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SoFi Settlement Provides Lessons for Lenders Marketing “Soft Pull” Preapprovals

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A class action was filed in November 2014 against Social Finance, Inc. (SoFi) for alleged violations of law stemming from its marketing of loans based on a “soft” pull of the consumer’s credit report that would not affect her credit score.¹ The case was recently settled for \$2.5 million in consumer redress and, as described in further detail below, provides lessons for the growing number of financial institutions offering consumers the ability to determine their eligibility for loan products without a “hard” pull.

The SoFi Experience

The SoFi user experience at issue began with a page that allowed consumers to determine their eligibility for certain credit products with a “soft” pull, which would not affect the consumer’s credit score. Before proceeding with the “Student Loan Eligibility” module, one Plaintiff in this case was asked, under the heading “Soft Credit Pull Authorization & Final Submit,” to check a box stating that “I/we understand that this is an eligibility inquiry for credit and authorize SoFi to obtain credit information from a credit reporting agency for purposes of this eligibility inquiry. *This inquiry will not affect your credit score.*” (Emphasis added). Under the check box an expandable set of additional terms stated: “You are authorizing us today for purposes of this loan application... [to] investigate your credit worthiness, and to obtain credit information, including a consumer credit report...”² SoFi processed this inquiry with Experian using a subscriber code that treated the request as a “soft” inquiry, meaning that it would not be factored into the consumer’s credit score (and perhaps not be reported to other lenders viewing the consumer credit report as an application for credit).

Based on this eligibility determination, the Plaintiffs were presented with “Step 2” to “Select an Amount” for a loan. This module included the detailed information about the particular loan being selected, including the loan amount, duration, monthly payment amount, interest rate, origination fee, APR, and projected “lifetime cost.” Following the consumer’s selection, one plaintiff was prompted with a “Request Amount” button and another plaintiff was presented with “Choose Now” or “Choose Later” buttons. After the consumer clicked one of those buttons, SoFi processed an inquiry with Experian using a subscriber code that treated the request as a “hard” inquiry, meaning that it was an application for credit that would appear on the consumer’s credit report and could affect the consumer’s credit score.

Plaintiffs’ Allegations

The Plaintiffs’ claimed that, in navigating this experience, they only authorized a “soft” pull, did not consent to a second “hard” pull, were misled to believe that only a “soft” pull would be conducted, and that SoFi accordingly did not have their written authorization or any other permissible purpose to conduct a “hard” pull. The Federal Trade Commission (FTC) issued guidance in 1998 addressing requests for credit report information from automobile dealerships.³ This guidance was cited by the Plaintiffs to support the proposition that merely inquiring about the possibility of obtaining a loan in the future or engaging in similar “shopping” behavior did not amount to a “credit transaction” for which a credit report could be obtained without written permission from the consumer. The Plaintiffs claimed that this conduct constituted knowing and willful violations of the Fair Credit Reporting Act and the California Consumer Credit Reporting Agencies Act. The Plaintiffs also claimed violations of California’s Unfair Competition Law.

SoFi's Response

SoFi claimed in its reply brief that it had a permissible purpose for the soft pull based on the consumer's express authorization (15 USC 1681b(a)(2) and Cal. Civ. Code 1785.11(a)(2)) and for the hard pull based on the consumer's request for a specific loan, which was "in connection with a credit transaction" for which consent was not required (15 USC 1681b(a)(3)(A) and Cal. Civ. Code 1785.11(a)(3)(A)).⁴

Denial of Motion for Summary Judgment

The District Court for the Northern District of California denied SoFi's motion to dismiss on several counts, holding (among other things) that:

- "[T]he facts [were] far from undisputed as to whether Plaintiffs' actions on Defendants' website constituted a credit transaction, or whether their actions simply constituted 'comparison shopping' behavior, which the [FTC] has stated (in non-binding but persuasive guidance) is not enough to rise to the level of a credit transaction under the FCRA"⁵;
- Alleged violations of the FCRA's prohibition against obtaining information from credit bureaus on "false pretenses"⁶ could not be dismissed because the plain language of statute didn't foreclose potential application to obtaining consumer consent under false pretenses (as opposed to only governing false statements to the consumer reporting agency), and the legislative purpose of the law as a consumer protection vehicle warranted a liberal reading;
- Whether any violations of the FCRA were "willful" and based on "objectively reasonable" interpretations of the law could not be determined on summary judgment, and that demonstrations of the company's interpretation of the statute based on their actions alone was not sufficient, noting that discovery requests for "guidance, advice or legal opinions" regarding FCRA compliance were met with assertions of attorney-client privilege;
- Under the California Unfair Competition Law, "Plaintiffs have shown that the placement of the credit disclosure (under the heading 'Soft Credit Pull Authorization') may have been misleading such that a reasonable consumer would believe that Defendants would not make any hard inquiries until further steps were taken in the application process." The court also cited evidence provided by the Plaintiffs indicating that SoFi may have known "the practice was misleading and purposefully failed to correct the website."

Following the court's order denying SoFi's motion to dismiss, a settlement was entered providing \$2.5 million to the settlement class.

Lessons for Lenders Marketing "Soft" Pull Eligibility Determinations

This case should serve as a note of caution for lenders marketing eligibility determinations based on a "soft" pull of a consumer's credit report. Notably the FCRA does not draw a distinction between "soft" and "hard" credit report inquiries; both result in the delivery of a consumer report and both require a permissible purpose. So while "soft" pulls are frequently based on written instructions of the consumer before an application for credit is initiated, if the "soft" pull (and the fact that the "soft" pull will not affect the consumer's credit score) is featured in any consumer facing language, creditors should consider:

- (1) Whether the permissible purpose for a subsequent hard pull is based on the consumer's prior written instructions, new written instructions, or the initiation of a credit transaction (e.g. a clear application for credit); and
- (2) Whether a prominent statement that a subsequent application might result in a "hard" pull is necessary to dispel any potential misperceptions regarding the nature of that subsequent credit pull.

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Footnotes

- 1 *Heaton v. Social Finance, Inc.*, Case No. 3:14-cv-05191-THE (N.D. Ca. November 24, 14), Docket No. 1.
- 2 Note that the Complaint contains exhibits with multiple variations of the authorization and terms and conditions, though all appear to be similar.
- 3 FTC Letter to Coffey (Feb. 11, 1998), available at <https://www.ftc.gov/policy/advisory-opinions/advisory-opinion-coffey-02-11-98> (last visited September 22, 2016).
- 4 *Heaton v. Social Finance, Inc.*, Case No. 3:14-cv-05191-THE (N.D. Ca. June 18, 2015), Docket No. 50. The parties' arguments contain additional elements but are simplified here for the sake of brevity.
- 5 *Heaton v. Social Finance, Inc.*, Case No. 3:14-cv-05191-THE (N.D. Ca. November 4, 2015), Docket No. 94, 6.
- 6 15 USC 1681q.

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