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Identity Theft and the Fair Credit Reporting Act: An Analysis of *TRW v. Andrews* and Current Legislation

Angie A. Welborn
Legislative Attorney
American Law Division

Summary

One of the ways in which victims of identity theft may recover for financial harm is by filing suit under the Fair Credit Reporting Act.¹ However, the Act imposes a two year statute of limitations on suits filed. On November 13, 2001, the Supreme Court decided a case interpreting when the Act's statute of limitations begins to run. In that case, the Court held that the statute of limitations begins to run when inaccurate disclosures first occur, and not when the consumer learns of the inaccuracies in his report.

Several pieces of legislation attempting to provide consumers with additional time to file suit have been introduced in response to the Court's decision. This report will provide a brief summary of the Fair Credit Reporting Act provisions in question, as well as an analysis of the recent Supreme Court decision and an overview of recent legislation (S. 22 and H.R. 818) introduced in response to that decision. This report will be updated as events warrant.

Fair Credit Reporting Act

The Fair Credit Reporting Act (FCRA) was enacted on October 26, 1970.² The purpose of the FCRA is "to require 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 the confidentiality, accuracy, relevancy, and proper utilization of such

¹ For more information on remedies available to victims of identity theft, see CRS Report RS21163, *Remedies Available to Victims of Identity Theft*.

² Pub. L. 91-508, tit. 6, § 601, 84 Stat. 1128, 15 U.S.C. 1681 *et. seq.*

information.”³ The FCRA applies to the files maintained by “consumer reporting agencies,” a term broadly defined to include anyone in the business of furnishing reports on the credit worthiness of consumers to third parties.⁴ Consumer credit reports generally include information about a consumer’s “credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.”⁵ This information is gathered and sold to creditors, employers, landlords and other businesses. The FCRA outlines a consumer’s rights in relation to his or her credit report, as well as permissible uses for credit reports and disclosure requirements. In addition, the FCRA requires credit reporting agencies to follow “reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.”⁶

The FCRA allows consumers to file suit for violations of the Act, which could include the disclosure of inaccurate information about a consumer by a credit reporting agency.⁷ A consumer who is a victim of identity theft could file suit against a credit reporting agency for the agency’s failure to verify the accuracy of information contained in the report and the agency’s disclosure of inaccurate information as a result of the consumer’s stolen identity. Generally, the FCRA requires consumer to file suit “within two years from the date on which the liability arises.”⁸ However, there is an exception in cases where there was willful misrepresentation of information that is required to be disclosed to a consumer and such information is material to the establishment of the defendant’s liability.⁹ In such cases, the action “may be brought any time within two years after the discovery by the individual of the misrepresentation.”¹⁰

TRW v. Andrews

The plaintiff in *TRW v. Andrews* was a victim of identity theft.¹¹ An imposter, who had the same last name and first initial as the plaintiff, obtained Andrews’ social security number and attempted to open numerous credit accounts under the imposter’s name. On four occasions, the creditors responding to the imposter’s applications sought reports from TRW, a credit reporting agency. TRW matched the social security number, last name, and first initial with Andrews’ file and disclosed her credit history to the creditors.

³ 15 U.S.C. 1681(b).

⁴ 15 U.S.C. 1681a(f).

⁵ 15 U.S.C. 1681a(d). In addition to credit information, consumer reporting agencies are allowed to include information on the failure of the consumer to pay overdue child support, if such information has been provided to the agency by a state or local child support enforcement agency or verified by any state or federal government agency. This information remains on the consumer report for up to 7 years. 15 U.S.C. 1681s-1.

⁶ 15 U.S.C. 1681e(b).

⁷ 15 U.S.C. 1681n; 15 U.S.C. 1681o.

⁸ 15 U.S.C. 1681p.

⁹ *Id.*

¹⁰ *Id.*

¹¹ 122 S. Ct. 441 (2001).

