CONSUMER FINANCIAL SERVICES LAW REPORT

FOCUSING ON SIGNIFICANT CASELAW AND EMERGING TRENDS

JUNE 6, 2014 | VOLUME 18 | ISSUE 3

FAIR CREDIT

PREVENTING ID THEFT IS A 'LEGITIMATE BUSINESS NEED' UNDER FCRA

When a company pulls a credit report from a credit reporting agency on an individual in order to protect him or her from identity theft, the company has a "legitimate business need" to do so, a federal appellate court concluded. That need translates into a "permissible purpose" under the Fair Credit Reporting Act said the appellate panel, dismissing a consumer's claim that the company willfully and negligently violated the FCRA. (*Bickley v. Dish Network, LLC*, Nos. 13-5956 & 13-5957, 2014 WL 1887565 (6th Cir. 05/13/14).)

"While this is an issue of first impression before this circuit, like the district court we are persuaded that verifying the identity of a consumer and assessing his eligibility for a service is a 'legitimate business need,' and therefore constitutes a permissible statutory purpose," wrote Judge David W. McKeague for a unanimous 6th U.S. Circuit Court of Appeals panel. "It also seems beyond dispute that a 'legitimate business need' exists to prevent identity theft."

An identity thief tried to open a satellite television account in the name of George Bickley through American Satellite, a third-party reseller for Dish Network LLC. American Satellite ran a credit check through all three major CRAs to verify the information provided by the identity thief, but they were unable to find a positive match. As a result, the identity thief was rebuffed and no account was opened. About two weeks later, Bickley received a credit report indicating that "Dish" had purportedly made an inquiry of some kind under his name, and Dish soon after informed him that someone had attempted to open an account in his name. Dish even provided Bickley with a recording of the phone conversation between the American Satellite representative and the identity thief.

Almost a year later Bickley sued, alleging that Dish willfully and negligently violated the Fair Credit Reporting Act by requesting and using his credit report without having a "permissible purpose." Neither the complaint nor a subsequent amended com-

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within seven days in violation of the Truth in Lending Act. The lender moved to dismiss, and Judge O'Neill granted the motion, saying the state and federal statutes require a payoff statement be given to a borrower within 21 and seven days, respectively, if the loan is not in default or up for sale. Because the borrowers' home was foreclosed and a notice of sale was recorded before they requested the report, the lender was not obligated to give them a statement within the prescribed times.

GUEST COMMENTARY

PROCEDURAL PROTECTIONS FOR INDIVIDUALS IN FINANCIAL ENFORCEMENT ACTIONS

By Jeremiah S. Buckley, Robert B. Serino, and Ann D. Wiles

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In the five years since the financial crisis began, critics have argued that regulators aren't doing enough to hold individual actors accountable for their conduct leading up to the crisis.

These critics, however, may soon be appeased, with regulators promising to name names and hold individuals accountable in enforcement actions going forward.

While there is general agreement with the basic principle that individuals should be held accountable for their conduct, pursuing individuals raises questions regarding what procedural protections should be in place to safeguard those whose conduct may not ultimately warrant an enforcement action. Indeed, regulators have long grappled with the question of whether, and how, to pursue individuals in enforcement actions, and lessons learned from prior individual enforcement actions can help guide us going forward.

WHERE WE'RE HEADED: FOCUS ON INDIVIDUALS IS INCREASING

Whether in response to public criticism, or part of the development of individual agency strategy, it is clear that the focus on individuals in enforcement actions is increasing. For example, just this past March, the head of New York's Department of Financial Services, Benjamin Lawsky, delivered a speech indicating that his agency will focus on holding individuals accountable in enforcement actions going forward.

It is Mr. Lawsky's position that regulators should hold individuals accountable both to deter misconduct and incentivize ethical behavior. Specifically, Mr. Lawsky stated that regulators "should publicly expose — in great detail — the actual, specific misconduct that individual employees engage in," and that "where appropriate — individuals should face real, serious penalties and sanctions when they break the rules." Regarding penalties, Mr. Lawsky proposed "suspensions, firings, bonus claw-backs, and other types of penalties in the regulatory context."

