Credit Damage and Interference with Credit Expectancy: Seven Things to be Aware of From a Plaintiff Point of View

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Abstract. As a result of any significant life event, one's respective financial credit and credit ranking can be significantly damaged. Understanding credit damage represents a vital area of knowledge for the rehabilitation professional, including the Forensic Economist and Rehabilitation Counselor. This article addresses several pitfalls or misunderstandings pertaining to interpretation of credit damage.

Keywords: credit, credit damage, plaintiff

Owing to a flush of recent publications concerning research in the niche market of credit damage and interference with credit expectancy,[1] I was asked by a radio show host to discuss for the credit consumer some of the general rules to be aware of before embarking on a course of litigation against a Defendant whom they considered wrongly damaged their credit standing.[2] In preparing for this show, I tried to identify the types of activities that a consumer should see as sure-to-fail arguments that their attorneys might try to make. Some arguments would permit Defense attorneys to easily dismiss an important element of damages that could be calculated by a forensic economist or throw out the entire case through summary judgment.

The seven pitfalls to avoid are the subject matter of this paper. I will name each pitfall and then identify a piece of litigation which supports it as a mishandling on the part of Plaintiff Counsel in the advancement of credit damage or interference with credit expectancy claims.

Pitfall 1. Methodology

Understanding how a Forensic Economist goes about quantifying Credit Damage and Interference with Credit Expectancy is an important start. Often the methodology behind the economic damage report is askew of admissible items according to federal or state legislation on credit damage matters, and, more than often introduces unacceptable financial metrics the Court considers unhelpful to the trier of fact.

Credit Damage Distinguished From Cost of Interference with Credit Expectancy

First, assume that the Defendant or one of the Defendants in a "new" lawsuit is a bank that has or had a business relationship with a plaintiff. Second, assume this bank reported at some date in the past a negative transaction to the credit reporting agencies, e.g., a charge-off of a loan, that is in error. This is the tort. Third, assume the plaintiff's credit score fell approximately 100 points from the negative reporting of this transaction and led to a poor credit report. This is a consequence of the tort.

Both credit damage and interference with credit expectancy each look to find an interest rate differential over the number of years of an existing loan or provable loan request. The reason for the use of an existing loan or provable loan request is to take speculation out of the equation. Credit damage is the provable differential from the defendant in extending credit, viz. an up-charge in either the rate of interest, or a limiting of the amount of credit to be extended, or the length of the loan associated with the wrongly reported credit score and credit report. Interference with Credit Expectancy is the credit denial by the defendant who at a later date then provides this funding or forces the plaintiff to find funding from a different source. In other words, in credit damage, the defendant extends credit with or without a loan denial but in a way consistent with the tort while in interference with credit expectancy a loan denial must be in evidence, even if funded at a later date by the same bank. Credit expectancy adds width to the credit damage claim alone.

Both credit damage and interference with credit expectancy look to interest rate differentials for the number of years running on an extension of credit or the cost of the delay in extending this credit. Contiguous economic events arising from the tort that are not quantified in this manner are often overlooked.

There are four steps a forensic economist takes in calculating damage to a consumer's credit:

Step 1. Estimate a pre-incident borrowing capacity of the plaintiff in a gross dollar amount.

Step 2. Estimate pre-incident and post-incident interest rates for that amount of estimated borrowing capacity.

Step 3. Determine the differential between the estimated pre-incident rate and the estimated post-incident rate.

Step 4. Multiply the interest rate differential between the estimated pre-incident rate and the post-incident rate by the estimated pre-incident borrowing capacity.

If a credit mishap is reported in error by a retailer to a credit reporting agency — the main ones being Equifax, Experian, or Trans Union — which (say) impacts a car loan in terms of either the grade or type of vehicle that could be purchased – credit capacity —, or the number of (shortened) years allowed on the loan, or the higher rate of interest charged on that loan, then "credit damage" is the difference between the lost credit capacity, the number of years and interest approved for the consumer against a higher credit capacity, longer number of years and lesser interest that would have been approved *but for* the credit reporting error.

"Interference with credit expectancy" would require an actual denial of the automobile loan.

How forensic economists go wrong in use of this methodology is almost too varied and wide as well as inconsistent to summarize in an article intended to include other pitfalls of analysis, but a recent court dismissal ought to suffice to demonstrate the court's uneasiness with a couple of financial metrics employed by one forensic economist.

