



## National Child Support Enforcement Association

### Credit Report Access by Title IV-D Child Support Enforcement Agencies

#### Legal Position Paper and Alert to IV-D Agencies (Draft: May 2008)

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#### I. Issue Presented

The recent federal court decisions in *Pintos* and *Miller* (discussed below) have called into question a governmental child support enforcement agency's ability to obtain credit reports as a judgment creditor under 15 U.S.C. §1681b(a)(3)(A) [subsection (3)(A)]. However, this does not preclude requests for credit reports by child support enforcement agencies. Below is a brief overview of the authority available to child support enforcement agencies under the Fair Credit Reporting Act (FCRA) (15 U.S.C. §1681 et seq.).

#### II. Federal Case Law

##### A. *Miller* Analysis

The case of *Miller v. Trans Union*, (N.D. Ill. Feb. 28, 2007, No. 06 C 2883) 2007 U.S. Dist. LEXIS 14315 addresses the question of what constitutes a "permissible purpose" for the use of a consumer credit report as defined by the FCRA. The specific issue in *Miller* was whether a private collection agency's use of a credit report to collect past-due child support was a permissible purpose under §1681b(a)(3)(A) of the FCRA. Section 1681b(a)(3)(A) authorizes the use of a consumer credit report ". . . in connection with a credit transaction involving the consumer . . ." The court, basing its decision on amendments to the FCRA made by the Fair and Accurate Credit Transaction Act of 2003 (FACTA), concluded that the private collection agency's use of the credit report was not a permissible purpose under §1681b(a)(3)(A).

FACTA added definitions of the terms “credit” and “creditor” to the FCRA. “Credit” is defined as “the right granted by a creditor . . . to defer payment of debt or to incur debts and defer its payment . . .” and “creditor” is defined as “any person who regularly extends, renews, or continues credit . . .” §1681a(r)(5). According to *Miller*, whether a particular use of a credit report is a permissible purpose under §1681b(a)(3)(A) must be determined in light of the definitions added by FACTA. The court found that child support obligations, which typically do “not involve one party granting rights to another to defer payment” are not “credit transactions;” therefore, the use of a credit report to collect past-due support lacks the “nexus to a credit transaction” required by §1681b(a)(3)(A). *Miller* at 14319. The court further found that the private collection agency was not a “creditor” within the meaning of §1681b. *Id.* at 14321. As a result, the court concluded that the private collection agency’s use of the credit report for collecting past-due child support was not a permissible purpose under §1681b(a)(3)(A).

The *Miller* case has raised concern over whether the use of credit reports for collection of past-due child support is a permissible purpose under the FCRA. *Miller* does call into question some creditors’ ability to access consumer reports under §1681b(a)(3)(A) of the FCRA. Yet it is important to note that in *Miller*, the entity seeking access to the credit report was a private collection agency, not a state child support enforcement agency (IV-D agency). By definition, a IV-D agency stands in a very different position with regard to the collection and enforcement of past-due child support than a private collection agency. In addition, in reaching its conclusion, the *Miller* court stated that:

Supportkids *has not offered* evidence that the alleged child support plaintiff owed to [the custodial parent] was a ‘credit transaction’ or that [the custodial parent] was a ‘creditor’ within the meaning of §1681b(a). Supportkids *has therefore not shown* a “permissible purpose . . .” *Miller* at 14321. (emphasis added).

It therefore remains possible that a IV-D agency, by offering sufficient evidence, could show that its use of credit reports to collect past-due child support is a permissible purpose under §1681b(a)(3)(A). However, under current law, it is not advisable for IV-D agencies to request credit reports under §1681b(a)(3)(A).

## **B. *Pintos* Analysis**

In *Pintos*, decided September 21, 2007, the Ninth Circuit court of Appeal reached the same conclusion as *Miller* regarding the application of the FACTA definitions to pre-FACTA actions. The issue in *Pintos* was whether a debt collection agency could request the credit report of a woman who had failed to pay impound fees owed when her car was towed due to an expired California vehicle registration. The *Pintos* court held that the collection agency was not entitled to request a credit

report as a judgment debtor under 15 U.S.C. §1681b(a)(3)(A) as the debtor had not voluntarily entered into a credit agreement with the collection agency.

