

## USEFUL INFORMATION AND CASE LAW

### 1. 1681s-2b...

- a. FCRA – investigation and fraud affidavits – Does furnisher conduct a reasonable investigation in response to an ACDV if it asks the debtor to provide a fraud affidavit or a police report? Answer. No. A consumer’s refusal to fill out police report or fraud affidavit does not impact the furnishers’ duty to conduct a reasonable investigation. *See Boggio v. USAA Federal Savs. Bank*, 696 F.3d 611 (6<sup>th</sup> Cir. 2012) The text of of § 1681s-2(b) does not permit furnishers to require independent confirmation of materials contained in a CRA notice of a dispute before conducting the required investigation. The issue is whether or not the Defendants’ actual investigation was reasonable, and not whether it was reasonable for Defendants to have an optional, more thorough review available to the Plaintiff if she would provide them with information they should already have had or prove to them that she was indeed dead. 1681s-2(b) does not specifically permit information furnishers to demand further documentation from consumers before conducting an investigation.
- b. If a consumer disputes information with the CRA, both the CRA and the furnisher have a duty to reasonably investigate and verify that the information is accurate. 15 USC § 1681(a)(1)(A), 1681s-2(b). <https://casetext.com/case/boggio-v-usaa-fed-sav-bank#.UwENIrRTay4>
- c. Any knowing re-aging or reinsertion of inaccurate information subsequent to an adequate investigation logically falls under § 1681s-2(b)(1)(E) as well. See *Cunningham v Ocwen* .
- d. When notified of a dispute about information furnished to a CRA, § 1681s-2(b) obligates a person to conduct an investigation and report the results to the CRA. 15 U.S.C. § 1681s-2(b)(1). The Fourth Circuit has held that investigation must be a reasonable one “to determine whether the disputed information can be verified.” *Johnson v. MBNA Am. Bank, N.A.*, 357 F.3d 426, 430-31 (4<sup>th</sup> Cir. 2004).
- e. As the court noted in *Larson v Ford Credit*, No. 06-cv-1811 JMR/FLN, 2007 WL 1875989 (D. Minn. 2007), “[t]he majority of courts considering the question have drawn upon defamation’s traditional ‘multiple-publications rule’. Under this rule, each publication of the same falsehood by the same defamer is a separate cause of action, thus starting the limitations clock anew.” (citing Restatement (Second) of Torts § 577A(1). In the FCRA context, this means each transmission of an erroneous credit information is a separate FCRA violation. (,after failing to perform a reasonable investigation and subsequently re-certifying false information to the CRA’s each month thereafter. This would negate the possibility of any time barred allegations connected to their actions by the Plaintiff when the

violations were on going at the time the complaint was filed. ) my addition in red.  
<http://law.justia.com/cases/federal/district-courts/oklahoma/okwdce/5:2012cv00718/84247/19> *Darlene Kellum v Midland Credit Management, INC., Capital One Services, LLC, Verizon Wireless; and FCNB-Spiegel* US Dist. Court, W. Dist. of California No. CIV-12-718-C (Memorandum Opinion and Order) Doc.19 pg.3

2. **FDCPA**... no validation...continued collection practices

- a. A copy of the consumer credit contract is not sufficient to validate the debt. Validation requires presentment of the account and general ledger statement signed and dated by the party responsible for maintaining the account. Pacific Concrete F.C.U. V. Kauano, 62 Haw. 334, 614 P.2d 936 (1980), GE Capital Hawaii, Inc. v. Yonenaka 25 P.3d 807, 96 Hawaii 32, (Hawaii App 2001), Fooks v. Norwich Housing Authority 28 Conn. L. Rptr. 371, (Conn. Super.2000), and Town of Brookfield v. Candlewood Shores Estates, Inc. 513 A.2d 1218, 201 Conn.1 (1986). and Solon v. Godbole, 163 Ill. App. 3d 845, 114 Ill. Dec. 890, 516 N. E.2d 1045 (3Dist. 1987).
- b. Letter from Federal Trade Commission (FTC) Attorney John F. LeFevre to Robert G. Cass stating that reporting a debt to a CRA constitutes a collection activity under § 1692g(b). Several cases have relied upon the FTC letter as persuasive authority that reporting a debt to a CRA is a collection activity. *Brooks v Midland Credit Management, Inc., et al.*, <http://www.leagle.com/decision/In%20FDCO%2020130603574> , See, e.g., *Purnell v. Arrow Fin. Servs. LLC*, 303 F. App'x 297, n.5 (6th Cir. 2008); *Mascona v. Cal. Bus. Bureau*, No. 10-CV-1468 BEN (CAB), 2011 WL 5085522, at \*3-4 (S.D. Cal. Oct. 25, 2011); *Edeh v. Midland Credit Mgmt.*, [748 F.Supp.2d 1030](#), 1035 (D. Minn. 2010), aff'd, 413 F. App'x 925 (8th Cir. 2011); *Quale v. Unifund CCR Partners*, [682 F.Supp.2d 1274](#), 1278-79 (S.D. Ala. 2010).