Case I. *Lauer v. CSR Credit Services, Inc.* (Defense Motion) 2010 WL 3263271 (S.D. 2010)

This case presents a fully detailed review of the credit damage issue with cases and peer review articles cited in abundance by J. Anthony Love of King & Spalding LLP of Atlanta, Georgia at the direction of the court and Judges Barker and Magnus-Stinson. Although there was a stipulated dismissal of the expert testimony, the case settled without any record of the terms of the settlement. Mr. Love wrote:

> *Lauer designated Stan Smith as an economic expert witness in an attempt to turn this small credit reporting case into a high-six-figure hedonic damages bonanza. Smith projected three different elements of damages: (1) lost credit expectancy; (2) the value of time spent on situation; and (3) hedonic damages or reduction in value of life.*

Mr. Love showed that hedonic damages can be rejected for four reasons and that situational and credit expectancy can also be rejected for four reasons. Hedonic damages were rejected because:

> *(1)Plaintiff Lauer never pleaded that he was seeking hedonic damages; (2) Smith's hedonic damages opinion are not reliable under Daubert or Kumho Tire; (3) Smith's opinion on hedonic damages are not helpful to juries; and (4) Courts routinely exclude Smith's testimony on hedonic damages.*
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> *Value of time on situation and credit expectancy is rejected because: (1) Laurer never pleaded he was seeking damages from his time spent on the situation; (2) Smith is lacking in qualifications to express an opinion on these two matters; (3) Smith's opinions on these matters are not reliable under Daubert or Kumho Tire; and (4) damages for these two matters are not recoverable under FCRA legislation.*
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> *For all these reasons, CSC, Equifax, and EIS respectfully request that this Court enter an order excluding Smith's testimony as to 'hedonic damages' (loss of value of life), 'loss of credit expectancy,' and 'value of time spent on the situation.'*

Court acceded to this argument from Mr. Love and stipulated a summary dismissal of Plaintiff's claims.

Pitfall 2. Economic Event

Courts look disfavorably upon a Plaintiff who says he was denied credit but cannot show the existence of any event (proof) where he or she asked for credit and was denied. Hypothetical instances of credit damage under the guise of interference with credit expectancy and "but for" arguments are not tolerated.

Case II. *Casella v. Equifax Credit Information Services et al.* (D. US 2nd District NY 1995

> *Whether or not Casella had the wherewithal to obtain a mortgage, the District Court properly found that, in the absence of any evidence that appellant made an offer to purchase property or applied for a home mortgage, the 'lost opportunity' damages he alleged were too speculative.*

Pitfall 3. Causation

A connect must be established between the economic event and an identifiable difference in either 1) Credit Capacity, or 2) longevity of the loan, or 3) rate of interest. Courts want a provable connection of economic event and credit damage. Here's a case laying out a positive finding of credit damage owing to a credit reporting error despite Defendant's attempt to mute or nullify the economic event.

Case III. *Bloor v. Robert A. Fritz, et al.* (D. WA 2008)

> *Due to the reduction of the Bloors' credit scores it is reasonably certain that for at least the next ten (10) years the Bloors will suffer economic loss when they apply for credit. A reasonable estimate of the loss they will suffer from the damage to their credit scores can be made based on the increased cost they will likely than not incur to acquire and pay for a home purchase loan. The reduced credit scores the Bloors now have will result in them having to pay approximately one percentage point more in interest on a home loan, which translates to a current loss of $10,000.00, when the added cost of the loan over the normal amortization period of the loan is reduced to present cash value. This loss is reasonably certain and based on reliable statistical data provided by the Bloor's economic expert witness.*[3]

Pitfall 4. No Speculation

If no loan was applied for, or no identifiable credit capacity, term of loan or interest rate difference is proven, Courts look disfavorably on a "but for" argument. Notice the expression, "reliable statistical data" employed in the *Bloor* case above, and the denial owing to "speculation" in *Casella*.

