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Loans in Dispute: A Look at the Fair Credit Reporting Act and the Evolving Guidance for Using Compliance Condition Codes

Jena M. Valdetero and Matthew M. Petersen*

The authors of this article discuss the Fair Credit Reporting Act, the Compliance Condition Codes used in the credit industry to indicate that a consumer disputes the reporting, and recent federal court decisions interpreting use of those codes.

Recent developments have heightened the focus on the obligation of furnishers of credit information to report loans and other types of credit accounts as disputed under the Fair Credit Reporting Act ("FCRA"),[1] when they become aware that a consumer contests the accuracy of reporting. Below is a discussion of the Compliance Condition Codes used in the credit industry to indicate that a consumer disputes the reporting, and recent federal court decisions interpreting use of those codes.

BACKGROUND

The FCRA was enacted to, among other things, ensure fair and accurate credit reporting. The FCRA imposes duties on "furnishers of information" in Section 1681s-2. "Furnishers of information" are the entities, including lenders, credit card companies, and loan servicers, that provide credit information to credit reporting agencies ("CRAs").

Subsection (a) of 1681s-2 covers the duty of furnishers to provide "accurate" information. For purposes of this article, subsection (a) also requires furnishers that receive direct disputes from consumers to provide "notice that such information is disputed" to CRAs:

> If the completeness or accuracy of any information furnished by any person to any consumer reporting agency is disputed to such person by a consumer, the person may not furnish the information to any

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[1] 15 U.S.C. § 1681, *et seq.*

> consumer reporting agency without notice that such information is disputed by the consumer.[2]

Conversely, subsection (b) of 1681s-2 addresses a second category of obligations on furnishers that are triggered "upon notice of a dispute" from a CRA. After receipt of a consumer dispute from a CRA, a furnisher is required by subsection (b) to conduct a reasonable investigation and correct any information that is "incomplete or inaccurate."[3]

THE FCRA PRIVATE RIGHT OF ACTION

The FCRA provides consumers with a private right of action only for claims arising under subsection (b). Consumers cannot sue for failure to report "accurate" information under subsection (a).[4] Instead, subsection (a) is enforced by federal and state officials.[5]

EXTENDING THE PRIVATE RIGHT OF ACTION

Federal courts have extended this private right of action to claims against furnishers for failing to report an account as disputed to the CRAs under Section 1681s-2(a)(3). To do so, federal courts—starting with the U.S. Court of Appeals for the Fourth Circuit in *Saunders v. Branch Banking & Trust Co.*,[6] and the U.S. Court of Appeals for the Ninth Circuit in *Gorman v. Wolpoff & Abramson, LLP*,[7]—rely on the "incomplete or inaccurate" language in Section 1681s-2(b)(1)(D) to find that a furnisher's failure to a report that an account's credit reporting is in dispute violates the FCRA if it creates a materially misleading impression. This approach has been followed by courts in all 13 federal judicial circuits.

Federal courts have limited causes of action for failure to report the dispute status of an account in two ways:

1) *Direct disputes.* Some federal courts have held that a consumer must first submit the dispute directly to the furnisher (i.e., a direct dispute) before submitting his or her dispute to the CRA (i.e., an indirect dispute) in order to pursue a private claim. Remember that (1) there

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[2] 15 U.S.C. § 1681s-2(a)(3).

[3] 15 U.S.C. § 1681s-2(b)(1)(A)–(E).

[4] *See* 15 U.S.C. § 1681s-2(c)(1).

[5] 15 U.S.C. § 1681s-2(d).

[6] 526 F.3d 142 (4th Cir. 2008).

[7] 584 F.3d 1147 (9th Cir. 2009).

is no requirement to report an account as being disputed in Section 1681s-2(b), (2) Section 1681s-2(a)(3) requires furnishers to report that an account has been disputed only if they receive a direct dispute from a consumer, and (3) there is no private right of action under Section 1681s-2(a)(3). Thus, the furnisher must have already received a direct dispute at the time it receives notice of the indirect dispute, such that, the failure to recognize the dispute in responding to the indirect dispute could be deemed "inaccurate or incomplete." In other words, a consumer may not maintain a claim if he or she submitted a dispute only through a CRA and did not first dispute the reporting directly with the furnisher.[8]

2) *Meritless disputes.* Many federal courts have also held that a furnisher is not obligated to report an account as being in dispute if that dispute was not meritorious. Courts generally consider whether the dispute is "bona fide," and find that consideration of whether a dispute is "bona fide" hinges on whether it "could materially alter how the reported debt is understood."[9]

COMPLIANCE CONDITION CODES—HOW TO REPORT AN ACCOUNT AS IN DISPUTE

Furnishers report that consumers have disputed the reporting on their account by using a "Compliance Condition Code" (the "CCC") in their transmissions to the CRAs. The available CCCs are listed in the Credit Reporting Resource Guide ("Metro-2 Manual"), a manual published annually by the Consumer Data Industry Association ("CDIA"), and used by credit data furnishers as the industry standard credit reporting guide.