3. **ACTUAL/PUNATIVE DAMAGES**

- a. *Saunders v. Branch Banking and Trust Co. of VA*, 526 F. 3d 142 - Court of Appeals, 4th Circuit 2008 This case clearly does involve the third factor, the "financial vulnerability" of "the target of the conduct." *State Farm*, 538 U.S. at 419, 123 S.Ct. 1513. **Saunders** has a modest income and limited resources compared to BB & T. Furthermore, BB & T's conduct rendered **Saunders** significantly more financially vulnerable. **The CRAs lowered Saunders' credit score substantially because of the reported debt, making it impossible for him to obtain a new loan at a favorable interest rate, but the CRAs would not have factored this debt into Saunders' credit score if BB & T had reported the dispute.** Thus, BB & T's refusal to correct its error made it more difficult for **Saunders** to access credit and increased his financial vulnerability. Cf. *In re Russell*, 378 B.R. 735, 740-43 (Bankr. E.D.N.Y.2007) (collecting cases involving furnishers allegedly refusing to correct reports to CRAs in order to pressure debtors into paying discharged debts, in violation of bankruptcy law).

- b. . BB & T's intentional misconduct and longstanding refusal to correct its errors are more reprehensible than negligence or a mistake quickly corrected. *See, e.g., Bains LLC v. Arco Prods. Co.*, 405 F.3d 764, 775 (9th Cir.2005) (**reasoning that a company's failure to remedy or address the effects of a statutory violation supports punitive damages award**); *Bogle v. McClure*, 332 F.3d 1347, 1361 (11th Cir.2003) (considering conduct more blameworthy for purposes of punitive damages analysis when it was "more than mere accident" and engaged in "intentionally").
4. **ENCORE LIABILITY...**
- a. *Hernandez v. Midland Credit Mgmt., Inc.*, 2006 WL 695451 (N.D. Ill. Mar. 14, 2006) Allegation showing that the defendant Encore at least "indirectly" engaged in the collection of a debt for a third party were adequate to state a claim that the defendant was a "debt collector" under the FDCPA. Encore is a debt buyer that owns Midland which was collecting the debt by sending out a notice for Encore
5. MARTHA VASALLE, et al., v MIDLAND FUNDING LLC, et al, US Dist. Court, Northern District of Ohio, Western Division **Case No. 3:11-cv-00096**  
<http://www.ftc.gov/policy/advocacy/amicus-briefs/2011/06/martha-vassalle-et-al-v-midland-funding-llc-et-al> – Overturned settlement and CFPB/FCC amicus brief in opposition to the class action settlement.
- a. Pg 6, SUMMARY ¶ 1.... Settlement agreement sought to exempts themselves from challenge when using.... “any affidavit in a debt collection lawsuit, would prohibit, inter alia, consumers from challenging judgments where they were not properly served but where Defendants submitted an affidavit of service attesting otherwise; ....., or where Defendants did not have admissible evidence proving ownership or existence of the debt, because the affiant was not a proper records custodian or otherwise.”
  - b. Federal Trade Commission’s Brief as Amicus Curiae, First, it does not actually prohibit **Midland** from creating false affidavits; rather, it only requires **Midland** to change its policies and provides oversight of this process. Second, the injunction only lasts one year, after which **Midland** is free to resume its predatory practices should it choose to do so.
  - c. **UNITED STATES COURT OF APPEALS, 6<sup>TH</sup> CIRCUIT**  
<http://www.ca6.uscourts.gov/opinions.pdf/13a0050p-06.pdf>
6. **ATTORNEY CONDUCT**
- a. In affirming summary judgment for the defense in an employment case, the Fifth Circuit reminded: “Although we appreciate and encourage vigorous representation by counsel, we will not tolerate representation that is ‘zealous’ to the point of false or misleading statements. A footnote to that reminder noted: “‘zealous’ is derived from ‘Zealots,’ the sect that, when besieged by the Roman Legions at Masada, took the extreme action of slaying their

