

# How To Avoid And Litigate Identity Theft Or Fraud Claims Under The Fair Credit Reporting Act



---

Ryan L. DiClemente, Esq.  
*Co-Chair of Saul Ewing's  
Consumer Financial Services Group*

**SAUL EWING**  
**ARNSTEIN**  
**& LEHR<sup>LLP</sup>**

© Copyright 2022 Saul Ewing Arnstein & Lehr LLP

## Quick Refresher On FCRA Basics

### FCRA's Purpose

- Congress enacted the FCRA “to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy.”
- As part of its regulatory scheme, the FCRA “imposes several duties on those who furnish information to consumer reporting agencies.”
- But only one of these duties provides consumers with a private right of action - the obligation to undertake a “Reasonable Investigation” upon receiving a dispute from a credit reporting agency.
- Failure to follow or comply with other duties under FCRA could still subject furnishers to action by state and federal regulators.



SAUL EWING  
ARNSTEIN  
& LEHR<sup>LLP</sup>

© Copyright 2022 Saul Ewing Arnstein & Lehr LLP

2

## Risks Of Non-Compliance

### FCRA Litigation On The Rise

- Since 2014, the number of FCRA lawsuits filed per year have nearly doubled, increasing in volume each year.
- Make up a significant portion of many of our clients' litigation portfolio.
- Over the years, consumers have become more and more focused on their credit scores and notations.
- Statutory damages, attorneys' fees and compliance challenges have led to a substantial increase in litigation.
- The “reasonable investigation” requirement is often a jury question and difficult to dispose of early in litigation or even on summary judgment.
- Some of the most difficult disputes are those alleging ID theft or fraud.

SAUL EWING  
ARNSTEIN  
& LEHR<sup>LLP</sup>

© Copyright 2022 Saul Ewing Arnstein & Lehr LLP

3

## FCRA Basics And Setting The Stage

### The Statutory Requirement To Conduct A Reasonable Investigation Upon Receiving Notice Of A Dispute

- After receiving notice of a dispute with regard to the completeness or accuracy of any information provided by a person to a CRA, the furnisher shall—
  - (A) conduct an investigation with respect to the disputed information;
  - (B) review all relevant information provided by the consumer reporting agency pursuant to [section 1681i\(a\)\(2\)](#) of this title;
  - (C) report the results of the investigation to the consumer reporting agency; (**within 30 Days**, but in reality the time to respond is more limited for furnishers)
  - (D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis; and
  - (E) if an item of information disputed by a consumer is found **to be inaccurate or incomplete or cannot be verified** after any reinvestigation under paragraph (1), for purposes of reporting to a consumer reporting agency only, as appropriate, based on the results of the reinvestigation promptly--
    - (i) **modify that item of information;**
    - (ii) **delete that item of information; or**
    - (iii) **permanently block the reporting of that item of information.**
- A similar obligation exists to investigate direct disputes submitted by consumers

SAUL EWING  
ARNSTEIN  
& LEHR<sup>LLP</sup>

© Copyright 2022 Saul Ewing Arnstein & Lehr LLP

4

## FCRA Basics And Setting The Stage

### What is a “reasonable investigation?”



- The term “investigation” is a “detailed inquiry or systematic examination,” which necessarily “requires some degree of careful inquiry;” and a “superficial, *un* reasonable inquir[y]” would hardly satisfy Congress' objective. (4<sup>th</sup> Circuit)
- By its ordinary meaning, an “investigation” requires an inquiry likely to turn up information about the underlying facts and positions of the parties, not a cursory or sloppy review of the dispute. (7<sup>th</sup> Circuit)
- The factfinder must balance “the potential harm from inaccuracy against the burden of safeguarding against such inaccuracy” and specifically weigh “the cost of verifying the accuracy of the information versus the possible harm of reporting inaccurate information.” (4<sup>th</sup> and 7<sup>th</sup> Circuits)

