

Ninth Circuit Rules Fannie Mae Not Consumer Reporting Agency Under FCRA

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On January 9, 2019, the U.S. Court of Appeals for the Ninth Circuit ruled that the Federal National Mortgage Association, or Fannie Mae, is not a consumer reporting agency under the Fair Credit Reporting Act when it licenses its Desktop Underwriter ("DU") software.

The plaintiffs alleged that Fannie Mae was liable as a consumer reporting agency for inaccuracies in the DU software's interpretation of "short sales" as foreclosures, which resulted in lenders declining consumers' applications for mortgages. After a trial, the lower court ruled that Fannie Mae is a consumer reporting agency when it licenses the DU software to lenders because the software "evaluates" consumer credit information and provides the information as a consumer report to the lenders. In so ruling, the lower court declined to follow established, but informal, Federal Trade Commission guidance that a seller of software to a company that uses the software to assemble or evaluate consumer information is not a consumer reporting agency.

The Ninth Circuit reversed, stating that the FTC guidance was persuasive and finding that Fannie Mae did not regularly engage in the practice of assembling or evaluating consumer information, but instead provided software that lenders could use to assemble or evaluate such information. In making this determination, the appellate court called the DU software a "tool," explaining that "when a person uses a tool to perform an act, the person is engaging in the act; the tool's maker is not." Specifically, the appellate court found that Fannie Mae's creation of an algorithm to be included in the DU software, storage of old software-generated case files, and updates to the software based on credit bureau database requirements did not amount to assembling or evaluating consumer information to make it a consumer reporting agency.

Furthermore, the appellate court found that Fannie Mae did not provide the DU software for the purpose of providing consumer reports to lenders, the other part of the definition of a consumer reporting agency, but instead to allow lenders to determine which loans Fannie Mae would purchase. The appellate court pointed to both the FCRA and Congress' establishment of Fannie Mae in drawing a distinction between a lender's origination of a loan and Fannie Mae's purchase of a loan on the secondary market.

Opinion

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