own families and then committing suicide rather than surrendering or fighting a losing battle.” [Branch v. Cemex, Inc.](#), No. 12-20472 (March 26, 2013, unpublished).

7. When considering Defendant’s motion, the court must construe the factual allegations in the complaint in the light most favorable to the plaintiff *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1403 (9<sup>th</sup> Cir. 1996)

MORE ON MIDLAND et al

After a contentious trial<sup>[1]</sup>, a jury awarded a consumer \$100,000 in actual damages and \$623,000 in punitive damages for Midland Credit's "willful noncompliance" of its duties under federal law (Fair Credit Reporting Act) to adequately investigate the consumer's repeated credit report disputes over a 2-year period.

The trial court revealed:

1. Midland credit receives about 8,000 disputes per year;
2. In 95% of those disputes, Midland merely checks its own electronic information as a means of validating the debt; and
3. Midland's debts are purchased at discount from creditors unable to collect them.

The jury determined defendant's conduct to be reprehensible.

Rather than accept the jury's verdict, sore loser Midland Credit sought to vacate the judgment or reduce the plaintiff's award. But the court refused, finding that a punitive damages award of roughly six times the actual damages award of \$100,000 was appropriate under Supreme Court standards. Furthermore, it supported the ultimate objectives of deterrence and punishment for credit report abuse. <sup>[1]</sup> [Brim v. Midland Credit Management, Inc.](#), 795 F. Supp.2d 1255 (2011)

## **FROM THE BETTER BUSINESS BUREAU IN SAN DIEGO...**

### **Government Actions**

#### **[Swanson V Midland Funding](#)**

**Date of Action:** 12/12/2012

On December 12, 2012, Midland Funding, LLC settled a lawsuit filed by Lori Swanson, Minnesota's Attorney General, against the company last year for filing unreliable “robo-signed” affidavits in collections lawsuits and sometimes targeting the wrong people for payment of old bills that it purchased from credit card companies. The lawsuit alleged that Midland filed thousands of collections lawsuits against individuals in Minnesota courts, often supported by

unreliable “robo-signed” affidavits generated at Midland’s St. Cloud, Minnesota offices. Several Midland employees admitted in sworn testimony to signing up to 400 affidavits per day, either without reading them, without personal knowledge of their contents, and/or without verifying the accuracy of the information contained in them.

The Consent Judgment requires Midland to: provide individuals with validation of the debt; verify the identity and address of an individual claimed to owe money at the outset, before any collection effort is made, investigate the matter and, if it cannot substantiate the debt, close the account; take steps to correct any adverse credit reporting, and not later resell the debt; not file affidavits w/ the court unless the person has: a) read and understood them, b) confirmed the authenticity of any documents filed w/ the affidavit, c) only based the affidavit on the signer’s personal knowledge, and d) signed the affidavit in the presence of a notary who acknowledges the affiant’s signature in accordance with law; implement standards to ensure it does not sue people on debt that is beyond the applicable statute of limitations; implement procedures to ensure it does not sue people on debt that it does not own; may not pursue a default judgment without giving the person written notice that their response does not constitute a legal answer and waiting 30 days so the person can seek legal counsel or otherwise respond to the lawsuit; include added specificity about the facts supporting its claims in its lawsuits so that individuals can meaningfully respond to the suits against them; at least 10 days before it pursues a default judgment against an individual, send a copy of the judgment request to the individual.

Under the Consent Judgment, Midland will also resolve outstanding and future consumer complaints made to the Attorney General’s Office and pay \$500,000 to the State of Minnesota. <http://www.bbb.org/san-diego/business-reviews/financial-services/midland-credit-management-inc-in-san-diego-ca-101104>