SAUL EWING  
ARNSTEIN  
& LEHR<sup>LLP</sup>

© Copyright 2022 Saul Ewing Arnstein & Lehr LLP

5

## FCRA Basics And Setting The Stage

### What is a “reasonable investigation?” cont.



- A “reasonable’ investigation” is “one that a reasonably prudent person would undertake under the circumstances.”(10<sup>th</sup> Circuit)(3<sup>rd</sup> Circuit)
- Some evaluate the reasonableness of a furnisher’s investigative procedure as it relates to the content of the notice of dispute sent by the CRA to the furnisher. (6<sup>th</sup>, 1<sup>st</sup>, 9<sup>th</sup> Circuits)
  - For instance, where a given notice contains only scant or vague allegations of inaccuracy, a more limited investigation may be warranted.
  - “If a CRA fails to provide ‘all relevant information’ to a furnisher, then the consumer has a private cause of action against the CRA...but not against the furnisher.”(1<sup>st</sup> Circuit)
  - Contacting a consumer directly is not expressly required. “[R]equiring a furnisher to automatically contact every consumer who disputes a debt would be terribly inefficient and such action is not mandated by the FCRA.” (7<sup>th</sup> Circuit)
- **This does not mean you always have to get it right – but the investigation must be “reasonable.”**

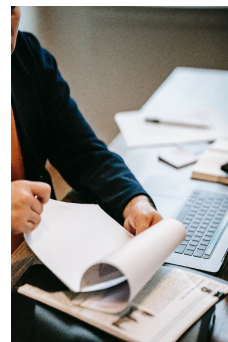
SAUL EWING  
ARNSTEIN  
& LEHR<sup>LLP</sup>

© Copyright 2022 Saul Ewing Arnstein & Lehr LLP

6

## What To Do When Faced With An ID Theft Or Fraud Claim

- Know your adversary
- Early case assessment and analysis are key
- Identify “bad facts” and issues **before** discovery
- Identify facts that support the investigation and conclusions in order to create leverage and drive down settlement demands



SAUL EWING  
ARNSTEIN  
& LEHR<sup>LLP</sup>

© Copyright 2022 Saul Ewing Arnstein & Lehr LLP

7

## What To Do When Faced With An ID Theft Or Fraud Claim



### Create a Check List of Relevant Items to be Examined:

1. **Examine application and origination documents for indicia of fraud**
  - ✓ Look for mismatched personal identifiers or personal information and for information that can connect Plaintiff to origination.
2. **Examine account information for email, primary telephone and billing address**
  - ✓ Look for changes at or near the time of origination.
3. **Examine payment history**
  - ✓ Were payments made prior to fraud dispute? Track payment information to the extent available.
4. **Examine ACDV history**
  - ✓ Were any previous non-fraud related disputes submitted?
  - ✓ Was the relevant dispute identified as fraud-based dispute? (commonly used dispute codes 01 and 103)

SAUL EWING  
ARNSTEIN  
& LEHR<sup>LLP</sup>

© Copyright 2022 Saul Ewing Arnstein & Lehr LLP

8

## What To Do When Faced With An ID Theft Or Fraud Claim



5. **Pull and examine call recordings**
6. **Examine all previous communications and fraud investigations**
  - ✓ Was a fraud investigation previously conducted? Was any new information submitted? Were any conclusions reached?
7. **Examine ACDV attachments, police reports, and fraud affidavits**
  - ✓ The details, or lack thereof, in these documents are important.
8. **Run People Map/Lexis or other third-party search on Plaintiff and other relevant parties**
  - ✓ Compare phone numbers, addresses, email information and relatives to information of Plaintiff.
  - ✓ Most Plaintiff's counsel will provide additional information, but only if you request it.
9. **Examine previous investigation and reasons for response**

**THE INFORMATION GATHERED SHOULD DRIVE LITIGATION STRATEGY**

SAUL EWING  
ARNSTEIN  
& LEHR<sup>LLP</sup>

© Copyright 2022 Saul Ewing Arnstein & Lehr LLP

9

## Recent ID Theft and Fraud Decisions

- ID theft and fraud decisions are highly fact specific
- Do not establish brightline rules or guidance on “reasonable investigations”
- However, a few takeaways from these decisions:
  - Simply comparing a consumer’s personal identifying information to the information in the file is unlikely to be “reasonable” under the FCRA.
  - It is a very high bar to succeed on summary judgment and establish an investigation was “reasonable” or “unreasonable” as a matter of law.
  - The utilization of dispute/compliance codes can help to potentially mitigate risk.



