Gross v. CitiMortgage: An Expansion of the Duty to Investigate Under the FCRA

David W. Thompson, Gregg Stevens, Joseph Apatov, & Sanford P. Shatz

David W. Thompson

Gregg Stevens

Joseph Apatov

Sanford P. Shatz

With more than 25 years of experience advising and representing financial services companies, David Thompson guides financial services companies in consumer lending and financing programs, information security and privacy, multistate licensing and consumer disclosure requirements, credit reporting, marketing, deposit products and payment systems, and electronic commerce. He counsels clients on complying with the contractual, disclosure, and conduct requirements in "alphabet soup" federal laws such as the Fair Credit Reporting Act (FCRA).

Gregg Stevens represents financial institutions, large national banks, lenders, credit card issuers, auto finance companies, and other organizations in commercial litigation and disputes stemming from the federal statutes pertaining to consumer financial services. Gregg primarily defends clients involved in regulatory issues raised under statutes such as the Fair Credit Reporting Act (FCRA). Gregg also advises companies in disputes centered on issues such as credit acceptance, mortgage fraud, credit card fees and practices, consumer leases, payday loans, debt collection practices, credit reporting, and application of credit card payments.

Joseph "Joe" Apatov litigates on behalf of financial services clients in both state and federal courts, with an emphasis on defending banks, mortgage lenders and servicers, private-label card issuers, and automobile finance companies. He has worked extensively with several major federal and Florida consumer protection statutes, including the Fair Credit Reporting Act (FCRA). His experience also includes representing financial institutions in complex mortgage foreclosure litigation.

For more than 35 years, Sandy Shatz has litigated cases involving commercial law, real estate, and consumer financial services, focusing on mortgage-related issues, and offered regulatory and compliance advice to

clients throughout the country. The majority of Sandy's work focuses on mortgage-related and privacy issues, including mortgage originations and servicing, default strategies, customer service, reverse mortgages, and regulatory compliance issues under various federal and state consumer protection laws.

I. *Gross v. CitiMortgage, Inc.*—Summary

On May 16, 2022, the Ninth Circuit[1] reversed the summary judgment granted to CitiMortgage and held the furnisher had a duty to conduct a reasonable investigation of not only a factual inaccuracy but a legal inaccuracy as well.[2] The underlying facts were not complicated.

In January 2007, Marshall Gross purchased a single-family home in Arizona and took out two separate mortgages.[3] The first loan covered 80% of the purchase price, and the junior mortgage covered 20%.[4] Like many other homes during that period, the house went down in value.[5] Mr. Gross, who experienced financial difficulties, stopped making payments on both loans in 2012.[6] The senior lender foreclosed on the property in June 2013.[7] The proceeds from the foreclosure sale were barely enough to satisfy the senior mortgage, and there were not enough proceeds to cover the junior mortgage that CitiMortgage had acquired.[8] Because Arizona law precludes a suit on a foreclosure deficiency, CitiMortgage lost its entire investment.[9]

In 2017, Mr. Gross began searching for a new home but could not get approved for a mortgage.[10] CitiMortgage was still reporting the junior mortgage as "past due" on his credit report, with accruing interest, late fees, and missed monthly payments.[11] This reporting prompted Mr. Gross to submit a written dispute through Trans Union in February 2018, which included a citation to the Arizona Statute that abolished the debt.[12] Trans Union sent CitiMortgage an "Automated Consumer Dispute Verification" (ACDV), which allegedly conveyed this information to CitiMortgage.[13] In response to the ACDV, CitiMortgage continued to report the debt as owing and 180 days late.[14] Mr. Gross disputed the debt with Experian and Trans

1. Gross v. CitiMortgage, Inc., 33 F.4th 1246 (9th Cir. 2022).
2. *Id.* at 1249.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Gross*, 33 F.4th at 1249.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Gross*, 33 F.4th at 1249.
12. *Id.* at 1250.
13. *Id.*
14. *Id.*

