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**FCRA FOCUS PODCAST: CFPB'S INVOLVEMENT IN TENANT SCREENING****HOST: DAVE GETTINGS****GUESTS: RON RAETHER****POSTED: JANUARY 5, 2023****Darron Franta:**

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 podcast. And now your host, Dave Gettings.

**Dave Gettings:**

Hey everyone and welcome to another edition of *FCRA Focus*, the podcast that focuses on all things fair credit reporting. Today we're going to be talking with Ron Raether about a topic he loves, the Consumer Financial Protection Bureau and its supervision of the tenant screening industry. Ron has promised today that he will only say nice things about the CFPB.

Now a brief introduction, Ron is a partner at Troutman Pepper who leads Troutman's Privacy and Cyber team. He's also been living the Fair Credit Reporting Act and state analogs for over 20 years with a particular focus on consumer reporting agencies and companies involved in public records.

Ron is so experienced in the FCRA that he's one of those people who refers to the provisions by their original section number in the legislation rather than the U.S. code. Every time I talk to Ron, I have to look up the provision he's discussing, because I have no idea what 603(p) or 603(a) is without looking at the U.S. code. Ron's also an avid scuba diver and soccer fan, so this episode will probably not feature as many baseball references as usual. Ron, welcome to the show. We appreciate you being here.

**Ron Raether:**

Dave, it's wonderful to be here.

**Dave Gettings:**

So, Ron, tell us a little bit about your background. I gave you a brief intro, but just give the audience a sense of your work related to the FCRA and tenant screening.

**Ron Raether:**

Dave, I don't know if I would call my intro brief. You covered a lot of what there is to really say about me. To put it in summary, I've been fortunate to deal with what I would consider a lot of technology cutting edge issues. Those started with the collection and use of public records before most folks had thought about that as a business concept and dealing with the privacy and legal issues relative to that.

I was fortunate enough to have opportunities to deal with the use of information in a variety of settings that implicated numerous different privacy statutes. As we all should recognize, the Fair

Credit Reporting Act is a privacy statute. It's based on the Fair Information Practice Principles. I've taken a lot of the technology knowledge (understanding how to take data from one source and data from another source), combine them and try to find correlations (what we now call matching in the FCRA space), and apply that technology experience and knowledge to advocate on behalf of companies that frankly are misunderstood consumer reporting agencies and our tenant screening clients.

**Dave Gettings:**

Before we jump into the CFPB piece specifically, from a little bit more of a macro perspective, what do you view as some of the most significant issues facing tenant screening companies today? Whether they're legal issues, whether they're regulatory issues.

**Ron Raether:**

Dave, the issues that are being confronted by the industry today are continued from things that we've identified in the past. You said I wasn't going to use baseball analogies and I will use one here. It's sort of like the catcher in a game. Nobody really notices the catcher until the catcher makes a mistake, misses a pitch and it goes by them. I think that's definitely true for tenant screening companies, especially in the tenant space.

Nobody really pays attention to our clients until something goes wrong. They don't notice the fact that 99% of the time they're catching the ball. They're preventing the sex offender from moving in next to our daughters, our moms, and our grandmothers. They're preventing the individual who doesn't pay their bill. We all know that individuals that don't pay their rent are likely also the same individuals that don't take their trash out, that don't treat the common areas in a way that is conducive to how everyone in that community wants to live.

So, I think the biggest issue that continues for our clients is public perception. We've not done a great job of being able to educate our legislatures or the public. I don't know frankly with the current CFPB leadership if we could ever do anything to cause them to take a different viewpoint. But if I think about all of the things that are going on, the difficulties that are being faced by our clients, it seems to be backing its way into that root challenge: being misunderstood.

**Dave Gettings:**

Do you think the public perception issue is actually the root issue of a lot of the symptoms we see manifesting? So increased federal and state regulatory scrutiny, increased lawsuits, increased — I'd say maybe — hostility from the bench. You think they're all the root cause of public perception?

**Ron Raether:**

It's easy to attack tenant screening companies. There's not a lot of goodwill. There's not a lot of support out there. So take, for example, the politics and — whether we want to admit this or not — the reality is the CFPB and what happens in D.C. is all motivated by politics. So, I think it's very easy for whether it's Senator Brown or if it's CFPB or it's others in D.C. to villainize tenant screening companies. There are not many constituents that are going to come back to

them and say, why are you picking on tenant screening companies? That has a slow-down consequence I think in terms of how judges and others begin to perceive the industry as well.

