

*FCRA Focus*

**Episode 1. FCRA Litigation: A Look Ahead for 2022**

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[ANNOUNCER]

Welcome to Troutman Pepper's podcast, FCRA Focus. This podcast series is designed to educate, inform and hopefully entertain you as well on all things related to the Fair Credit Reporting Act. To stay abreast of these issues and to make sure you don't miss an episode, please subscribe via iTunes, Stitcher, Google Play or wherever you download your podcasts. And now, your host, Dave Gettings.

[DAVE GETTINGS]

Welcome to FCRA Focus. I'm Dave Gettings, an attorney in the Consumer Financial Services practice at Troutman Pepper. FCRA Focus is one of the few, if not only podcasts dedicated to discussing the Fair Credit Reporting Act. If you're listening to this podcast, my guess is that you're involved in the industry somehow, either working for a furnisher, wholesaler, consumer reporting agency, end user, or maybe you're outside counsel for all four. Or maybe you're just a plaintiff's counsel who wants to learn a little bit more about how defendants think, or don't think, at times. Or maybe you're none of those. Maybe you just really like credit reporting. That's fine too. This is a judgment-free podcast. Regardless, we appreciate you listening. Our goal for each episode is to cover an interesting topic in credit reporting so that by the time the episode's over, you've learned something new, thought about an issue in a different way, or maybe just gained some insight that can help you do your job better. We'll have speakers from the industry, lawyers from both sides and many guests in between. And we'll also keep the podcast relatively short so our listeners can digest them while walking the dog, commuting to work, for those that still commute, or waiting for the next Zoom call to begin. And with that in mind, I'd like to introduce our first guest, Joe Rogan. No, that's a little FCRA Focus humor. Our virtually non-existent budget is not big enough for Joe Rogan, and I'm not sure Joe knows anything about credit reporting. And even if he does, we don't know Joe and wouldn't be able to get him on the show. Instead, I'm joined today by my fellow partner at Troutman Pepper, David Anthony. David is a nationally recognized litigator who represents consumer financial service companies across the U.S. One of his main focuses is class actions under the Fair Credit Reporting Act. David has served as lead counsel in more than 100 class actions and more than 1,500 individual cases across the country with a specific focus on the FCRA. David also has the amazing and really renown ability to turn most conversations into a sports analogy. So don't be surprised when talking about credit reporting if David starts talking about how defendants need to play zone defense or how something somewhere is like hitting a 2-0 fastball. And with that, David, welcome and thanks for taking the time today.

[DAVID ANTHONY]

Thanks, Dave. Thanks for that kind introduction and my brain is whirling with sports analogies.

[DAVE GETTINGS]

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Any off the bat right now? No pun intended, actually, pun totally intended.

[DAVID ANTHONY]

I'm trying to figure out how to weave in Tom Brady's retirement, so stay tuned.

[DAVE GETTINGS]

Well, David, first rule about podcasting, is you just dated us, because Tom Brady announced his retirement today, but this podcast will probably not drop until later in February, so it will give you time to think.

[DAVID ANTHONY]

I'll keep working.

[DAVE GETTINGS]

Alright. So, David, what we're going to talk about today on the inaugural podcast is where we see FCRA litigation going in 2022. As we're getting ready to record the podcast, I saw a stat that in 2021 FDCPA filings were down 4%, TCPA filings were down 48%, not unsurprising, but FCRA filings were up 3-1/2% year over year. Does that match what you've seen in your own practice?

[DAVID ANTHONY]

It does. I think that the FCRA filings have been largely steady and increasing. FDCPA has been similarly fairly steady. There's been some decline as I think there has been some filtering out of the Supreme Court's decision in the *Ramirez* case on standing and particularly FDCPA space. At the TCPA there had been some spike in some of those cases, both the Supreme Court's ruling and the *Facebook/Duguid* case, they have fallen generally. The 48% figure doesn't surprise me and I think a lot of courts as well as plaintiff's counsel are re-evaluating the kinds of TCPA claims that they were bringing.

[DAVE GETTINGS]

That makes sense, it's what I've seen in my practice too. You know, you mentioned *Ramirez* briefly and there was a lot of talk about *Ramirez* in 2021 and how it potentially impacted the standing requirements for consumer protection cases. Do you see *Ramirez* having a big impact on FCRA litigation in 2022? You know, maybe one option would be more cases brought in state court, but outside of that, do you see a big impact?

