



Federal Appeals Court Holds that Obtaining a Credit Report Without Authorization is a Basis for Liability Even if a Consumer Suffers no Tangible Harm

November 6, 2019

A federal appeals court has found that a consumer has standing to sue a third party for obtaining the consumer's credit report without authorization, even if the consumer has suffered no tangible harm from the third party's action. This appears to be a significant expansion of a consumer's rights under the Fair Credit Reporting Act ("FCRA").

The FCRA prohibits a third party from using or obtaining a consumer's credit report unless the consumer provides written authorization, or there is a permissible purpose, such as for evaluating the consumer for credit, insurance or employment. There have been many lawsuits where consumers have tried to hold third parties liable for obtaining a credit report without authorization or a permissible purpose, but courts have generally required a consumer to allege an actual, tangible harm resulting from the third party obtaining the credit report.

In *Nayab v. Capital One Bank*, No. 17-55944, 2019 WL 5608837 (9th Cir. Oct. 31, 2019), the Ninth Circuit Court of Appeals held that a consumer does not have to allege an actual, tangible harm in order to bring a claim under the FCRA against a third party that allegedly obtained a credit report without written authorization or a permissible purpose. The court found that a consumer's substantive privacy interest in his or her private information is enough of a basis to give the consumer standing to bring a suit under the FCRA, even if the consumer did not actually suffer any actual damages due to the violation.

In addition, the court held that a consumer is not required to determine and state the third party's unauthorized purpose for obtaining the report, but rather just the fact that the third party obtained the credit report for a purpose not authorized by the FCRA. The burden is on the third party to show that it had an authorized purpose under the FCRA to obtain the credit report. In the *Nayab* case it was not even mentioned why Capital One Bank obtained the plaintiff's credit report.

The Ninth Circuit Court of Appeals, which decided the *Nayab* case, is generally known for its consumer-friendly opinions. While the Ninth Circuit only has jurisdiction over certain parts of the western United States and the case is subject to appeal by Capital One Bank, this opinion is a potential concern for financial institutions and

other parties throughout the United States that obtain credit reports. For example, lower federal courts in New York have generally required a showing of an actual, tangible harm in order to proceed with an FCRA claim, but the Ninth Circuit opinion in *Nayab* could provide a basis for a change in that position.

If you have any questions regarding this case or the FCRA in general, please feel free to contact Joseph D. Simon at (516) 357-3710 or via email at jsimon@cullenanddykman.com, Kevin Patterson at (516) 296-9196 or via email at kpatterson@cullenanddykman.com, Elizabeth A. Murphy at (516) 296-9154 or via email at emurphy@cullenanddykman.com, or Mandy Xu at (516) 357-3850 or via email at mxu@cullenanddykman.com.

Practices

- Banking and Financial Services

Attorneys

- Elizabeth A. Murphy
- Joseph D. Simon
- Kevin Patterson