The activity of plaintiff's attorneys we all know is motivated by the fee provision in the FCRA. That's given I think growth to an entire plaintiff's bar, that absent that, provision in the FCRA never probably would've existed. That being said, there is an opportunity and a continued opportunity, and frankly, you know Dave, when we try these cases in front of juries, that's part of what we do. We educate the jury. We educate the judge on having a more balanced and realistic and honest view of what's happening in this ecosystem.

**Dave Gettings:**

Yeah, that's interesting. So, talking about the CFPB specifically, in November 2022, the CFPB issued a report entitled *Tenant Background Checks Market Report*. The report described the tenant screening industry as the CFPB sees it and described market challenges as the CFPB called them regarding longstanding issues that have the potential to create or reinforce market distortions and harms for landlords and renters. That was the formal discussion, but the summary of the report is the CFPB highlighted what it perceives as issues that need to be corrected by tenant screeners.

We've seen the CFPB increasingly active in putting out these types of reports, whether it be on problems in tenant screening or whether it be on matching. What do you think the CFPB's primary motivation is in putting out these reports?

**Ron Raether:**

Dave, I have been litigating screening cases since 2006. I think my first tenant screening case was in maybe 2008 or 2009. I've also been litigating public record issues. In other words, the use of public records in the context of consumer reports, in that same timeframe. I give that background because what I read in the CFPB white paper are the precise arguments and theories that plaintiff's counsel have been putting forth during that entire period of time.

In fact, if I pick on one in particular, this issue about expunge records, that's something that frankly is questionable with respect to eviction records. By that, I mean judgments that are obtained in court in order to remove an individual who is staying beyond what they're legally permitted to do at an apartment or collecting on a past due rent that person failed to pay before they vacated the premises. Those cases we've been seeing pop up from plaintiff's council long before the CFPB dropped this into what was released this year.

My point being, that if you look at state laws with respect to expungement of unlawful detainer judgments or eviction judgment, there aren't many states that have that. Frankly, they are certainly not the equivalent of what you would see on the criminal record side in terms of courts and how expunge records are treated. So, my question then is, "How did that become a focus point?" Such an obscure issue in the CFPB's white paper. I think the question answers itself.

**Dave Gettings:**

The sense I have seen, and tell me if you think it's different, I think the CFPB's goals are threefold when they put out these reports. One, to put pressure on consumer reporting agencies to modify processes in the way the CFPB sees fit; to potentially put public pressure on

lawmakers to focus on consumer reporting agencies; then also, probably third and most important, to try to create standards that courts will adopt when looking at litigation.

It's sort of a self-licking ice cream cone. You've got consumer advocacy groups that work with the CFPB, and we've seen this through FOIA requests in order to have the CFPB put out standards or reports that the consumer advocacy groups will then use as the standard when litigating these same issues. Have you seen that before?

**Ron Raether:**

I would disagree a little bit, because-

**Dave Gettings:**

On my own podcast, Ron.

**Ron Raether:**

Yeah, but Dave, the purposes that you just outlined assume that the industry isn't doing its best, isn't trying to work as hard as it can to achieve accuracy to respond to consumer disputes. It seems to ignore the actual economics of what happens with tenant screening companies, and frankly, the rental market itself. So, I would not agree that the CFPB's goal is necessarily putting pressure to exact change, because I'm not sure that pressure is needed.

Secondly, I'm not sure lawmakers are necessarily going to make any amendments to the FCRA, and I haven't seen even discussion of bills being introduced to do so. I know that there have been some murmurs of trying to extend the 613. So, in other words, in your terms, Dave, the 1681k obligations. For those listening to the podcast that aren't this nerdy on FCRA issues, I'm talking about the requirements that apply in employment screening context when public records are in use. You see that attempt to try to extend those obligations sprinkled within the CFPB's white paper we're discussing.

But my question there, Dave, is we know that there are similar requirements under ICRAA, the California version of the FCRA that do things like require production of the consumer report considered by the property management company or the property owner to the consumer. I'm not seeing any real need or consideration or even analysis of how the ICRAA in its application has improved or affected either accuracy or dispute in consumer experiences in dispute.

But let me end this long dialogue coming back to the basic economics. If we look at accuracy and we look at what tenant screening companies are charged to do, they're being asked to help the property make a decision as to whether to allow somebody into this community — both for safety reasons, as well as for communal peace, right? We don't want people moving in that are not going to take their trash out or that are going to create problems with rodents or roaches.

