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Attorneys Beware: Obtaining Credit Reports on Opposing Party May Lead to Punitive Damages

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Bakker v. McKinnon[1]

I. INTRODUCTION

Knowledge is power, and a credit report is a great way to obtain knowledge. An attorney could gain useful information from a credit report when preparing for litigation, especially in determining who to sue or whether to sue. However, under the Fair Credit Reporting Act ("FCRA" or "Act"), an attorney may face punitive damages if he or she uses a credit report in a manner that is not authorized by the FCRA. This is exactly what happened to an Arkansas attorney who, while aggressively representing her clients, obtained credit reports on the opposing party. She could have avoided the imposed damages—both actual and punitive—had she been aware of the permissible purposes for obtaining a credit report under the FCRA. However, she is not alone. There are many attorneys who are unaware of what they can and cannot do under the FCRA.[2]

II. FACTS AND HOLDING

In September 1995 and April 1996, attorney Laura J. McKinnon obtained credit reports on Dr. Johnny L. Bakker, a dentist, and his two adult daughters.[3] McKinnon obtained the reports while representing several of Dr. Bakker's female patients in a malpractice suit against him.[4] Initially, McKinnon acquired a credit report only on Dr. Bakker.[5] However, she subsequently obtained another credit report on Dr. Bakker and credit reports on each of his two daughters.[6] Dr. Bakker and his two daughters filed suit in September 1996 after learning that McKinnon had obtained the credit reports.[7] In their lawsuit, Dr.

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1. 152 F.3d 1007 (8th Cir. 1998).

2. Creditors' attorney Robert M. Landman conducted an informal survey of trial attorneys and found that most of them did not understand that, in most instances, it is a violation of the FCRA to obtain credit reports in connection with litigation. *Lawyer Sued For Obtaining Defendant's Credit Report*, MO. L. WKLY., Jan. 11, 1999, at B9.

3. *Bakker*, 152 F.3d at 1011.

4. *Id.* at 1009-10. McKinnon filed suit in Arkansas state court on behalf of her clients, female patients of Dr. Bakker, who claimed that he touched them in an inappropriate manner during their dental visits. *Id.* Dr. Bakker's daughters were not parties in that suit. *Id.*

5. *Id.* at 1011.

6. Baker v. McKinnon, 152 F.3d 1007, 1011 (8th Cir. 1998).

7. *Id.*

Bakker and his daughters alleged that McKinnon obtained the credit reports in violation of the FCRA.[8]

McKinnon admitted that she obtained the credit reports on Dr. Bakker and his daughters, but she defended on two grounds.[9] First, McKinnon claimed that the reports were not "consumer reports" because she obtained them "for a commercial or a professional purpose."[10] Second, she argued that even if the reports were deemed to be "consumer reports" within the FCRA, she obtained them because of a "legitimate business need," as allowed by the FCRA.[11] McKinnon asserted that her "legitimate business need" for obtaining the reports was to determine whether Dr. Bakker was judgment proof or whether he was passing assets to his two daughters.[12]

McKinnon submitted a motion for summary judgment, arguing that the reports were not consumer reports, or in the alternative, that she had a "legitimate business need."[13] The district court denied the motion and, following a full trial on the merits, awarded Dr. Bakker and each of his daughters five hundred dollars in actual damages and five thousand dollars in punitive damages.[14] The district court rejected McKinnon's argument that the reports were not within the scope of the FCRA because they were not obtained for a consumer purpose.[15] The district court determined that the proper inquiry is not how the credit reports were used, but the purpose for which the reports were originally collected by the consumer reporting agency.[16]

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8. *Id.* at 1009.

9. *Id.*

10. *Id.* A consumer report is a type of credit report. "Consumer report" is defined by the FCRA as:

> [A]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (A) credit or insurance to be used primarily for personal, family, or household purposes; or (B) employment purposes; or (C) other purposes authorized under § 1681b of this title.

15 U.S.C. § 1681a (Supp. 1996).

11. Bakker v. McKinnon, 152 F.3d 1007, 1009-10 (8th Cir. 1998). The Act provides that "[a] consumer reporting agency may furnish a consumer report . . . . [to] a person which it has reason to believe . . . otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer." 15 U.S.C. § 1681b(3)(E) (1994), *amended by* 15 U.S.C. § 1681b(a)(3)(F)(i) (Supp. 1996).