© Copyright 2022 Saul Ewing Arnstein & Lehr LLP

SAUL EWING  
ARNSTEIN  
& LEHR<sup>LLP</sup>

10

## Recent ID Theft and Fraud Decisions

- *Hopkinson v. Pennsylvania Higher Educ. Assistance Agency*, Civil Action No. 19-cv-12290-IT, 2022 WL 104912 (D. Mass. Jan. 11, 2022)
  - Denied furnisher’s Motion for Summary Judgment finding that “In light of the irregularities on the face of the loan documents that would suggest that there was a substantial and unaddressed dispute as to the loan origination, Great Lakes cannot establish that the investigation was reasonable as a matter of law.”
- *Burns v. Ford Motor Credit Co. LLC*, Civil Action No. 19-1647, 2021 WL 1962856 (E.D. Pa. May 17, 2021)
  - Denied defendant’s Motion for Summary Judgment finding investigation could be “unreasonable.”
  - Plaintiff was disputing that she signed the subject agreement, but Defendant confirmed account information was accurate “by comparing Plaintiff’s name, social security number, date of birth, and current address to its existing account information.”
  - In addition, the Court held that defendant’s actions could be willful under FCRA because “the fact that the furnisher routinely invokes ‘blanket policies’ can support a finding of willfulness.”

© Copyright 2022 Saul Ewing Arnstein & Lehr LLP

SAUL EWING  
ARNSTEIN  
& LEHR<sup>LLP</sup>

11

## Recent ID Theft and Fraud Decisions

- *Romero v. Monterey Fin. Servs., LLC*, Civil Action No. 19-cv-1781 JM (KSC), 2021 WL 268635 (S.D. Cal. Jan. 27, 2021)
  - Denied both parties' Motions for Summary Judgment as to the reasonableness of the investigation. In denying the furnisher's Motion, the Court noted that "[w]ith the exception of asking Plaintiff for more documents, it is also not clear that Monterey's investigation went much beyond reviewing the records in its 'possession.' For example, as discussed above, Monterey admittedly did not call back the detective that took Plaintiff's report of identity theft."
- *Petras v. Navy Fed. Credit Union*, Civil Action No. 2:20-cv-00874-RFB-BNW, 2022 WL 526138 (D. Nev. Feb. 22, 2022)
  - Denied furnisher's Motion for Summary Judgment. Finding the "Court is unpersuaded that Defendant was only responsible for investigating whether the account was opened fraudulently or without Plaintiff's authorization. While the CRA notified Chase that Plaintiff's dispute pertained to an "account fraudulently opened," this does not mean that Defendant did not have notice that Plaintiff was also challenging the underlying transactions.

SAUL EWING  
ARNSTEIN  
& LEHR<sup>LLP</sup>

© Copyright 2022 Saul Ewing Arnstein & Lehr LLP

12

## Common Questions

- 1) *Can we outsource our reviews?*
  - Increases risk
  - Minimizes direct oversight
- 2) *Do we need to seek information from the originator of credit or loan?*
- 3) *Can/should we ask consumers for additional information?*
  - This is not a substitute for a "reasonable investigation"

SAUL EWING  
ARNSTEIN  
& LEHR<sup>LLP</sup>

© Copyright 2022 Saul Ewing Arnstein & Lehr LLP

13

## Common Questions

- 4) *Do we have to cease reporting upon receipt of a ID theft report or fraud affidavit?*
- *See 15 USC 1681-2(a)(6)(b) – “If a consumer submits an identity theft report to a person who furnishes information to a consumer reporting agency ...the person may not furnish such information...unless the person subsequently knows or is informed by the consumer that the information is correct.”*
  - *Content and details matter. See 15 U.S.C.A. § 1681a(q)(4); 12 C.F.R. § 1022.3(i)*
  - *A bare bones affidavit will not suffice.*

SAUL EWING  
ARNSTEIN  
& LEHR<sup>LLP</sup>

© Copyright 2022 Saul Ewing Arnstein & Lehr LLP

14

## So How Do You Avoid These Claims?

- **Ensure proper compliance on the front end of direct and indirect disputes**
- **Monitor and confirm ID theft/fraud disputes are escalated**
- **Flag attorney letters and track filings**
- **Document investigation – not just procedures**
- **Consider pursuing instances of familial/relationship fraud**

SAUL EWING  
ARNSTEIN  
& LEHR<sup>LLP</sup>

© Copyright 2022 Saul Ewing Arnstein & Lehr LLP

15



# FCRA

## QUESTIONS?



SAUL EWING  
ARNSTEIN  
& LEHR<sup>LLP</sup>

© Copyright 2022 Saul Ewing Arnstein & Lehr LLP