Specifically, the Ninth Circuit held that FACTA created definitions of “credit” and “creditor” that were otherwise missing from the FCRA. In order to determine the application of 15 U.S.C. §1681b(a)(3)(A), the *Pintos* court read that section along with the definitions supplied by FACTA despite the fact that the definitions were not effective until March 31, 2004. Thus, like *Miller*, *Pintos* applied FACTA definitions retroactively to pre-FACTA actions.

By giving the FACTA definitions retroactive effect, *Pintos* held that a collection agency did not have a permissible purpose for requesting a credit report pursuant to 15 U.S.C. §1681b(a)(3)(A) when the debtor “did not voluntarily seek credit.”<sup>[1]</sup> Because the debt was statutory, *Pintos* found that there was no credit relationship such that 15 U.S.C. §1681b(a)(3)(A) would apply.

In reaching its conclusion, the Ninth Circuit overturned the lower court’s finding that debt collection, without an underlying, voluntary credit transaction, was a permissible purpose under 15 U.S.C. §1681b(a)(3)(A). The *Pintos* court held that the case law the District Court had relied upon was decided prior to the 2003 FACTA amendments. Thus, the case had to be re-evaluated in light of the FACTA amendments.

The case the District Court had relied upon was the *Hasbun* case decided in March of 2003.<sup>[2]</sup> *Hasbun* centered on a IV-D agency obtaining a credit report in order to collect an overdue child support obligation. In that case, the Ninth Circuit held that collection of child support by a child support agency was a permissible purpose as required by 15 U.S.C. §1681b(a)(3)(A). While *Pintos* held that the *Hasbun* interpretation of 15 U.S.C. §1681b(a)(3)(A) had to be reevaluated, it did not overturn *Hasbun* in its entirety.

*Pintos* held that “FACTA helped to clarify the specific circumstances in which credit reporting agencies may furnish credit reports to debt collectors under 15 U.S.C. §1681b(a)(3)(A).”<sup>[3]</sup> While *Hasbun* held that “debt collection was generally a permissible purpose,”<sup>[4]</sup> the *Pintos* court held that “debt collection was not *always* a permissible purpose for obtaining credit reports.”<sup>[5]</sup> Thus, *Pintos* re-interpreted 15 U.S.C. §1681b(a)(3)(A) based on the definitions provided for in FACTA. However, the court in *Pintos* took no position on “when and how a child support enforcement

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<sup>[1]</sup> *Pintos v. Pacific Creditors Association* (9<sup>th</sup> Cir. Jan. 9, 2007, No. 04-17485, No. 04-17558) 2007 U.S. App. 22519

<sup>[2]</sup> *Saleh Hasbun v. County of Los Angeles* (2003) 323 F.3d 801

<sup>[3]</sup> *Id* at \*4

<sup>[4]</sup> *Pintos* at \*4

<sup>[5]</sup> *Pintos* at \*4

agency may lawfully obtain the consumer credit report of an individual who has fallen behind in paying court-ordered child support” as that issue was not before the *Pintos* court.<sup>[6]</sup>

### III. Statutory Analysis

#### A. Enforcement Purpose - Section 1681b(a)(4)

In the aftermath of *Miller* and *Pintos*, IV-D agencies are evaluating what, if any, affect these rulings will have on their ability to access credit reports for use in establishing and enforcing child support. While these cases may prove to limit the definition of permissible purpose for use of credit reports under §1681b(a)(3)(A), IV-D agencies continue to have access to credit reports under other provisions of the FCRA.

One such provision allowing IV-D agencies access to consumer reports is §1681b(a)(4) [subsection (a)(4)]. Pursuant to subsection (a)(4), the use of consumer reports by IV-D agencies for enforcement of past-due child support is a permissible purpose. This proposition is supported by several factors. The plain language of subsection (a)(4)(A) indicates that the statute contemplates enforcement of past-due support. Subsection (a)(4)(A) authorizes a consumer reporting bureau to furnish a consumer report for the purpose of “establishing an individual’s capacity to make child support payments or determining the appropriate level of such payments.” The wording of this section arguably is focused on determining the ability to pay an existing child support order, especially when compared to the wording of the following subsection (a)(5), which addresses the use of credit reports to set an initial or modified child support “award.”

