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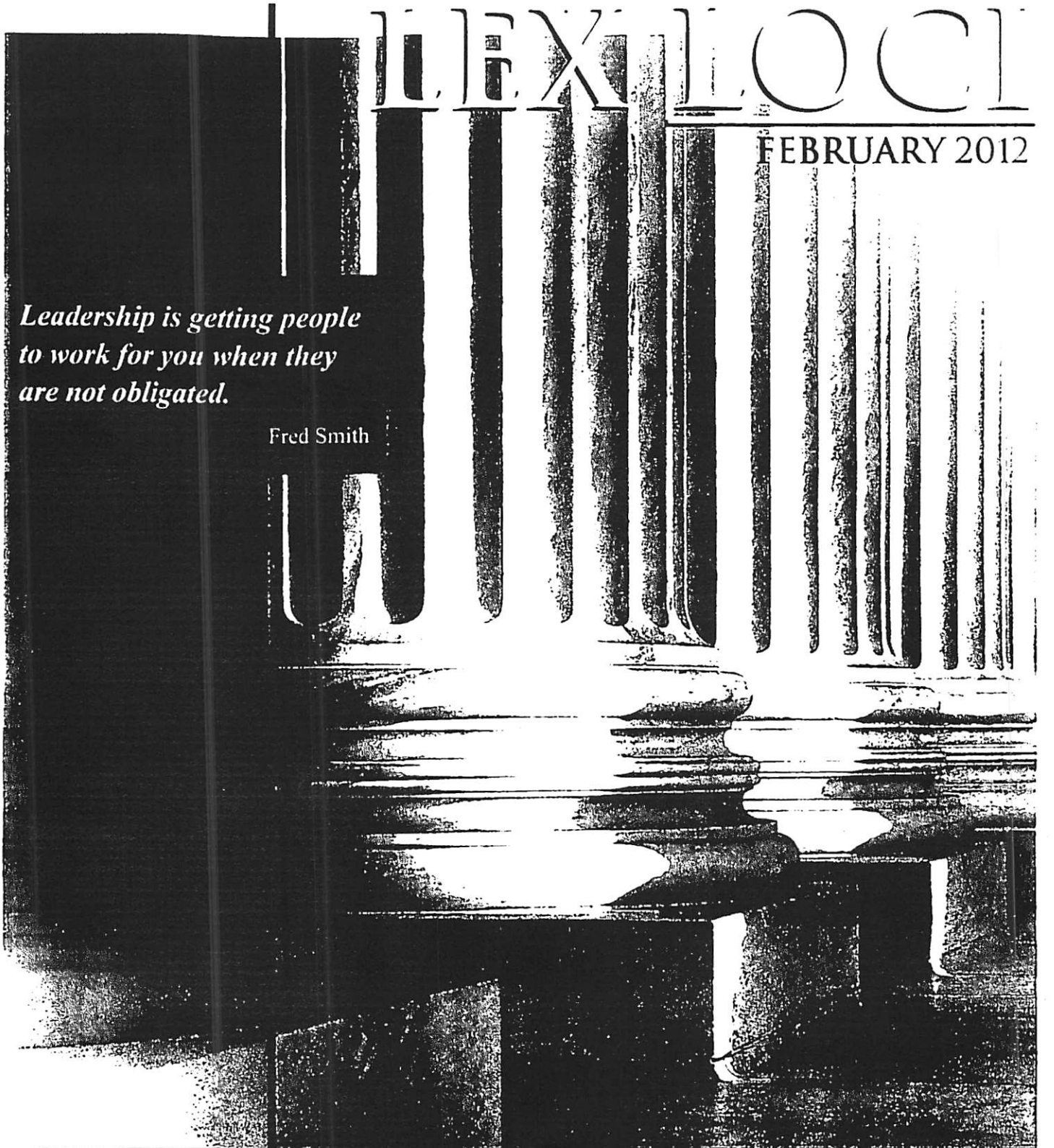

Leadership is getting people to work for you when they are not obligated.

Fred Smith

Northern Kentucky Bar Association

REPRESENTING CLIENTS WITH CREDIT REPORTING ISSUES

Steve Shane

What is your client's most valuable asset? You might be surprised to learn that it is not always something you can either taste, smell or even touch. It is his or her credit standing or creditworthiness. It translates into the ability to purchase a home, automobile or something of critical importance to your client and/or family member. The rights of consumers as well as the obligations of credit users and furnishers[1] are regulated by the Fair Credit Reporting Act [FCRA].[2] Any and all information about a consumer's creditworthiness is stored in databases maintained by the "Big Three" National Credit Bureaus[3]. Each consumer has a credit file maintained by each Bureau. The Bureaus issue consumer information to countless credit furnishers (subscribers), debt collectors and other entities or individuals who each have a permissible purpose to view one's credit information[4]. The FCRA focuses on two primary areas: insuring the accuracy of credit information that is reported; and, insuring the privacy of consumers in their financial affairs.