12. *Bakker*, 152 F.3d at 1010.

13. *Id.*

14. *Id.*

15. *Id.*

16. Bakker v. McKinnon, 152 F.3d 1007, 1010 (8th Cir. 1998).

The district court also rejected McKinnon's argument that she had a "legitimate business need" for the credit reports because McKinnon was not involved in a business transaction with Dr. Bakker or his daughters.[17] The court declined to adopt a liberal definition of "business transaction" and limited the term to include consumer credit, insurance, and employment transactions.[18] The court therefore reasoned that McKinnon did not have a "legitimate business need" because obtaining a credit report to determine whether the adverse party is judgment proof does not relate to consumer credit, insurance, or employment.[19]

McKinnon appealed the district court's decision.

III. LEGAL BACKGROUND

A. History and Relevant Provisions of the FCRA

Since the end of World War II, the credit industry has grown at an astonishing rate.[20] At the same time, consumers have grown increasingly apprehensive about "confidentiality, accuracy, relevance, and the proper utilization of consumer information."[21] Until Congress reacted in 1970, consumers were unable to find a satisfactory remedy for injuries resulting from invasion of privacy and improper use of credit reports.[22] The Ninety-First Congress finally responded to these problems in the credit industry by passing the Fair Credit Reporting Act.[23] The FCRA became effective on April 25, 1971[24] and, as specifically set forth, explained that its purpose is to:

> [R]equire that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this title.[25]

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17. *Id.*

18. *Id.*

19. *Id.*

20. S. REP. NO. 103-209, at 2 (1993).

21. *Id. See also* Elwin Griffith, *The Quest for Fair Credit Reporting and Equal Credit Opportunity in Consumer Transactions*, 25 U. MEM. L. REV. 37, 37-41 (1994).

22. *See* Griffith, *supra* note 21, at 37-38; Virginia G. Maurer & Robert E. Thomas, *Getting Credit Where Credit Is Due: Proposed Changes in the Fair Credit Reporting Act*, 34 AM. BUS. L.J. 607, 630-31 (1997).

23. NATIONAL CONSUMER LAW CENTER, FAIR CREDIT REPORTING ACT 40 (3d ed. 1994).

24. *Id.* at 32.

25. 15 U.S.C. § 1681(b) (1994).

Congress has amended the FCRA many times since its enactment, but these changes have, for the most part, been minor.[26] However, in 1996, Congress, for the first time, made significant modifications to the FCRA, particularly the permissible purposes for which a consumer report may be obtained.[27]

B. Cases Under the FCRA

The FCRA creates civil liability for willful noncompliance[28] and negligent noncompliance[29] with the FCRA. It also provides a fine and imprisonment for obtaining information under false pretenses.[30] Despite these facts, there has been little FCRA litigation since its enactment.[31] The lack of FCRA litigation has been attributed to consumer ignorance (of rights under the FCRA), the ease with which violators can avoid detection, and loopholes in the FCRA.[32] In addition to a small body of precedent, the FCRA does not give authority to any federal agency to publish regulations interpreting the FCRA.[33] Still, the Federal Trade Commission ("FTC") has issued "Statements of General Policy or Interpretations" under the Fair Credit Reporting Act.[34] While this commentary "does not have the force or effect of regulations or statutory provisions,"[35] it can be helpful in interpreting the FCRA. The FTC may also issue informal opinion letters when requested to do so.[36]

While there has been little litigation under the FCRA, those cases dealing with whether litigation is a proper purpose for obtaining a credit report focus on two provisions, Sections 1681a(d) and 1681b.[37] Section 1681a(d)(1) defines a "consumer report" as:

> [A]ny written, oral, or other communication of any information . . . which is *used or expected to be used or collected in whole or in part* . . . as a factor in establishing the consumer's eligibility for (A) credit or insurance to be used primarily for personal, family, or household

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26. NATIONAL CONSUMER LAW CENTER, *supra* note 23, at 40-41.
27. *See infra* note 93.
28. 15 U.S.C. § 1681n (1994).
29. 15 U.S.C. § 1681o (1994).
30. 15 U.S.C. § 1681q (1994).
31. NATIONAL CONSUMER LAW CENTER, *supra* note 23, at 33.
32. *Id.*
33. *Id.* at 34.
34. *See* 16 C.F.R. pt. 600 app. (1999).
35. *Id.*
36. NATIONAL CONSUMER LAW CENTER, *supra* note 23, at 34.
37. *See infra* notes 37-84 and accompanying text. *See generally,* Griffith, *supra* note 21, at 37-38.