Andrews did not learn of the disclosures until she attempted to refinance her home and requested a copy of her credit report, which reflected the impostor's activity. TRW corrected Andrews' file when notified of the mistakes. However, Andrews alleged that the blemishes on her credit report "forced her to abandon her refinancing efforts and settle for an alternative line of credit on less favorable terms."¹²

Andrews filed suit against TRW on October 21, 1996, approximately 17 months after she became aware of the inaccurate information on her credit report and more than two years after TRW made the two initial disclosures.¹³ Andrews alleged that TRW's failure to verify, prior to disclosing information to creditors, that she initiated the requests or was otherwise involved in the underlying transactions was in violation of the Fair Credit Reporting Act's requirement that credit reporting agencies maintain reasonable procedures to avoid improper disclosures.¹⁴ By failing to verify that Andrews was the initiator of the requests, Andrews alleged that TRW facilitated the identity theft. She sought injunctive relief, punitive damages and other compensation.

TRW argued that Andrews' claims based on the two earliest disclosures were barred because the Fair Credit Reporting Act's two year statute of limitations had expired.¹⁵ Andrews countered that all of her claims were timely because the statute of limitations did not toll until the date she learned of the inaccurate disclosures. This argument was based upon Andrews' contention that the FCRA incorporated a general federal rule which tolls the statute of limitations at the time the plaintiff becomes aware of the injury. The District Court agreed with TRW, and held that a general federal discovery rule was not incorporated into the Fair Credit Reporting Act, thus barring Andrews' claims based on the two earliest disclosures.¹⁶ The District Court also granted TRW's motion for summary judgement on the two remaining claims, finding that TRW had maintained adequate procedures to avoid improper disclosures.¹⁷

The Ninth Circuit Court of Appeals reversed the District Court, applying the "general federal rule . . . that a federal statute of limitations begins to run when a party knows or has reason to know that she was injured."¹⁸ The Ninth Circuit rejected the District Court's assertion that the text of 15 U.S.C. 1681p, including the exception to the commencement of the statute of limitations, precluded the application of general federal discovery rules, holding that "unless Congress has expressly legislated otherwise the equitable doctrine

¹² 122 S. Ct. 445.

¹³ *Id.*

¹⁴ *Id.* Not relevant to the Supreme Court's opinion was an additional claim by Andrews that TRW failed to "follow reasonable procedures to assure maximum possible accuracy of the information" in the reports, in violation of 15 U.S.C. 1681e(b). This claim was resolved by a jury in favor of TRW. *Id.* at 446, note 3.

¹⁵ 122 S. Ct. at 446.

¹⁶ *Andrews v. Trans Union Corp.*, 7 F. Supp.2d 1056, 1066-1067 (CD Cal. 1998).

¹⁷ 7 F. Supp.2d at 1068-1071.

¹⁸ *Andrews v. TRW*, 225 F.3d 1063, 1066 (9th Cir. 2000).

fo discovery is read into every federal statute of limitations.”¹⁹ The court concluded that since the Fair Credit Reporting Act contained no express legislative directive the general rule applied, thus the statute of limitations had not expired on any of Andrews’ claims.²⁰

TRW appealed to the Supreme Court, which reversed the Ninth Circuit’s decision, stating that the Ninth Circuit “conspicuously overstated” the scope and force of the presumption that general discovery rules apply unless Congress has expressly legislated otherwise.²¹ The Court said that while some lower federal courts have applied a general discovery rule when a statute is silent on the issue, the Supreme Court has not adopted that position. Furthermore, the Court stated that it had “never endorsed the Ninth Circuit’s view that Congress can convey its refusal to adopt a discovery rule only by explicit command, rather than by implication from the structure or text of the particular statute.”²²

While the Ninth Circuit correctly noted that the Fair Credit Reporting Act contains no specific directive against the application of general federal discovery rules, the Court noted that the statute does set forth a specific statute of limitations, along with a single exception to the general rule.²³ Based upon the text and structure of the statute in question, the Supreme Court determined that Congress’ “intent to preclude judicial implication of a discovery rule” was clear.²⁴ Citing an earlier case, the Court held that “[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”²⁵ Applying general principles of statutory construction, the Court reasoned that “Congress implicitly excluded a general discovery rule by explicitly including a more limited one.”²⁶ To allow the incorporation of a general rule in light of this fact, would have the practical effect of rendering the stated exception to the general rule “entirely superfluous in all but the most unusual circumstances,” thus violating a “cardinal principal of statutory construction” - that “a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant.”²⁷

As if anticipating the Court’s decision, Andrews argued that if the statute of limitations was to commence on the date on which liability arises, the date should be the date on which the inaccuracies come to the attention of the potential plaintiff, rather than

¹⁹ 225 F.3d at 1067.