The properties want 100% occupancy. There is a loss for them anytime that they have a unit empty. The incentive of the property is to get those units filled with qualified people as quickly as possible. So, if you look at those basic economics, everyone's interest in this ecosystem is to put people in units — qualified people. There is a natural economic force that is driving towards pushing tenant screening companies to do everything they can possibly do to get the information accurate.

What the CFPB report does and what I think regulators and sometimes even others, and by that, I mean courts, what they fail to look at are really the underlying root causes of inaccuracies. They're putting the blame, for example, on consumer reporting agencies, or frankly, inadequacies of the courts themselves being able to either have good data in their court records. Or more recently, Dave, we know that in trying to mask courts inability to have accurate found data in their court records, they've simply cut off consumer reporting agencies and the public from being able to get access to that information.

**Dave Gettings:**

Yeah, we've seen that a lot in recent cases. That's actually a really good segue to the next section of the report, which talked about matching and over-inclusiveness. One of the things I noticed was the CFPB's report suggested that many tenant screening companies appear to err on the side of over-including criminal records and over-including eviction records. Has that been your experience in the screening industry?

In my experience, at least, which overlaps with some of yours certainly, our clients are really, really striving to not be over-inclusive, because over-inclusiveness leads to cost. Just like you said, it's contrary to the goal of trying to get people in units. What's been your take on whether clients typically err on the side of over-inclusiveness?

**Ron Raether:**

I disagree. I think that if you went back 20 years, that statement would've had more truth to it, but the industry has matured to a great deal on technology. In other words, the proper use of technology in order to remove some subjectiveness in the process, the use of technology to enhance the experience of both the customers. Which we have to remember, the FCRA is not one-sided. It's not "do everything you can for the consumers." It doesn't really matter what the market effects would happen. It's meant to actually achieve the right equilibrium and balance between the two competing concerns.

But I would say with respect to accuracy, there's actually unison, not really divisiveness. It's just this mischaracterization that the industry is somehow taking profit, overdoing everything that it can possibly do or reasonably do to assure accuracy. That's where we get back to the economics.

For example, the CFPB has this whole section on where they're talking about the price of a consumer report and whether that's being included in the application or not. I have questions about the accuracy based on my experience of the numbers included in the CFPB report. But even putting data aside for a moment, if we look at those numbers and we say, "Well, the industry should be doing everything that it could possibly do," that's going to require a certain cost. How are those costs realized? In other words, we know that in the end of the day, those costs are going to be borne by the applicants — the same people the CFPB is arguing they're trying to protect.

But let's go back, Dave, from that context and talk about the catcher analogy again. The vast majority — 99 or so percent of individuals — that are coming through the door are having a positive experience. They're not going to the CFPB and saying, "What a wonderful job tenant screening has done," but they're moving into their apartments and they're moving into communities that meet their needs.

So, if I then pivot to what is the industry doing and what can they do, they're implementing and using technology. Again, Dave, I think the limitations, I'll say it again, are not necessarily in terms of what are within the power of the CRAs. The technology will continue to improve. We'll use AI and ML, I think, to see some great advancements in matching, but matching can only be as good as the underlying data that's available.

So, if the courts continue, for example, to not have good data hygiene, not have good data practices, or not be able to assure that they're providing timely updates to the court records, I'm not sure how the blame can be laid to the feet of the consumer reporting agency if those underlying issues aren't fixed.

**Dave Gettings:**

Yeah, I think that's a good point. On matching, we've seen clients use some pretty creative solutions to try to mitigate some of the lack of personal identifiers in public records. We've seen a lot of AI in terms of trying to design matching algorithms. We've seen a lot of technology in terms of trying to deal with common names and trying to maybe marry up identifiers from multiple different records to get a full picture. So, it does seem like the industry is really trying to do the best job it can when, to your point, Ron, some of the courts and some of the legislatures are limiting the amount of information available on public records.

Continuing on AI a little bit and just on technology. In the CFPB's report, it suggests that eviction records and criminal records may not be good indicators of potentially bad tenant outcomes. What have you seen in your experience that may help clients and just give some clients ideas? What have you seen that tenant screening companies are doing to try to fine-tune some of the predictive ability of consumer reports and of the records they report?

**Ron Raether:**

So, it's actually a very interesting question, Dave, because I think it depends on an underlying assumption made by the CFPB that I don't necessarily agree with, which is "Let's limit the use of information without any statistical or utter support to suggest that it isn't influential or isn't meaningful." I think common sense begins to prevail a little bit with respect to that question.