purposes; (B) employment purposes; or (C) any other purpose authorized under section 1681b of this title.[38]

Section 1681b sets forth the permissible purposes of consumer reports. It states that a consumer report may be obtained in response to a court order[39] or when a consumer consents.[40] It is also permissible to obtain a consumer report for credit transactions (including the extension of credit and review of an account),[41] employment purposes,[42] and the underwriting of insurance.[43] A consumer report may also be obtained to determine eligibility for licenses and benefits granted by the government.[44] Finally, it is permissible to obtain a consumer report when there is a legitimate business need for the report in connection with a transaction involving the consumer.[45]

While litigation under the FCRA has been infrequent, several courts have considered the issue of whether obtaining consumer reports during the course of litigation is a permissible purpose under the FCRA. For instance, in 1986, the Third Circuit decided *Houghton v. New Jersey Manufacturers Insurance Co.*[46] New Jersey Manufacturers Insurance Co. ("NJMI") obtained a credit report on plaintiff when plaintiff filed suit against NJMI's insured.[47] While the court found that NJMI had not violated the FCRA, it refused to adopt a broad interpretation of Section 1681b(3)(E)'s "legitimate business need" and stated that "mere potential liability under an insurance policy" does not amount to a "business transaction" between the plaintiff and the defendant.[48] To construe Section 1681b(3)(E) broadly would "render the specificity of [Sections] 1681a(d) and b(3) meaningless."[49] The court stated that a "business transaction" under Section 1681b(3)(E) must relate to credit, insurance eligibility, employment, or licensing; that is, those areas which are specifically enumerated in Section 1681b(3).[50] The court further noted that there must be a consumer

38. 15 U.S.C. § 1681a(d) (1994) (emphasis added). *But see* Pub. L. 104-208, 110 Stat. 3009 (1996) (revising 1994 provisions and adding further exclusions in para. (2)).

39. 15 U.S.C. § 1681b(1) (1994).

40. 15 U.S.C. § 1681b(2) (1994).

41. 15 U.S.C. § 1681b(3)(A) (1994).

42. 15 U.S.C. § 1681b(3)(B) (1994).

43. 15 U.S.C. § 1681b(3)(C) (1994).

44. 15 U.S.C. § 1681b(3)(D) (1994).

45. 15 U.S.C. § 1681b(3)(E) (1994), *amended by* 15 U.S.C. § 1618b(a)(3)(F) (Supp. 1996).

46. 795 F.2d 1144 (3d Cir. 1986).

47. *Id.* at 1146.

48. *Id.* at 1149.

49. *Id.*

50. *Id.*

relationship between the parties when the "business transaction" exception is alleged.[51]

In 1987, following *Houghton*, the Seventh Circuit addressed the same issue in *Ippolito v. WNS, Inc.*[52] In a trademark infringement suit, WNS, Inc. ("WNS") obtained a report on the plaintiffs in preparation of that litigation.[53] The court had to determine whether the report received by WNS was a "consumer report" within the FCRA. Specifically, the court addressed whether the report obtained by WNS was "used or expected to be used or collected" for any of the purposes set forth in Section 1681b(3).[54] The parties agreed that WNS's use of the report—to inspect an opposing party—was not a permissible purpose under the FCRA.[55] Therefore, it was not a "consumer report."

The court then inquired whether the credit reporting agency had expected the report to be used for a permissible purpose or had collected the information to be used for a permissible purpose under the FCRA.[56] Because WNS never disclosed its reason for obtaining the report, the court found that the credit reporting agency could reasonably expect WNS to use the report as it normally did to evaluate potential franchisees.[57] The court then discussed the "business transaction" language of Section 1681b(3)(E) to determine whether this purpose—evaluating potential franchisees—was permissible.[58] If the court found that this was a permissible purpose within the FCRA, then the report would be a "consumer report," and WNS would be in violation of the FCRA because its actual use—which was in connection with the litigation—was impermissible. The *Ippolito* court followed the *Houghton* court and others,[59] determining that if the language of Section 1681b(3)(E) were interpreted too broadly, "the other provisions of [Sections] 1681a(d) and [1681b(3)] would be rendered a nullity."[60] The *Ippolito* court found further support in Congress's intent when the FCRA was enacted—"to regulate the dissemination of information used for consumer purposes, not business purposes."[61] In light of

51. *Id.*

52. 864 F.2d 440 (7th Cir. 1987).

