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What Triggers the Statute of Limitations for Violations of the Fair Credit Reporting Act?

by Ralph C. Anzivino


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ISSUE

Does the two-year statute of limitations for violations of the Fair Credit Reporting Act (FCRA) commence upon the "occurrence" of the violation or upon the debtor's "discovery" of the violation?

FACTS

On June 17, 1993, respondent Adelaide Andrews went to the office of a radiologist for an X-ray. Because she had not been to that office before, she filled out a patient information form, listing personal information such as her birth date, Social Security number, and driver's license number. Respondent then handed the form to a receptionist named Andrea Andrews who, unknownst to respondent, at some point took the information in the form, moved to Las Vegas, and began impersonating respondent.

Using respondent's Social Security and driver's license numbers as well as a conglomeration of respondent's and her own name, the imposter rented an apartment and obtained both telephone and electric service. The imposter also made several attempts to obtain credit and other services using respondent's identity. On July 25, 1994, the imposter applied for credit with First Consumers National Bank (FCNB) using respondent's Social Security number and birth date. In response, the bank requested a credit report, and petitioner provided FCNB with information from respondent's file. After reviewing the report from petitioner, FCNB denied the imposter's application. On Sept. 27, 1994, the imposter applied for cable service from Prime Cable of Las Vegas using respondent's Social Security number. Prime Cable did open a cable account at the imposter's Las Vegas residence. Prime Cable also requested a credit report, and petitioner once again provided information from respondent's file.

Subsequently, the imposter applied for credit with other companies,

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which similarly requested credit reports and petitioner again provided information from respondent's file. In October 1994, the imposter applied for credit at Dillard's department store using respondent's Social Security number, and Dillard's requested a credit report from Trans Union, another national credit bureau. Trans Union provided credit information from respondent's Trans Union file to the store. Dillard's granted the imposter credit. The imposter also failed to pay her cable bills or make her rent payments, and both accounts were eventually referred for collection.

In late May and early June 1995, respondent discovered the imposter's activities and the resulting disclosures of her credit records. The sequence of events began on May 31, 1995, when respondent went to a lending institution to inquire about refinancing her home mortgage. The institution ran a routine check on her credit with a credit-reporting agency, which assembled information from the three national credit bureaus. At that time, the three national credit bureaus were Equifax, Trans Union, and petitioner TRW Inc. The report, which was shown to respondent, listed the imposter's delinquent Dillard's account. Respondent decided not to apply for refinancing from that lending institution, and eventually obtained an equity line from Merrill Lynch, at a higher rate of interest.

That same day, respondent contacted TRW and requested disclosure of all information in its file on respondent. The disclosure that was printed on May 31, 1995, showed the Dillard's account as well as a listing of parties who recently received credit reports on respondent. After reviewing the disclosure, respondent recognized that credit reports had been issued to FCNB, Prime Cable, and others based upon applications by someone else. Thereafter, she contacted Dillard's, the Las Vegas Police Department, TRW's fraud department, and others informing them of the imposter's various activities.

On Oct. 21, 1996, almost 17 months after discovering the imposter's activities, and more than two years after TRW's disclosures of respondent's file to FCNB and Prime Cable, respondent sued both petitioner and Trans Union in district court. Respondent claimed that TRW had violated the Act by disclosing those reports in connection with the imposter's activities. Respondent also alleged that TRW had violated the FCRA by erroneously including the imposter's account with Dillard's in her file. In addition, respondent claimed that Trans Union had prepared inaccurate credit reports, made unauthorized disclosures of her file, and failed to reinvestigate and correct the information in her file.

Prior to trial, petitioner moved for partial summary judgment on the improper disclosure claims. The district court found that the claims based upon the FCNB and Prime Cable disclosures were barred by the FCRA's statute of limitations because they were brought more than two years after the disclosures. The two-year misrepresentation exception did not apply because respondent did not claim that there had been any misrepresentation under the Act. Although respondent claimed that the running of the statute of limitations was delayed until May 1995, when she discovered the disclosures, the district court disagreed. The court reasoned that the plain language of Section 618 did not incorporate a general discovery rule and that the section's explicit "discovery" exception for misrepresentations precluded the implication of an additional, unstatuted, and more general exception.


