

9th Circ. FCRA Ruling Highlights Furnishers' Role In Disputes

By Sasha Leonhardt and Cierra Newman (May 19, 2022)

In recent years, consumers have raised a variety of arguments to dispute negative information on their consumer reports — in some instances, raising not only factual questions about the existence or amount of a debt, but also more complex questions about whether a debt is legally permitted under state law.

The Fair Credit Reporting Act requires furnishers of information to conduct an investigation of any dispute, but does that require a furnisher to sit in judgment of a consumer's legal claims as to the validity of the debt?

The U.S. Court of Appeals for the Ninth Circuit answered this question earlier this week in *Marshall Gross v. CitiMortgage Inc.*, holding that if a consumer disputes a debt on the basis that it has been extinguished by state law the creditor must research this legal dispute.

By siding with the plaintiff — and an amicus brief filed by the Consumer Financial Protection Bureau — the Ninth Circuit raised a host of legal questions and operational challenges for creditors that furnish information to consumer reporting agencies.

Background

During the financial crisis, Gross stopped making payments on both the first and second lien mortgages on his Arizona home. The holder of the first mortgage foreclosed on his home and sold it — as such, the borrower never paid off the second mortgage.

For four years, the second mortgagor reported the outstanding balance on Gross' second mortgage on his consumer report. When Gross later applied for a mortgage to purchase a new home, he discovered the outstanding second mortgage on his credit report. He disputed the credit entry, arguing that he did not owe any money post-foreclosure on the second mortgage.

In his dispute, Gross cited Arizona's anti-deficiency statute eliminating his second mortgage debt. The statute states that "no action may be maintained to recover any difference between the amount obtained by sale and the amount of the indebtedness" on a mortgage, and the Arizona Supreme Court has held that the anti-deficiency statute will abolish the personal liability of a borrower after a foreclosure sale.

After receiving the dispute, the mortgagor verified that there was an outstanding balance on the mortgage and reaffirmed its prior reporting, noting that Gross had now disputed the debt. In response to a later dispute from Gross, the mortgagor then updated the reporting to show the debt as charged off.

The U.S. District Court for the District of Arizona held that the mortgagor accurately reported Gross' debt because the Arizona anti-deficiency statute did not extinguish the debt but rather, merely ended the mortgagor's ability to collect on it.

According to the district court, whether the statute rendered the debt uncollectible is a legal



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question, not a factual one, and the FCRA does not require furnishers to resolve legal questions, only factual inaccuracies. Gross appealed, and the Ninth Circuit reversed the district court.

Ninth Circuit Decision: Furnishers Must Investigate "Questions of Legal Significance"

Furnishers must implement reasonable procedures to investigate disputes under the FCRA, and according to the Ninth Circuit, this may include resolving factual and legal issues raised by the consumer.

The Ninth Circuit agreed with the CFPB's amicus brief in this case that the "FCRA does not categorically exempt legal issues from the investigations that furnishers must conduct," and that the distinction between legal and factual issues is "ambiguous" and "potentially unworkable."

According to the Ninth Circuit, "the point is that, vis-à-vis Gross, no outstanding balance existed, because the statute abolished his personal liability." As such, the Ninth Circuit held that furnishers must research legal issues — such as whether a debt has been extinguished by a state anti-deficiency statute — when raised by a consumer.

Notably, the Ninth Circuit compared Gross' argument under Arizona's anti-deficiency statute to credit disputes in bankruptcy cases. Citing *Midland Funding LLC v. Johnson*, a 2017 U.S. Supreme Court case, the Ninth Circuit held that practically speaking there is no difference between the two scenarios since a bankruptcy discharge also extinguishes the personal liability of the debtor.

Finally, the Ninth Circuit held that the reasonableness of an investigation is a factual question for a jury and remanded the case to the district court.

Gross' Lessons for Consumer Reporting Agencies and Furnishers

The Gross opinion provides a number of do's and don'ts for companies that respond to consumer disputes:

Do not assume legal issues are outside the scope of consumer disputes.

The Ninth Circuit made clear its view that a furnisher's responsibility to investigate a dispute includes both factual issues and legal questions. It is unclear whether other circuits will adopt Gross' reasoning, but furnishers receiving disputes that raise legal issues should investigate and respond to these issues — particularly if the consumer is located in the Ninth Circuit.

Do anticipate the challenges in responding to legal disputes.

Responding to factual disputes can be a relatively straightforward process: Review the consumer's dispute, identify relevant servicing records and respond based upon the account information. Legal disputes are necessarily more difficult, because in addition to researching internal facts, furnishers now will need to layer on a further application of the relevant law to the facts.

These challenges are magnified by the possibility of open and unresolved questions of law — including in *Gross*, where the district court and Ninth Circuit disagreed on whether Arizona's

anti-deficiency statute eliminated the debt or simply rendered it uncollectible. In such instances, a furnisher may need to make a judgment call on an area of law where the furnisher does not practice, does not have clear legal guidance, does not have all the relevant facts, and cannot reasonably assess whether a consumer's dispute is valid.

Do identify similar nuances in other state laws.

The Ninth Circuit's decision turned on Arizona's anti-deficiency statute and how that law has been interpreted by state courts, but several other states also have laws that may eliminate personal liability after a mortgage foreclosure — or for other types of outstanding debts. Furnishers may want to identify similar state laws and consider how to address disputes arising under these laws.

Do consider staffing and process changes to provide timely responses.

Under the FCRA, furnishers only have 30 days — with a possible 15-day extension — to respond to a consumer dispute, and nothing in Gross suggests that legal disputes are exempt from this requirement. Researching disputes that turn on questions of law may require furnishers to supplement their legal or compliance staff to investigate these matters, research the relevant law and reach a timely and accurate conclusion.

Do read the consumer's dispute request.

The Gross opinion does not require furnishers to identify every potential basis for why a consumer may have disputed a debt. It only requires furnishers to conduct a reasonable investigation of the consumer's complaint. For example, in Gross the consumer specifically cited Arizona's anti-deficiency statute and stated that his home had been foreclosed upon. Accordingly, furnishers should read the dispute carefully and respond to the specific issues raised by the consumer.

Do oversee third-party vendors involved in dispute resolution.

In Gross, a third party first researched the consumer's debt and determined that it was valid, but the court drew no distinction between the actions of the third party and the furnisher. This is consistent with the position that the CFPB and other federal regulators have taken over years of public guidance and enforcement actions: Financial institutions are ultimately responsible for the actions of their third parties.

Do consider your audience when crafting reasonable investigations of consumer disputes.

Whether a furnisher conducts a reasonable investigation of a consumer dispute is a question of fact for a jury. And in a regulatory or enforcement action, the government may substitute its own definition of reasonable for that of a jury. When developing dispute investigation procedures, take steps to ensure that this audience will find your investigation to be reasonable.

Do not forget the fundamentals.

Although Gross focused on the novel and nuanced question of whether furnishers are required to resolve legal disputes, credit reporting is an area of focus for the CFPB, the Federal Trade Commission, and other financial regulators. Beyond the novel "legal dispute" issues raised by Gross, these regulators will continue to probe overall dispute

resolution procedures, compliance with timelines, adherence to Metro 2 guidance, and other aspects of consumer reporting.

Conclusion

It is uncertain how the district court will respond to Gross and whether other courts adopt its reasoning, but we expect the CFPB, other federal regulators and plaintiffs attorneys to take note of this decision. At the same time, furnishers should use Gross as an opportunity to evaluate how they respond to consumer disputes and assess their overall compliance with the FCRA.

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