Fair Credit Reporting Act Litigation: Winning the Tug-of-War on Mortgage Servicers' Post-Bankruptcy Discharge Credit Pulls

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I. Introduction

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Residential mortgage servicers will often pull credit reports for borrowers in connection with loss mitigation considerations. Sometimes, those borrowers have received a discharge from personal liability on the mortgage loan through a Chapter 7 bankruptcy, while the lien of the mortgage remains attached to the property. In those instances, pulling credit has attracted litigation, using a theory that the servicer now lacks a "permissible purpose" to do so under the Federal Fair Credit Reporting Act (FCRA), and possibly other state statutes. Those claims benefited from a lack of controlling authority and were often aggregated in putative class actions seeking statutory and other damages, as well as attorney's fees.

Recently, a court of appeals panel in the Ninth Circuit added clarity to the issue. In the published opinion of *Marino v. Ocwen Loan Servicing, LLC*,[1] the court squarely held that a mortgage servicer had a permissible purpose to pull the credit reports on borrowers tied to two mortgages, even though the borrowers' personal liability for the loans was discharged in bankruptcy.[2] This article will review that leading decision and other pertinent

1. Marino v. Ocwen Loan Servicing, LLC, 978 F.3d 669 (9th Cir. 2020).
2. Borrowers filed a petition for rehearing en banc, which was denied on December 29, 2020. Marino v. Ocwen Loan Servicing LLC (3:16-cv-00200), Court

cases, to provide current guidance for mortgage servicers who may need to pull a borrower's credit report to service a continuing lien after a personal bankruptcy discharge.

II. Overview of FCRA

An overview of the FCRA is necessary to understand the rationale behind the Ninth Circuit's opinion in *Marino*. Some inquiries or "pulls" of credit reports from the credit reporting agencies (CRAs) can negatively affect a consumer's credit score, which can increase the cost of credit for that consumer or result in difficulty obtaining credit.[3] However, some inquiries commonly called "soft pulls" may not affect a credit score. These soft pulls allow lenders, employers, and other interested parties to review a credit report, but these inquiries are not associated with lending decisions. On the other hand, inquiries known as "hard pulls" can act to lower a credit score. When a consumer goes to apply for a line of credit, whether on a credit card, mortgage, or other type of loan, the lender will obtain a credit report from one of the credit bureaus, which is known as a "hard pull". A hard pull is a credit inquiry into a consumer's credit history and credit worthiness, which is reported to the credit bureaus. These inquiries are associated with applications for credit and corresponding lending decisions, and therefore can impact a credit score. Access to this credit history requires a "permissible purpose," which may involve certain creditor relationships. This article considers the *Marino* court's analysis of a mortgage servicer's "hard pull" for loss mitigation investigation following a borrower's bankruptcy discharge from personal liability on the loan.

The FCRA provides privacy protections to information assembled by the consumer reporting agencies.[4] This law, which was passed in 1970, was the first federal law to regulate the use of consumers' personal information by private businesses. Because of Congress's concern with a consumers privacy, consumer reports can only be obtained and used for certain enumerated purposes. The structure of the FCRA makes its privacy protections self-executing; there is no obligation imposed on a consumer to demand the protections or to safeguard their private information assembled by the CRAs. Instead, the FCRA imposes an obligation to show there was a permissible purpose for pulling the records, on the person who wants a consumer's records.[5]

Listener, https://www.courtlistener.com/docket/4316241/marino-v-ocwen-loan-servicing-llc/.

3. The three main credit reporting agencies are Equifax, Inc., Experian, and TransUnion, all which are publicly-traded, for-profit companies.

4. See 15 U.S.C. § 1681(a)(4) ("There is a need to insure that consumer reporting agencies exercise their grave responsibilities with . . . a respect for the consumer's right to privacy.").

5. *See* 15 U.S.C.A.§1681b(f) (prohibiting "certain use or obtaining of information").

III. "Permissible Purpose"

Under the FCRA, consumer reports can only be disseminated for certain enumerated purposes. Pursuant to section 1681b(f)(1), a person is forbidden from obtaining a consumer credit report without having a "permissible purpose."[6] The recent case, *Beckford v. Clarity Services, Inc.*,[7] illustrates the issue. In *Beckford*, the court found a consumer's initial application and receipt of credit from a lender was enough to show "a permissible purpose" under the FCRA.[8] The court explained that "the first and most well-recognized express permissible purpose under the FCRA is where the person requesting the report 'intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished . . . .'"[9] Accordingly, a credit transaction initiated by the consumer will virtually always provide a permissible purpose for furnishing a consumer report to the person intending to use the report in connection with the credit transaction.