Further support for the argument that subsection (a)(4) provides authority for an enforcement request is found in the legislative history of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). PRWORA was intended to address welfare and child support enforcement issues and added subsections (a)(4) and (a)(5), at the same time, to the FCRA. This would seem to indicate that they were intended to have different purposes. Clearly, there would be no need for both subsection (a)(4) and (a)(5) if the drafters’ intent for subsection (a)(4) was to authorize use of credit reports for establishment of child support orders only. There is strong support for the position that subsection (a)(4) authorizes IV-D agencies’ access to credit reports for use in enforcing past-due child support.

Child support enforcement agencies must take note, however, of the certification required by subsection (a)(4). Prior to requesting a credit report under subsection (a)(4), a IV-D must certify to the consumer reporting agency that:

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<sup>[6]</sup> *Pintos* at \*4 fn3

- (A) the consumer report is needed for the purpose of establishing an individual's capacity to make child support payments or determining the appropriate level of such payments;
- (B) the paternity of the consumer for the child to which the obligation relates has been established or acknowledged by the consumer in accordance with State laws under which the obligation arises (if required by those laws);
- (C) the person has provided at least 10 days' prior notice to the consumer whose report is requested, by certified or registered mail to the last known address of the consumer, that the report will be requested; and
- (D) the consumer report will be kept confidential, will be used solely for a purpose described in subparagraph (A), and will not be used in connection with any other civil, administrative, or criminal proceeding, or for any other purpose.

Although time-consuming and, in some cases costly, the certification requirements are not overly burdensome and some IV-D agencies may even satisfy one or two of the requirements as part of their existing business practices. For example, it is unlikely that a IV-D agency would try to collect past-due support if the obligor's paternity had not already been established. In addition, IV-D agencies are already required to adhere to strict confidentiality rules. On the other hand, one requirement that is likely to be a departure from current practices is the notice requirement set forth in §1681b(a)(4)(C).

Prior to requesting a consumer's credit report pursuant to subsection (a)(4)(C), a IV-D agency must provide at least 10 days' written notice to the obligor of its intention to request the credit report. The notice must be sent by certified or registered mail, for which there is a fee above that of standard postage, to the obligor's last known address. The statute does not require the IV-D agency to wait for the obligor's response, nor does it require that the IV-D agency provide proof that the obligor actually received the notice. In other contexts, courts have found that notice sent by certified mail to an individual's last known address is sufficient, even if the intended recipient did not actually receive the notice (*See, Wiley v. United States et al.*, 96-1 U.S. Tax Cas (CCH) P50,089 (1995)); the addressee ignored the notice of certified mail (*See, Rifenburg v. Liffiton Homes, Inc.*, 107 A.D.2d 1015 (NY 1985); or the certified mail was returned as undeliverable (*See, Kelcon v. Marvin*, 278 N.Y.S.2d 117 (1967)). However, these courts have held that if certified mailing is required, the sender must be able to show the act of mailing, proven by evidence of mailing practices corroborated by direct testimony or documentary evidence. (*Wheat v. Commissioner of Internal Revenue Service*, T.C.M. (CCH) 2955 (1992); *See also, Lundy v. United States*, 2007 U.S. Dist. LEXIS 14094). It is therefore imperative that IV-D agencies implement procedures to document the act of mailing the notice, such as recording the certified mail number, stamping "certified" on the envelope, and

retaining the receipt stamped by the post office with the date of mailing.<sup>[7]</sup> Once the appropriate notice is given, and as long as proper documentation of certified mailing is made, the notice requirement would appear to be satisfied.

*B. Establishment Purpose - Section 1681b(a)(5)*

In addition to subsection (a)(4), §1681b(a)(5) [subsection (a)(5)] provides a IV-D agency administering a State Plan with the authority to request a credit report for “use to set an initial or modified child support *award*.” (emphasis added). The term award indicates the setting of an amount of support due. This differs from subsection (a)(4) in that subsection (a)(4) appears to be referring to enforcement actions considering the stated permissible purpose of establishing the obligor’s capacity to make payments or the “appropriate level of such payments.” In subsection (a)(5), the purpose is focused on setting a new or modified child support order as opposed to determining the ability to pay an existing child support order.