In a current Illinois lawsuit where a loan denial arose owing to a credit reporting error directly the responsibility of a defendant bank – *Holtmann vs. Citizen's Community Bank*[4] – the Plaintiff (a farmer) had not filled-out a loan application to buy a parcel of land nor could he remember the date or form of the denial of the loan request from the bank. The interference with credit expectancy and loss of capital gain as a result of this failed loan request – the land subsequently sold three years later for more than twice the price — would have looked very much like speculation without evidence of a loan application or receipt of a loan denial were it not for the intense deposition directed at the loan officer of the bank who went on record as rejecting any need for a loan application because of the known bad credit of the Plaintiff. This testimony delivered the evidence needed to transcend an otherwise speculative damage into one of hard, concrete, and provable reality. The fact that the public auctioneer selling the piece of land provided an affidavit left no doubt as to the financial consequences arising to the detriment of the plaintiff owing to the defendant's tort.

Pitfall 5. Damages Must Specify a Violation

Damages must be directly traceable to a passage from either federal or state legislation; any damage failing to identify a violation of legislation is not admitted by the Courts and often leads to summary dismissal of the entire case. *Casella* of Case II also becomes one of two cases demonstrating this pitfall of analysis.

Sources for finding admissible credit damage claims are found in: Fair Credit Reporting Act 15 USC §1681 (FCRA), the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691, et seq. (ECOA), the Fair Debt Collection Practices Act (FDCPA), and the Federal Consumer Protection Act (FCPA) along with State equivalents of same such as, for example, a state's own Consumer Protection Act as in the state of Massachusetts as used in *Smith v. Jenkins*, 2011 U.S. Dist. LEXIS 47742 (D. MA 2011) or in a "violation of the Illinois Consumer Fraud and Descriptive Business Principles Act (815 ILCS §505 Et Seq.)" as used in *Holtmann v. Citizens Community Bank* referenced above.

Case IV. *Casella v. Equifax Credit Information Services et al.* (D. US 2nd District NY 1995)

This appeal from a grant of summary judgment in favor of two credit reporting agencies requires us to consider the types of injury that can justify a damages award under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (1988) ('FCRA').

The Court concluded … that

> *appellant was not entitled to pain and suffering damages in this case because he had failed to show that his emotional distress was caused by Equifax and Trans Union, as opposed to San Diego. Thus, appellant's claims were apparently rejected due to a lack of causation between the harm alleged by Casella and appellees' alleged violations of the FCRA. In rejecting Casella's claim for pain and suffering, we note that at least one court has recently held that a cause of action exists under the FCRA even absent a denial of credit. See Guimond, supra, at 1333. Whether or not we would agree with Guimond, we do not believe a plaintiff can recover for pain and suffering when he has failed to show that any creditor or other person ever learned of the derogatory information from a credit reporting agency. Appellant has not met his burden of presenting evidence that*

Equifax or Trans Union caused his pain and suffering.

Case V. *Reed v. Experian Information Solutions, Inc., et al.* (D. MN 2004)

Under FCRA, CRAs are required to maintain reasonable procedures calculated to ensure 'maximum possible accuracy' of consumer credit reports. 15 U.S.C. § 1681e (b). For plaintiff's § 1681e (b) claims to survive defendants' motions for summary judgment, he must present evidence that: (1) Experian and CSC negligently or willfully failed to follow reasonable procedures intended to assure the accuracy of their reports, (2) they reported inaccurate credit information about plaintiff, (3) plaintiff suffered harm, and (4) defendants' failure to follow reasonable procedures was the cause of that harm. See Whelan v. Trans Union Credit Reporting Agency, 862 F. Supp. 824, 829 (E.D.N.Y. 1994).

This claim fails because plaintiff has offered no evidence showing that Providian accessed his credit report for an impermissible purpose.

Pursuant to 15 U.S.C. §§1681b (a) (3) (A) and (F) (ii), creditors in Providian's position are permitted to obtain and review credit reports on current debtors such as plaintiff. Summary judgment is therefore appropriate as to that claim.

Pitfall 6. No Hedonics

Despite Nevada being one of two states, the other is New Mexico, that accepts quantification by a forensic economist of loss of enjoyment of life as a part of pain and suffering, credit damage and interference with credit expectancy damage courts have not been kind to this kind of insertion of economic damages. Case VI is from a Court nearby the two hedonic states in the state of Utah.

