient claim to survive summary judgment, the published opinion gives no guidance on whether the disclosure to her co-workers was in fact a violation of the ADA.

Cash v. Smith, 231 F.3d 1301 (11th Cir. 2000) raised an issue not addressed in Cossette, namely that the health care information, in order to be protected, must be made in response to an employer's inquiry within the meaning of 42 U.S.C. § 12112(d). In Cash, a confidentiality claim had been rejected on the ground that 42 U.S.C. § 12112(d) does not govern voluntary disclosures initiated by the employee. Id. at 1307-8.

In Downs v. Massachusetts Bay Transp. Authority, 13 F.Supp.2d 130 (D.Mass.,1998) the employer granted workers' compensation claims representatives access to Downs's medical files. Downs had signed a release authorizing access to information regarding one particular injury he had sustained, and that only for the limited purpose of evaluating his claim for that particular injury. The court held that this release

was not enough to permit the claims representatives to gain access to any other medical information. Id. at 141. "As Downs points out, the claims representative is neither a supervisor or manager, nor a first aid or safety person, nor a government investigator." Id. The court held that this release of Downs's medical information violated his right to confidentiality under the ADA and the Rehabilitation Act. Id. at 142.

J. Tips for the handling and protection of sensitive consumer information.

The heightened interest regarding the sensitivity of consumer information has its roots, at least in part, in the FACT Act, which in turn has its roots in the growing fear of identity theft. It stands to reason that there should be special procedures and rules in place to govern the handling and disposal of sensitive consumer information. After all, the stringent laws and regulations put into place to guard the privacy of the consumer will matter little if some responsibility is not ultimately placed on the end users of consumer reports to use caution and reasonable procedures in the handling and disposal of this information. Consumer reports carelessly tossed into garbage cans or left laying in public workspaces for all to see will scarcely serve the interests the FCRA and its amendments are designed to protect.

There are, therefore, special provisions in place to ensure that the confidential consumer information envisioned by the FCRA is guarded and protected by those with a legitimate purpose to possess it, and to guard against the careless use of consumer reports or the careless disposal of consumer reports.

The FTC published final regulations for the disposal of consumer information on November 24, 2004. The regulations implement 15 U.S.C. § 216 of the FACT Act (i.e., 15 U.S.C. §1681w of the FCRA), and requires that any persons who maintain, use, or otherwise possess consumer information derived from consumer reports for a business purpose property dispose of such information using "reasonable measures" to protect against unauthorized access to this information. Additionally, distinctions are drawn between the handling of consumer information and the disposal of consumer information. Different—but overlapping—entities are covered under the so-called "Safeguards Rule" and the "Disposal Rule." The Safeguards Rule and the Disposal Rule also apply to different types of information.

1. Handling sensitive consumer information—i.e., the "Safeguards Rule."

The Safeguards Rule applies to "customer information." § 681.1(b) and § 682.2(b). The safeguards rule is taken from the Gramm-Leach-Bliley Act, and requires the use of reasonable procedures for the safeguarding of sensitive consumer information. Generally, the requirements for safeguarding information include implementing an information security program, implementing the appropriate employee training programs regarding protected information, appointing an individual to monitor and supervise the implementation of these steps, and others.

2. Disposal of sensitive consumer information—i.e., the "Disposal Rule."

The Disposal Rule applies to "consumer information" and is more broad than the Safeguards Rule. As an example, an individual who applies for a loan at a bank and is

turned down is not a "customer" of the bank, and his information is therefore not customer information and not subject to the Safeguards Rule. He remains a consumer, however, and the disposal of his consumer information will be subject to the Disposal Rule. The same thing is true of employees. Employees of a financial institution are not customers as defined under the Safeguards Rule, but information pertaining to employees is certainly information covered under the Disposal Rule.

The rule gives some examples of reasonable methods of disposal. For example, the implementation—and monitoring—of policies and procedures for the burning, shredding, or pulverizing of papers contained sensitive information is sufficient. Furthermore, after due diligence, the entity can enter into a contract with another party who is engaged in the business of records destruction

3. Note Bene: Some new pitfalls of which employers should be aware.

Included in the disposal rule is the "sale, donation, or transfer of any medium, including computer equipment, upon which consumer information is stored." As a result, anyone that stores consumer information in an electronic format on the hard drive of any computer or server needs to pay close attention and ensure that any such information is deleted prior to selling, donating or transferring any such equipment. Ostensibly, the same thing would apply to back up tapes, CD's, diskettes, and any other medium used for storing electronic data.