Union again in May 2018.[15] In response, CitiMortgage "charged the debt off" and reduced the mortgage balance to zero as of May 2018.[16] Gross sued and alleged a claim under the Fair Credit Reporting Act (FCRA), claiming that CitiMortgage failed to reasonably investigate his dispute and provided inaccurate information.[17]

The district court eventually granted CitiMortgage's Motion for Summary Judgment, holding that the credit report was accurate as a matter of law and CitiMortgage reasonably investigated the dispute.[18] Gross appealed to the Ninth Circuit, which reversed.[19]

The Ninth Circuit held that the information on Gross's credit report was inaccurate as a matter of law because no debt was due based on the Arizona Anti-Deficiency Statute, which abolished personal liability for mortgage deficiencies.[20] The court equated the impact of the Arizona statute to that of a bankruptcy discharge, distinguishing it from a statute that merely eliminates procedural remedies such as a statute of limitations.[21] Once the Ninth Circuit determined the credit report was inaccurate, it turned its attention to whether the investigation was reasonable and decided that summary judgment was inappropriate.[22] In reversing the summary judgment, the Ninth Circuit stated, "[t]his means that FCRA will sometimes require furnishers to investigate, and even to highlight or resolve, questions of legal significance."[23] The court also highlighted the amicus brief filed by the Consumer Financial Protection Bureau (CFPB), which argued the FCRA "does not categorically exempt legal issues from the investigations that furnishers must conduct."[24] The CFPB also argued that such a rule could invite furnishers to "evade their investigation obligation by construing the relevant dispute as a 'legal' one,"[25]

A. Other Duty to Investigate Cases.

At first glance, it appears the *Gross* decision contradicts the Ninth Circuit's earlier decision in *Carvalho v. Equifax Information Services, LLC*.[26] In *Carvalho*, the Ninth Circuit held "reinvestigation claims are not the proper

15. *Id*.
16. *Gross*, 33 F.4th at 1250.
17. *Id*.
18. *Id*.
19. *Id*. at 1253.
20. *Id*. at 1252.
21. *Gross*, 33 F.4th at 1252.
22. *Id*.
23. *Id*. at 1253 (emphasis added).
24. *Id*.
25. *Id*. (emphasis added).
26. *See* Carvalho v. Equifax Info. Servs., LLC, 629 F.3d 876, 891–892 (9th Cir. 2010) (establishing credit reporting agencies do not have a duty to reinvestigate claims already investigated by the creditor).

vehicle for collaterally attacking the legal validity of consumer debts."[27] In reaching its conclusion, the court held that a credit reporting agency ("CRA") does not have a direct relationship with the consumer, and the furnisher of information or creditor is in a better position to make a thorough investigation of a disputed debt than the CRA.[28] In addition, the Ninth Circuit stated that the "CRA is not required . . . to provide a legal opinion on the merits" and is not required to report information on a disputed item just because a legal defense is asserted.[29]

In reviewing *Gross* in detail, it does not appear to contradict the 2010 *Carvalho* opinion. *Carvalho* involved the credit reporting agencies,[30] where *Gross* involved CitiMortgage, which was a furnisher of information.[31] In addition, *Gross* cites *Carvalho* for the proposition that a furnisher's obligation to investigate a dispute needs to be more extensive and thorough than that of a credit-reporting agency.[32] The two opinions do not appear to be inconsistent. Still, it will be interesting to see how District Courts within the Ninth Circuit interpret *Gross*, especially if the legal issue is more nuanced than the Arizona anti-deficiency statute.