If there is a violation of the FCRA, a consumer can recover compensatory damages if the action is found to be negligent, and statutory and punitive damages if the violation is willful.[10] Under the FCRA, to show that a violation was willful, a plaintiff must show that the defendant either knowingly violated the Act or recklessly disregarded the Act's requirements.[11] In *Safeco Insurance Co. of America v. Burr*, the Supreme Court held that a credit reporting agency may "willfully" violate the FCRA by acting in "reckless disregard of statutory duty."[12] The Court explained that a company does not act in "reckless disregard" of the FCRA, however, if its "reading of the statute, . . . was not objectively unreasonable."[13] To show that a

6. *See* 15 U.S.C. §1681b(f)(1) ("A person shall not use or obtain a consumer report for any purpose unless . . . the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished . . . .").

7. Beckford v. Clarity Servs., Inc., No. 8:20-cv-2718-30SPF, 2021 WL 2980534 (M.D. Fla. July 13, 2021).

8. *Id*. at *3.

9. *Id*. at *2 (citing 15 U.S.C. § 1681b(a)(3)(A)).

10. *See* 15 U.S.C. §§ 1681n, 1681o (outlining civil liability for willful and negligent noncompliance). Such damages include financial losses suffered directly as a result of the statutory violation and other costs incurred, such as time lost correcting a false credit report. For willful noncompliance, plaintiffs may recover actual or statutory damages ranging from $100 to $1000 per violation. 15 U.S.C. § 1681n(a). The Act also permits recovery of punitive damages, though courts have broad discretion in this regard. Attorney's fees and costs are also recoverable. 15 U.S.C. §§ 1681n, 1681o.

11. *See* Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 69 (2007) (discussing whether a company subject to the FCRA acted in reckless disregard of the terms of the Act).

12. *Id*. at 56–57.

13. *Id*. at 69.

defendant recklessly disregarded the Act's requirements, a plaintiff must show that the defendant "ran a risk of violating the law substantially greater than the risk associated with a reading [of the Act] that was merely careless."[14] The *Safeco* Court emphasized that whether a company committed a willful violation of the FCRA must be an objective inquiry and dismissed arguments that "evidence of subjective bad faith" could create liability in the face of objectively reasonable interpretations.[15] In the Court's view, "Congress could not have intended such a result for those who followed an interpretation that could reasonably have found support in the courts, whatever their subjective intent may have been."[16]

Actual damages are recoverable regardless of whether the statutory violation is negligent or willful; however a violation of the FCRA generally must cause actual harm to the plaintiff. The U.S. Supreme Court first provided guidance in *Spokeo, Inc. v. Robins*.[17] There, the plaintiff brought a FCRA claim against the defendant consumer reporting agency, asserting that the defendant prepared a consumer report on the plaintiff that contained inaccurate information.[18] Addressing the issue of standing, the Supreme Court noted, "Particularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be 'concrete.'"[19] Further, the Court noted that while intangible injuries could be concrete for purposes of standing, alleging a bare procedural violation without harm is not enough.[20] More recently, in another decision involving the FCRA, the Supreme Court returned to this issue, emphasizing that "[o]nly those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation in federal court."[21]

In sum, the servicer must have a "permissible purpose" under the FCRA to obtain a consumer's credit report following a post-bankruptcy discharge to avoid liability for various damages.[22] From time to time, the Ninth Circuit has considered the contours of a "permissible purpose" to obtain credit reports under 15 U.S.C. § 1681b(a)(3)(A).

14. *Id.*
15. *Safeco*, 551 U.S. at 70 n.20.
16. *Id.*
17. Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016).
18. *Id.* at 1540.
19. *Id.* at 1548.
20. *Id.* at 1549.
21. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021) (holding that class members whose credit reports contained misleading information did not suffer concrete harm if the reports were not disseminated to third parties).
22. *See* 15 U.S.C § 1681b(a)(3)(A) (requiring the person accessing the information to show there is an existing credit relationship between the parties; *see also* 15 U.S.C. § 1681b(f)(1) (a consumer report must be obtained for a purpose for which the consumer report is authorized to be furnished).