Because nothing is ever truly "deleted" from any of the above mediums, the term "reasonable procedures" takes on a whole new light here. The rule opines that the purchase of "wiping software" which cleans computer memory should suffice.

K. Proof models and litigation tips.

1. Private enforcement rights.

Any person who violates the FCRA may be liable for damages. This of course includes consumer reporting agencies, furnishers of information, and users of consumer reports. It is noteworthy that prior to the FACT Act in 1996, liability was limited just to reporting agencies and users. See, Hawthorne v. Citicorp, 2002 WL 1378641 (E.D.N.Y. 2002).

The FCRA makes a distinction between willful and negligent noncompliance. Any person who is negligent in failing to comply with the requirements of the FCRA is liable for the actual damages caused as a result, in addition to court costs, and attorney's fees. For a willful violation, however, a consumer is entitled to actual damages or statutory damages. A person liable for a willful violation of the FCRA is also subject to punitive damages at the discretion of the Court. It is important to remember that each violation of the FCRA is a separate violation, and a consumer might in theory be entitled to multiple awards of statutory damages.

Although the statute itself is silent as to whether emotional pain and distress are actual damages compensable under the FCRA, the body of case law is clear that the term actual damages is to be construed to include non-pecuniary losses.

2. How are damages calculated?

(a) Pecuniary Damages.

Financial damages proximately caused by a violation of the FCRA are compensable. The consumer must show a causal relation between the violation of the

statute and the loss of credit or other harm. Crabill v. Trans Union, 259 F.3d 957 (3rd Cir. 1996); Cahlin v. General Motors Acceptance Corp., 936 F.2d 1151 (11th Cir. 1991). It is not necessary for the consumer to show that the FCRA violation was the only cause of the loss; the consumer needs only to show that it was a substantial factor. Richardson v. Fleet Bank, 190 F.Supp.2d 81 (D. Mass. 2001).

(i). Proof of Pecuniary Damages

Denial of credit is one of the costliest and most painful—both for consumers and for consumer reporting agencies responsible for violations—that result from violations of the FCRA. In situations where a consumer applies for a loan to buy a house, for example, and is denied, the consumer reporting agency is responsible, in theory, for the lost wealth that would have resulted from the consumer's equity in the home. Similarly, consumer reporting agencies can be responsible for the higher costs of loans received under less favorable circumstances as a result of FCRA violations.

Proof of such damages is naturally a hotly contested issue. The consumer's testimony about the denial of credit will not be sufficient, as consumers often have no knowledge of why credit was denied. Riley v. Equifax Credit Information Services, 194 F.Supp.2d 1239 (S.D. Ala. 2002). Direct proof such as credit denial letters can meet the burden of proof, even if such letters do not directly state the reason credit was denied. In McMillan v. Experian, 170 F. Supp.2d 278 (D. Conn. 2001) the Court held that proof that an insurer accessed an erroneous consumer report and then immediately denied coverage would allow the jury to infer that the consumer report was the cause of the denial.

(b) Punitive Damages.

Willful failure to comply with the terms of the FCRA raises the possibility of such punitive damages "as the court will allow." 15 U.S.C. § 1681n(a)(2). Willfulness is an issue of fact for a jury. Thibodeaux v. Rupers, 196 F.Supp.2d 585 (S.D. Ohio 2001).

(c) Statutory Damages.

Statutory damages are available for willful violations of the FCRA, but not for negligence violations. The statute provides that any person who willfully fails to comply with the FCRA with regards to any consumer is liable for either actual damages sustained, or damages ranging from $100 to $1000 for each violation of the Act. Statutory damages are available when the actual damages are impossible to prove or are nonexistent.

(d) Attorney's fees and costs.

Attorney's fees are mandatory under the FCRA to a successful Plaintiff. The usual lodestar method employed by U.S. District Courts will be used to calculate the fee.

3. Public enforcement.

Public enforcement either civilly by the FTC or criminally by the U.S. Department of Justice is possible also. As mentioned previously, the FTC or DOJ can pursue claims for which an individual does not have a cause of action.