In addition to *Gross*, the CFPB has filed amicus briefs in a handful of other cases on this issue related to legal disputes. This includes a pending Eleventh Circuit appeal, *Milgram v. JPMorgan Chase Bank, N.A.*,[33] Case No. 22-10250, where the defendant prevailed on summary judgment in district court against an FCRA claim predicated upon alleged identity theft.[34] Among the arguments accepted by the District Court was that in order to prevail the plaintiff was required to prove a factual inaccuracy, not a legal dispute about responsibility for the account.[35]

Milgram has a convoluted factual history,[36] but the crux of the case is that plaintiff, Shelly Milgram, was allegedly the victim of identity theft by an employee of her business, resulting in an outstanding balance of over $30,000.00 on a Chase credit card that the employee opened in her name.[37] Complicating the situation, Milgram allegedly did not discover the fraud

27. *Id.* at 892 (emphasis added).
28. *Id.*
29. *Id.*
30. *Id.* at 881.
31. *Gross*, 33 F.4th at 1249.
32. *Id.* at 1253.
33. Milgram v. JPMorgan Chase Bank, No. 22-10250, 2022 (11th Cir. Jan. 20, 2022) (WestLaw).
34. Milgram v. JPMorgan Chase Bank, No. 19-60929-CIV, 2021 WL 6755283, at *1 (S.D. Fla. Dec. 30, 2021).
35. *Id.* at *10–11.
36. Appellant's Brief is seventy pages long, including twenty-two pages of "Factual Background."
37. *Id.* at *1.

until two years after the account had been opened, and during that time the employee's credit card payments were being paid through Milgram's personal bank accounts.[38]

Upon discovering the alleged fraud, Milgram began taking action to redress the situation, including notifying Chase, making multiple disputes to the credit reporting agencies, and working with law enforcement.[39] Eventually, the alleged fraudster pled guilty to charges related to the alleged identity theft.[40] Therefore, *Milgram* is interesting insofar as it is an identity theft case where there is little dispute that identity theft did occur, and the primary issue relates to whether Milgram is nonetheless legally liable for the credit card debt.

Prior to any dispute to the credit reporting agencies, Milgram was in direct contact with Chase in an ultimately unsuccessful attempt to resolve the issue.[41] However, Chase's position was that although the employee opened the credit card, she did so under Milgram's supervision, and then two years' worth of payments came from Milgram's own accounts, so Milgram was legally responsible for the debt.[42]

Thereafter, Milgram began making disputes to the credit reporting agencies, and Chase continued to confirm the reporting was accurate and Milgram was liable for the credit card.[43] These disputes continued over a two-year period and then Milgram ultimately filed an FCRA lawsuit against Chase.[44]

After rejecting arguments predicated upon the statute of limitations, the district court turned to the reasonableness of Chase's investigations. The district court initially noted that Milgram failed to identify any particular information Chase should have reviewed or acquired as part of its investigation.[45] Instead, the district court boiled Milgram's dispute down to a disagreement over Chase's substantive conclusion, not Chase's "procedural duty under the circumstances to conduct a reasonable investigation or to verify the accuracy of the charges on the Chase credit card account."[46] Therefore, it is possible *Milgram* could be affirmed on the reasonableness of the investigation without the Eleventh Circuit reaching the issue raised in the CFPB's brief that the FCRA does not categorically exempt disputes that present legal questions. However, since Courts typically find the reasonableness of an investigation is a question for the jury, there is a fair likelihood that the Court reaches the issue regarding legal disputes.

38. *Id*. at *1, *3.
39. *Id*. at *3.
40. *Id*. at *2.
41. Appellant's Brief at *3.
42. *Id*.
43. *Id*. at *3–4.
44. *Id*. at *5–6.
45. *Id*. at *5.
46. Appellant's Brief at *11.

If so, *Milgram* raises the issue from an interesting posture, which may lead to an equally interesting result. *Milgram* is not a case where characterizing a dispute as a "legal dispute" is being used to try to cover up for a deficient investigation. Rather, Chase is taking the legal position that it is of no moment that Milgram did not open the credit card account, she is responsible under the doctrine of apparent authority.[47] Therefore, if the Eleventh Circuit reaches the issue and does not categorically find that a furnisher lacks any obligation to investigate legal disputes, then it will be tasked with determining the critical question of how far a furnisher needs to go in reconsidering a legal conclusion.