The CDIA made an important revision to its instruction regarding use of CCCs in 2017. Prior to 2017, the Metro-2 definitions did not include distinctions in its code definitions or instructions for direct or indirect disputes. Instead, the Metro-2 Manual provided that the CCCs were to be used whenever a consumer initiated a "dispute" under the FCRA, without specification regarding whether the dispute was made directly to the furnisher or indirectly to the CRA. This lack of clarity led to a number of courts finding that furnishers were required to a use a CCC regardless of whether the dispute was direct or indirect.

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[8] *See, e.g., Collins v. BAC Home Loans Servicing LP*, 912 F.Supp.2d 997, 1009–10 (D. Colo. 2012).

[9] *See, e.g., Gorman*, 584 F.3d 1147; *Seamans v. Temple Univ.*, 744 F.3d 853, 867 (3d Cir. 2014).

However, in 2017, the CDIA edited its instructions and definitions for use of CCCs. The 2017 Edition of the Metro-2 Manual provided, for the first time, that "[t]he Compliance Condition Codes should *not* be reported in response to a consumer dispute investigation request from the consumer reporting agencies" (emphasis in original). The CDIA also revised the relevant CCC definitions as follows (2017 revisions in Bold):

XB = "Account information **has been** disputed by **the** consumer **directly to the data furnisher** under the Fair Credit Reporting Act**; the data furnisher is conducting its investigation**. *Definition: Reported when the completeness or accuracy of the account information is disputed **directly to the data furnisher** by the consumer under the FCRA and investigation of the dispute is in progress by the data furnisher.*"

XC = "Completed investigation of FCRA **direct** dispute—consumer disagrees. *Definition: Reported when the investigation of an FCRA dispute **made by the consumer directly to the data furnisher** has been completed by the data furnisher; however, the consumer disagrees with the outcome of the investigation.*"

XH = "Account previously in dispute; **the data furnisher has completed its** investigation ~~**completed, reported by data furnisher**~~ (To be used for **direct disputes under the** FCRA**, FDCPA disputes** or FCBA disputes). *Definition: Reported when the investigation of a dispute by the data furnisher was completed.*"

Each CCC has a different impact on the consumer's credit. The "XB" code is used while the furnisher completes its investigation following receipt of a dispute. It causes credit scoring systems, like the industry standard FICO and VantageScore systems, to ignore the disputed entry in the scoring model's payment history and debt related metrics. Conversely, the "XH" and "XC" codes are used after a furnisher has completed its investigation, and the payment history and debt associated with the account *will* be considered when calculating the credit score. Many lenders, including Fannie Mae and Freddie Mac, refuse to approve loans or allow underwriting to proceed when any of the three codes appears on a consumer's report.

Consumers use these dispute mechanisms and codes in a variety of ways. While some may use the dispute process legitimately, other consumers may attempt to rehabilitate their poor credit profile by disputing negative items on their report in an effort to negotiate an unwarranted "clean up" of their credit history, resulting in undeservedly improved credit scores. The use of CCCs to artificially improve credit scores has given rise to more scrutiny on the CCCs used by furnishers.

The 2017 Metro-2 makes clear for the first time that a furnisher should not use CCCs if it receives a consumer's dispute from a credit reporting agency. Consistent with the statutory language of Section 1681s-2(a), a furnisher should report the dispute status only if the consumer submits a direct dispute to the furnisher. Courts, however, have not yet had an opportunity to adjust to these new CCC definitions and instructions.

THE MOST RECENT DECISIONS CONSIDERING THE COMPLIANCE CONDITION CODE USED

The initial wave of account dispute status cases involved furnishers that neglected to report the underlying account as being in dispute altogether. More recently, consumers' claims have extended to furnishers that reported the dispute status of the account using one or more CCCs, but the consumer contends that the furnisher's choice of the specific CCC violated the FCRA. These claims proved challenging for courts to evaluate due to the lack of statutory or regulatory guidance. Neither the FCRA nor the Consumer Financial Protection Bureau's ("CFPB") regulations addressed *when* particular CCCs should be used, and, prior to 2017, the Metro-2 Manual failed to provide meaningful guidance beyond definitions that simply instructed that CCCs should be used whenever there was a "dispute."

Whether the CCC reported by the furnisher violated the FCRA was a question in the following cases decided over the last three years:

1) *Gissler v. Pennsylvania Higher Education Assistance Agency*, challenging the "XH" code.[10]
2) *Wood v. Credit One Bank*, challenging the "XH" code.[11]
3) *Fulton v. Equifax Info. Servs., LLC*, challenging the "XB" code.[12]
4) *Armeni v. Trans Union LLC, Inc.*, challenging the "XB" code.[13]
5) *Matson v. Edfinancial Services LLC*, challenging the "XB" code.[14]
6) *Horton v. Trans Union, LLC*, challenging the "XB" code.[15]

Given the lack of clear guidance, the results in these cases have unsurprisingly been a mixed bag. *Fulton* granted summary judgment to the furnisher when the

[10] No. 16-cv-1673-PAB-MJW (D. Colo. Sept. 28, 2017).