The case went to trial on the inaccuracy claims. At trial the jury rendered a verdict in favor of TRW. On appeal, the Ninth Circuit affirmed the jury's verdict on the inaccuracy claims but vacated the district court's grant of partial summary judgment on the improper disclosure claims. Andrews v. TRW, Inc., 225 F.3d 1063 (9th Cir. 2000). In reversing the district court's ruling on the statute of limitations, the court of appeals relied upon what it characterized as the general federal rule that a federal statute of limitations does not begin to run until a party knows or has reason to know that she was injured. The Supreme Court granted certiorari on March 5, 2001. TRW, Inc. v. Andrews, 121 S.Ct. 1223 (2001).

CASE ANALYSIS

Credit bureaus and other consumer reporting agencies play a vital role in making credit available to American consumers. They facilitate credit, insurance, and employment decisions by providing reports that help their users gauge the risk of extending credit, insurance, or employment to a consumer. Approximately 2 million credit reports are purchased every workday. Consumers can, however, be denied credit or other opportunities due to inaccurate reports. Consumers, therefore, have an interest in keeping the information in those reports accurate and private. Accordingly, in 1970, Congress passed the Fair Credit Reporting Act, which was revised extensively in 1996, to regulate the credit reporting industry.
The FCRA strikes a balance between the interests of consumers in accuracy and privacy on the one hand, and the needs of the credit reporting industry and the credit information users it serves on the other by requiring reporting agencies to adopt reasonable procedures to ensure accuracy, confidentiality, and the proper utilization of the information they collect. 11 U.S.C. § 1681b. The FCRA also requires such agencies to follow reasonable procedures to assure the maximum possible accuracy of the information in their reports. 15 U.S.C. § 1681e(b).

The FCRA provides specialized remedies for violations of the Act. For negligent violations, the Act creates a private right of action for damages sustained as the result of the violation, which entitles successful plaintiffs to attorney's fees. 15 U.S.C. § 1681o. The Act also creates a right of action for willful violations, which provides for statutory and punitive damages as well as compensatory damages and attorney's fees. 15 U.S.C. § 1681n. The limitations period in Section 618 governs the Act's private rights of action and precludes actions brought two years after “liability arises.”

Petitioner TRW asserts that Section 618 does not condition the running of the statute of limitations on the “discovery” of any fact. Quite the contrary, it adopts the traditional commencement rule that begins the statute when the formal right to sue under the Act attaches. Under the traditional commencement rule, statutes of limitations begin to run when the plaintiff has a “complete and present cause of action.” In other words, limitations periods traditionally begin to run at the time of the occurrence of a judicially recognizable injury or event constituting a breach of duty even if the plaintiff was unaware of the accrual of his or her cause of action. The traditional rule is still the norm in most areas of the law.

Since the middle of the last century, the “discovery” rule, which delays the running of the statute of limitations until “discovery” of injury or some other crucial fact, has been extended outside the fraud context in which it was originally developed, but only into areas such as medical malpractice and product liability. The rule has not been generally applied to defamation and invasion of privacy, which are the types of claims normally brought in connection with a credit-reporting violation. In addition, at the time the FCRA was enacted, credit-reporting claims were subject to the traditional commencement rule, not the “discovery” rule. As federal statutes covering areas traditionally regulated by the common law are presumed to retain long-established principles, the FCRA would have to explicitly adopt the “discovery” rule to depart from that tradition. In fact, in more than a dozen statutes since 1933, Congress has expressly linked the commencement of limitations periods to the “discovery” of a claim or fact. On each occasion, Congress expressly used the word “discovery” to adopt a discovery rule.

TRW argues that the limited discovery provision in Section 618's misrepresentation exception precludes implication of a more general discovery rule. Section 618 expressly includes a discovery rule that applies when certain misrepresentations are made. Under the misrepresentation exception, when a defendant has “materially and willfully misrepresented any information required under this subchapter to be disclosed,” and the information misrepresented is “material to the establishment of the defendant's liability under this title,” a claim based upon the liability may be brought “within two years after discovery by the individual of the misrepresentation.” 15 U.S.C. § 1681p. The presence of this express exception to the general rule governing claims under the Act precludes implication of an unstated general discovery rule. It is well settled that when Congress explicitly enumerates exceptions to a statute, additional unstated exceptions generally cannot be implied into the statute.