Disputing Inaccurate Information

Congress became aware, in 1970, of the growing power and influence of the credit bureaus in our society to effect the lives of consumers. Congress believed that it was in the best interest of our banking system and for the stability of commerce, in general, to ensure the accuracy of credit information being reported concerning consumers.[5] Congress, therefore, enacted the Fair Credit Reporting Act [hereinafter the "Act"]. The Act, among other things, requires that consumer reporting agencies (the "bureaus") adopt and maintain procedures for ensuring the accuracy of the information being reported concerning consumers. It is not possible or necessary in this brief summary to trace the extensive history of the Act. Suffice it to say, there was a major overhaul of the statute in September 1996.[6] The most critical improvement was the ability of consumers to sue individual credit furnishers for reporting inaccurate or incomplete information. Unbelievably, prior to 1996, a consumer was only able to bring suit against a credit bureau for reporting inaccurate and incomplete information. In order to hold either a credit furnisher or bureau liable under the Act, any and all consumer disputes must be initiated through the Bureau which is reporting the inaccurate information. Since it is somewhat counterintuitive, it cannot be emphasized enough that a claim under the Act can only be brought after a dispute has been made directly to a credit bureau. A furnisher who receives a dispute sent only to it has no obligation to correct any inaccuracy. (This attorney has seen this error made too many times by both consumers and their attorneys and, at minimum, it results in a major waste of time and effort. This mistake is especially damaging when a consumer needs immediate relief when applying for a mortgage or re-financing.)

The Dispute Process

The bureaus have set-up a specific procedure for handling disputes received from consumers.[7] The consumer, or consumer's lawyer, should write a letter to each Bureau that is inaccurately reporting information setting forth the dispute with as much detail as possible, along with supporting documentation[8]. He or she must make certain to request that the bureau conduct an investigation (referred to as "re-investigation" in the industry). The bureau must then immediately transfer the dispute to the credit furnisher and request that it conduct an investigation and timely report back so that the bureau can report the results to the consumer within 30-45 days. Upon receipt of any consumer dispute the bureau will transfer it electronically directly to the credit furnisher using a standard credit industry form known as an Account Dispute Verification Form ["ACDV" or "CDV"]. The ACDV contains numerous codes which briefly describe the nature of each dispute available to the consumer. For example: "103-identity fraud";"013-disputes current balance"; and, "021-claims account closed and paid". Each furnisher employs ACDV operators who, upon receipt of the form, conduct an investigation into the dispute and report back to the bureau. The consumer will ultimately receive notice from the Bureau which will either make the correction or "verify" the account is accurately reported. It is only after the receipt by the consumer of an investigation incorrectly verifying the account as accurate that a cause of action can accrue[9]. That cause of action will be against both the credit furnisher and the bureau[10]. A consumer must bring an action within two years of the date his or her dispute results in verification of inaccurate information.

Objective Inaccuracy

Occasionally, I am contacted by individuals who claim that they have inaccurate information on their reports who have little understanding or concern for the definition of the term "accurate". They look upon the process as a "crap shoot" where they are pleased when they dispute an account and, for some reason, the credit furnisher is unable to timely respond. This results in the Bureau deleting the account. Needless to say, it's a bad idea for any lawyer to become involved with this type of dispute. More often clients will ask you to dispute accounts which are more the result of arguments between them and a credit furnisher, which require subjective review and analysis. Again, this is not the kind of case you should take. A credit bureau cannot be held liable for failing to delete or correct an account which is the result of a legitimate dispute between your client and a furnisher. It is best to take only cases involving "objective inaccuracy," where there can be no question that the information reported is inaccurate, because it is subject to objective analysis. For example, the Act prohibits the reporting of any obsolete and derogatory information concerning an account which has been delinquent for more than 7 years[11]. If a client comes to you with proof that an account that has been delinquent for more than 7 years is currently being reported, that is an account which you should consider advising the client to dispute.

Privacy

The Act's other focus involves the issue of privacy, where a consumer's credit information can be accessed only under limited and lawful circumstances.