In *Gross*, the argument was that the legal position was "patently incorrect."[48] Would the Ninth Circuit have reached the same conclusion in *Milgram*, or is there a line to be drawn based upon the degree to which the legal proposition in dispute has been settled? For example, if a difficult but non-frivolous argument can be made, must a furnisher concede the issue or risk FCRA liability? Previously the Eleventh Circuit had answered in the negative.[49]

In *Hunt*, the court explained that even if a consumer had no legal obligation to pay his mortgage loan because the mortgage foreclosure had accelerated his loan and relieved him of any monthly payment obligation, his FCRA argument predicated upon that position nonetheless fails.[50] The Eleventh Circuit explained that "[a] plaintiff must show a factual inaccuracy rather than the existence of disputed legal questions to bring suit against a furnisher under [the FCRA]."[51] *Hunt* was an unpublished opinion and is therefore not controlling authority, so we will need to wait and see whether the Eleventh Circuit will shift its view or maintain this position.

II. CFPB Argues Greater Furnisher Duty to Investigate

On April 19, 2021, the CFPB ("the Bureau") filed an amicus brief with the U.S. Court of Appeals for the Ninth Circuit, offering support for the plaintiff-appellant in *Gross*.[52] One year later, the Bureau filed another amicus brief, this time with the U.S. Court of Appeals for the Eleventh Circuit, offering similar support for the plaintiff-appellant in *Milgram*.[53]

47. *See id.* at *10–11 (holding Milgram's failure to monitor her checking account activity and timely object to the fraudulent charges made her liable for the debt under the doctrine of apparent authority).
48. *Gross*, 33 F.4th at 1252.
49. *See* Hunt v. JPMorgan Chase Bank, Nat'l Ass'n, 770 F. App'x 452, 458 (11th Cir. 2019) (establishing a furnisher's "purported legal error was an insufficient basis for a claim under the FCRA").
50. *Id*.
51. *Id*.
52. *Gross*, 33 F.4th at 1253.
53. Milgram v. JPMorgan Chase Bank, No. 22-10250, 2022 (11th Cir. Jan. 20, 2022) (Westlaw).

In both briefs, the CFPB noted that the FCRA, 15 U.S.C. § 1681, imposes certain accuracy requirements on consumer reporting agencies (CRAs), and on the entities furnishing information to the CRAs (furnishers) when they compile and disseminate information about consumers. To explain the CFPB's interest in filing the briefs, the CFPB noted its exclusive rule-writing authority for most of the FCRA, as well as its authority to enforce the FCRA's requirements, along with other federal and state agencies.[54]

A. CFPB's Arguments.

Although the cases are based on different facts, the CFPB's arguments and the FCRA context are similar.

In each case, a consumer contacted the CRA to dispute the accuracy of information provided by a particular furnisher—in other words, notifying the CRA of an "indirect dispute," within the meaning of 15 U.S.C. § 1681i, instead of notifying the furnisher of a "direct dispute," within the meaning of 15 U.S.C. § 1681s-2(a)(8) and the CFPB's Regulation V, 12 C.F.R. §§ 1022.40–1022.43. A consumer may sue the furnisher for willful or negligent noncompliance with its duty to investigate indirect disputes, but not with respect to its investigation of direct disputes.[55]

In both briefs, the CFPB made the same argument: the FCRA requires that furnishers reasonably investigate disputes about the accuracy and completeness of the information they furnish to CRAs, regardless of whether the consumer's indirect dispute is based on "factual inaccuracies" or "legal questions." After noting that the FCRA itself does not make distinctions between "factual disputes" and "legal disputes," the CFPB argued that making this type of distinction would conflict with the FCRA's purpose and text, it would be difficult to implement, and it could encourage furnishers to evade their investigation duties by regularly claiming that consumers had asserted "legal disputes" that furnishers could not resolve without interpreting law and deciding legal issues.[56]