Case VI. *Anastasacion v. Credit Service of Logan* (D. UT 2011)

This case is an amended memorandum decision and order granting in part and denying in part Defendant's *Motion in Limine* to exclude the testimony of Stan V. Smith. Judge Stewart denied a motion to exclude testimony of Stan V. Smith regarding loss of credit expectancy and claims based on "time spent trying to resolve problems with the credit reporting agency" based on insufficient facts and speculation, but allowed the defendant to raise further objections at trial. Judge Stewart excluded Stan Smith's testimony based on hedonic damages arising from credit problems based on the fact that there has been no physical injury or loss of life.

Finally, with respect to Dr. Smith's testimony regarding reduction in the value of Plaintiff's life, or hedonic damages, the Court will grant Defendant's Motion. Plaintiff argues in her Reply that his evidence should be admissible, arguing that Dr. Smith is extremely qualified, that his testimony is based on reliable economic and scientific methods, and that it has received extensive peer review and acceptance.

Plaintiff further states that hedonic damages are 'used by every federal regulatory agency.' However convincing these arguments may be, they do not change the fact that hedonic damages are used to approximate the loss of the value of life, and therefore are used in cases involving death or injury. As Plaintiff herself states, when "every federal regulatory agency" used hedonic damages, it is 'in analyzing the potential impact to life or limb.' Furthermore, the three Tenth Circuit cases that have mentioned hedonic damages all involve either physical injury or loss of life. (Citations omitted.) As Plaintiff has not suffered the loss of life or limb, testimony regarding hedonic damages will not assist the trier of fact. Therefore, the Court will grant Defendant Motion with respect to this testimony.

Pitfall 7. Proof of Contact or Reaching Out

In the event of a credit reporting error, Plaintiff must show evidence of approaching either the retail or banking entity reporting the error and the CRAs recording the error.

Case VII. *Phil Rosequist v. Washing Mutual Bank FA, Clark County, NV,* case no. 07A536296 (2008)

Despite proven evidence of a credit reporting error on the part of WAMU, Judge Valarie Adair looked a scoff at Mr. Rosequist's credit damage claims *valid as they were* since no proof was ever provided by Mr. Rosequist that he actually contacted WAMU or Experian to correct the credit reporting error. This absence of action took precedence over the belated notice of correction filed independently by WAMU to Experian. Negligence or inattentiveness and inaction to a credit denial are an important part of judicial thinking.

The reasoning works the other way as well, since failure to notify a consumer of a negative reporting event transmitted by a retail vendor to a CRA is a violation of FCRA. In *Holtmann v. Citizens Community Bank* referenced above, plaintiff did not find out about a negative charge-off a loan current and being paid down until a full four years after the transmittal event.

Summary Dismissal or Summary Judgment

Failure of the Plaintiff to satisfy the Court's understanding of the complaint in any of the above seven matters reduces the quality of the complaint and usually predisposes the Court to either a dismissal of a particular damage element proposed as in #6 hedonics, or in having the entire lawsuit dismissed as in matter #5 – failure to identify the exact and acceptable damage element allowed by legislation.

Case VIII. *Reed v. CSC Credit Services, Inc. et al.* (D. MN 2004)

Credit expectancy is not a valid claim in all states. In the state of Minnesota, in *Reed v. CSC Credit Services, Inc. et al.* (D. MN 2004), the court had to make an adjustment for the trier of fact to even hear the credit expectancy damage claim.

> *Plaintiff's final claim alleges that Providian interfered with his credit expectancy. While Minnesota does not recognize a cause of action for interference with credit expectancy, courts have read such claims as pleading interference with economic expectancy, which is recognized in Minnesota. See Mattice v. Equifax, 2003 U.S. Dist. LEXIS 10162, 2003 WL 21391679, at (D. Minn. June 13, 2003). However, Mattice was decided on defendant's motion to dismiss and the court simply held that plaintiff had stated a cognizable claim. See 2003 U.S. Dist. LEXIS 10162. Here, construing plaintiff's claim as interference with economic expectancy does not save it from summary judgment, because plaintiff fails to present evidence of harm and causation, which are essential elements of the claim. See H. Enterprises Int'l., Inc. v. General Elec. Capital Corp., 833 F. Supp. 1405, 1418 (D. Minn. 1993) (citing Gits v. Norwest Bank Minneapolis, 390 .W.2d 835, 837 (Minn. Ct. App. 1986)). Therefore, summary judgment in favor of Providian is also granted as to this claim.*

The concept of summary judgment takes us into a more pragmatic understanding of credit damage and credit expectancy damage claims. Most claims are dismissed in summary judgment in favor of the Defense. In my prior paper in this journal,[5] I provided a simple answer in the form of six connected propositions.

