THE
NATIONAL LAW REVIEW

Let it Burn: Court Does Not Believe Defendant Intentionally Destroyed Records to Avoid Identification of Potential Plaintiffs in FCRA Class Action

Saturday, September 29, 2018

Here's one that will light your fire.

Martinez v. Triple S Props., No. 6:17-03195-CV-RK, 2018 U.S. Dist. LEXIS 166357 (W.D. Mo. Sep. 27, 2018) is a proposed class action against Triple S Properties ("Defendant), an owner of residential rental properties. The Plaintiffs alleged in a motion for negative inference brought under Federal Rule of Civil Procedure 37, that Defendant intentionally burned documents relevant to the suit after it was filed to prevent disclosure of information about the potential class.

In the suit, the Plaintiffs allege that the Defendant violated the Fair Credit Reporting Act ("FCRA") because it failed to give FCRA-required disclosures to Plaintiffs that it took adverse action against them based on the content of the credit reports it received from May 2012 to May 2017. The documents allegedly burned included lease applications and credit reports that the Plaintiffs argued were necessary to identify class members and prove their class allegations.

Defendant did not deny that relevant documents were burned but argued that a negative inference was not warranted because the documents were destroyed in the normal course of business before the lawsuit began, and there was no bad faith or intentional destruction of evidence. Defendant also argued that Plaintiffs failed to show that they were prejudiced by the destruction of evidence.

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Interestingly, while the motion was pending Plaintiffs were able to obtain copies of the credit reports from third-party, Equifax. As a result, Plaintiffs developed a list of potential class members with names and other important identifying information like last known address and phone number. Plaintiffs then changed their argument to allege that the burning of documents prejudiced them because the newly discovered evidence identified potential joint-tortfeasors Plaintiffs claimed would have been identified earlier if not for Defendant's spoliation of evidence.

Citing *Stevenson v. Union Pac. R.R.*, 354 F.3d 739, 745 (8th Cir. 2004) and *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988), the Court noted that when evaluating a retention policy, the Court considers: "(1) whether the record retention policy is reasonable considering the facts and circumstances surrounding those documents, (2) whether lawsuits or complaints have been filed frequently concerning the type of records at issue, and (3) whether the document retention policy was instituted in bad faith."

Here, the Court found no evidence of bad faith[1] or intentional destruction of documents to suppress the truth on the part of the Defendant. The Court held that Defendant's regular business practice was to periodically burn files to avoid inadvertently disclosing confidential information on lease applications and credit reports. *Martinez*, at *7.

Further, the Court held that a policy of burning documents containing consumer information is considered a

reasonable method of destruction under 16 C.F.R. § 682.3(b)(1), “Proper Disposal of Consumer Information.”

For your information, The Federal Trade Commission’s other examples of permissible means of disposal for consumer information can be found: here.

[1] The Court has the discretion to give the negative inference instruction even absent an explicit showing of bad faith. *Stevenson v. Union Pac. R.R.*, 354 F.3d 739, 750 (8th Cir. 2004). It also has the discretion to deny sanctions for spoliation of evidence where it expressly finds . . . that there is no evidence of intentional destruction of evidence to suppress the truth. *Martinez*, at *5-6, citing *Gallagher v. Magner*, 619 F.3d 823, 845 (8th Cir. 2010) (citations omitted).