Debt Collection as a Permissible Purpose for Obtaining Credit Reports under the Fair Credit Reporting Act (FCRA)

A recent case decided by the U.S. Court of Appeals for the Ninth Circuit, Pintos v. Pacific Creditors Association, No. 04-17485 (April 30, 2009), has held that the Fair Credit Reporting Act (FCRA) does not give a creditor the right to obtain the credit report of a consumer in determining the likelihood of collecting a debt unless the debt has either arisen out of a transaction for which the consumer actively sought credit or been reduced to judgment. The ruling has been hailed by consumer advocates as a victory for individual privacy rights as much as it has been feared by credit professionals. According to this reader, however, the effect of Pintos is not as far-reaching as it appears at first glance.

The Plaintiff is a consumer residing in California. Her car was towed to an impound lot as a result of her failure to renew her vehicle registration. Subsequently, after the consumer failed to pay the towing fees or retrieve her car, the towing company sold the vehicle at auction. The sale of the vehicle did not satisfy the outstanding balance in full, and as a result, the towing company referred the remaining balance to the Defendant, a collection agency. In determining the likelihood of recovery of the balance, the Defendant obtained a credit report on the Plaintiff from Experian.

The Plaintiff filed suit, alleging that there was no permissible purpose under the FCRA for the Defendant to obtain her credit report. The Defendant contended that it was authorized to do so under 15 U.S.C. 1681b(a)(3)(A), which provides that a consumer reporting agency may provide a consumer credit report to a person it has reason to believe "intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer."

The Ninth Circuit held that since the Plaintiff did not initiate the transaction with the Defendants, the transaction did not involve the Plaintiff, and as a result the first part of 1681b(a)(3)(A) was not satisfied. The Court based this decision on several sources of authority:

- Mone v. Dranow, 945 F.2d 306 (9th Cir. 1991) The Defendant in this case had obtained a copy of the Plaintiff's credit report prior to initiating a lawsuit against the Plaintiff seeking damages for alleged unfair competition. The court, without discussion, concluded that the Defendant couldn't rely on 1681b(a)(3)(A) because it did not use the credit information in connection with a credit transaction involving the consumer.

- Andrews v. TRW, Inc., 225 F.3d 1063 (9th Cir. 2000) The Plaintiff's identity was stolen, and several credit cards were applied for using her social security number. The credit card companies sought credit reports from the Defendant credit bureau. The court found that this scenario does not constitute a credit transaction "involving the consumer" inasmuch as the consumer was not a willing participant in any transaction but an innocent bystander, and as a result the Plaintiff's claims were allowed to proceed to the jury.

- Hasbun v. County of Los Angeles, 323 F.3d 801 (9th Cir. 2003) The Defendant, a government child support enforcement body, pulled the Plaintiff's credit reports after determining that the Plaintiff was in violation of a child support order. The Plaintiff filed suit, alleging that this was not a permissible purpose under the FCRA. The Ninth Circuit found that the child support enforcement

agency did have a permissible purpose to obtain the credit report, relying on Federal Trade Commission (FTC) commentary found in the Appendix to 16 Code of Federal Regulations (CFR) Part 600, that stated that "[a] judgment creditor has a permissible purpose to receive a consumer report on the judgment debtor for use in connection with collection of the judgment debt, because it is in the same position as any creditor attempting to collect a debt from a consumer who is the subject of a consumer report," as well as authority from the Sixth Circuit in Duncan v. Handmaker, 149 F.3d 424 (6th Cir. 1998), stating that collection of a debt is considered to be the "collection of an account" under the FCRA, and therefore debt collection provides a permissible purpose to pull a consumer report.

The Pintos Court held that the Defendants did not have authority to obtain a copy of the Plaintiff's credit report. In so holding, the Court attempted to distinguish itself from Hasbun on the ground that whereas Hasbun involved the collection of an account that had been adjudicated by a court of competent jurisdiction, Pintos, like Mone and Andrews, did not. Therefore, according to the Pintos Court, a judgment creditor has a permissible purpose to obtain a credit report under Hasbun, but a nonjudgment creditor does not under Mone and Andrews.

This distinction is fictional. Hasbun's reasoning that a judgment creditor could obtain a credit report under Section 1681b(a)(3)(A) was based on the above quoted language in the FTC commentary to the CFR. The Pintos Court cites the first part of the FTC commentary, that "[a] judgment creditor has a permissible purpose to receive a consumer report on the judgment debtor for use in connection with collection of the judgment debt..." But in drawing the distinction between a judgment creditor and any other creditor based on this language, the Court ignores the second part of the FTC's statement, which was quoted by Hasbun, "...because it is in the same position as any creditor attempting to collect a debt from a consumer who is the subject of a consumer report." According to Hasbun and the FTC, a judgment creditor is no different than any other creditor. The Pintos decision fails to properly address this notion. Instead, the Court concludes, without citation, that under Hasbun, "[i]f a debt has been judicially established, there is a credit transaction involving the consumer, no matter how it arose."

The Pintos Court's distinction between judgment creditors and ordinary creditors is further belied by the Hasbun Court's reliance upon Duncan in reaching its decision. Duncan announced the principle that when a law firm obtains the credit report of a debtor prior to judgment in connection with its representation of a creditor in a lawsuit arising from a debt, it does so with authority under 1681b(a)(3)(A) and 1681b(a)(3)(E). The Court noted, in accordance with Mone, that if the lawsuit is not for collection of a debt, there is no permissible purpose.

Finally, the effect of Pintos is limited by the operative facts of that case. The majority found it significant that the Plaintiffs were not willing participants in a "credit transaction." In light of the FACTA definition of "credit," found at 15 U.S.C. 1691a(d), many debtors are. For instance, in some circumstances, where an individual receives medical treatment from a provider without paying for that treatment in advance, there can be said to be an implicit agreement by the provider to defer payment for the services, and as a result, the patient may be considered a participant in a credit transaction. Likewise, wherever payment is made by a postdated check or otherwise accepted over time, a credit transaction may be found to exist. The dissenting Judge in Pintos believed that the Plaintiff there was involved in a credit transaction by virtue of the California Code provision allowing for deficiency claims against the owners of vehicles that are impounded and sold to compensate the towing company. Of course, each case is different.

Essentially, obtaining a credit report on an individual in furtherance of examining the likelihood of collecting a delinquent account remains a valuable tool to creditors and collection professionals, and legal advice as to the propriety of doing so under a particular set of circumstances should be obtained in lieu of across the board abandonment of this practice in the wake of Pintos.