53. *Id.* at 444-46.

54. *Id.* at 450-54.

55. *Id.* at 450.

56. *Id.* at 450-54.

57. *Id.* at 450-51. WNS frequently obtained reports from the credit reporting agency for this purpose. *Id.* at 443-44. These reports were known as "Special Service Reports" and were used for business purposes. *Id.*

58. *Id.* at 451-52.

59. *Id.* at 451 (citing Houghton v. New Jersey Mfrs. Ins. Co., 795 F.2d 1144, 1149-50 (3d Cir. 1986); Hovater v. Equifax, Inc., 823 F.2d 413, 419 (11th Cir. 1987); Cochran v. Metropolitan Life Ins. Co., 472 F. Supp. 827, 830-31 (N.D. Ga. 1979)).

60. *Id.* at 451.

61. *Id.* at 452.

these factors, the court found that "evaluating prospective franchisees does not fall within one of the consumer purposes set forth in the FCRA.[62]

The court then found that there was no evidence regarding why the credit reporting agency had originally collected the information.[63] The court noted that even if the information in the report had been collected for a permissible use under the FCRA, WNS had no way of knowing this fact.[64] Therefore, the court concluded that the report obtained by WNS was not a consumer report.[65]

In 1991, the Ninth Circuit also addressed this issue when it decided *Mone v. Dranow*.[66] In this case, three days prior to Dranow's filing of an unfair competition suit against Mone, Dranow had obtained a credit report on Mone to prepare for that suit.[67] When Mone learned of Dranow's actions, he filed his own suit against Dranow, alleging that Dranow had violated the FCRA by obtaining a report for an impermissible purpose.[68]

In the *Mone* case, there was no dispute regarding whether the report obtained by Dranow was a consumer report within the FCRA.[69] The only real dispute was whether Dranow's purpose for obtaining the report—to determine whether or not Mone could satisfy a five million dollar judgment in the unfair competition action—was a permissible one within the "legitimate business need" language of Section 1681b(3)(E).[70] In an attempt to fulfill the intent of Congress, the Ninth Circuit found that "[d]etermining whether an adverse party in litigation will be able to satisfy a judgment is plainly a purpose unrelated to 'an individual's eligibility for credit, insurance or employment.'"[71] The court also reasoned that this interpretation of Section 1681b(3)(E) was consistent with the decisions of other courts.[72]

More recently, the Sixth Circuit considered the issue in *Duncan v. Handmaker*,[73] a case which the *Bakker* court relied on in making its decision.[74]

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62. *Id.*
63. *Id.* at 453.
64. *Id.* at 454.
65. *Id.* at 452, 454.
66. 945 F.2d 306 (9th Cir. 1991).
67. *Id.* at 307.
68. *Id.*
69. *Id.* at 308.
70. *Id.*
71. *Id.* (citing 116 CONG. REC. 36,572 (1970) (statement of Rep. Sullivan)).
72. Mone v. Dranow, 945 F.2d 306, 308 (9th Cir. 1991) (citing Houghton v. New Jersey Mfrs. Ins. Co., 795 F.2d 1144, 1149 (3d Cir. 1986); Ippolito v. WNS, Inc., 864 F.2d 440, 451 (7th Cir. 1987); Russell v. Shelter Fin. Servs., 604 F. Supp. 201, 202-03 (W.D. Mo. 1984); Boothe v. TRW Credit Data, 557 F. Supp. 66, 70 (S.D.N.Y. 1982); Cochran v. Metropolitan Life Ins. Co., 472 F. Supp. 827, 830-31 (N.D. Ga. 1979)).
73. 149 F.3d 424 (6th Cir. 1998).
74. *See infra* notes 93-103 and accompanying text; *see also* Cornelia W. Honchar & Lawrence M. Templer, *Search for an Edge Led to Self-Inflicted Wound*, CHI. DAILY

In this case, the Duncans brought suit against several parties, including Bankers Mortgage Corporation ("BMC"), when they learned that their house's well was contaminated.[75] Handmaker, the attorney representing BMC, obtained credit reports on the Duncans while preparing to defend the suit.[76] When the Duncans learned this, they filed suit against Handmaker alleging that he had obtained the reports in violation of the FCRA.[77] Handmaker and his law firm asserted that they had obtained the reports pursuant to the FCRA because they had a "legitimate business purpose" as permitted by Section 1681b(3)(E).[78] They also asserted that the reports were obtained for a permissible purpose because their "need was connected to the underlying business transaction between [BMC] and the Duncans."[79]