[11] No. 3:15-cv-594 (E.D. Va. Sept. 21, 2017).

[12] No. 15-14110 (E.D. Mich. Sept. 30, 2016).

[13] No. 3:15-cv-066 (W.D. Va. July 28, 2016).

[14] No. 14-cv-1052-JPS (E.D. Wis. Aug. 21, 2015).

[15] No. 12-2072 (E.D. Pa. Mar. 10, 2015).

"XB" code was unquestionably correct based on the Metro-2 Manual definitions. *Wood* and *Matson* favored the plaintiff consumer on summary judgment when the code used by the furnisher was unquestionably incorrect. *Gissler*, *Armeni*, and *Horton* found that whether the furnisher's CCC complied with the FCRA was a question of fact that survives summary judgment. These cases indicate that use of a CCC is an issue that *can* be decided at summary judgment when the underlying circumstances align with the Metro-2 Manual definitions. However, beyond finding that credit reporting violates the FCRA if it creates a materially misleading impression, these district courts did not apply a common standard or test to evaluate whether the CCC used by the furnisher was misleading. The general lack of instruction on use of CCCs leaves open the questions of what factors furnishers should take into consideration when applying CCCs. Of course, none of these six cases considered the CDIA's new instruction in the 2017 Metro-2 Manual, and it remains to be seen how these new instructions will impact judicial interpretation of the CCCs, if at all.

Additionally, beyond the CCC issue, both *Gissler* and *Matson* granted summary judgment to the furnisher because the plaintiff failed to establish any actual damages resulting from the CCC. Consequently, arguing that a consumer has no actual damages is another way for a furnisher to prevail on a claim for negligent violation (as opposed to intentional) of the FCRA based on use of a CCC.

OPEN QUESTIONS

The Metro-2 Manual's 2017 revisions, coupled with the lack of uniform approach by the FCRA, CFPB, and district courts, leave a number of open questions:

- *Do Plaintiffs Still Have Claims Against Furnishers for Use of CCCs?* The CDIA's 2017 Metro-2 Manual places into doubt whether Plaintiffs can assert FCRA claims based on use of CCCs. The new definitions are significant because they limited use of the CCCs to direct disputes, and the FCRA does not provide customers with a private right of action for a furnisher's conduct after it receives a direct dispute. Therefore, one possible outcome is that consumers will no longer be able to assert claims against furnishers based on CCCs. However, it is also possible that courts will continue to focus on *Saunders* and its instruction that a furnisher's credit reporting can be actionable if it creates a materially misleading impression without regard to the Metro-2 Manual. Additionally, consumers can potentially still state a claim under Section 1681s-2(b) if they submit a dispute to their credit furnisher regarding use of the CCCs and the furnisher's investigation of that dispute fails

to comply with the FCRA. This will be an issue to keep an eye on as more recent FCRA cases work their way through the federal courts.

- *Which CCC to Use?* While the 2017 Metro-2 Manual specifies that CCCs are to be used only when a furnisher receives a direct dispute, there is a still a lack of judicial or regulatory guidance regarding which CCC to use when a direct dispute investigation is completed. This places furnishers in the precarious position of enacting CCC policies and procedures without instruction for how to avoid being misleading. The Metro-2 Manual's distinction between the "XH" and "XC" codes is less than clear, and this is problematic given the seemingly countless forms a consumer's "disagreement" with an investigation outcome may take. Some consumers may disagree but say nothing. Others may show their disagreement by submitting duplicative disputes or by filing a lawsuit. As furnishers often face cost, labor, and technology limitations, case-specific CCC determinations can be difficult. This leaves open the question of whether the furnisher should be required to assume that a consumer disagrees with an investigation conclusion based on the consumer's post-investigation conduct, and, if so, at what point should the furnisher be required to do so.
- *Question of Fact or Not?* The lack of clarity also creates a challenge for furnishers deciding how to best defend themselves against claims for use of an allegedly incorrect CCC. While the question of whether a particular CCC was misleading is inherently going to depend on the underlying circumstances, *Fulton* makes clear that it is not something that will always be a fact question. Furnishers can rely on the Metro-2 Manual definitions and other judicial precedent to support their use of a particular CCC. However, doing so is made more difficult by the lack of uniformity across jurisdictions in which a furnisher may do business.
- *Actual Damages?* Recent cases have raised questions as to how consumers will prove damages resulting from the CCC. A growing number of courts are finding that a decrease in credit score alone, without an accompanying harm such as a credit application denial is insufficient to prove actual damages. Even if consumers can establish some measure of actual harm, however, cases involving CCCs require the consumer to prove that such harm can be traced to the CCC. This can be a difficult task because, other than the "XB" code's impact on credit scores as addressed above, the other CCCs have no impact on credit scores.