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ABOUT THE AUTHOR

Landon Van Winkle is an associate within the firm's Consumer Financial Services Compliance & Litigation practice group where he assists clients with pre-suit negotiations and litigation in matters involving consumer financial services litigation and compliance and bankruptcy. His areas of practice are Consumer Financial Services Litigation & Compliance, Commercial Creditor Bankruptcy, and Commercial Litigation.

Post-Discharge Credit Inquiries by Mortgage Servicer did not Violate FCRA

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A divided panel of the U.S. Court of Appeals for the Ninth Circuit recently held that a mortgage servicer had a permissible purpose for pulling the consumer reports of three borrowers for whom it serviced two mortgages even though the borrowers' personal liability on the mortgages had been discharged in bankruptcy. *Marino v. Ocwen Servicing, LLC*, 978 F.3d 669 (9th Cir. 2020). Specifically, the servicer was authorized to access the borrowers' consumer reports in order to evaluate them for loss mitigation options, such as a loan modification, short sale, or deed-in-lieu of foreclosure. *Id.* at 675.

The borrowers each owned a home subject to a mortgage serviced by Ocwen Loan Servicing, LLC ("Ocwen"). The borrowers subsequently filed bankruptcy, and each received a discharge, which discharged their personal liability under their respective mortgages. Following the discharges, Ocwen obtained the borrower's credit reports. The borrowers, eight in total, sued Ocwen in a putative class action, alleging that it willfully violated the FCRA by obtaining their consumer reports without a permissible purpose, in alleged violation of 15 U.S.C. § 1681b(f)(1).

The U.S. District Court for the District of Nevada granted Ocwen's motion for summary judgment. In doing so, it relied on a prior unpublished decision from the Ninth Circuit, *Vanamann v. Nationstar Mortgage, LLC*, 775 F. App'x 260 (9th Cir. 2018). In *Vanamann*, the Ninth Circuit dealt with identical facts—a borrower whose personal liability on a mortgage that was discharged in a bankruptcy and a mortgage servicer who subsequently accessed the borrower's credit report. *Marino*, 978 F.3d at 672 (citing *Vanamann*, 775 F. App'x at 262). There, the plaintiff alleged *only* a willful violation of the FCRA, requiring her to demonstrate that Nationstar "engaged in conduct 'known to violate the [FCRA]' or acted in 'reckless disregard of [a] statutory duty.'" *Vanamann*, 775 F. App'x at 262 (quoting *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 56–57 (2007)). To prove reckless disregard, the plaintiff had to prove that Nationstar's interpretation of the FCRA was objectively unreasonable. *Id.* Nationstar argued that it had a permissible purpose under § 1681b(a)(3)(A), which permits a consumer reporting agency to furnish a consumer report to a person which the agency has reason to believe "intends to use the information in connection with a credit transaction involving the consumer . . . or review or collection of an account of, the consumer . . . ." 15 U.S.C. § 1681b(a)(3)(A). The Ninth

Circuit assumed that Nationstar lacked a permissible purpose under § 1681b, but nevertheless affirmed the dismissal of the plaintiff's FCRA claim, because the plaintiff could not demonstrate that Nationstar's conduct was known to violate the FCRA, or that its interpretation of § 1681b(a)(3)(A) was objectively unreasonable. *Id.* Crucially, the panel noted that the FCRA contained no provision "addressing bankruptcy discharges for Nationstar to interpret, much less interpret recklessly." *Vanamann*, 775 F. App'x at 262. Based on the nearly identical facts at issue in *Vanamann*, the district court concluded that Ocwen could not have willfully violated the FCRA, and therefore granted its motion for summary judgment.

On appeal, the Ninth Circuit affirmed the district court and cited *Vanamann* approvingly. However, it followed a somewhat circuitous route in analyzing the case. Rather than follow the straightforward process in *Vanamann*, in which the panel assumed that Nationstar had violated the FCRA, but found that any such violation could not have been willful, the *Marino* majority instead made a point to address the "threshold question of whether the defendant violated the FCRA." *Marino*, 978 F.3d at 671. Addressing this "threshold question" was important, according to the majority, in order to "prevent the law in this area from stagnating." *Id.* The majority's basis for this approach was its view that since a defendant in an FCRA case could "nearly always avoid liability so long as an appellate court ha[d] not already interpreted" the FCRA provision at issue, if the appellate courts simply continued to dispose of cases on the basis that there was no negligent or willful violation of the FCRA, then "the question of statutory interpretation will likely never be answered." *Id.* at 673–74.