Petitioner also asserts that the misrepresentation exception precludes the implication of a general discovery rule because such a rule would render the limited discovery provision superfluous. Such an interpretation reads out of the Act the misrepresentation requirement in which Congress specifically directed application of the discovery rule. It is an elementary canon of construction that a statute should be interpreted so as not to render one part inoperative. Since a general discovery rule would basically swallow the limited discovery provision of the misrepresentation exception, such a rule cannot be implied into Section 618.

TRW believes that the carefully crafted “notice and access” provisions in the FCRA make a judicially implied “discovery” rule both unnecessary and inappropriate. The FCRA imposes a number of notification requirements that inform consumers about the disclosure and use of their credit information. For example, the Act requires disclosure of adverse actions taken on the basis of a consumer report. The FCRA also entitles consumers to access files kept on them by consumer reporting agencies and information concerning the use of those files. For example, upon a consumer's request, the Act requires agencies to disclose “all information

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in the consumer's file at the time of the request.’” 15 U.S.C. § 1681(a)(1). These notification and access provisions work together to enable consumers to discover violations of the Act in a timely fashion. Thus, the FCRA provides consumers with the means to quickly discover any improper disclosure of an investigative report and any inaccurate information in their files that has harmed them. These provisions obviate the need for a “discovery” rule.

Petitioner also believes that a general discovery rule would upset the balance struck by Congress in the FCRA. Statutes of limitations strike a balance between competing interests. On the one hand, the public has an interest in “protecting valid claims.” On the other hand, both defendants and the public have a significant interest in “repose,” which is the basic objective that underlies limitations periods. Thus statutes of limitations limit the litigation of claims after memories have faded, witnesses have disappeared, and other evidence has disappeared. Accordingly, a statute of limitations reflects a value judgment concerning the point at which interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones. The addition of a “discovery” rule to a statute of limitations significantly alters this balance.

By delaying the commencement of the limitations period, a “discovery” rule increases the effective length of time during which a defendant is subject to suit. In so doing, the rule arguably affords greater protection to valid claims. At the same time, however, by increasing the effective period in which claims may be brought, the “discovery” rule decreases the certainty the statute affords and increases the risk of litigating stale claims. Thus, application of the “discovery” rule tips the balance struck by a statute of limitations in favor of protecting claims and against repose.

Moreover, a general “discovery” rule would directly increase the petitioner’s cost of doing business. Credit reporting is an information business. The industry sells more than 550 million reports each workday. The national credit bureaus alone maintain files on nearly 200 million consumers, and these files are updated monthly with more than 2 billion pieces of information. By extending the effective length of time in which claims may be brought, a general “discovery” rule would require credit reporting agencies to retain records for longer periods of time, thereby adding to the credit industry’s already massive burden of storing information.

Petitioner also contends that the adoption of a “discovery” rule would directly conflict with the history of the FCRA. In 1970, a general “discovery” rule was specifically proposed to Congress for adoption. The proposal was not incorporated into the FCRA. Further, at the time of the adoption of the FCRA, credit industry officials testified that the two-year statute of limitations period accurately reflected existing record-keeping practices. Thus the adoption of a “discovery” rule would directly contradict the historical context of the statute.

Finally, TRW believes that Congress’s subsequent treatment of the FCRA also belies respondent’s claim that Congress intended to incorporate a general “discovery” rule into Section 618. In 1996, Congress enacted the Consumer Credit Reform Act, which revised nearly every section of the FCRA. In so doing, however, Congress did not amend Section 618. This omission is significant because at the time of the revisions every court of appeals to consider the question had rejected the argument that Section 618 implicitly incorporated a general “discovery” rule. Congress is presumed to be aware of settled judicial interpretation of a statute’s language when it reenacts or amends a statute and to adopt that interpretation when it does not change the language. Thus the 1996 amendments to the FCRA undermine the claim that Section 618 contains a general “discovery” rule.

