Banking and Finance Law Daily Wrap Up, TOP STORY—6th Cir.: Mere procedural FCRA violation is insufficient for Article III standing, (May 6, 2019)

Banking and Finance Law Daily Wrap Up

Click to open document in a browser

By Nicole D. Prysby, J.D.

A bare procedural violation of the FCRA requirement to report all data in a consumer's file upon request is not a sufficient injury to create Article III standing.

A consumer lacked Article III standing for his Fair Credit Reporting Act claim, because the claim was based solely on a check verification company's procedural violation of failing to include all information in the consumer's file on request, held the Sixth Circuit Court of Appeals. The consumer obtained a copy of his file from a check verification company and the report failed to list all checking accounts linked to his driver's license. The consumer alleged no other injury; he never had a check declined, was not at imminent risk of having a check declined, and did not allege that he would have done anything with the missing information had he received it. Congress's ability to create standing through intangible injury does not extend to defining harmless procedural violations as injuries in fact, the court held. The consumer suffered no adverse consequences of the procedural violation and Congress provided no guidance as to why the type of incomplete disclosure the consumer received constitutes an injury in fact. Therefore, the technical violation of FCRA has not created an injury sufficient to convey Article III standing. However, the dissent would have held that the consumer had standing, based on the potential risk of a check being declined and the consumer's inability to use the FCRA grievance process to correct the data (*Huff v. TeleCheck Services, Inc.*, May 3, 2019, Sutton, J.).

Background. The consumer requested a copy of his file from check verification company TeleCheck Services, Inc. TeleCheck links consumer data to identifiers such as driver's license or bank account numbers. When a consumer presents two identifiers in a transaction, TeleCheck records a link between the identifiers in its system. If in a later transaction a customer uses only one of those identifiers, TeleCheck recommends that the merchant decline the transaction if there is a debt associated with the presented identifier or the linked identifier. The report omitted that the consumer's driver's license was linked to six different bank accounts. The accounts were linked because he had presented his license in transactions alongside checks from each of the accounts. However, the report did indicate that TeleCheck had more information: a disclaimer at the bottom of the report informed him that his record was linked to information not in the report and he should contact TeleCheck for additional information. The consumer sued TeleCheck in a putative class action, alleging violations of the FCRA duty to disclose "[a]ll information in the consumer's file" upon request. TeleCheck has never told a merchant to decline one of the consumer's checks due to his linked information.

Consumer lacks Article III standing. The court held that although the consumer had successfully alleged the elements of a statutory cause of action under FCRA, he failed to demonstrate an injury in fact. He did not allege an actual injury, because he did not claim that TeleCheck's conduct caused a check to be declined, or even that he would have done anything with the missing information had he received it. There was also no imminent risk that he would suffer injury (in the form of a declined check). Four of the linked accounts were last used between 2008 and 2010, making it a virtual certainty that no one would write a bad check on them today. One of the other linked accounts was the consumer's personal account, meaning he could not blame TeleCheck's nondisclosure if he bounced a check on it. The remaining account belonged to the consumer's wife, and it would take a number of events (such as his wife creating an unresolved debt with a merchant) for him to suffer a check decline based on her account. The consumer offered no evidence that, had he received what he wanted, he would have tried to

delink any accounts from his driver's license. TeleCheck also alleviated any risk of harm by including the linked data disclaimer.

The consumer also argued that the FCRA statutory violation created an injury, but the court rejected that argument. Although Congress has some ability to create standing through intangible injury, that ability does not extend to defining harmless procedural violations as injuries in fact. TeleCheck's alleged statutory violation did not harm the consumer's interests under the Fair Credit Reporting Act because it had no adverse consequences. None of the six accounts linked to the consumer's driver's license has ever been associated with an outstanding debt, which means that the linked data never affected, altered, or influenced a single consumer report. TeleCheck at most prevented the consumer from delinking those accounts from his driver's license. But because the undisclosed information was irrelevant to any credit assessment, delinking the accounts would not have had any effect. Congress provided no guidance as to why the type of incomplete disclosure the consumer received constitutes an injury in fact; therefore, the technical violation of FCRA has not created an injury. The court rejected the consumer's argument that he was prevented from being able to monitor his file and correct its accuracy, because he never took any action after receiving the undisclosed information, indicating he wouldn't have done anything even if he had received it earlier.

Dissenting opinion. A dissenting opinion asserted that the consumer's injury in fact was sufficiently concrete to satisfy Article III standing requirements because (1) Congress conferred on consumers the right to request their entire file to protect their interest in having only accurate information reported about them, and (2) TeleCheck's failure to provide the consumer's entire file created a material risk that inaccurate information would be reported about him and he would face a check decline. When the consumer exercised his right to receive his file, TeleCheck failed to disclose those bank accounts, and he therefore was unable to use the FCRA's grievance procedures to correct that information. Consequently, he was at risk of harm if one of those accounts developed a debt and he presented his driver's license while paying by check.

The case number is No. 18-5438.

Attorneys: Martin D. Holmes (Dickinson Wright) for James Huff. David Ruben Esquivel (Bass, Berry & Sims PLC) for TeleCheck Services, Inc., TeleCheck International, Inc. and First Data Corp.

Companies: TeleCheck Services, Inc.; TeleCheck International, Inc; First Data Corp.

MainStory: TopStory FairCreditReporting