Secrets of Consumer Credit Litigation

By John Ulzheimer

Few expert witnesses are more in demand and less in supply than the true consumer credit expert witness. The complexities of consumer credit dictate that the witness must have firsthand knowledge not only of the industry, but also of the practices of lenders, credit reporting agencies and credit score developers. He or she must be able to provide commentary not only on the credit report and credit score, but also on any changes in credit reputation and/or damage caused directly by negligence. Given the unique nature of the industry, it is unsurprising that witnesses can be guilty of mistakes and omissions in their work. Two of the most common that I see are:

1. **A lack of systemic understanding of why credit scores react the way they do to incorrect or negligent credit reporting**

   One challenge is to clearly distinguish the credit score impact of negligent credit reporting from organic credit score movement, as well as score movement caused by unrelated or legitimate negative credit reporting. On the plaintiff's side, this is important because a qualified expert for the defense can pick apart your damage assertions if they have systemic understanding of why credit scores move and react to changes in credit report data, both legitimate and negligent. On the defendant's side, this is important because an ill-equipped expert may be incapable of identifying what I call "piling on," which is the process of blaming all plaintiff's credit woes on defendant's actions, regardless of whether or not their actions are at all responsible for the credit score damage.

   Credit scoring systems do not operate using common sense criteria. They use highly complex, empirically derived formulae, which reside within multiple scoring environments referred to as "scorecards," where each formula is different. Understanding exactly what caused the credit score to decrease or increase is a challenge that really can be addressed only by someone who has spent time developing and managing credit scoring models or technology.

2. **Not understanding the differences between the variety of credit reports and credit scores sold into the consumer market (B2C) versus those sold into the lender market (B2B)**

   Each of the U.S. credit reporting agencies sells credit reports and scores to lenders and others with a permissible purpose to access such data. They also all sell credit reports and scores to consumers. And, in almost all cases the data and scores that are sold to consumers are not the same as those sold to lenders.

   This is especially problematic when the plaintiff's understanding of credit damages is based on credit scores that no lender has ever seen or aren't even commercially available to lenders. In addition, this can cause confusion related to documents because those produced by plaintiff and defendant during discovery are almost always sourced from the same credit repository, but are generally different.

   Many experts are unfamiliar with the variety of credit products that are available only to consumers. They are similarly unfamiliar with the differences between these products and those that are available only to lenders.

For example, in a recent case, plaintiffs sued a mortgage lender for incorrectly reporting a foreclosure. The plaintiffs correctly claimed credit score damage, yet attempted to rely on documents that included scores sold only to ***consumers*** rather than scores sold to ***lenders***, which could have undermined their claim for damages. With competent expert consult, the plaintiffs refocused on the relevant, lender-specific credit scores, which strengthened their case.

In another case I was involved with, the credit report documents that were supplied were a disorganized collection of credit files purchased on the Internet and "tri-merge" files from credit data brokers who sell to mortgage lenders. This made it more difficult to craft a chronology of relevant events because of the "apples to oranges" comparisons. Some of the credit reports contained the erroneous information while others, seemingly produced by the same credit bureau and at around the same time, did not. The question that continued to come up was: "Did the credit reports contain incorrect information or not?" At any given time, the question could be answered either "yes" or "no," depending on which credit report was being examined. The plaintiff's case was strengthened once the review was refocused on the core credit file data as housed and maintained at the credit repository level, rather than reports sold by resellers and Internet sites.

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