Advisory Opinion to Tatelbaum (07-26-00)

July 26, 2000

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Dear Mr. Tatelbaum:

This responds to your letter asking for the staff's opinion on the application of the Fair Credit Reporting Act ("FCRA") to the extension of credit for commercial purposes. Specifically, you inquire whether a permissible purpose exists under the FCRA for a business credit grantor to obtain a consumer report on an individual who is a principal, owner, or officer of a commercial loan applicant (a sole proprietorship, partnership, or corporation), or who signs a personal guarantee in connection with a commercial credit application by a third party. For the reasons discussed hereafter, we answer in the negative.

1. The report on the individual is a "consumer report" subject to the FCRA.

Section 603(d)(1) of the FCRA states:

The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other purpose under Section 604.

We understand your inquiry to mean that the credit report that the business credit grantor obtains is a report on the *personal* credit and other history of the individual who is a principal, owner, or officer of the entity that is undertaking the commercial loan (or who is serving as a guarantor). Because the information is "collected in whole or in part for the purpose of (assisting evaluation of) the consumer's eligibility for credit (or other authorized purpose)," the overwhelming weight of authority is that such a report is a "consumer report," regardless of the unauthorized purpose to which the information may in fact be used by the party procuring the report. *Yang v. Government Employees Ins. Co.*, 146 F.3d 1320, 1325 (11th Cir. 1998); *Comeaux v. Brown & Williamson Tobacco Co.*, 915 F.2d 1264, 1273-74 (9th Cir. 1990); *St. Paul Guardian Ins. Co. v. Johnson*, 884 F.2d 881, 884-85 (5th Cir. 1989); *Heath v. Credit Bureau of Sheridan, Inc.*, 618 F.2d 693, 696 (10th Cir. 1980); *Hansen v. Morgan*, 582 F.2d 1214, 1218 (9th Cir. 1978); *Pappas v. Calumet City*, 9 F.Supp.2d 943, 947-48 (N.D.Ill. 1998); *Boothe v. TRW Credit Data*, 523 F. Supp. 631, 634 (S.D.N.Y. 1981). The Commission's

May 1990 Commentary on the Fair Credit Reporting Act[1], is in accord[2]. Where the information concerns the subject's *business* history or status (i.e., is collected and provided by a commercial reporting agency for use in *business* transactions), of course, its communication to the user does not constitute a "consumer report" under Section 603(d). *Wrigley v. Dun & Bradstreet, Inc.*, 375 F. Supp. 969 (N.D. Ga. 1974);*Boothe*, 523 F. Supp. at 633[3].

We recognize there is some authority to the contrary. See *Matthews v. Worthen Bank & Trust Co.*, 741 F.2d 217, 219 (8th Cir. 1984), where the court cites a comment by Representative Sullivan to the effect that the FCRA "does not apply to reports used for business, commercial, or professional purposes."[4] While this piece of legislative history is intriguing, we interpret it to mean that reports to business lenders by commercial reporting services such as Dun & Bradstreet, which compile data and provide reports only for commercial purposes, are not covered by the FCRA. It is highly unlikely that Rep. Sullivan's comments were intended to negate Section 603(d)'s specific application to a report made by a credit bureau that "collected (the information) . . . for the purpose of serving as a factor in establishing the consumer's eligibility" for credit or other purposes authorized by the FCRA, by focusing instead solely on the purpose of the user. Emphasizing only the user's purpose emasculates the statute, as articulated by the court in the St. Paul case:

To illustrate the untenable nature of St. Paul's construction of the FCRA in this context, suppose X secured Y's credit report for the sole purpose of disclosing it to embarrass Y. Under St. Paul's reasoning, focusing solely on X's "use" of the report, the report would not be a credit report under the FCRA and thus Y would not be afforded FCRA protections. Not only would this run contrary to congressional intent, it would render meaningless (Section 604) which allows for the release of credit reports only for certain purposes.