In both briefs, the CFPB opened by arguing that the FCRA requires the furnisher to complete an investigation reasonable under the circumstances, without regard to whether the consumer has asserted a "factual dispute" or a "legal dispute."[57] When a CRA notifies the furnisher of a consumer's indirect dispute about the information furnished to the CRA, the FCRA

54. Brief for Defendant-Appellee at 2, Gross v. CitiMortgage, No. 20-17160 (9th Cir. May 16, 2022); Brief for Defendant-Appellee at 1, Milgram v. JPMorgan Chase Bank, No. 22-10250, (11th Cir. Jan. 20, 2022) (Westlaw) (first quoting 12 U.S.C. § 5581; and then quoting 15 U.S.C. §§ 1681s(a)–(c), (e)).
55. 15 U.S.C. §§ 1681n–o, s-2(a)(8), (b)–(d).
56. Brief for Defendant-Appellee at 8–9, *Gross*, No. 20-17160 (9th Cir. 2022); Brief for Defendant-Appellee at 11–12, *Milgram*, No. 22-10250, (11th Cir. 2022) (Westlaw).
57. *Id.*

requires the furnisher to "conduct an investigation with respect to the disputed information" and "review all relevant information" provided by the CRA.[58] Because the statute requires the furnisher to "conduct an investigation," courts have interpreted this as implicitly requiring the furnisher to conduct "at least a reasonable, non-cursory investigation" or prohibiting the furnisher from conducting only a "superficial, unreasonable inquiry."[59] The Federal Trade Commission has also stated that the furnisher's investigation must be "reasonable under the circumstances," noting that the investigation "may be either simple or complex, depending on the nature of the dispute."[60]

In the *Gross* brief, the CFPB asserted that nothing in the FCRA suggests that Congress intended to exempt furnishers from investigating disputes that implicate legal issues. The CFPB argued that the accuracy and completeness of information in consumer files often turns on legal issues, such as whether a debt is valid and whom it obligates. To support the argument in *Gross*, the CFPB pointed to its *direct* dispute regulations and related exceptions, stating: "Nothing in the exceptions or regulation overall suggest that a furnisher would have difficulty investigating disputes that are legal in nature indeed, the regulations explicitly require investigation of consumer disputes related to a consumer's liability for a credit account or other debt with the furnisher."[61] Although the CFPB made similar points in *Milgram*, it did so only through footnoted content, perhaps because the CFPB has not issued regulations addressing the furnisher's duty to investigate *indirect* disputes.[62]

In the *Milgram* brief, the CFPB included a more detailed argument as to why the FCRA requires that furnishers perform an investigation that is reasonable under the circumstances, regardless of whether the dispute raises legal issues. In *Milgram*, the CFPB argued that "the reasonableness of the investigation can be evaluated by how thoroughly the furnisher investigated the dispute (*e.g.*, how well its conclusion is supported by the

58. 15 U.S.C. § 1681i(a)(2)(A).
59. Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1155, 1157 (9th Cir. 2009); Johnson v. MBNA Am. Bank, NA, 357 F.3d 426, 429–31 (4th Cir. 2004); Westra v. Credit Control of Pinellas, 409 F.3d 825, 827 (7th Cir. 2005); Hinkle v. Midland Credit Mgmt., Inc., 827 F.3d 1295, 1301–02 (11th Cir. 2016).
60. Fed. Trade Comm'n, 40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations (2011), https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-faircredit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf.
61. Brief for Defendant-Appellee at 11, *Gross*, No. 20-17160 (9th Cir. 2022) (citing 12 C.F.R. § 1022.43).
62. Brief for Defendant-Appellee at 16 n. 13, *Milgram*, No. 22-10250 (11th Cir. 2022) (Westlaw).

information it considered or reasonably could have considered)."[63] The CFPB also noted that it was unsure about how to interpret the district court's opinion in *Milgram*, saying in a footnote:

