JUNE 19, 2018

Ninth Circuit Declines to Hold CRA Responsible for Subscriber's Misapplication of Credit Report

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In *Shaw v. Experian Information Solutions, Inc.*, No. 16-56587, 2018 WL 2424105 (9th Cir. May 29, 2018), the Ninth Circuit affirmed summary judgment on FCRA class claims against Experian based on a subscriber's erroneous use of properly-reported information in a credit report. By recognizing important, common-sense limitations on a credit reporting agency's (CRA's) liability under the statute, *Shaw* should serve as an obstacle to FCRA lawsuits that seek to transform a subscriber's misuse of an accurate report into a claim against the CRA itself.

The plaintiffs in *Shaw* alleged that Experian had violated FCRA by reporting certain real property transactions in a confusing and inaccurate manner. Specifically, Experian had used a numeric code for "short sales" (*i.e.*, sales of real property for less than the outstanding mortgage amount) that at least one significant subscriber (Fannie Mae) treated the same as the code used for foreclosures. Plaintiffs alleged that, because of Fannie Mae's actions, Experian's use of this code had adversely affected their ability to obtain credit.

In affirming summary judgment for the CRA, the Ninth Circuit emphasized two important limitations for future FCRA litigation in the Circuit: (1) context matters in assessing the accuracy of reported information; and (2) a CRA cannot be held responsible for a subscriber's misuse of properly-reported information.

First, the *Shaw* court declined to find Experian's coding of short sales and foreclosures sufficiently misleading to be actionable. Even if a subscriber had elected to treat the short sale code in the same manner as the foreclosure code, the actual code used by Experian accurately described a short sale transaction. Adopting the district court's reasoning, the Ninth Circuit held that the full numeric code used by Experian eliminated any ambiguity in the report. *Shaw*, 2018 WL 2424105, at *6 (citing *Banneck v. HSBC Bank USA, N.A.*, No. 15-cv-02250-HSG, 2016 WL 3383960, at *1, *3-4 (N.D. Cal. June 20, 2016)).

Second, *Shaw* rejected Plaintiffs' effort to hold Experian responsible for Fannie Mae's (since corrected) treatment of events coded as short sales as potential foreclosures. The Ninth Circuit held that any adverse effect experienced by Plaintiffs resulted from "Fannie Mae's mistreatment of Experian's coding, not Experian's own inaccuracies." *Id.* at *7. Indeed, Fannie Mae itself had admitted it "knew that, by treating accounts with [the short sale code] as a foreclosure, it was 'necessarily capturing accounts that [were] not actually foreclosures.'" *Id.* "The FCRA does not suggest that Experian should be liable for the misconduct of [its thousands of] subscribers, even if that subscriber is as well known as Fannie Mae." *Id.*

The *Shaw* decision should have the effect of cabining FCRA actions in the Ninth Circuit predicated on creative attempts to hold CRAs liable for the actions of their subscribers. And it should serve as a reminder to district courts and FCRA litigants that the statute should be interpreted to serve its statutory purpose of protecting consumers from the transmission of inaccurate information by CRAs, rather than imposing strict liability on CRAs for the actions of its subscribers.