

VERDICT

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ARTICLE OF INTEREST

Credit Rating Damage: Compensable, Yet Often Overlooked Damage in Tort Cases



James A. Francis, Esq.

Let's assume you have a client who is out of work for close to a year because of the injuries caused by the defendant. Liability is excellent, and through settlement or trial, you obtain lost wages for the entire period of time lost from work, any compensable medical bills, and the appropriate amount for pain and suffering. You've achieved a total recovery, correct? Maybe not.

What about the fact that because your client was not working for that period of time, she was not able to fully pay her bills? She fell behind on one or more credit card or mortgage payments (delinquency defined by being 30, 60, 90, or 120 days past due); maybe the card was cancelled; maybe the debt was written off as a bad debt or total loss (one of the worst ratings on a credit report); and maybe one or more of her accounts went into collections. In any of these situations, her credit score will have dropped significantly, and in the worst situations her credit rating will have been trashed. Not just for those few months, *but for up to 7 years*. Based upon the fair credit reporting law and credit reporting industry practices, most negative credit history information (e.g. late payments, collection accounts), stays on a consumer's credit

report for 7 years. Liens and bankruptcies may stay on longer.

This reality presents an entirely distinct dimension of actual damages, which needs to be pursued, because even if you put the client back in the same job, pay her unpaid medical bills and recover past losses; you have not necessarily made her whole. Because of the tortfeasor's negligence, your client may now be "subprime". We are all too well aware of what this means. Irresponsible lending to consumers who had

poor credit ratings, or were subprime, has created a devastating effect on the economy. Subprime loans were an attractive product to sell because they were expensive. People with low credit ratings pay high amounts for credit. Your client will now likely have to overpay for any credit, loans and services, if she can use credit at all. This blight or stigma to her credit reputation resulting from the tortfeasor's negligence is an actual damage that should be entirely compensable.

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Credit Rating Damage

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These situations are real, and many lawyers never realize these claims exist. I never did. As some of you know, I was fortunate enough to begin my career at a top tier firm like the Kolsby Gordon firm. Since taking what seemed like a crazy step at the time, and starting a practice with a partner over 10 years ago, my practice has been primarily concentrated in litigating consumer protection and class action cases. The conventional wisdom holds that there would be no overlap between the issues in my cases and those facing personal injury litigators. As with much conventional wisdom, it is conventionally wrong. The purpose of this brief article is to introduce one of those areas of overlap, namely the recovery of damage relating to credit rating harm; an additional, yet not often pursued aspect of damages in personal injury cases.

A regular part of our practice involves recovering actual damages for consumers whose credit ratings or reports have been harmed due to the negligent or reckless conduct of a bank, credit reporting agency, or debt collector. But such damage can be just as easily caused by any number of third party tortfeasors, including the negligent driver or careless medical provider who rendered your client incapable of returning to work for a period of time, and thus unable to pay her bills.

No two cases are the same, and every client's situation will be different. Some will walk into your office with a well-earned, terrible credit rating independent of any

injury caused to them. But there will be those whose excellent credit ratings are truly destroyed because of any injury that was no fault of their own. For the latter group, any recovery that does not include redress for *that* injury cannot really be considered a success, can it?

Credit rating damage is often multi-faceted. In addition to the pure financial impact caused by paying higher interest rates or insurance premiums, your client lives with damage to her reputation, as she now appears financially irresponsible to the lending world. The fact that her brief period of financial difficulty was the result of an unavoidable injury will be invisible to the future creditors and lenders who review her credit reports. To make matters worse, especially in an environment in which credit card companies and other lenders are routinely reducing or closing credit lines upon the slightest decrease in a consumer's credit score, your client may be left completely unable to use or obtain credit, and deprived of the ability to obtain the most basic services or perform the most routine consumer transactions, such as renting an apartment or hotel room (can you think of a hotel that does not require a credit card?) or opening a bank account. In these situations, your client has been essentially rendered financially paralyzed; deprived of access to the free marketplace. Finally, your client may suffer significant emotional and mental distress due to the loss of her otherwise good name. Such emotional or psychological injury is distinct from that

accompanying the injury itself.

While perhaps not often sought in personal injury cases, recovery for the varying types of harm that emanate from a damaged credit rating is well-recognized in other areas of the law, which permit the recovery of actual damages. The Fair Credit Reporting Act, 15 U.S.C. §1681 *et seq.* and caselaw surrounding it is one such area, but it is by no means alone. The U.S. Supreme Court has recognized that the concept of actual damages or actual injury embraces a far broader scope of harm than just direct pecuniary loss. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (actual injury in defamation case was not limited to out-of-pocket loss, and included loss of reputation in the community, personal humiliation and mental anguish and suffering; see also *Carey v. Phipps*, 435 U.S. 247 (1978) (actual injury includes a variety of psychological harms as well as pecuniary loss).