The Sixth Circuit declined to adopt Handmaker's arguments because the purpose for which the reports were obtained "only tangentially related to the extension of credit."[80] The Sixth Circuit, in accord with other courts, noted that a broad interpretation of Section 1681b(3)(E) would make the specificity under the FCRA trivial.[81] However, the court did admit that there may be a "legitimate business need" to obtain a consumer report in some lawsuits.[82] According to the Sixth Circuit, lawsuits during which it will be permissible under the FCRA to obtain a consumer report generally concern debt collection.[83] The court did note that the further a lawsuit moves "outside the realm of debt collection," the lower the chances that a consumer report may be obtained for a permissible purpose within the FCRA.[84]

IV. INSTANT DECISION

In *Bakker*, the Eighth Circuit considered McKinnon's challenge to the actual and punitive damage awards assessed against her. McKinnon made four arguments on appeal: (1) that the district court erred in denying her motion for summary judgment; (2) that the credit reports she obtained were not "consumer reports" and therefore were not covered by the FCRA; (3) that even if the credit reports were "consumer reports" within the FCRA, she had a "legitimate

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L. BULL., Nov. 20, 1998, at 5.

75. Duncan v. Handmaker, 149 F.3d 424, 425 (6th Cir. 1998).

76. *Id.* at 426.

77. *Id.*

78. *Id.* at 427.

79. *Id.*

80. *Id.*

81. *Id.* (citing Houghton v. New Jersey Mfrs. Ins. Co., 795 F.2d 1144, 1150 (3d Cir. 1986); Mone v. Dranow, 945 F.2d 306, 308 (9th Cir. 1991)).

82. *Id.* (finding that obtaining a consumer report during litigation concerning a past-due debt was a permissible purpose within the FCRA).

83. *Id.* at 428.

84. *Id.*

business need" to obtain them; and (4) that the punitive damage award of five thousand dollars per appellee was unreasonable.[85] The Eighth Circuit rejected all of McKinnon's contentions and affirmed the district court opinion.[86]

The court, while not even agreeing that McKinnon had preserved the issue for appeal, first considered her argument concerning the denial of the summary judgment motion.[87] The court quickly dealt with this argument, stating that the issue is one that is "interlocutory in nature and not appealable after a full trial on the merits."[88] It was further noted that a judgment following a full trial "supersedes earlier summary judgment proceedings."[89]

The court then considered McKinnon's next two arguments. McKinnon argued that the credit reports were not "consumer reports" because she obtained them for a commercial or professional purpose and therefore the reports were not subject to the FCRA.[90] In the alternative, if the court were to find that the reports were within the FCRA, McKinnon argued that she did not violate the FCRA because the reports were obtained for a "legitimate business need" as allowed by the FCRA.[91] The Eighth Circuit rejected both of these arguments.[92]

Before explaining why it disagreed with McKinnon's arguments, the court first noted that the facts were not in dispute and that the issue was one of interpreting the FCRA as it read at the time McKinnon obtained the reports.[93] In its analysis of the FCRA, the court first determined whether the credit reports were "consumer reports" covered by the Act. McKinnon had claimed that she obtained the reports in connection with the litigation against Dr. Bakker and that the reports were therefore obtained for a commercial or professional use and outside the purview of the FCRA.[94] The FCRA's definition of "consumer reports" limits such reports to information which is used, expected to be used,

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85. Bakker v. McKinnon, 152 F.3d 1007, 1010-13 (8th Cir. 1998).

86. *Id.* at 1013.

87. *Id.* at 1010.

88. *Id.*

89. *Id.*

90. *Id.* at 1010-11.

91. *Id.* at 1011; 15 U.S.C. § 1681b(a)(3)(F)(i) (1996) (allowing consumer reports to be obtained if they are to be used in connection with a business need).

