

The Intersection of FCRA and Chapter 7 Bankruptcy

Making the connection between the Two

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RESOURCES

- This PowerPoint and many related documents are available at
- <http://www.KrumbeinLaw.com/NACA>
- 2006 Credit Report Resource Guide

WARNING-

FCRA IS NOT FOR DABBLERS

- FDCPA is strict liability.
 - If the debt collector violates, you get to sue.
 - Like speeding- you violate, you pay a fine.
- FCRA IS NOT STRICT LIABILITY.
 - You must plead and prove detailed things.
 - Negligent violation
 - Duty, breach, damages, causation
 - Willful violation
 - Knowledge that the information is false and the intentional act to report it.

Considerations before Bankruptcy

- Why do people file for Bankruptcy?
 - Too much debt?
 - Overspending?
 - Job loss?
 - Divorce?
 - Medical bills?

Purpose of FCRA

- To ensure that people have accurate credit reports.
- Congressional findings- 30% of people have errors affecting their ability to obtain credit.
- NOTE- this has nothing to do with why people file for Bankruptcy.

Purpose of Bankruptcy

- To provide a “fresh start” to the well meaning, but unlucky Debtor (as defined by the Bankruptcy code). (Chapter 7)
- To allow a consumer the ability to readjust debts and decelerate secured debt. (Chapter 13)
- Is not a complete “get out of jail free” card.

Chapter 7 Bankruptcy Outline

- Person must generally have less income than expenses
- Must have less income than median for state (note- there are exceptions)
- List all assets (real property and personal property)
- List all debts (secured, unsecured, special [priority], and special [non-dischargeable]).
- Trustee is tasked with taking all non-exempt assets and liquidating for purpose of payment to creditors.

Chapter 13 Outline

- For people who have more income than expenses or who are above median income
- List all assets and debts like in a Chapter 7
- Pay the excess income to a Chapter 13 trustee who distributes proceeds to creditors
- Assets are generally not liquidated
- Often used for purpose of saving house or car.
- Discharge is entered after all payments have been made, but Automatic Stay is in effect the entire time.

Chapter 12 Outline

- Similar to Chapter 13, only limited to farmers or fisherman
- Debt limits are higher

Chapter 11 Outline

- Usually done by corporations, but CAN be done by individuals.
- Much more complex type of Bankruptcy.
- Can manipulate many other things that cannot change in Chapter 7, 12 or 13.

FCRA Outline

- CRA subject to 2 provisions
 - 15 USC 1681e[b]
 - Failure to MAINTAIN procedure to assure maximum possible accuracy
 - 15 USC 1681i
 - Failure to CORRECT AFTER DISPUTE

FCRA Outline part 2

- Furnishers only subject to 1 provision
 - 15 USC 1681s-2[b]
 - Failure to correct after dispute TO THE CRA.
 - NOTE- NO PRIVATE RIGHT OF ACTION AGAINST FURNISHER FOR DIRECT DISPUTE (15 USC 1681s-2[a])

FCRA Considerations PRIOR to Bankruptcy

- If the consumer is willing and able to pay their own bills, but is considering filing BK due to someone else's debts appearing on their own credit report, then FDCPA and FCRA may be effective in not needing to file for Bankruptcy.
- If they are not paying their own bills, regardless of the other options, a BK may be in their future.

FCRA Considerations PRIOR to Bankruptcy

- Examples of good FCRA cases prior to BK
 - ID theft
 - Mixed credit files
 - False status
- AS LONG AS THE CONSUMER IS PAYING THEIR BILLS.
 - ie: if they are not paying, NO FCRA CASE.

FCRA Considerations

AFTER Bankruptcy- CRA duties

- The CRA has a duty to update the accounts that were outstanding and IN DEFAULT on the date of Bankruptcy.
- This is the procedure to assure maximum possible accuracy.
 - White et al v. Experian et al 8:05-cv-1070(C.D. Cal)
 - Both the procedural changes (injunctive relief agreement) and the class settlement are on the website.

FCRA Considerations

AFTER Bankruptcy- CRA Duties

- But there are limitations.
 - Accounts not in default are excluded from the injunctive relief
 - Accounts that were charged off or 0 balance are excluded from the injunctive relief
 - Educational loans MAY be excluded, but are not GENERALLY dischargeable from the Bankruptcy in any event.

FCRA Considerations

AFTER Bankruptcy-CRA Duties

- *Sarver v. Experian*, 390 F. 3d 969 (7th Cir, 2004)
 - No way for CRA to know the update was needed if no dispute. No claim under 1681e[b].
- BUT the opposite holding in *White v. TransUnion*, 462 F. Supp 2d, 1079, 1082 (C.D. Cal, 2006).

FCRA Considerations

AFTER Bankruptcy-CRA duties

- Best choice is to dispute to the CRA anyway, even absent the holding of *White*.
- This implicates 1681i reinvestigation duties.
- Also allows the “charged off” and “0 balance” and “sold to another lender” accounts to be updated.
- Also implicates 1681i duty to forward to the furnisher.