[DAVID ANTHONY]

I see an impact. You know, I don't think it's a silver bullet by any stretch of the imagination. In the FCRA space there was a lot of fall-out over the *Spokeo* decision several years ago. You know, the *Ramirez* case was a natural follow-up to the *Spokeo* case and a lot of the, what I would say, were the bottom of the barrel claims where there was not expected to be a claim under the FCRA, a lot of the courts sort of filtered those out. I think the pleadings have gotten more refined on the plaintiff's side. Frankly the ruling from the Supreme Court in the *Ramirez* case didn't surprise me. I do think there's probably two observations that to me are important. The first one is, we have yet another refinement of the pleadings strategy by the

plaintiffs who now are armed with *Ramirez* which was an FCRA case to include in their allegations and their complaint as well as the claims they bring. The second one to me is a very interesting one which is what's the impact of *Ramirez* and *Spokeo* across a class. Some courts have ruled on this and there were certainly some references in the Supreme Court's decision in *Ramirez*, but I am seeing courts grapple with some of the lessons and what does this mean at the FCRA level. I would sort of call it a *Spokeo/Ramirez* 2.0 kind of analysis as opposed to very basic issues like whether the plaintiff has standing to bring this to claim under the FCRA for "x" claim.

[DAVE GETTINGS]

Where I see *Ramirez* shaking out in 2022 it is not necessarily where the case is, because we're always going to try to remove to federal court, but more on class cert, frankly. And, you know I've seen a couple court decisions at this point saying *Ramirez* does create a really interesting challenge on class cert to predominance and commonality and I think that body of law is only going to continue to grow in 2022. I certainly plan to use it as much as possible.

[DAVID ANTHONY]

I would agree and add, one of the things that has vexed plaintiff's counsel in the context of class cases is when and how and to what extent do they allege that the named plaintiff in the class has suffered some type of injury. And the more specificity that a plaintiff's counsel gives to show that the named plaintiff has suffered an injury, and in fact, a cognizable injury under Article 3 of the U.S. Constitution, the greater risk that that creates that the damages to the named plaintiff may or may not be the same as the supposed class that the plaintiff seeks to represent. You know, we refer that as an individualized inquiry and it's a really fine line for a plaintiff's counsel to walk to allege enough to satisfy Article 3, but not to create individualized issues that would destroy a class.

[DAVE GETTINGS]

I really fully expected some sort of pun about injured reserved or disabled list in that answer and I think you're falling down on your game, David, that you didn't make a sports analogy there. So, let's work on it.

[DAVID ANTHONY]

You know, I was trying to have my Barry White voice and have at it, but, you know, I'll work on sports analogy.

[DAVE GETTINGS]

Alright, so moving past *Ramirez* a little bit, what do you see as the landscape for state credit reporting claims in 2022? I know right now, for example, I'm dealing with a couple California mini-FCRA claims and something I've noticed is difficult for companies is that they often try to organize their compliance requirements around a national standard driven largely by the FCRA. The unfortunate thing is that a bunch of these state mini-FCRAs don't necessarily always agree with the FCRA, are often more onerous and really become a trap for the unwary for clients if they're trying to have a national compliance program, but then have to customize it per state. Do you think that's fertile battleground for 2022?

[DAVID ANTHONY]

I do, I do think we will see greater state law compliance issues. I do think that more state legislators are looking at the requirements under the Fair Credit Reporting Act through the lens of social justice whether that be insurance or rental properties or jobs or credit, housing, all of those kinds of things, and so there has been an increase in proposed bills that would specify that certain kinds of debts, whether that be for domestic violence or for medical debt, or you know, fill in the blank, may or may not reported. Nearly every state that I've seen seems to have somebody proposing something along those lines, and at the same time there has been litigation challenging some of those requirements by industry folks as well as some of the trade associations such as the CDIA and PBSA who do a great job of trying to make sure that the system is as uniform as possible. But I agree with you that it will be more of a problem in 2022 than it was in 2021 and if I had to predict, 2023 will be the same. I do think that I'm not sure that the fallout has reached the level of litigation. You know if you think about, say a California-specific statute or a Maine-specific statute that by itself would limit the class and a lot of the plaintiff's counsel are interested in getting a national class and being in Federal Court, and so you know, the folks that I regularly deal with on the plaintiff's side, I don't see them running to file a bunch of state law claims, but there are state law claims more so than there've been in the past, and I think we'll see more of them.

[DAVE GETTINGS]

I think that's right. You know something you mentioned was social justice and its interaction with credit reporting. Social justice is obviously a hot topic nationwide for the last few years. Sort of related to that topic, a type of claim I know we've seen recently from a couple really good plaintiff's counsel are claims related to Social Security number verification products. You know, not a perfect segue with social justice, but Social Security number verification deals with citizenship, deals with employability. Have you seen some of those cases where consumer reporting agencies are offering Social Security number verification products and they're being challenged on whether, in fact, those are reasonable procedures when they're employing those?