Maybe not in New York. Maybe not in Philadelphia, where there has been some history of landlord abuse. For example, trying to move individuals out because there is rent control in those units. But I think outside of the coast, we have that issue somewhat in Los Angeles as well. But if you talk about the vast majority of the United States, a landlord is not going to go through the effort of filing an eviction action. In other words, spending money on a lawyer to write papers and file something unless they have a tenant that's being a problem for them. Not paying their rent, not taking out their trash, being a disruptor within the residential community.

I think the fact that a landlord has had to go through the effort and time to simply file a complaint is informative. If I were a property owner — if I rented out, for example, my house — I would certainly want to, at least, have that as a knowledge point for me making a decision as to who I'm going to allow into my community and who I'm going to allow into my house.

In terms of what can be done by the industry with regard to predictive analytics, that's where technology, I think, Dave, is going to provide some very useful data points as the industry continues to defend what I think is a commonsense approach to the relevance of this information. So, with AI, by AI I mean artificial intelligence. ML is machine learning. As we

begin to feed into our processes, both what was in a consumer report, when a consumer was allowed to occupy a unit, their experiences during the time that they occupied that unit, how they exited the unit.

As we begin to collect those data points and draw correlations, we'll begin to know better what is the connection between, for example, an eviction judgment and whether somebody's going to pay their rent or not, or they're otherwise going to be a problematic tenant.

**Dave Gettings:**

Yeah, that makes a lot of sense, and it's something we've seen in the last few years continue to grow and continue to grow in sophistication, I would say. Ron, I know in your practice you deal a lot with regulators on both the federal and state level. This is the prediction section of the podcast. What do you see potentially as regulator areas of focus over the next two, three, four, five years with respect to tenant screening companies?

**Ron Raether:**

The biggest one will continue to be assertions of disparate impact. You see that somewhat in the CFPB paper that we've been discussing here today, Dave. The suggestion that somehow the system and the data have, whether an intended or unintended, impermissible impact on minorities. I think that will continue to be a high focus of both state regulators, as well as federal regulators.

I know that folks — like our partner, Chris Willis — have been instrumental in working with our clients and getting them prepared for scrutiny on those issues. In other words, doing sampling or doing other analyses that creates the foundation for us to demonstrate that in fact the decisioning algorithms, these predictive coding/predictive analytics are not in practice resulting in disparate impact. I think that will continue.

The other big issue to me, Dave, will be one we've talked about as well, which is access to information, and whether access, for example, to court records and public records, whether that will further a discussion about these accuracy issues and matching issues. Quite frankly, I — in the back of my mind — see at least the CFPB trying to push for major changes in the FCRA and consumer reporting agency environment that will continue to build on what we've seen so far.

**Dave Gettings:**

What have you seen in terms of level of sophistication of regulators? As the years go on, are they getting better at going under the hood, so to speak, and looking at algorithms and looking at scoring models to try to really dig in and understand how they work and try to find potential issues?

**Ron Raether:**

I would say today, no. What I do see is the regulators realizing that they have a knowledge gap and need to begin to develop those skills and pull together data in order to either make their case. That's my opinion. Or, I guess if you take a more objective balance opinion, so they can better understand the market and the ecosystems to provide regulatory support and guidance.

For example, I mentioned earlier that CFPB has taken not just in this tenant screening paper, but in others, positions with respect to disparate impact. I've yet to see any statistical support

for those assertions. If you go back and look at the language in this tenant screening white paper, they actually use very conditional language when they say there is a disparate impact. So, I think as a consequence, they're going to have to start analyzing this data and looking into these issues with more consideration if they want to have any weight behind the statements that they're making.

**Dave Gettings:**

So last question, Ron, and most important, because it's going to see how well this podcast ages: who is your pick for the World Cup?

**Ron Raether:**

Oh, Brazil, no doubt.

**Dave Gettings:**

All right, we will see if you turn out to be correct. Ron, we really appreciate your time on the podcast today. Really appreciate you discussing your expertise and thank you very much for all the work you do.

**Ron Raether:**

Thanks, Dave, for putting together this excellent podcast.

**Dave Gettings:**

I'd like to thank everyone for listening to *FCRA Focus*, the podcast that focuses on all things credit reporting. Please do not forget to head over to Troutman's blog, [consumerfinancialserviceslawmonitor.com](http://consumerfinancialserviceslawmonitor.com) for much more great content discussing credit reporting, debt collection, and all things in between.

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