On the heels of these statements, the head of the Office of the Special Inspector General for the Troubled Asset Relief Program (SIGTARP), Christy Romero, also made public statements regarding the agency's efforts to go after individuals, including making referrals for criminal prosecutions. Ms. Romero stated that "[a]n important part of SIGTARP's work is investigating bankers who commit crimes, arresting those bankers, supporting their prosecution, and getting them banned from the banking system before they can do further harm to their banks." She acknowledged the "public outcry for arrests based on the culture of risk-taking and greed that contributed to the financial crisis," further stating that the agency will "seek individual accountability in the form of serious jail time particularly for senior bank officers that put the safety of the bank and taxpayers' TARP investment at risk."

It is clear that the atmosphere around financial enforcement actions is increasingly focusing on individual actors. In the context of criminal proceedings, there are more well-defined processes for ensuring that an individual's procedural due process rights are protected. But in the civil regulatory enforcement arena, the procedural protections an individual should be afforded are less well-defined. This leaves individuals particularly vulnerable to the risk of irreparable reputational and other damage that they may incur when facing allegations that may not ultimately result in any finding of misconduct.

DEVELOPING THE RIGHT PROCESS: CONSIDERATIONS FOR PURSUING INDIVIDUALS

To his credit, Mr. Lawsky recognized that "when you're talking about an employee's reputation, career, or even personal liberty, you have to have a very high degree of confidence that the action you're taking is just and fair. And you need strong evidence regarding an individual's misconduct before you proceed."

Ms. Romero similarly acknowledged that "[p]art of maintaining confidence in the justice system is to ensure that we dispense justice in a fair and rational manner based only on the facts and the law." But giving enforcement agencies the latitude needed to pursue misconduct, while providing individuals the appropriate level of procedural protection, is easier said than done.

In order to strike the right balance, we would propose that any enforcement authority that seeks to hold individual actors accountable adopt and follow written procedural guidelines specific to individual investigations and actions. These procedures — including the standards the agency will use in deciding when to bring actions against individuals, as well as the level of potential punishments that might be sought — should be published and made available for public comment before being finalized. Published standards, which the agency would be obligated to follow, would not only serve as a necessary guide to enforcement personnel, but also serve as a deterrent to bad behavior by sending a clear signal to individuals regarding what constitutes conduct for which they may incur personal liability.

As part of these written procedures, we also would propose that any individual who is the target of an investigation receive a confidential notice of investigation that details the allegations against them and provides an opportunity to respond outside of a public forum. While we recognize the federal banking regulators do use a 15-day letter process to enable a subject of potential civil money penalties to respond to a potential action, much like the Securities and Exchange Commission's Wells process, there is no such process established in cases where a federal banking regulator proposes to bring a cease and desist or removal action, and procedures vary at the state enforcement level. We believe a confidential notice process should be used in all enforcement actions, regardless of the potential remedy sought, so that, where appropriate, the matter can be addressed before any unjustified publicity.

Next, after receipt of the individual's response, if the enforcement authority determines that an enforcement action is warranted, it might be appropriate for the individual to have an opportunity for an independent review of any proposed charges by the agency's ombudsman before an action is filed or the investigation is otherwise made public. We would recommend that the ombudsman be required to make a written finding on all grounds for the proposed enforcement action to discourage what could be perceived as rubber-stamping of the agency's decision. Even if the ombudsman's recommendation were not binding, an ombudsman process would provide a layer of protection against potentially overzealous enforcement personnel, and also ensure that there is a heightened level of objectivity in the enforcement decision, which will add credibility to the agency's decision. Providing an independent review of enforcement decisions will be particularly helpful in adding credibility to the agency's decisions considering that, under the Administrative Procedure Act, the person or board tasked with making the decision to bring charges is also the person or board that is ultimately tasked with determining liability, essentially acting as both prosecutor and judge.

Notably, administrative enforcement proceedings at the federal banking regulators were originally non-public, but in 1990 Congress mandated that any enforcement action from a formal agreement through cease and desist orders, civil money penalties, or removals be made public. While transparency in government can hardly be argued against, public proceedings significantly increase the risk that an individual may be subjected to devastating reputational and other harm before there has been a finding of actual misconduct.

The public nature of these proceedings increases the stakes for putting procedures in place to ensure that the right call is made in deciding to bring an enforcement action. The case below highlights the risks and concerns surrounding individual enforcement actions, and how procedural protections could benefit both individuals and the enforcement agencies.

