

Banks Can't Decide What Triggers FCRA Investigation

Law360, New York (November 15, 2012, 1:07 PM ET) -- The Fair Credit Reporting Act determines what is necessary to trigger a duty to investigate a credit dispute, not a bank's internal policies. In *Boggio v. USAA Federal Savings Bank*, No. 11-4040, 2012 U.S. App. LEXIS 20239 (6th Cir. Sept. 27, 2012), the Sixth Circuit rejected USAA's argument that it was entitled to a police report and a fraud affidavit before it needed to do any investigation beyond a cursory review.

The case details were far from unique. When Frank and Sarah Boggio separated in 2006, Frank left Texas and gave his wife Sarah authority to complete matters necessary for their divorce. In 2007, Sarah bought a Honda Civic, which USAA financed. According to her complaint, Sarah signed Frank's name along with hers on the checks USAA issued to the car dealership.

In 2008, Frank signed a divorce agreement which confirmed that the Civic was bought during the marriage, identified the USAA secured loan as marital debt, and provided that Sarah alone be responsible for paying it. In the fall of 2009, Frank began having credit problems, linking it to Sarah's falling behind on her payments for the car loan. Through his divorce attorney, Frank sent letters to all the major credit agencies and to USAA disputing his status as obligor on the car loan. The credit agencies then passed on the disputes they received to USAA. USAA did not change its reporting on Frank, pinning its reasoning on Frank's failure to submit a police report regarding his ex-wife's purported forgery of his name on the USAA check.

Frank filed suit and after summary judgment was granted to USAA, appealed to the Sixth Circuit Court of Appeals. The Sixth Circuit acknowledged that the FCRA creates a private right of furnisher's duty to conduct a reasonable investigation. 15 U.S.C. § 1681s-2(b). According to the court, the claim arises though only if a complaint is made to a credit reporting agency and the credit reporting agency ("CRA") provides the information to the furnisher. Once that happens, the furnisher is under a duty to investigate. In outlining the furnisher's duty the Sixth Circuit provided that the furnisher must:

1. Conduct an investigation with respect to the disputed information that is "fairly, searching inquiry" and at least something more than a cursory review.
2. Review all relevant information the CRA provides. The more relevant information the CRA provides about the dispute the more robust the investigation required of the furnisher. If the CRA only provides scant information, a cursory review of internal electronic documents may be enough. However, if the CRA provides, like here, that the customer is disputing his status as a co-obligator on his wife's debt, more is required.
3. Report the results of the investigation to the CRA. This reporting is required irrespective of the outcome of the investigation.
4. Correct any inaccurate information by notifying the CRA who reported the problem and all other CRAs to whom the furnisher provided information.
5. Modify, delete or permanently block the reporting the information it finds upon investigation to be inaccurate or incomplete.

If a furnisher does not comply with all these duties once notified of a problem by a FCRA, it violates the FCRA.

In this case, the Sixth Circuit found there was enough evidence to conclude USAA's investigation was not reasonable. The CRA dispute notice stated "that the ex-wife purchased [the car] while they were separated." Because USAA received a specific notice regarding the specific nature of the dispute, a reasonable investigation required USAA to review all relevant underlying documentation.

Frank contended that USAA had at its disposal plenty of documents demonstrating Sarah's sole ownership of the car, including letters from his attorney. Frank said USAA simply failed to review this. Frank also noted USAA had a policy that prohibited its reviewers from consulting documents in the file including the check which Frank's wife allegedly forged. USAA only verified Frank's identify before responding to the CRA notice.

The court ruled that USAA could not put additional conditions on its duty to investigate. The fact that USAA required a fraud affidavit or police report before it would conduct a further inquiry did not absolve it of its responsibility to conduct a reasonable investigation under the law. The text of 15 U.S.C. § 1681s-2 does not allow furnishers to require independent confirmation of materials contained in a CRA notice. In other words, the obligation to conduct a reasonable investigation does not hinge on whether the consumer provides information required by the bank's internal policies. The court reversed the summary judgment determination and sent the case back to the district court for trial.

USAA's policy may have been based on a misunderstanding of the FCRA. As the court noted in a footnote, USAA appeared to derive its fraud policy from 15 U.S.C. § 1681g(e) which covers identify theft. Under that section, a business may require a consumer to provide a police report or an affidavit to demonstrate that he was a victim of identity theft. However, there is no such provision in 15 U.S.C. § 1681s-2(b).

What constitutes a reasonable investigation is an open question. One court has noted that reasonableness might be determined from prevailing industry standards for conducting an investigation. *Ferrarelli v. Federated Fin. Co. of Am.*, No. 1:07cv685, 2009 U.S. Dist. LEXIS (S.D. Ohio Feb. 2, 2009). Another has suggested that a reasonableness can be evaluated by comparing the cost of verifying the accuracy of the source versus the "possible harm of reporting inaccurate information." *Murphy v. Midland Credit Mgmt. Inc.*, 456 F. Supp. 2d 1082, 1090 (E.D. Mo. 2006).

However, it is unlikely that such cost-benefit analysis will ever obviate the need for a true factual determination. When considering reasonableness a court will likely analyze how much time was spent on an investigation and what information is reviewed. At a minimum the investigating employee should review the documents that are submitted by the person disputing the reported. For example, where a consumer contends that checks have been forged, it might be necessary to at least compare the signature on file for the account with the checks alleged to have been forged. *Meyer v. FIA Card Servs. NA.*, 780 F. Supp. 2d 879 (D. Minn. 2011). In some cases it may be even necessary to contact the customer who raises the dispute.

A lot can be learned from Boggio and cases like it. Furnishers should develop procedures for dealing with customer information disputes. More careful consideration of a customer's dispute can potentially prevent expensive litigation later.

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