

Reporting a Charged Off Debt As Past Due Is Not Inaccurate Under the FCRA

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Failing to pay your credit card bills doesn't pay. And it shouldn't. But that doesn't stop some debtors from at least trying to make a personal pay day out of it under the Fair Credit Reporting Act ("FCRA"), as evidenced by the Eastern District of New York's recent decision in *Butnick v. Experian Info. Solutions, Inc.*, No. 20-CV-1631, 2021 U.S. Dist. LEXIS 21926 (E.D.N.Y. Feb. 4, 2021).

There are a number of defendants, but here are the key facts: The plaintiff, Yonatan Butnick, had credit cards with Bank of America, N.A. ("BANA") and American Express ("AmEx"). The accounts became delinquent, and BANA and AmEx eventually charged off the accounts for failure to pay. BANA and AmEx reported the accounts to consumer reporting agencies ("CRAs") as charged off and past due.

After learning of this negative information on his credit reports, Butnick submitted disputes to the CRAs, alleging that his accounts were being inaccurately reported. The CRAs provided notice of the disputes to BANA and AmEx. After BANA and AmEx verified the reporting as accurate, Butnick sued BANA, AmEx, and the CRAs. In Butnick's view, because BANA and AmEx had charged off the accounts, they were essentially "cancelled" and nothing was past due.

BANA and one of the CRAs moved to dismiss the complaint. (AmEx moved to compel arbitration, which was also granted, but that is not really relevant for why this decision is interesting.) Because the FCRA requires as a threshold matter that the credit reporting be inaccurate, the defendants argued simply that the reporting was accurate: the debt was charged off and the balance at the time of charge off was being accurately reported. Butnick conceded that the reported balance was correct. But Butnick argued that it was inaccurate and misleading to specifically report the balance as "past due," which conveyed an impression that there was an ongoing monthly obligation to pay, and that his obligation to pay had ceased when the account was charged off.

The district court rejected Butnick's arguments. In granting the motion, the court hit head on a common misconception regarding charged off debt: just because a creditor charges off a debt does not mean that debtor is no longer liable for it. Rather, federal regulations require banks to charge off debts that are past due by 180 days. A "charge off," the court noted, is a term of art in banking, meaning that the account is switched from being considered an asset on the bank's balance sheets to a loss for accounting purposes, because there is a low probability that the account will be repaid after a lengthy period of delinquency. The court concluded that Butnick's arguments "conflates two unrelated concepts: namely, Plaintiff's legal responsibility to pay his debt to Defendant BANA and BANA's internal estimate of his likelihood to do so." And because the reporting was therefore accurate, the court granted the defendants' motion to dismiss.

The court in *Butnick* is certainly not the first court to reach this same conclusion. However, the decision remains important. FCRA filings have continuously and dramatically increased over the past decade and are now at an all-time high, with over 5,000 FCRA filings in federal court in 2020. Financial institutions and creditors can continue to expect plaintiffs to press new and inventive (and sometimes, just spurious) claims to argue that straightforward information is misleading under the FCRA, particularly as the “big three” CRAs continue to offer free weekly credit reports to consumers during COVID-19 (presently through April 2021).

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