LESSONS FROM PRIOR ENFORCEMENT ACTIONS

There will always be criticism of regulators regarding the enforcement actions they bring — critics either argue that the regulators aren't being tough enough or that they have become rogue prosecutors, wasting resources on meritless cases. That being said, there are still lessons to be learned from prior enforcement actions, and the case against Patrick Adams, the former President and CEO of T-Bank in Dallas, by the Office of the Comptroller of the Currency is one example where additional procedural protections likely would have benefited both Mr. Adams and the OCC.

The OCC issued a 15-day letter and ultimately a Notice of Charges for Issuance of an Order to Cease and Desist and Notice of Assessment of Civil Money Penalties against Mr. Adams, alleging that he had engaged in unsafe or unsound banking practices and breached his fiduciary duty to the bank. Specifically, the OCC alleged that Mr. Adams', and the bank's, handling of third-party processors and merchants and the use of remotely created checks was done in an unsafe or unsound manner because, among other things, it was done with a lack of due diligence and follow-up by the bank. The OCC further alleged that Mr. Adams had breached his fiduciary duty to the bank by taking bank and supervisory files to prepare for his testimony and defense in the investigation.

Under the applicable administrative procedures, the Notice went before the federal banking regulators' administrative law judge for a hearing and a recommendation on the charges. In addition to civil money penalties, the OCC sought broad restrictions on Mr. Adams' future banking-related employment, which the ALJ stated were "so broadly worded as to be tantamount to an order of prohibition."

The ALJ held hearings over six days where the parties presented evidence and witnesses, and submitted post-hearing briefs. In a scathing 150-page opinion issued on Nov. 8, 2012, the ALJ recommended that the notice against Mr. Adams be dismissed in its entirety, finding that Mr. Adams had not engaged in any unsafe or unsound banking practices, and had not breached his fiduciary duty to the bank. Specifically, the ALJ found that the OCC had failed to prove that there was an unsafe or unsound banking practice or a violation of the law that had a "reasonable direct effect on the bank's financial stability." Under applicable procedures, the ALJ's decision to dismiss the action was returned to the OCC for final decision. Although the statute provides that the agency's decision should be rendered within 90 days, to date the OCC has not issued an opinion.

The ALJ's decision raised a number of concerns regarding the OCC's procedural processes. For example, the ALJ noted that the director of enforcement of the OCC had informed the bank's counsel, prior to the bank's consenting to a formal agreement regarding the subject practices, that "he did not intend to recommend an enforcement action against any individuals" and that he "did not believe the agency would initiate an enforcement action against any individuals." This representation was communicated to the Board during the meeting at which it voted to enter into the formal agreement. Yet three months later, the OCC instituted the action against Mr. Adams and another bank official, who the ALJ noted had reached a settlement with the OCC because "she could not afford to fight the OCC's charges against her."

Although the ALJ reasoned that these statements "when considered in their totality, do not 'manifest an unequivocal intention' on the part of the OCC not to pursue an action against any bank officer or directors," the ALJ suggested that the director of enforcement should "have chosen his words more carefully and considered the implications of his statement, particularly when he chose to vote in favor of an enforcement action against Adams less than three months later."

The ALJ also raised concerns regarding whether political pressure surrounding the use of RCCs contributed to the OCC's decision to bring the charges. The ALJ explained that, following media coverage of RCCs, including an article in the *New York Times*, there had been increasing political pressure surrounding the issue, including a letter from Representatives Barney Frank and Edward Markey to the Comptroller requesting information on the status of any investigations regarding RCCs.

The ALJ stated that he was troubled by the inability of the OCC examiners to recall with any specificity any of the events surrounding the agency's shift in focus to RCCs, and that "[t]he chain of events certainly makes it more likely than not that the sudden public and political interest in the processing of RCCs bore some relationship to the change in focus." The ALJ said that, while if the practices were in fact unsafe or unsound it would make no difference, the ALJ was troubled by the inability of anyone "to proffer a credible explanation" regarding the agency's focus on that issue.

In addition to these concerns raised by the ALJ, Mr. Adams' case also raises issues regarding the fairness of timing and the enforcement method used. Mr. Adams received the initial 15-day letter from the OCC on June 25, 2010. Less than two weeks later, the bank gave Mr. Adams the option of resigning or being fired. As a result, he resigned on July 9, 2010. The notice of charges, however, was not filed until 15 months later on Sept. 26, 2011. And while the ALJ issued his recommended decision over 18 months ago, the Comptroller has not issued a final decision, despite a statutory requirement to do so within 90 days.