IV. The Tug-of-War

In *Pintos v. Pacific Creditors Association*,[23] the court of appeals held that a debt collector may run a credit report of a debtor, even if the debtor does not agree to it.[24] Nearly ten years later, however, the court in *Nayab v. Capital One Bank*,[25] placed the burden of proving that permissible purpose on the party asserting it, allowing the consumer's claim to proceed if enough facts were pled to create a reasonable inference that there was no permissible purpose.[26]

In *Nayab*, a consumer brought a class action against a bank that made several inquiries on her credit report, when the consumer had never conducted any business with or had any debt with that entity.[27] The court of appeals held that a consumer does not have to plead the third-party's actual unauthorized purpose in obtaining a credit report to survive a motion to dismiss.[28] Instead, the authorized purposes listed under the FCRA were exceptions that the party relying on them, i.e., the defendant, must plead and prove as affirmative defenses.[29] Placing the burden on the consumer, the court found, would be unfair because that would require her to plead a negative fact peculiarly within the knowledge of the defendant.[30]

In *Marino v. Ocwen Loan Servicing*, the court of appeals again considered a permissible purpose, this time in connection with servicing residential mortgages following the borrower's personal bankruptcy discharge.[31] Although the borrowers were discharged from further liability on the loan, they continued to hold title to their respective homes, and the mortgage liens, which Ocwen Loan Servicing, LLC (Ocwen) serviced, survived the bankruptcy.[32] Ocwen pulled credit reports on the debtors to consider their prospects for loss mitigation options, such as loan modifications or other borrower relief, and was sued under the FCRA.[33] The complaint alleged that Ocwen willfully violated the FCRA by obtaining the reports without a permissible purpose under 15 U.S.C § 1681b(f)(1).[34]

The district court rejected this claim based on an unpublished ruling in *Vanamann v. Nationstar Mortgage, LLC*,[35] and granted Ocwen summary

23. Pintos v. Pac. Creditors Ass'n, 605 F.3d 665 (9th Cir. 2010).
24. *Id.* at 676.
25. Nayab v. Capital One Bank, 942 F.3d 480 (9th Cir. 2019).
26. *Id.* at 498–99.
27. *Id.* at 480.
28. *Id.* at 493.
29. *Id.* at 495.
30. *Id.*
31. *Marino*, 978 F.3d at 670.
32. *Id.*
33. *Id.*
34. *Id.* at 671.
35. Vanamann v. Nationstar Mortg., LLC, 735 F. App'x 260 (9th Cir. 2018).

judgment.[36] *In Vanamann*, the plaintiff alleged that Nationstar, a mortgage servicer, willfully violated the FCRA by obtaining credit reports after her personal liability for the loan was discharged in bankruptcy.[37] The court of appeals assumed for purposes of appeal that the mortgage servicer lacked a permissible purpose to check credit.[38] However, the court concluded that the district court properly granted summary judgment because the borrower failed to show that any violation was willful.[39] The court reasoned that the servicer could have reasonably believed that it had a permissible purpose to pull credit, finding that "[t]he plain text of the Act does not prohibit a mortgage servicer from obtaining a consumer's credit report after a bankruptcy court's discharge of the consumer's mortgage debt. Nor have we interpreted the Act to prohibit that practice."[40]

Similarly, in *Marino*, the court of appeals agreed with the district court that the debtors could not show that a reasonable fact finder could conclude that Ocwen's alleged violations were willful.[41] However, the court went a step beyond *Vanamann*, and determined whether the FCRA was violated in the first place.[42]

The borrowers claimed that the servicer had no legitimate use for their credit reports following their discharge in bankruptcy.[43] The court of appeals disagreed, acknowledging that a permissible purpose remained to access the reports to evaluate loss mitigation options pursuant to the continuing mortgage lien.[44] The court held that obtaining a credit report in this instance fit within the scope of Section 1681b(a)(3)(A) of the FCRA by "intend[ing] to use the information in connection with a credit transaction involving the consumer . . . and involving the extension of credit to, or review or collection of an account of, the consumer."[45] The court held that there was nothing in Section 1681b(a)(3)(A) that required a borrower to affirmatively request a foreclosure alternative before a servicer could review the account to determine eligibility for a loss mitigation option.[46] Likewise, the court noted that the discharge injunction in the Bankruptcy Code against collection of discharged debts "does not apply to a secured credi-

