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COMMENTARY

Keep Your Credit Cards Close. Keep Your Employees Closer.

Imagine you have an employee that opens a credit card in your name for your business. Your employee then runs up tens of thousands of dollars of debt on the account and illegally accesses your bank accounts to partially pay off the monthly statements.

August 21, 2023 at 01:00 PM

By Eddie Holiday | August 21, 2023 at 01:00 PM

'Milgram v. Chase Bank USA,' 72 F.4th 1212 (11th Cir 2023)

Imagine you have an employee that opens a credit card in your name for your business. Your employee then runs up tens of thousands of dollars of debt on the account and illegally accesses your bank accounts to partially pay off the monthly statements. When you discover the scheme, you report the fraud to your bank, but the bank refuses to characterize those charges as fraudulent because payments to the account were made. Your now-former employee has pled guilty to identity theft, and you provide that information to your bank, but the bank still refuses to label the charges made on the account as fraudulent. You sue your bank under the Fair Credit Reporting Act (FCRA) challenging the accuracy of the information on your credit report and allege that the bank failed to conduct a reasonable investigation regarding the fraud. Do you have a cause of action against the credit information furnisher?

This is exactly what happened to Shelly Milgram, a Broward County business owner. Milgram hired Jean Williams to be her office manager, but did not authorize Williams to handle credit cards, make payments on those cards or access bank accounts. As for her bank accounts, she kept all of the information necessary to access the accounts in an unlocked file cabinet in her office and expressly told Williams not to open the file cabinet.

Between 2014 and 2016, Williams opened three credit cards in Milgram's name without her knowledge or permission. When the bills came due, Williams made payments on the cards from the business's checking accounts. In May 2016, Milgram noticed a charge on her account that she didn't recognize. Upon reviewing her credit, Milgram discovered three unauthorized credit cards in her name. Milgram called Chase to informally report fraud and then filed a police report. Chase then called Williams, who admitted that all the charges were fraudulent, and that Milgram was not responsible. In June 2016, Milgram formally reported the fraud to Chase and provided Chase with the police report, screenshots from the bank accounts, and text messages from Williams admitting to the fraud.

Chase's fraud investigation team looked into Milgram's claim. Chase's in-house legal department created a set of criteria to determine if charges are fraudulent. Under Chase's fraud procedures, if even one of the criteria is met, then Chase holds the actual/alleged accountholder responsible. The important factors used in this case were: payments were made on the account; and the payments came from an account owned by the actual/alleged accountholder. Because the alleged fraudulent account was for Milgram's business and because Milgram's accounts were used to pay the balance, Chase determined that Milgram was liable for the charges.

Over the next two years, Milgram continued to file disputes with the national credit-reporting agencies—Equifax, TransUnion and Experian—who in turn forwarded the disputes to Chase. Additionally, Williams was charged with seven counts of grand theft in the second and third degree, criminal use of personal identification information, and defrauding a financial institution. In October 2018, Williams pleaded guilty to all the criminal charges. The state court also issued an order recognizing that Williams fraudulently opened the accounts and recommended that the credit reporting agencies remove any negative charge offs and negative delinquencies from Milgram's credit history. Milgram filed another dispute with Chase and attached the order. Chase still refused to report the charges as fraudulent.

On April 10, 2019, Milgram sued Chase for violating the FCRA. After Chase's motion to dismiss was denied, both sides cross-moved for summary judgment. Milgram argued that given the overwhelming evidence that fraud occurred, Chase's conclusion was necessarily unreasonable. Chase argued that the disputed legal issue of what constitutes a reasonable investigation wasn't cognizable under the FCRA; and even if it were, Chase did conduct a reasonable investigation. The district court granted Chase's motion and denied Milgram's. Ultimately, the district court found that Milgram failed to identify any steps Chase could have taken or evidence it should have considered. In short, just because Milgram disagreed with Chase's conclusion didn't mean that Chase's investigation was unreasonable.

The U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's decision. The Eleventh Circuit explained that while a consumer cannot sue directly for the outcome of an investigation, if a furnisher verifies an account, the question of whether the furnisher behaved reasonably will turn on whether the furnisher acquired sufficient evidence to support the conclusion that the information was true. Importantly, while an FCRA claim requires: a cognizable inaccuracy under the FCRA; and a showing that the furnisher's investigation into the dispute was unreasonable, the appellate court did not rule on whether legal inaccuracies can, under certain circumstances, raise a claim under the FCRA. Instead, the Eleventh Circuit focused its attention on the fact that Milgram could not make a showing that Chase's investigation was unreasonable.

The fatal flaw in Milgram's argument was her focus on what actual authority William's had. Although there was a mountain of evidence that Williams did not have actual authority to open the accounts, Chase made its determination based on Williams' apparent authority to do so. Specifically, the Eleventh Circuit stated:

The question we must answer is this: what import (if any) did Williams' criminal judgment have on that conclusion? We don't think the criminal judgment was relevant to Chase's apparent-authority determination. To be sure, Williams' criminal judgment proved that Williams lacked actual authority. But Milgram's automatic payments to pay off the card each month led Chase to conclude that Williams had authority to incur those charges. That Williams didn't actually have the authority doesn't undercut that conclusion; it doesn't go to apparent authority at all.

Without Milgram asserting that Chase's apparent-authority analysis was flawed for failure to consider additional evidence, she could not demonstrate that a reasonable investigation would have resulted in Chase concluding that the information was inaccurate or incomplete.

While the appellate court's decision may appear to doom consumers that run into similar circumstances, Circuit Judge Rosenbaum provided advice for future plaintiffs. In her concurring opinion, Rosenbaum suggested that in cases like this, a plaintiff could properly use a declaratory-judgment action to challenge a determination made by a furnisher. Milgram could have preemptively sued Chase for a declaratory judgment that she doesn't owe Chase the money or, after not paying the debt, Milgram could have filed a counterclaim against Chase for any of Chase's claims involving the debt.

The big takeaway here is that under the FCRA, a furnisher's conclusions can be challenged only indirectly. Credit furnishers, such as banks, should ensure that they continually improve their reasonable investigation processes as well as know when to pick their battles. A tradeline deletion request to the credit reporting agencies and nominal settlement payment may make better business sense compared to years-long litigation. Based on the concurring opinion of Rosenbaum, banks in Florida may see increases in lawsuits in federal and state courts that include claims under the FCRA, its state equivalent, and for declaratory judgment that the debt is not owed.

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