> To the extent the district court suggested that Chase's investigation was 'reasonable' because Ms. Milgram did not identify a *procedural* deficiency in it, regardless of the thoroughness of the investigation and the fit between the evidence and the substantive conclusion, its decision is inconsistent with this Court's precedent, and would contravene the purpose of the statute to require meaningful investigation to ensure accuracy.[64]

In both briefs, the CFPB acknowledged that certain courts have distinguished between "factual" and "legal" disputes in connection with a different FCRA provision that applies directly to CRAs.[65] Section 1681i of the FCRA requires that CRAs conduct a "reasonable reinvestigation" of the disputes they receive from consumers about the accuracy or completeness of information in the consumer's file. The CFPB also acknowledged that the First Circuit Court of Appeals and other courts have made similar distinctions between "factual" and "legal" disputes that furnishers must investigate, after concluding that "just as in suits against CRAs, a plaintiff's required showing [in a suit against a furnisher] is factual inaccuracy, rather than the existence of disputed legal questions . . . [and] [l]ike CRAs, furnishers are 'neither qualified nor obligated to resolve' matters that 'turn[] on questions that can only be resolved by a court of law.'"[66] The CFPB argued, however, that furnishers are both qualified to assess, required to assess, and routinely do assess whether debts are actually due or collectible because furnishers are in a "better position to make a thorough investigation of a disputed debt than the CRA [is] on reinvestigation."[67]

In both briefs, the CFPB argued that making formal distinctions between "factual disputes" and "legal disputes" would be a frustrating and unworkable practice because the same dispute might be characterized as ei-

63. *Id*. at 15 (first citing Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1161 (9th Cir. 2009); then citing Doss v. Great Lakes Educ. Loan Servs., Inc., No. 3:20CV45, 2021 WL 1206800, at *9 (E.D. Va. Mar. 30, 2021); and then citing Hinkle v. Midland Credit Mgmt., Inc., 827 F.3d 1295, 1303 (11th Cir. 2016)).
64. Brief for Defendant-Appellee, *supra* note 62, at 15–17 n. 11.
65. *Id*. at 18–19 (first citing Solus v. Regions Bank, No. 1:19-CV-2650-CC-JKL, 2020 WL 4048062, at *4 (N.D. Ga. July 17, 2020); then citing Carvalho v. Equifax Info. Servs., LLC, 629 F.3d 876, 892 (9th Cir. 2010); and then citing Chiang v. Verizon New Eng., Inc., 595 F.3d 26, 38 (1st Cir. 2010)).
66. Brief for Defendant-Appellee, *supra* note 62, at 19–20 (citing *Chiang*, 595 F.3d at 38); *see also Gorman*, 584 F.3d at 1156–57 (recognizing the relative lack of ability and responsibility of third-party CRAs to investigate disputed debts compared with furnishers); DeAndrade v. Trans Union LLC, 523 F.3d 61, 68 (1st Cir. 2008) (acknowledging "Trans Union is neither qualified nor obligated" to determine matters of law).
67. Brief for Defendant-Appellee, *supra* note 62, at 20–21 (citing *Carvalho*, 629 F.3d at 892).

ther factual or legal or both factual and legal.[68] To support this argument, the CFPB pointed to cases consolidated for review by the Seventh Circuit, where district courts had offered different reasoning and conclusions in the consolidated cases—some determining that whether creditors owned the underlying debts presented a question of law; others determining that debt ownership presented a mixed question of law and fact; and others deciding not to make distinctions between fact and law, focusing instead on whether the CRAs were institutionally competent to resolve the claims.[69]

68. *Id*. at 22 (citing Cornock v. Trans Union LLC, 638 F. Supp. 2d 158, 163 (D.N.H. 2009)).
69. *Id*. (citing Chuluunbat v. Experian Info. Sols., Inc., 4 F.4th 562, 566 (7th Cir. 2021)).