36. *Marino*, 978 F.3d at 672.
37. *Vanamann*, 735 F. App'x at 261.
38. *Id.* at 262.
39. *Id.*
40. *Id.*
41. *Marino*, 978 F.3d at 673.
42. *Id.*
43. *See id.* at 674 (turning to the question of whether Ocwen had a permissible purpose for retrieving the credit reports after the mortgage debts had been discharged).
44. *Id.* at 675.
45. 15 U.S.C. § 1681b(a)(3)(A).
46. *Marino*, 978 F.3d at 675.

tor's efforts to seek 'periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien.'"[47]

The Ninth Circuit in *Marino* also offered definitions of willful and negligent FCRA violations. Thus, "[t]o prove a willful violation, a plaintiff must show not only that the defendant's interpretation was objectively unreasonable, but also that the defendant ran a risk of violating the statute that was substantially greater than the risk associated with a reading that was merely careless."[48] In addition, "[t]o prove a negligent violation, a plaintiff must show that the defendant acted pursuant to an objectively unreasonable interpretation of the statute."[49] Regardless, neither form of violation existed in these circumstances based on the servicer's permissible purpose.

V. Conclusion

Now, mortgage servicers can reference the holding in *Marino* as authority to pull credit reports of discharged borrowers for loss mitigation purposes.[50] Under the ruling, mortgage servicers can have a permissible purpose to access a borrower's consumer report after personal liability on the loan is discharged in bankruptcy.[51]

However, the servicer must intend to use the credit report to evaluate the borrower for loss mitigation options relating to that lien. A borrower can vitiate that permissible purpose if she unequivocally informs the mortgage servicer that there is no interest in loss mitigation options. Thus, risk of litigation under the FCRA—including liability for its available damages and relief—remains whenever a borrower unequivocally states that they

47. *Id.* (quoting 11 U.S.C. § 524(j)(3)).
48. *Id.* at 673.
49. *Id.*
50. While the holding in *Marino* is binding on the many district courts in the United States Court of Appeals for the Ninth Circuit, which includes California, Alaska, Arizona, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and certain territorial courts, it is not binding on courts within the other twelve circuit courts of appeal. Even so, it may be cited as persuasive authority in those courts when considering similar factual circumstances. *See* Wilson v. Layne, 526 U.S. 603, 617 (holding that in the absence of controlling authority, courts may look to persuasive authority to determine whether the law is established).
51. Some courts have also cited *Marino* to reject claimed violations of the FCRA in other circumstances. *See* Mintun v. Equifax Info. Servs., LLC, No. 2:19-cv-00033-JAD-NJK, 2021 WL 1601505 (D. Nev. Apr. 23, 2021) (stating that "a consumer may succeed on a claim under the FCRA only if [s]he . . . shows that the defendant's violation was negligent or willful") (*citing Marino*, 978 F.3d at 673); *see also* Romero v. Monterey Fin. Servs., LLC, No. 19CV1781 JM (KSC), 2021 WL 268635, at *4 (S.D. Cal. Jan. 27, 2021) (granting creditor's motion for summary judgment finding that they did not willfully violate FCRA).

are not interested in loss mitigation.[52] Therefore, the servicer's reason for the credit pull, as well as any refusal from the borrower to receive loss mitigation consideration, should be well-documented in the servicing notes. Likewise, care should be taken to ensure that borrowers who have identified as uninterested in loss mitigation relief should be systemically blocked from credit report reviews that would be intended for such purposes.

52. *See Marino*, 978 F.3d at 675 (the court stating "[w]e imagine that if a consumer clearly informs the servicer or lender that he or she has no interest in avoiding foreclosure, then the servicer or lender might lack a permissible purpose for continuing to review the consumer's credit"). *Cf.* Zirpoli v. Midland Funding, LLC, Civ. No. 1:19-CV-01428, 2021 WL 2826720 (M.D. Pa. July 7, 2021) (holding a debt purchaser's procurement of a consumer's credit report lacked permissible purpose because the debt purchaser was not lawfully permitted to purchase the loan at issue under applicable state law).