FCRA Considerations

AFTER Bankruptcy-Furnisher duties

- NO duty under FCRA absent a dispute.
- Credit reporting MAY NOT be collection.
 - *In Re Helmes*, 336 BR 105 (Bankr. ED VA, 2005)
 - *In re Mahoney*, 368 BR 579 (Bankr. WD TX 2007)
 - (the “Cabrito” case)
 - *In re Vogt*, 257 B.R. 65, 70 (Bankr. D. CO 2000)
 - Need to show that it was for the PURPOSE of collection
 - *In Re Jones*, 367 B.R. 564 (Bankr. E.D. VA 2007)

FCRA Considerations

AFTER Bankruptcy-Furnisher duties

- Continuing to report money is owed MAY be an attempt to collect a debt.
 - *Riviera v. Bank 1*, 145 FRD 614, 623 (D. PR, 1993)
 - *Screen v. Equifax*, 303 F.Supp.2d 685 (D.Md. 2004)
 - *in. Re Torres*, 367 BR 478, (Bankr SDNY, 2007)
 - Related case- Mateo.
 - TORRES and MATEO ARE OUTLIERS. DO NOT DEPEND ON THESE CASES.

FCRA Considerations

AFTER Bankruptcy-Furnisher duties

- NOTE THAT THE BAD CASES ARE ALL BANKRUPTCY CASES.
 - The Bankruptcy is all about COLLECTION of money owed.
- FCRA is not about COLLECTION but about ACCURACY.
 - An action must be based upon factually, objectively inaccurate information

FCRA Considerations

AFTER Bankruptcy-Furnisher duties

- FCRA requires that the CRA forward the reinvestigation request and all relevant documents to the furnisher (source of information) 1681i[a][2]
- The furnisher must conduct their OWN investigation, and report back to the CRA. 1681s-2[b][1][A]-[E]

FCRA Considerations

AFTER Bankruptcy-Furnisher duties

PRACTICE TIPS

- Look out for unlisted creditors
 - Even though they are Discharged, they may not know they are discharged, and the CRA has no way to know either.

FCRA Considerations

AFTER Bankruptcy-Furnisher duties

BANKRUPTCY PRACTITIONERS

- Every debt collector has a creditor they represent. LIST BOTH
- Most creditors assign accounts to certain debt collectors. LIST BOTH
- Check the credit report (“due diligence” in filing a Bankruptcy anyway) and look for accounts that were sold, charged off, or have a 0 balance. Ask about them.

FCRA Considerations

AFTER Bankruptcy-Furnisher duties

FCRA PRACTITIONERS

- Anyone who has an unlisted creditor issue needs to think twice before filing the case.
- Unlisted, pre-petition debts are Discharged anyway, AS LONG AS THEY ARE DISCHARGEABLE. Read and know 11 USC 523.
 - *In Re Madaj*, 149 F.3d 467 (6th Cir, 1998)
 - *Judd v. Wolfe*, 78 F. 3d 110 (3rd Cir, 1996)

FCRA Considerations

AFTER Bankruptcy-USER duties

- [review attempt to collect a debt]
- Why did the creditor inquire into the credit file of the consumer?
 - Were they attempting to collect? MAYBE.
 - Did they have an other purpose that is permissible? MAYBE.

[cases on next slide]

FCRA Considerations

AFTER Bankruptcy-USER duties

- *Levine v. WFNNB*, 437 F.3d 1118 (11th cir, 2006)
- *Godby v. Wells Fargo*, 599 F. Supp. 2d 934 (SD Ohio 2008)
- Note that in *Levine II*, *Levine v. WFNNB*, 554 F. 3d 1314 (11th Circuit 2009), the court ruled that it was NOT an impermissible sale of the credit report AS TO EXPERIAN. (at 1318)

FCRA Considerations ALL Cases

- You need to prove that
 - The information is false or inaccurate.
 - The information was transmitted to a 3rd party.
 - The information caused damage in a financial manner
 - Damage to the credit score is meaningless unless it changed someone's mind about lending to the client.

FCRA CONSIDERATION SPECIFIC TO BANKRUPTCY

- FCRA is most often used in ID theft or mixed credit file litigation.
- FCRA is not designed to give big relief to consumers with bad credit
- Consumers who have filed for Bankruptcy have bad credit.
- YOU WILL NOT GET MONSTER VERDICTS ON BK-FCRA CASES.

Jurisdiction of the Court

- FCRA-Bring in State or Federal Court.
 - Jurisdiction based on 15 USC 1681.
 - Selection based on how the judges are in your area.

Jurisdiction of the Court

- Do NOT bring FCRA in Bankruptcy Court
 - Statutory jurisdiction but
 - NO CONSTITUTIONAL Jurisdiction
 - *Stern v. Marshall*, 131 S. Ct. 2594 (2011)
 - Equivalent to licking a flagpole in Wisconsin in February.

Jurisdiction of the Court

- MAY bring DISCHARGE in Bankruptcy Court
 - Statutory jurisdiction AND
 - CONSTITUTIONAL Jurisdiction
 - *Stern v. Marshall*, 131 S. Ct. 2594 (2011)
 - Have to have unequivocal “attempt to collect”, which is not inferred.
 - Must know your circuit, district and judge.
 - NO PROA IN MANY JURISDICTIONS FOR DISCHARGE VIOLATION

SUMMARY

- DON'T
 - DON'T sue for inaccuracies credit in Bankruptcy Court.
 - DON'T Use the Discharge injunction in District Court
 - Don't do anything during the short period of time the Bankruptcy is active.
 - Don't do anything before the Bankruptcy.
 - Nothing good can come of that.
 - DON'T pursue weak or questionable claims.
 - Enough bad law has been made.

SUMMARY

- DO
 - Send requests to reinvestigate to the CRAs
 - Monitor the credit file for long times
 - Watch the changes.
 - Beware of damages issues- No damages, no claim.
 - Beware of “publication” requirements
 - Treat this like a conventional FCRA case.