> *I begin the first proposition with a great quote from a prominent forensic economist. 1) "Most credit damage cases are crap,"[6] so that 2) most credit damage cases are dismissed in summary judgment, because 3) most Plaintiff attorneys do not parse correctly the requirements of Fair Credit Reporting Act 15 USC §1681 (FCRA), the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691, et seq. (ECOA), the Fair Debt Collection Practices Act (FDCPA), and the Federal Consumer Protection Act (FCPA), or the state equivalents of same, and, therefore, 4) the case gets dismissed through requesting a damage, such as credit expectancy or hedonics, not permitted under federal and/or state credit laws, so that 5) FE damage quantifications are ill-conceived at the front-end in matters of law, and 6) where the attorney has gotten the FE over this hurdle of matter of law, the quantification the FE makes is ill-conceived in using a methodology unacceptable to the courts.*

Before the reader goes away thinking credit expectancy damage is not permissible under federal and/or state legislation on consumer credit, one Judge makes sure that it is the quality of the complaint and not the complaint itself that is seen to be the problem.

Case IX. *Smith v. Dorchester* (D. MA. 2013)

Judge Howard pointed out that credit damages and credit expectancy damages were "real" and "compensable," but not in the manner constructed by Dr. Smith for a Mr. Smith.

> *None of this is to suggest that the damage to Smith's credit rating is not compensable. See* United States v. Burke, *504 U.S. 229, 239, 112 S. Ct. 1867, 119 L. Ed. 2d 34 (1992) (listing "a ruined credit rating" as an example of consequential damages). Dr. Smith's methodology was simply not a useful measure, and his testimony should not have been admitted.*

Conclusion

Avoid the seven pitfalls outlined in this article, and as a Plaintiff you will have a very good chance of avoiding the outcome, represented by a summary dismissal of an element of damage employed in your case or a summary judgment to the favor of the Defense. However, transact your litigation employing any of these seven pitfalls, and you can be assured of the certainty of the eighth outcome.

Endnotes

1 Three publications and a recently presented paper by the author are available at: **(1)** 2011. "Response to Credit Damage: Causes, Consequences, and Valuation," *Forensic Rehabilitation and Economics,* 4(2): 89-98; **(2)** 2014. "Credit Damage and Interference with Credit Expectancy," *The Rehabilitation Professional,* vol. 21(1), 23-28; **(3)** 2014. "Credit Expectancy Damages – A New Hedonics Bonanza?" *Journal of Legal Economics,* vol. 20(1), 31–48; **(4)** 2014. "Credit

Damage and Interference with Credit Expectancy: How the Expectancy Claim can lead to Loss of Capital Gain and Loss of Income," a paper delivered at the American Academy of Economic and Financial Experts (AAEFE) annual conference in Las Vegas, NV on March 20, 2014.

[2] The radio show on AM 720 KDWN is called "Legal Hour" and airs weekdays in Las Vegas from 9-10 AM with the "Credit Show" hosted by Harry Jacobs airing on Fridays. My appearance was on Friday, February 7, 2014 at 9 AM.

[3] Robert Moss and not Stan Smith. Dr. Moss is the only other named expert witness in credit damage cases other than Dr. Smith and me who are the most often named. Of the 48 cases available on LEXIS on this issue, Moss is named once, I am named twice, and Smith three times. Moss and I had are damages kept in evidence; Smith had his damages dismissed. The other 44 cases have no mention of the economic expert witness even when damage elements were dismissed.

[4] In the Circuit Court Twentieth Judicial Circuit St. Clair County, Illinois, Cause No. 13-L-I22, filed March 12, 2014 for a tort that occurred on June 1, 2008.

[5] Climo, Thomas A. 2014. *The Rehabilitation Professional*, the second article cited in endnote 1.

[6] On reading the section of the AAEFE presentation referenced as the fourth article in endnote 1 relating to the seven things plaintiffs do wrong in credit damage litigation, this prominent forensic economist who leads off the other of the six connected propositions to follow indicated to your author this is the exact reason he formerly considered credit damage cases as "crap." He now says that "provided credit damage cases do not succumb to the seven things identified in Climo's analysis, then and only then are credit damage cases worthwhile."

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