Your client should be entitled to recover pecuniary losses stemming from any denials of credit or lost credit opportunities, and such amounts can be significant. See *Bach v. First Union Nat'l Bank*, No. 04-3899, 2005 WL 2009272 (6th Cir. 2005) (affirming jury award of \$400,000 in compensatory damages for lost credit and mortgage opportunities and damage to plaintiff's reputation for creditworthiness, but remanding of punitive damages award of \$2,628,600); see also *Philbin v. Trans Union Corp.*, 101 F.3d 957 (3d. Cir. 1996) (credit denial letters sufficient proof of actual damages to defeat

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UGH . . . My Deep Pocket Has Filed for Bankruptcy*Continued from page 8*

57, (1998) (holding that Section 523(a)(6) exception did not apply medical malpractice judgment).

¹² 11 U.S.C. § 523(a)(9).

¹³ *In re Wagner*, 2007 U.S. Dist. LEXIS 22769 (E.D. Pa. 2007).

¹⁴ 11 U.S.C. § 547(b).

¹⁵ 11 U.S.C. § 547(b)(4).

¹⁶ For example, the plaintiff may

ask the defendant to represent and warrant that: (a) it possesses sufficient funds to make payment of the settlement amount; (b) it is not insolvent within the meaning of 11 U.S.C. § 547(b)(3); and (c) it will not be rendered insolvent as a result of making payment of the settlement

amount.

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summary judgment). In cases involving credit denials or lost credit opportunities, pecuniary injury may, for example, be established through proof of payment of elevated interest rates, and/or excessive points or other fees that your client had to pay due to her lowered credit rating.

It not necessary, however, that your client actually be denied credit or lose out on a specific credit opportunity in order to recover for credit rating damage. See *Cushman v. Trans Union Corp.*, 115 F.3d 220 (3d. Cir. 1997); *Guimond v. Trans Union Credit Information Company*, 45 F.3d 1329 (9th Cir. 1995). Even without pecuniary or out-of-pocket loss, your client may recover actual damages for the mere injury to her reputation or creditworthiness caused by the delinquencies appearing on her credit report. *Boris v. Choicepoint Servs., Inc.*, 249 F.Supp.2d 851 (W.D. Ky. 2003) (\$100,000 in actual damages based in part on damage to plaintiff's reputation); *Dalton v. Capital Assoc.*, 257 F.3d 409, 418019 (4th Cir. 2001); *White v. Imperial Adjustment Corp.*, 2002 WL 1809084 (E.D. La. 2002) (damages for injury to

reputation and creditworthiness are available even without proof of pecuniary damages).

Your client may also recover actual damages in the form of emotional and mental distress and humiliation because of having a negative credit rating and the accompanying stigma, even if she has no pecuniary harm. See *Cushman, supra*. The term "actual damages" has been interpreted to include recovery for emotional distress and humiliation. *Johnson v. Department of Treasury, I.R.S.*, 700 F.2d 971 (5th Cir. 1983).

These injuries are not just legally compensable, they often significant. Given that we live in a world where credit reports are relied upon more heavily than ever in connection with employment decisions, mortgage and credit applications, and insurance underwriting (think of all those GEICO ads), juries from around the country have not hesitated to award significant sums to consumers based exclusively upon damage to their credit reputation and the ensuing emotional distress. See e.g. *Jorgeson v. TRW, Inc.*, C.A. No. 96-286 (D. Or. 1998) (\$600,000 for compen-

satory damages for emotional distress); *Valentine v. Equifax Information Services LLC, et al.* U.S. District Court (Or.) Case No. 05-CV-0801-JO (\$200,000 for emotional distress damages only); *Zotta v. Nations Credit*, (E.D. Missouri 2003) (\$87,500 for emotional distress only); *Johnson v. MBNA* (D. Virginia 2002) (jury award of \$90,300 emotional distress).

Fairly recently, our firm obtained an \$800,000.00 jury verdict (since remanded) in the Eastern District of Pennsylvania in a credit reporting case where the damages were based entirely on non-economic damages, including damage to our client's credit reputation, her significant emotional distress and humiliation. See *Cortez v. Trans Union, LLC*, Civil No. 05-5684 (E.D. Pa., April 26, 2007). Clearly, damages in these cases can be very real. It just proves that it sometimes pays to ignore the conventional wisdom.

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