This section clearly applies to the establishment or modification of an order for support. Subsection (a)(5) has no requirement for a notice to the consumer and also does not state any requirement that paternity be established or acknowledged prior to the request.

**IV. Additional Authority Under the FCRA to Obtain Credit Reports**

*A. Consumer Authorization - Section 1681b(a)(2)*

Section 1681b(a)(2) of the FCRA provides IV-D agencies with another alternative for obtaining credit reports. Pursuant to §1681b(a)(2), a consumer reporting agency can provide a credit report “in accordance with the written instructions of the consumer to whom it relates.” If a IV-D agency obtains an obligor’s written authorization to request a credit report, the IV-D agency is not required to provide written notice to the obligor or make any certification to the consumer reporting agency. The practice of obtaining an obligor’s signed authorization can be incorporated into a IV-D agency’s everyday business procedures, either by incorporating an authorization clause into already existing forms or creating a distinct authorization form. The authorization could be obtained any time there is contact between the obligor and the IV-D agency in anticipation of a future need to request the obligor’s credit report. The authorization should state in clear and specific terms when it expires and that revocation of the authorization by the obligor must be made in writing to the IV-D agency.

*B. Enforcement Purpose - Section 1681b(a)(3)(F)*

One additional subsection may be of significant assistance in obtaining credit reports for enforcement related activities without the necessity of the 10 day notice to

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<sup>[7]</sup> See, *Chiaradonna v. Schweiker*, 569 F.Supp. 1471 (1983) and *Eischen v. Hildebrandt, et al.*, 683 N.W.2d 813 (2004) for descriptions of sufficient documentation of certified mailing.

consumer. Specifically, §1681b(a)(3)(F) provides that a credit report may be obtained if there exists a legitimate business need for the information in connection with a business transaction that is initiated by the consumer; or, there is a legitimate business need “to review an account to determine whether the consumer continues to meet the terms of the account.” Although this section has never been applied in a child support enforcement context, the plain language appears to apply. The problems associated *Pintos* and *Miller* related to the new definitions of credit transaction supplied by FACTA do not appear to affect the application subsection (a)(3)(F).

Although this subsection has been narrowly construed in the past, it may, based on its plain language, have some applicability to child support enforcement agencies seeking credit reports. For example, child support enforcement agencies certainly have a legitimate business need to determine whether a consumer has paid other creditors instead of the child support debt in violation of the account terms (law requiring payment of child support before all other debts). If the consumer has not paid other creditors, perhaps a contempt action may not be filed; whereas if they have paid other creditors the action may be filed.

## **V. Access to Locate Information**

The last section to be considered for this discussion is 15 U.S.C. §1681f [section f]. Section f has been a part of the FCRA since before PRWORA and the FACTA amendments. Unlike subsections (a)(4) and (a)(5), it is straightforward and specific as to its purpose and scope and leaves little need for interpretation. Section “f” is intended for a governmental agency, such as a State child support enforcement agency, to request “identifying” information on a child support obligor or a presumed father.

This sections states, “[n]otwithstanding the provisions of section 1681b of this title, the consumer reporting agency may furnish identifying information respecting any consumer, limited to his name, address, former addresses, places of employment, or former places of employment, to a governmental agency.” The Office of Child Support Enforcement (OCSE) has interpreted section “f” to mean that child support agencies may use this section to obtain locate information on an obligor.<sup>[8]</sup> OCSE has further stated that section “f” may even be used “without a legally enforceable order.”<sup>[9]</sup>

Section “f” is a strong tool available to child support enforcement agencies for use in locating obligors for the purposes of establishing or enforcing a child support order. While it will not provide information on assets or income, it may provide information that will allow for contact with obligors whose whereabouts have otherwise been unknown.

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<sup>[8]</sup> OCSE IM-88-1

<sup>[9]</sup> Essentials for Attorneys in Child Support Enforcement, Chapter 5-Location of Noncustodial Parents and Their Assets. [www.acf.hhs.gov/programs/cse/pubs/2002/reports/essentials/c5.html](http://www.acf.hhs.gov/programs/cse/pubs/2002/reports/essentials/c5.html).