Therefore, the majority first examined whether Ocwen's conduct violated § 1681b(f)(1). Ocwen argued that § 1681b(a)(3)(A) provided it with a permissible purpose, because it was using the borrowers' credit reports to evaluate them for loss mitigation options. *Id.* at 675. The borrowers argued that because they had vacated and "surrendered" their homes prior to Ocwen's credit inquiries, and because they had never expressed any interest in avoiding foreclosure, Ocwen lacked a permissible purpose. *Id.* at 675–76. In rejecting these arguments, the majority observed that nothing in § 1681b(a)(3)(A) required a consumer to affirmatively request a foreclosure alternative before a servicer could review the consumer's account to determine his or her eligibility. Further, the discharge injunction in the U.S. Bankruptcy Code specifically excepts from its ambit "a secured creditor's efforts to seek 'periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien.'" *Id.* at 675 (quoting 11 U.S.C. § 524(j)(3)). Similarly, it was largely irrelevant whether the borrowers had vacated their homes prior to the credit inquiries at issue, since Ocwen "could have reasonably thought that even a debtor that moved out of his or her home might be interested in returning if Ocwen made a sufficiently attractive offer." *Id.* at 676. The majority thus held that Ocwen articulated a permissible purpose to access the borrowers' consumer reports under § 1681b(a)(3)(A). In *dicta*, however, the majority sought to cabin this holding somewhat when it opined that "[w]e imagine that if a consumer clearly informs the servicer or lender that he or she has no interest in avoiding foreclosure, then the servicer or lender might lack a permissible purpose for continuing to review the consumer's credit." *Id.* Then, in a single paragraph, the majority noted its "agreement with the district court that Ocwen did not willfully violate the FCRA." *Id.* at 676.

Judge Bea concurred in the result and the reasoning of the majority regarding its conclusion that Ocwen did not willfully violate the FCRA. *Id.* at 676 (Bea, J., concurring). However, Judge Bea chided the majority for including "discussion of two matters not essential to the determination of this case." *Id.* First, Judge Bea took issue with the majority's analysis of whether Ocwen's conduct violated the FCRA, an analysis which he noted was "not relevant to the decision of the case before us." *Id.* Second, he took issue with the majority "imagin[ing] a hypothetical, which Plaintiffs did not plead nor prove, that the majority states may constitute a statutory violation of the FCRA." *Id.* at 677. Judge Bea's concern with the majority's inclusion of a hypothetical FCRA violation appears particularly valid in the Ninth Circuit, where "dicta in panel opinions may become the binding law of the circuit." *Id.* at 679 (citing *United States v. Johnson*, 256 F.3d 895, 947 (9th Cir. 2001)).

Mortgage servicers, at least in the Ninth Circuit, should take some comfort in the Court's finding that such servicers retain a permissible purpose for accessing a borrower's consumer report even after the borrower's personal liability on the mortgage has been discharged, so long as the servicer intends to use the report to evaluate the borrower for loss mitigation options. However, mortgage servicers should remain wary of the limitations on this permissible purpose forecast by the *Marino* panel, and should consider adopting a policy to limit or modify future credit inquiries for loss mitigation accounts where the borrower unequivocally informs the servicer that he or she is not interested in pursuing loss mitigation options.

CONTACT US

919.250.2000
mail@smithdebnamlaw.com

RALEIGH OFFICE

The Landmark Center
4601 Six Forks Road, Suite 400
Raleigh, NC 27609

Phone: 919.250.2000
Fax: 919.250.2100

CHARLESTON OFFICE

171 Church Street
Suite 120C
Charleston, SC 29401

Phone: 843.714.2530
Fax: 843.714.2541