Under St. Paul's reasoning, credit reports would be releasable under all circumstances. If used for non-FCRA purposes, a credit report would be releasable because in did not fall within the FCRA definition of a consumer report. If used for FCRA purposes, a credit report would likewise be releasable because it would meet the definition of a consumer report. We simply cannot conclude that Congress intended such an illogical result."

884 F.2d at 884-85.

We believe the majority view is clearly the correct one,[5] and that a report by a credit bureau on an individual based on information that was collected for the purpose of reporting on that

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[1] 16 CFR § 600 Appendix; 55 Fed. Reg. 18804-18828 (May 4, 1990). In this letter, specific sections are cited as "FCRA Commentary, comment . . ." with the latter part of the citation reflecting the applicable comment.

[2] See FCRA Commentary, comment 604(3)(E)-2, revised by the Commission from an earlier draft to clarify this point. 55 Fed. Reg. at 18805, 18816.

[3] FCRA Commentary, comments 603(d)-2 and 603(d)-3C, 55 Fed. Reg. at 18810.

[4] 116 Cong. Rec. 36572 (1970) (Conf. Report on H.R. 15073). Citations from Rep. Sullivan also were featured in lower court decisions that preceded the Matthews decision in taking the minority view. Henry v. Forbes, 433 F. Supp. 5, 9 (D. Minn. 1976); Sizemore v. Bambi Leasing Corp., 360 F. Supp. 252, 254 (N.D. Ga. 1973); Fernandez v. Retail Credit Co., 349 F. Supp. 652, 654 (E.D. La. 1972).

[5] In fact, it is not clear that even the Eight Circuit continues to follow the Matthews case, which is the linchpin of the minority view cited at the beginning of this paragraph. In Bakker v, McKinnon, 152 F.3d 1007, 1012 (8th Cir. 1998), that court ignored Matthews and instead quoted St. Paul approvingly stating, "Under the FCRA whether a credit report is a consumer report does not depend solely upon the ultimate use (of the report), but instead, it

individual does not lose its character as a consumer report because of an impermissible purpose of the user.

2. A commercial transaction does not provide a "permissible purpose" for a consumer report

Your letter shows that you clearly understand that the lender may always assure a permissible purpose pursuant to Section 604(a)(2), which authorizes a report to be supplied pursuant to the written instructions of the consumer. We disagree, however, with your position that a permissible purpose exists under Section 604(a)(3)(A) or (F)(i). Those subsections provide such a purpose only where the recipient of the report:

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to ... the *consumer*; or ... (F) otherwise has a legitimate business need for the information (i) in connection with a business transaction that is initiated by the *consumer*. (Emphasis added)

Section 604(c) states, "The term 'consumer' means an individual." Your letter states specifically that the "credit process is initiated *by the company* seeking the business or trade credit." When a corporation, partnership, or other business entity -- rather than an individual -- applies for commercial credit, there is thus neither an "extension of credit to (a) consumer" or "a business transaction that is initiated by a consumer" to provide a permissible purpose under either Section 604(a)(3)(A) or (3)(F)(i).

Because "extension of credit to ... the *consumer*" (emphasis added) is a prerequisite to the application of Section 604(a)(3)(A), where the application is made by a business entity, the provision does not provide a permissible purpose for a lender to obtain a consumer report on a guarantor or co-signer for -- or a principal, owner, or officer of -- the commercial credit applicant.

Section 604(a)(3)(F)(i), which provides a permissible purpose only for a "transaction that is initiated by the consumer," is also inapplicable to a credit transaction initiated by a business entity. The provision does not encompass commercial or credit purposes; rather, is designed to provide a permissible purpose to a business that is considering a *consumer* application for a purpose *other than* credit, employment, or insurance set forth in Sections 604(a)(3)(A), (3)(B), or (3)(C).[6] For example, a landlord to whom a consumer applies to rent an apartment, a bank to which a consumer applies to open a checking or savings account, or a merchant to whom a consumer offers a personal check as payment for goods or services has a "permissible purpose" to obtain a consumer report under this provision.[7] Section 604(a)(3)(F)(i) thus provides no authority for a lender to obtain a consumer report in connection with a credit application for any commercial purpose.