Respondent, on the other hand, maintains that under any reasonable interpretation of the FCRA, her initial discovery of her injuries should trigger the accrual of her FCRA claims. Statutory interpretation begins with the statutory language itself. Congress presumptively uses words in their known and ordinary sense. The term arises commonly refers to a “springing up,” “coming into notice,” or presentation. The Oxford English Dictionary defines arise as “to spring up, come into notice, ‘come up,’ present itself.” Applying this common meaning of arises to Section 618, the statute literally expresses a “discovery” rule. Thus FCRA liability arises only when it springs up, comes into notice, or presents itself to the consumer. Therefore, from respondent Andrews’s point of view, not one element of TRW’s alleged liability sprang up, came into notice, came up, or presented itself before May 31, 1995, when she first discovered that she had a credit problem.

The alternative definition of arises is “comes into existence.” If one applies this alternative definition, “liability arises” under the FCRA when it first comes into existence. The term liability can have a broad variety of meanings. Liability exists under the FCRA when all the necessary elements of a statutory cause of
action coalesce—duty, breach, causation, and injury. Liability arises when one suffers injury as a result of any breach of duty owed him by another. Under FCRA, liability is expressly and narrowly defined. Pursuant to FCRA's principal liability provision, civil liability for negligent noncompliance exists only where actual damages are sustained by the consumer as a result of the defendant's failure to comply with the FCRA. Thus, under FCRA, no liability arises before the consumer realizes actual damages.

Here, Andrews realized no actual damages prior to May 31, 1995—the date on which she first discovered TRW's violations or, more accurately, suffered any effects because of them. Only then were her potential, unrealized damages transformed into actual damages. Simply put, because Andrews had not yet suffered actual injury, she had no FCRA claim to bring before May 31, 1995.

Respondent also reasons that a "discovery" rule is the only interpretation that can be reconciled with the purpose of a statute of limitations. The purpose of a statute of limitations is to encourage the reasonably diligent presentation of a claim. Obviously, a claimant cannot present a claim until he or she has knowledge of it. Therefore, the "discovery" rule is the only rule that is consistent with the purpose of a statute of limitations.

Andrews also asserts that specific textual changes made when Congress drafted Section 618 indicate that its limitations period does not start running upon the "occurrence" of a statutory violation. The FCRA was first introduced in the Senate in 1969. The Senate bill proposed an extremely restrictive two-year statute of limitations reflecting an "occurrence" rule. During 1969 and 1970, however, the House considered competing proposals for governing the credit reporting industry. The House favorite provided a relatively expansive, five-year limitations period—albeit, like the Senate bill, keyed to the "occurrence" of a violation. Congressional conference then met and refashioned the FCRA into its final form. When the FCRA emerged from conference, it contained a new and different Section 618. No longer was it keyed to the date of the "occurrence" of the violation. Instead, it was keyed to when "liability arises."

An obvious explanation for Section 618's ultimate language is that Congress compromised by choosing a more accommodating statute of limitations. The ultimate statute is neither the two-year, most restrictive type of violation "occurrence" statute sought by the Senate, nor the five-year, but otherwise similar, statute favored by the House. Rather, the final enactment suggests a moderate bridging of the difference between the two houses of Congress. Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to adopt statutory language that it had earlier discarded in favor of other language.

Respondent believes that, contrary to TRW's assertion, applying a "discovery" rule to Section 618's primary provision does not render the misrepresentation exception superfluous. Rather, Andrews believes that the misrepresentation exception operates to extend but not truncate the FCRA's primary limitations period. Indeed, the misrepresentation exception reflects Congress's insistence that any diligent consumer who already suspects a reporting agency's violation but is then willfully deceived about such matters, does not lose his day in court through the lapse of time while deceived.