[DAVID ANTHONY]

I have, and I think, to me, this is a natural extension. You know, there has been a rise in verification products, whether that be for identification or to prevent fraud, and when and how those get done, there have been more claims with that at the same time I am of the belief and am very impressed with the plaintiff's bar, they are very coordinated and I don't believe that the bringing of these cases is anything random, it's part of a plan and we're seeing some of the key industry folks bring those claims, and so, I certainly think those are cases to watch.

[DAVE GETTINGS]

You hit that out of the park. Total home run, David. Good answer. I'm doing a better job at the sports analogies.

[DAVID ANTHONY]

If you could see me, I'd be spiking the ball and I would be doing a dance with my best pose faking a picture of myself, but keep going.

[DAVE GETTINGS]

Alright. No problem with keep going. So, a few more items I want to talk about, just for the benefit of people maybe listening. You know something I think we're going to continue to see in 2022 is using the FCRA to do a collateral attack on the underlying credit. Talk a little bit about whether you think that's going to happen, feel free to disagree, and how those claims typically look.

[DAVID ANTHONY]

I think they will continue, and to make sure that everybody on the phone and the podcast, we're talking the same language. You know, a collateral attack doesn't say whether the credit reporting was right or was wrong, but contests the legality of the loan or the document on the underlying purpose. So for instance, if you would assume that a loan was procured by fraud by say a car dealer, the credit reporting might be accurate but the loan itself was procured by fraud and what we've seen over the past probably 3-5 years is as opposed to simply contesting the debt itself, they have taken a full-scale attack at the CRA who is reporting that and attempting to litigate the viability or legality of that debt at the federal court level. I've seen that in the auto finance base, I've seen that in the credit card space, say for an identity theft on a credit card. I've seen it in the tribal lending space where the argument is that these loans are illegal and so, hence, credit reporting on a loan that is supposedly legal violates the Fair Credit Reporting Act. There have been a decent number of decisions that have said that's not the role of the FCRA or of this court and you're asking the court to essentially play a super CRA to decide who's right and wrong in this, but from a standpoint of providing closure to a consumer, it's not a surprise to me that we have seen and will see more and more collateral attacks.

[DAVE GETTINGS]

I think that's a good point. One other area, I think, as I've seen grown the past year, and I think it's probably going to grow in 2022 as well is disputes related to fraud, whether that's identity theft or fraudulent charges on accounts. I've seen that a lot on the furnisher side where they've got to put pretty significant resources into fraud investigations and it's tough to get those right. And if you get them wrong, which plaintiff's counsel always thinks it's deciding it wasn't fraud, those tend to be really, really tricky FCRA cases and can be really, really expensive too, both from a settlement perspective and from a litigation perspective. I know you do a lot of work on the CRA side, have you also seen a lot of fraud cases and you think those are going to keep growing?

[DAVID ANTHONY]

Yeah, I do. Probably for the last 10 years there have been more and more identify theft cases and, using a sports analogy, it would be sort of like recognizing a blitz, right. It may be a blitz, it may be a fake blitz, then to the offense, or in this situation, the furnisher or the CRA, try to figure out whether someone is the victim of identity theft is extremely difficult to do. At the same time there are fraudsters in this space who will say they're a victim of identity theft when, in fact, they are not a victim of identity theft, and if you look at the distinctions between the Fair Credit Reporting Act and the FDICPA, how you would validate or investigate a dispute under FDICPA may be different than it would be under the FCRA. And so, questions begin to arise like who has the burden, and the damages tend to be more exacerbated because it's a hassle to have had your identity genuinely stolen and to get that fixed. The identity theft

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crimes have gotten more and more sophisticated. There've been data breaches, there've been all kinds of phishing scams that we all have seen, and so trying to fix that after that occurs can be challenging for everybody, but if you think about the FCRA case, it's been my experience that the plaintiff's counsel will value a good identity theft FCRA case at substantially higher than a run-of-the-mill statutory damage individual FCRA case.

[DAVE GETTINGS]

I've had the same experience as well. I think with that, David, it's a good point to wrap it up. I really appreciate your time. I appreciate you talking about what you see coming in 2022 and I hope and expect to have you as a guest on the podcast in the coming months as interesting cases come out and credit reporting developments happen throughout the year.

[DAVID ANTHONY]

Appreciate the opportunity and glad to share these thoughts, and keep on fighting.

[DAVE GETTINGS]

Thanks, David.

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