The court authorities are generally in accord. A "*consumer* relationship must exist between the party requesting the report and the subject of the report." *Houghton v. New Jersey Manufacturers Ins. Co.*, 795 F.2d 1144, 1149 (3d Cir. 1986) (emphasis added). Thus, there is no permissible purpose to obtain a consumer report on a corporate principal to evaluate the capacity of the company to pay a judgment. *Mone v. Dranow*, 945 F. 2d 306, 308 (9th Cir.

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is governed by the purpose for which the information was originally collected in whole or in part by the consumer reporting agency."

[6] FCRA Commentary, comment 604-1D; 55 Fed. Reg. at 18814.

[7] Estiverne v. Saks Fifth Avenue, 9 F.3d 1171, 1173-74 (5th Cir. 1993).

1991). Similarly, "evaluating prospective franchisees does not fall within one of the consumer purposes set forth in the FCRA." *Ippolito v. WNS, Inc.*, 864 F.2d 440, 452 (7th Cir. 1988). Other courts have held that a city had no permissible purpose to obtain a consumer report on the proprietor of a towing company that removed illegally parked cars on request from the police department, regardless of whether the municipality had a contract with the towing company, *Pappas v. Calumet City*, 9 F.Supp.2d 943, 950 (N.D.Ill. 1998); a company had no legitimate "business need" purpose to obtain a consumer report on a former employee who had suddenly resigned and was suspected of embezzlement, *Russell v. Shelter Financial Services*, 604 F. Supp. 201 (W.D. Mo. 1984); and a manufacturer had no "business need" purpose to obtain a consumer report on an individual who operated a mail order business that sold its products among others. *Boothe v. TRW Credit Data*, 523 F. Supp. 631 (S.D.N.Y. 1981).

Again, we acknowledge that the reported cases are not unanimous on the point. In *Advanced Conservation Systems, Inc. v. Long Island Lighting Co.*, 934 F. Supp 53 (E.D.N.Y. 1996), *aff'd without opinion*, 113 F.2d 1229 (2d Cir. 1997), the court found a permissible "business need" purpose for a consumer report on a corporate principal. If that view had any force at some point, it disappeared with enactment of the Consumer Credit Reporting Reform Act of 1996 ("the 1996 amendments") that revised Section 604 any many other sections of the FCRA.[8] The predecessor to Section 604(a)(3)(F)(i), quoted in the foregoing case,[9] provided a permissible purpose if the party "otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer."[10] Because the 1996 amendments abandoned the "involving the consumer" formulation and replaced it with "initiated by the consumer,"[11] it is now clear that there is no permissible purpose unless a consumer (an individual) rather than a business entity initiates the transaction. Thus, in *Pappas v. Calumet City*, 9 F.Supp.2d 943, 950 (N.D.Ill. 1998), a court applying the amended FCRA found no permissible purpose to obtain a consumer report on the corporate principal based on the report user's dealings with the company operated by that individual.

The opinions set forth in this informal staff letter are not binding on the Commission.

Yours truly,

David Medine

[8] Title II, Subtitle D, Chapter 1 of Public Law 104-208, the Omnibus Consolidated Appropriations Act for Fiscal Year 1997.
[9] 934 F. Supp. at 55.
[10] In the original FCRA, this provision was Section 604(3)(E). Because Subsections (a)(3)(E), (b), (c), (d), (e), (f), and (g) were added to Section 604 by the 1996 amendments that also revised this portion of the FCRA, it was re-designated Section 604(a)(3)(F) at that time.
[11] The change "restricts the scope of the business need exception by further defining the circumstances in which it applies." Duncan v. Handmaker, 149 F.3d 424, 427n3 (6th Cir. 1998).