In other words, the two "discovery" rules can operate simultaneously. A crucial distinction must be made between (1) the initial discovery of an actual injury or violation in the normal situation, and (2) the entirely distinguishable discovery of a reporting agency's subsequent, willful misconduct in the more egregious situation. These two different situations involve the discovery of different misconduct. Although both rules commence upon "discovery," the primary rule commences upon "discovery" of a violation, and the misrepresentation exception commences upon "discovery" of the misrepresentation. The rules are harmonious even though they operate independently. Therefore, Section 618's misrepresentation exception is both compatible with, and entirely distinguishable from, the application of a "discovery" rule in Section 618's primary provision.

Respondent also asserts that TRW's interpretation of the FCRA statute is internally inconsistent. Andrews asks why Congress would give consumers two full years in which to file suit after discovering the falsity of a misrepresentation that had interrupted the running of an earlier limitations period but not give them two full years in the first instance. Common sense suggests that Congress would afford consumers two full years to marshal a federal lawsuit after discovering either type of misconduct.

Andrews also disputes TRW's claim that the FCRA notice and access provisions make a "discovery" rule unnecessary and inappropriate. In reality, victims of identity theft and other improper privacy breaches receive no timely notices of any kind. Victims discover an identity

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theft on average after 15 months, and at least 20 percent learn of the problem after two years. In this case, TRW breached Andrews's financial privacy four times before May 31, 1995. Andrews received no notice about any of these privacy breaches until after she sought to refinance her home—more than 10 months after the first violation. Ironically, it was the imposter (as the would-be credit applicant), rather than Andrews, who received any required notice whenever the imposter suffered an “adverse action.”

Finally, respondent quarrels with TRW's claim that a “discovery” rule burdens credit reporting agencies with additional record-keeping and costs. Some states (e.g., California, Ohio, and Georgia) have already subjected reporting agencies to a “discovery” rule. Because TRW's successor in interest, Experian, and its credit reporting brethren do business in those states, one can assume that they have in place procedures aimed at complying with those states’ “discovery” rules. Thus affording the “discovery” rule here will not add significantly to the industry's data-keeping burdens. Indeed, apart from occasionally being required to defend the reasonableness of procedures in place at a given time (and perhaps pay damages), no substantial, additional financial burdens would befall reporting agencies if the Supreme Court were to apply the injury “discovery” rule.

**SIGNIFICANCE**

In 1970, Congress enacted the Fair Credit Reporting Act as Title VI of the Consumer Credit Protection Act. The Acts were intended to provide for plenary regulation of the national consumer credit industry. Consumer credit has expanded exponentially in the past 50 years and is now one of the largest sectors of the national economy. Growing from $6 billion at the end of World War II, outstanding consumer credit debt rose to $116 billion in 1970 when Congress enacted the FCRA and reached more than $700 billion by 1993. By March 2001, consumer credit had passed $1.5 trillion.

To support this phenomenal level of activity, only eight years ago the consumer reporting industry maintained 450 million credit files on more than 110 million individuals and processed almost 2 billion pieces of data per month. Now the database of just one of the three major consumer reporting agencies contains information on the personal financial habits of 190 million persons, virtually the entire adult population of the country, and that agency alone processes approximately 1.5 billion records per month. Despite the intent of Congress in adopting the FCRA, accurate information is not being consistently provided by the consumer reporting system. In the deliberations that culminated with the 1996 FCRA amendments, Congress was presented with staggering statistics that nearly half of all consumer reports (48 percent) maintained by the three major consumer reporting agencies contain inaccurate information, and nearly one out of five (19 percent) contain errors that could adversely affect the consumer's eligibility for credit.

In the center of this controversy surrounding the accuracy of credit reports is the FCRA statute of limitations, which provides a two-year limit on claims against the reporting agency from the date “liability arises.” Consumer groups assert that the two years commence upon “discovery” of the FCRA violation. They believe such a rule would encourage more accurate credit reports because of the extended threat of private enforcement. The credit industry, however, argues that the two years should commence upon the “occurrence” of the violation, and that the consumer's knowledge of the violation is irrelevant. The credit industry asserts that the “occurrence” is the rule traditionally used in a statute of limitations and is the rule that most closely comport with industry practices. The Supreme Court now will decide whether “liability arises” under the FCRA upon “discovery” of the violation or its “occurrence.”

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