92. Bakker v. McKinnon, 152 F.3d 1007, 1011 (8th Cir. 1998).

93. *Id.* The FCRA was amended in 1996, and Section 1681b(3)(E) became Section 1681b(a)(3)(F). *Id.* It now states that a person may obtain a report if it "otherwise has a legitimate need for the information--(i) in connection with a business transaction that is initiated by the consumer; or (ii) to review an account to determine whether the consumer continues to meet the terms of the account." 15 U.S.C. § 1681b(a)(3)(F) (Supp. 1996). The court cited to *Duncan v. Handmaker*, a Sixth Circuit case which noted that the FCRA, as amended, restricts the scope of the "legitimate business need exception." *Bakker*, 152 F.3d at 1011 (citing Duncan v. Handmaker, 149 F.3d 424, 427 n.3 (6th Cir. 1998)).

94. *Bakker*, 152 F.3d at 1012.

or collected for a business transaction regarding personal credit, insurance, employment, and licensing.[95]

Because the FCRA definition of "consumer report" includes reports where "the information contained therein was collected for a consumer purpose," the court held that the reports obtained by McKinnon were "consumer reports" within the FCRA.[96] These were consumer reports despite the fact that they were not used for a consumer purpose. According to the court, "the purpose for which the information was originally collected" is the key when determining whether a credit report is a consumer report within the FCRA.[97] To further support its conclusion, the court noted that the contract that McKinnon signed when obtaining the credit reports stated that the reports were governed by the FCRA.[98] By signing the contract, McKinnon agreed that she would only use the reports for "consumer purposes identical to those set out in the Act."[99]

The Eighth Circuit then explained why McKinnon did not have a "legitimate business need" as permitted by the FCRA. The court stated that, in order to show a "legitimate business need," McKinnon needed to demonstrate that she was involved in a business transaction with Dr. Bakker and his daughters.[100] The Eighth Circuit stated that a business transaction "must relate to 'a consumer relationship between the party requesting the report and the subject of the report' regarding credit, insurance eligibility, employment, or licensing."[101] McKinnon admitted that she was not involved in any business transaction with the appellees regarding credit, insurance, employment, or licensing.[102] Therefore, the court determined that no consumer relationship existed and the reports were not obtained within the "business need" exception. The Eighth Circuit further rejected McKinnon's argument that litigation is a legitimate business need within the Act.[103]

Finally, the Eighth Circuit rejected McKinnon's argument that the punitive damage award was unreasonable.[104] The court stated that the FCRA imposes civil liability on individuals who obtain credit reports under "false pretenses."[105] If there is a willful violation of the FCRA, a consumer may recover actual and punitive damages and reasonable attorneys' fees.[106] To establish that a violation

95. *Id.* (citing Ippolito v. WNS, Inc., 864 F.2d 440, 451 (7th Cir. 1988)).
96. *Id.*
97. *Id.*
98. Bakker v. McKinnon, 152 F.3d 1007, 1012 (8th Cir. 1998).
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 1012-13.
105. *Id.* at 1012.
106. *Id.* at 1013.

was willful, a consumer need not show that the violator acted with malice but only that the violator acted knowingly or intentionally in conscious disregard of the rights of the consumer.[107] The court also noted that "'[a]ctual damages are not a statutory prerequisite to an award of punitive damages.'"[108]

The court then only looked to see if there was evidence that McKinnon had willfully violated the Act.[109] In order to establish a willful violation, plaintiffs do not need to show malice or evil motive, but that the act was done knowingly and intentionally with a conscious disregard for the rights of others.[110] The court looked to the district court's factual determination that McKinnon had made a "blatant attempt to extract a settlement from Dr. Bakker's insurance carrier, without regard to whether such conduct was fair or a clear violation of Rule 4.4 of the Arkansas Rules of Professional Conduct."[111] The district court had also determined that appellant's "multiple requests for credit reports . . . were designed and intended to carry on the 'vendetta'" against Dr. Bakker.[112] Finally, the court noted that while neither Dr. Bakker nor his daughters were subjected to any out-of-pocket expenses due to the credit reports having been obtained, they did testify to the emotional stress they suffered when they learned that their privacy had been invaded.[113] Therefore, the court decided that the district court had not abused its discretion in awarding actual and punitive damages.[114]

V. COMMENT

A. What Can't an Attorney Do Under the FCRA?

In the Eighth Circuit it is now clear that an attorney may not obtain a consumer report when the attorney plans to use the report in connection with litigation that does not concern the collection of a debt. Most cases considering this issue have held that use of a consumer report in litigation is not permissible under the FCRA.[115] These cases are consistent with the "FTC's Commentary

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* (citations omitted).