A consumer report contains the kind of information which should only be accessed or viewed by persons or entities who have a legitimate business need. (See footnote 4 for those specific purposes.) Not, for example, by an estranged spouse in a divorce proceeding or in connection with litigation, if the purpose is to determine whether one of the litigants has the financial resources to continue.[12] A more common occurrence may involve, for example, an account recently discharged in bankruptcy where a former creditor continues to access a consumer's credit information. In one situation, a financial institution believed it was appropriate to conduct "account reviews" of clients' credit information for several years after they discharged their mortgage obligation. The excuse given was that the title to the real estate was never transferred. Assuming it was even relevant, discovery revealed that the Bank failed to take any action to transfer the title.[13] Appropriate advice to any bankruptcy client who has recently received a discharge may be to request copies of all credit reports. If any report reveals that a former creditor has accessed the client's credit information after the date of discharge, that client should contact you.

Damages and Attorney Fees

Any negligent violation of the Act may result in the payment of actual damages, which can be proven.[14] Proof of pecuniary loss as an element of actual damage is often quite difficult. That is why Courts recognize the element of emotional distress as a key component of actual damage. Typically, this will consist of sleeplessness, anxiety, embarrassment, loss of appetite, irritability and other similar symptoms which usually result from the frustration a consumer experiences in dealing with these issues[15]. A willful violation of the Act, if proven will, in addition to actual damages allow for the recovery of punitive damages.[16] In all cases, once liability is established, the Act provides for the payment of attorney fees to any prevailing plaintiff.

Conclusion

It is imperative that all clients or potential clients be advised to obtain and closely monitor their consumer reports at regular intervals; especially, in this time of epidemic identity theft and other consumer credit fraud. Fortunately, Congress has made this process much easier for the average consumer by providing that any person may obtain all three credit reports annually at no cost. The consumer may call or write for or even obtain their reports online at a website entitled https://www.annualcreditreport.com. Consequently, there is no longer any excuse for not spotting errors or for allowing them to go unchallenged. In addition to checking for accuracy of their own tradelines, a client or potential client should be advised to carefully check for strange and unfamiliar accounts as well as inquiries or requests to view their credit information.

These websites are also very helpful:
http://www.myfaircredit.com/
http://www.e-oscar.org/
http://www.fightidentitytheft.com/flag.html
http://www.ftc.gov/bcp/menus/consumer/credit/rights.shtm

The author further suggests that you may write him at shanelaw@fuse.net or call at (859) 431-7800 ext. 11 if you ever need any assistance.

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[1] A "credit user" or "furnisher" is any entity or individual who accesses the credit information of a consumer for a permissible purpose under the Act.

[2] 15 U.S.C. §1681, et seq.

[3] Trans Union, LLC, Equifax Information Services and Experian Information Solutions.

[4] Generally speaking under the FCRA one may permissibly obtain credit information concerning a consumer for any one of 4 basic purposes: (1) an extension of credit; (2) employment; (3) insurance underwriting; and, (4) for the rental of any premises. A creditor who has already extended credit may access a consumer's credit information periodically to conduct "account reviews". Anyone who does not have a permissible purpose in accessing credit information can be subject to civil liability for both actual and punitive damages. See 15 U.S.C. §1681b.

[5] 15 U.S.C. §1681a

[6] The Consumer Credit Reporting Reform Act of 1996, effective September, 1996.

[7] The e-oscar dispute system.

[8] Disputes can be initiated over the telephone or online but this is not recommended. First, this does not allow for providing documents that support a dispute. Second, in the event that a bureau denies receiving a dispute as they often do, one has no way of proving that it was sent and/or received. Therefore, disputes should always be mailed, preferably, by certified mail.

[9] The only exception to this strict rule is for a claim made under 15 U.S.C. §1681e(b) which provides that a consumer may bring a claim against any Credit Bureau (not a furnisher) for failing to maintain procedures to assure maximum possible accuracy of the information it reports.

[10] Although a Bureau may claim that it has the right to rely exclusively on the investigation of the credit furnisher, a credit bureau is always required to conduct an investigation of the consumer dispute that is independent of that of the credit furnisher. See 15 U.S.C. §1681i and Cushman vs. Trans Union, 115 F.3d 220 (3d Cir. 1997).

[11] 15 U.S.C. §1681c

Duncan vs. Handmaker, 149 F.3d 424 (6th Cir. 1998) and ***Thibodeaux vs. Rupers***, 196 F.Supp. 2d 585 (S.D. Ohio 1998).

Godby vs. Wells Fargo, 599 F.Supp. 2d 804 (S.D. 2008).

[12] 15 U.S.C. §1681b.

Morris vs. Credit Bureau of Cincinnati, 563 F.Supp. 962 (S.D. 1983).

[13] 15 U.S.C. §1681n