²⁰ *Id.* at 1066.

²¹ 122 S. Ct. at 446.

²² *Id.* at 447.

²³ 15 U.S.C. 1681p.

²⁴ 122 S. Ct. at 447.

²⁵ *Id.* at 447, *citing* *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980).

²⁶ *Id.*

²⁷ *Id.* at 449 (citations omitted).

the date on which the credit reporting agency made the inaccurate disclosure.²⁸ Andrews relied on legislative history pointing to Congress' consideration of alternative language in making her argument. The Court rejected Andrews' reliance on legislative history noting that TRW was able to present information to the contrary.²⁹ The Court also rejected Andrews' argument that liability did not arise until actual damages materialized. Refusing to address the issue because it was not raised earlier, the Court doubted that the argument would have aided Andrews due to the fact that Andrews' alleged damages began to materialize when the inaccurate disclosures were made, causing the statute of limitations to toll at the same time as under the statutory language in question.³⁰

By reversing the Ninth Circuit's decision, the Supreme Court barred Andrews' claims based upon the two earliest disclosures. The case was remanded for further proceedings consistent with the opinion, presumably allowing Andrews to go forward with the other claims.

Legislative Proposals

107th Congress. In response to the Supreme Court's opinion, the 107th Congress considered several pieces of legislation which would have allowed more time for victims of identity theft to file suit under the Fair Credit Reporting Act. Several of these bills are discussed below. This is not intended to be an exhaustive list of identity theft legislation considered during the 107th Congress.³¹

On November 14, 2002, the Senate passed S. 1742, the Identity Theft Victims Assistance Act of 2002. If enacted, the legislation would have amended the statute of limitations under the FCRA to allow suit to be brought "not later than 2 years from the date of the defendant's violation of any requirement under this title."³² Actions by victims of identity theft could be brought not later than 4 years from the date of the defendant's violation if the victim "has reasonable grounds to believe that [he or she] is the victim of an identity theft; and has not materially and willfully misrepresented such a claim."³³

S. 1723, the Protect Victims of Identity Theft Act of 2001, would have also amended the Fair Credit Reporting Act's statute of limitations. The amendment would have allowed suit to be filed "not later than 2 years after the date on which the violation is discovered or should have been discovered by the exercise of reasonable diligence."³⁴ An identical bill, H.R. 3368, was also introduced.

²⁸ *Id.* at 449.

²⁹ *Id.* at 450.

³⁰ *Id.* at 451.

³¹ For an overview of legislation related to identity theft, see CRS Report RL31752, *Identity Theft: An Overview of Proposed Legislation*.

³² S. 1742, as passed, Sec. 4, 107th Cong.

³³ *Id.*

³⁴ S. 1723, Sec. 2, 107th Cong.

Another House bill, H.R. 3369, the Fair Credit Reporting Act Amendment of 2001, would have also allowed more time for suit to be filed in cases arising under the Fair Credit Reporting Act. H.R. 3369 would have amended the Act to allow suit to be filed within two years from the “earlier of the date on which the consumer discovers, or the date by which the consumer reasonably should have discovered, the violation giving rise to the liability.”³⁵

108th Congress. To date, several bills related to identity theft have been introduced in the 108th Congress. At least two of these bills include a provision to amend the Fair Credit Reporting Act’s statute of limitations.

S. 22, the Justice Enhancement and Domestic Security Act of 2003, would amend the Fair Credit Reporting Act’s statute of limitations generally to allow suit to be brought “not later than 2 years from the date of the defendant’s violation of any requirement under [the Act].”³⁶ In cases where the defendant “materially and willfully misrepresented any information required to be disclosed to an individual,” an action may be brought “at any time within 2 years after the date of discovery by the individual of the misrepresentation.” If the plaintiff is a victim of identity theft, the statute of limitations would be extended to 4 years from the date of the defendant’s violation.

H.R. 818, the Identity Theft Consumer Notification Act, would amend the Fair Credit Reporting Act’s statute of limitations to allow suit to be brought “not later than 2 years after the date on which the violation is discovered or should have been discovered by the exercise of reasonable diligence.”³⁷

³⁵ H.R. 3369, Sec. 2, 107th Cong.

³⁶ S. 22, Sec. 3114, 108th Cong.

³⁷ H.R. 818, Sec. 3, 108th Cong.