111. *Id.* Rule 4.4 states that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." ARKANSAS RULES OF PROFESSIONAL CONDUCT Rule 4.4 (1998).

112. Bakker v. McKinnon, 152 F.3d 1007, 1013 (8th Cir. 1998).

113. *Id.*

114. *Id.*

115. *See Bakker*, 152 F.3d at 1012 (finding that litigation is not a "legitimate business need" to obtain a credit report under the FCRA); Duncan v. Handmaker, 149 F.3d 424, 427 (6th Cir. 1998) (finding that litigation does not normally give rise to a permissible use of a consumer report under the FCRA); Mone v. Dranow, 945 F.2d 306,

and Informal Opinion Letters."[116] The FTC's Commentary states that "[t]he possibility that a party may be involved in litigation . . . does not provide a permissible purpose for that party to receive a consumer report . . . because litigation is not a 'business transaction' involving the consumer."[117] Attorneys lack a permissible purpose to obtain a consumer report under the FCRA in tort litigation,[118] divorce proceedings,[119] criminal trials, criminal investigations, and when attempting to locate a defendant.[120]

In 1996, Congress amended the FCRA,[121] significantly changing Section 1681b. Section 1681b(3)(E) became Section 1681b(3)(F) as a result of the amendments[122] and now provides that to obtain a consumer report, a party must "otherwise [have] a legitimate business need for the information (i) in connection with a business transaction that is initiated by the consumer; or (ii) to review an account to determine whether the consumer continues to meet the terms of the account."[123] It has been argued that the new language narrows the range of what constitutes a "legitimate business need."[124] Therefore, the amendment to the

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308 (9th Cir. 1991) (finding that using a consumer report to "[d]etermin[e] whether an adverse party in litigation [can] satisfy a judgment" is not a permissible purpose under the FCRA); Ippolito v. WNS, Inc., 864 F.2d 440, 450 (7th Cir. 1988) (finding that using a consumer report to evaluate a litigant is an impermissible non-consumer purpose); Houghton v. New Jersey Mfrs. Ins. Co., 795 F.2d 1144, 1149 (3d Cir. 1986) (finding that a "business transaction" under § 1681b(3)(E) must relate to credit, insurance eligibility, employment, or licensing). *See also* Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264 (9th Cir. 1990); Auriemma v. City of Chicago, No. 86 C 9260, 1990 WL 36774 (N.D. Ill. Mar. 12, 1990); Maloney v. City of Chicago, 678 F. Supp. 703 (N.D. Ill. 1987); Chiapetta v. Tellefson, No. 85 C 1673, 1985 WL 1951 (N.D. Ill. July 9, 1985); David A. Szwak, *Fair Credit Reporting, Credit Cards and Fraud*, 990 PLI/Corp 647, at 672-73 (May 1997).

116. *See* 16 C.F.R. pt. 600 app. § 604 (1999); C. Lee Peeler, F.T.C. Informal Staff Opinion Letter (August 27, 1977), *reprinted in* NATIONAL CONSUMER LAW CENTER, *supra* note 23, at 349 app. D; Jonathan D. Jerison, F.T.C. Informal Staff Opinion Letter (December 12, 1988), *reprinted in* NATIONAL CONSUMER LAW CENTER, *supra* note 23, at 443 app.D.

117. 16 C.F.R. pt. 600 app. § 604 (1999).

118. *Id.*

119. *See Chiapetta*, 1985 WL 1951, at *1.

120. 16 C.F.R. pt. 600 app. § 604 (1999); C. Lee Peeler, F.T.C. Informal Staff Opinion Letter (February 26, 1979), *reprinted in* NATIONAL CONSUMER LAW CENTER, *supra* note 23, at 359-60 app. D; Christian S. White, F.T.C. Informal Staff Opinion Letter (February 18, 1977), *reprinted in* NATIONAL CONSUMER LAW CENTER, *supra* note 23, at 346-47 app. D.

121. *See* Duncan v. Handmaker, 149 F.3d 424, 427 n.3 (6th Cir. 1998).

122. *Id.*

123. 15 U.S.C. § 1681b(3)(F) (Supp. 1996).

124. *Duncan*, 149 F.3d at 427 n.3; H.R. REP. No. 103-486, § 103 (1994); Carol A. Ahern & Jeffrey P. Taft, *The Consumer Credit Reporting Reform Act of 1996: An Attempt to Make the Fair Credit Reporting Act More Fair*, 51 CONSUMER FIN. L.Q. 304,

FCRA has not changed the line of cases and opinions regarding what is permissible under the "business need" language of Section 1681b.