Thus, it has been almost four years since Mr. Adams became the subject of an enforcement action — a functional, if not formal, ban from the industry — despite the ALJ's findings that charges are not warranted. Mr. Adams' forced resignation from the bank also is noteworthy because the OCC did not bring an action for removal, which would have required that significant additional criteria be established. Nevertheless, the same result was obtained through a cease and desist action.

The case against Mr. Adams — where the ALJ, acting as an objective third-party arbitrator, ultimately held that the allegations did not warrant an enforcement action — highlights the unique issues that arise when pursuing individuals. Some would argue that regulators are not going to win every case, and they should not be deterred from bringing actions where they believe they are warranted just because sometimes they will lose.

But others would argue that the case against Mr. Adams highlights a lack of procedural protections for individuals who may suffer significant reputational harm, damage to their careers, and significant expense in defending themselves, only for it to be ultimately found that an enforcement action was not warranted.

WHERE WE GO FROM HERE

It is clear that there will be concerted efforts by regulators to name names and hold individuals accountable in enforcement actions going forward. While no one would disagree that individual bad actors should be held accountable for their conduct, it will be critical that appropriate procedures are in place that take into consideration the unique position of individuals as enforcement activity increases.

To quote former U.S. Labor Secretary Ray Donovan, who was acquitted after an eight-month criminal trial, where does one go to "get his reputation back?" But enhanced procedural protections won't just protect individuals, they will make the government's cases stronger when enforcement actions are warranted, and they will increase public confidence in the enforcement process.

CONSUMER & ENFORCEMENT UPDATE

SALLIE MAE TO REFUND $60M TO MILITARY MEMBERS

The U.S. Department of Justice said Sallie Mae and student loan servicer Navient Corp. will pay a refund totaling about $60 million to members of the military whose interest rates it failed to cap at 6 percent, in violation of federal law. Separately, the Federal Deposit Insurance Corporation announced a settlement with the two companies that will pay back $30 million to borrowers affected by late-fee practices, which the regulator said were deceptive. The FDIC said that Sallie Mae allocated payments in a way that maximized late fees and did not adequately disclose how borrowers could avoid them.

On May 1, Sallie Mae split into two separate companies: Sallie Mae Bank, which will focus on making private student loans, and Navient, which services loans on behalf of the Department of Education's Federal Family Education Loan Program. The majority of Tuesday's settlement will be borne by Navient.

In addition to the government-directed payments, the student loan servicer said it would refund another $42 million to borrowers who are not technically eligible under the FDIC settlement but who were overcharged due to the late-fee issues. In a statement, Navient said most of the servicemember refunds will be distributed to customers that the company did not believe qualified for the benefit based on prior regulatory guidance. But Navient said it was entering into the settlement anyway, to put the matter behind it.

The settlement with the DOJ will compensate an estimated 60,000 servicemembers who were charged more than the legally mandated 6 percent interest rate, which was put in place to keep education affordable for military personnel.

DEBT BUYERS SETTLE N.Y. CHARGES, WON'T CHASE OLD CLAIMS

Two large consumer debt-buying firms have agreed to stop pursuing $16 million of judgments against New York borrowers, and also agreed to pay fines, to resolve allegations that they repeatedly brought improper debt collection actions.

A unit of Portfolio Recovery Associates Inc will pay $300,000, while Sherman Financial Group LLC will pay $175,000 under separate settlements announced by New York Attorney General Eric Schneiderman. The payments include civil penalties and costs. Both firms specialize in buying defaulted debt, such as on credit cards, from lenders, and then try to collect in court. The debt often costs just a few cents on the dollar, in part because of uncertainty over whether sums owed will be repaid.

Schneiderman accused the firms of violating New York law by trying to collect debt that was too old from thousands of people, after statutes of limitations had run out. Neither firm admitted or denied the allegations. According to Schneiderman, Portfolio Recovery Associates LLC and Sherman would obtain default judgments against New York consumers who did not respond to their lawsuits, even though deadlines to pursue recoveries had already passed.

He said Portfolio Recovery Associates had obtained more than 2,000 improper judgments since 2008, while Sherman had obtained more than 400 improper judgments. The settlements require the firms to seek to throw out these judgments, stop pursuing the underlying claims, tell borrowers they won't sue once statutes of limitations have run out, and provide more information about the debt allegedly owed.

INDUSTRY SELF-REGULATOR REFERS BANK TO CFPB

A program that came out of the Advertising Self-Regulatory Council has referred SunTrust Bank to