Not only is it impermissible to obtain a consumer report in connection with litigation, but it is also impermissible to obtain a consumer report to locate a witness or juror.[125] Furthermore, a consumer report may not be used to undermine a witness at trial[126] or to evaluate a prospective juror.[127]

B. What Can an Attorney Do?

While, as a general rule, an attorney may not obtain a consumer report in connection with litigation, there are exceptions. If the transaction underlying the litigation is a business transaction involving the consumer, then an attorney may obtain a consumer report.[128] The type of litigation which usually fits this exception involves a party suing on a debt or credit account.[129] However, as litigation moves beyond the collection of a debt, the chance that there is a permissible purpose to obtain a consumer report decreases.[130] An attorney may also obtain a credit report on judgment debtors or those whose property is subject to a lien for clients who are judgment and lien creditors.[131]

It is also permissible for an attorney to obtain a consumer report on a prospective client, provided that the individual seeks legal assistance regarding a personal, family, or household matter.[132] This is permissible because there is a transaction between the attorney and the client.

Attorneys who want to use a credit report in connection with litigation still may—the report just cannot qualify as a consumer report under the FCRA. If an attorney requests a credit report on an opposing party, while explicitly stating

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311 (1997); Major Lescault, *Federal Trade Commission Staff Issues Informal Interpretation of FCRA Changes*, ARMY LAW., Jun. 1998, at 9; Virginia A. Maurer & Robert E. Thomas, *Getting Credit Where Credit Is Due: Proposed Changes In the Fair Credit Reporting Act*, 34 AM. BUS. L.J. 607, 661 (1997).

125. 16 C.F.R. pt. 600 app. § 604 (1999); Kim M. Garman, F.T.C. Informal Staff Opinion Letter (June 17, 1985), *reprinted in* NATIONAL CONSUMER LAW CENTER, *supra* note 23, at 400-01 app. D.

126. 16 C.F.R. pt. 600 app. § 604 (1999). *See also* Rylewicz v. Beaton Servs., Ltd., 698 F. Supp. 1391 (N.D. Ill. 1988), *aff'd*, 888 F.2d 1175 (7th Cir. 1989).

127. Kim M. Garman, F.T.C. Informal Staff Opinion Letter (June 17, 1985), *reprinted in* NATIONAL CONSUMER LAW CENTER, *supra* note 23, at 400-01 app. D.

128. 16 C.F.R. pt. 600 app. § 604 (1999).

129. *See generally* Spence v. TRW, 92 F.3d 380 (6th Cir. 1996); Allen v. Kirkland & Ellis, No. 91 C 8271, 1992 WL 206285 (N.D. Ill. Aug. 17, 1992); Zeller v. Samia, 758 F. Supp. 775 (D. Mass. 1991). *See also* Duncan v. Handmaker, 149 F.3d 424, 428 (6th Cir. 1998).

130. *Duncan*, 149 F.3d at 428.

131. *See* 16 C.F.R. pt. 600, app. § 604 (1999).

132. *See* NATIONAL CONSUMER LAW CENTER, *supra* note 23, at 112.

that he or she is planning to use it in litigation, the report is not a consumer report and its use in litigation is not prohibited by the FCRA.[133]

Finally, an attorney can, and should, question an opposing party during discovery to determine whether the opposing party has obtained a consumer report on his or her client.[134] This would enable the attorney to protect his or her client by discovering possible violations of the FCRA. If so, the client, like the Bakkers, could be awarded actual and punitive damages.

VI. CONCLUSION

The Eighth Circuit has made it clear that it is generally impermissible under the FCRA to obtain consumer reports on opposing parties during the course of litigation. The recent amendments to the FCRA further support this view. Attorneys need to be aware of what is and is not allowed under the FCRA, not only to protect themselves, but to protect their clients as well. While ignorance is said to be bliss, it might just lead to a punitive damage award.

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133. *See* Ippolito v. WNS, Inc., 864 F.2d 440 (7th Cir. 1988).

134. *See* National CONSUMER LAW CENTER, *supra* note 23, at 111; Clark et al., *Aggressive Defense May Lead to Turned Tables*, TEX. EMPLOYMENT L. LETTER, December 1998, at 4.