
FCRA Focus: 2022 Year in Review and Look Ahead Crossover with *The Consumer Finance Podcast***HOSTS: DAVE GETTINGS AND CHRIS WILLIS****GUESTS: CINDY HANSON AND DAVID ANTHONY****POSTED: FEBRUARY 17, 2023****Dave Gettings:**

Hey everybody, I'm Dave Gettings, an attorney in the Consumer Financial Services Practice at Troutman Pepper. And welcome to another edition of *FCRA Focus*, the podcast that focuses on all things credit reporting. But today's an exciting episode because it's a crossover episode — the first in the history of *FCRA Focus* — and we're crossing over with Troutman's other podcast on consumer financial services issues, *The Consumer Finance Podcast*. With me is Chris Willis, the host, who will introduce himself.

Chris Willis:

Thanks, Dave. And I'm really happy that we're doing this crossover episode. Thanks for doing this together with me. As Dave said, I'm Chris Willis, I'm a member of our Consumer Financial Services Regulatory Group and today the episode that we have in store for you is an FCRA year in review and look ahead with several of our expert partners on the Fair Credit Reporting Act. But before we jump in today's episode, let me remind you to visit and subscribe to our blog, [ConsumerFinancialServicesLawMonitor.com](https://www.consumerserviceslawmonitor.com), where you'll see daily updates about everything going on in the consumer finance world. And check out our other podcasts. In addition to [FCRA Focus](#) and [The Consumer Finance Podcast](#), we also have [The Crypto Exchange](#), which is about all things crypto and our privacy and data security podcasts called [Unauthorized Access](#). And all our podcasts are available on all popular podcast platforms. And if you like our podcast, let us know. Leave us a review on your podcast platform of choice and let us know how we're doing.

Dave Gettings:

Chris, you can tell you do a weekly podcast instead of my monthly because you are like four times as polished as I am on that intro. I appreciate that. Let us introduce our guests today. First is Cindy Hanson, who's like me, a North Easterner transplant to the south. I also learned today that she doesn't like saying FCRA, so I'm going to try and say FCRA every chance I have on this podcast today. Cindy, can you introduce yourself?

Cindy Hanson:

Hi, Dave and Chris. I'm real happy to be here. I'm Cindy Hanson. I've been doing FCRA litigation for the last 25-plus years and, once again, 2022 was a momentous year in the case law and the developments in this area. Looking forward to talking to you about them today.

Dave Gettings:

Thanks, Cindy. And then we've got David Anthony returning to the podcast. He was one of the ... Actually, I think the inaugural guest of the *FCRA Focus* podcast. He got us started on using

sports analogies whenever possible on that podcast. David, can you just give the 15 second elevator speech that I'm sure you've practiced about yourself?

David Anthony:

Hey everybody, I'm David Anthony. I'm a partner in the Richmond office of Troutman. I've been doing FCRA litigation for almost 30 years and glad to be here today for both of y'all.

Dave Gettings:

Thanks, David. Thanks, Cindy. Appreciate it. Cindy, we'll bring the first FCRA question to you. In terms of your review, we've talked to some of our clients about some issues they've seen in 2022. One of the biggest issues I've seen, and the clients have seen is settlements in individual cases seeming to go up. Every time I talk to a client that hasn't settled a case in a few years, they've said, "Well, we usually settle this case for five grand. Why is so much more now?" Is that something you've seen in your practice, and can you give a sense of what you attribute it to?

Cindy Hanson:

Dave, I've definitely seen it in my practice. Cases that, I mean, when I started doing this, were going unbelievably for about a thousand dollars, then went up to five or 10. Even settlements that \$20,000 are unusual. I mean, we're definitely seeing settlements north of that and that is becoming more regular. I don't know, I think it's attributable to a couple of things. One, I just think it's the numbers have gone up. Plaintiff's counsel have become unwilling to accept lower numbers. They're generally hearing that clients are willing to spend more in settlement and, so therefore, they're demanding higher numbers and they're sticking to those numbers early in the cases where you used to be able to negotiate down at the beginning of the case, let's say before discovery, even pre-answer. Now, I find more and more counsel are sticking at those higher numbers and that's where the case ultimately, whether it settles then or later, they're settling at those numbers and higher. Do I think the cases are getting better? Not necessarily. I just think that has become the market value for these cases and plaintiff's counsel know that.

Dave Gettings:

Yeah, we've actually seen some clients in 2022 be more willing to make offers of judgment because of that very issue and trying to do anything they can to exert leverage in order to drive down those settlements. And I think a trend in 2023 will probably be earlier and maybe even higher offers of judgment to see whether we can gain any traction in terms of pushing down settlements. Because I think it's a trend clients are obviously very interested in trying to reverse.

Cindy Hanson:

I see more and more offers of judgment that are not just a number, but there are a specific number to the plaintiff and then attorney's fees up until that point in time as negotiated or as decided by the court. They're trying to capture the offer judgment so that it can be useful should the case proceed all the way to trial and the defendant is able to beat it.

David Anthony:

I'll just add, I echo all those comments. I think there's a couple of perhaps sub-trends in there. One is the very good cases and the plaintiff's counsel for instance, identity theft cases, the value of those cases and demands have gone up. I would say that the typical, what I would call a marginal case that would've settled for something, the price has gone up for that probably more dramatically than I think it's worth, but that's what seems to be the norm. And then even the nuisance cases, there was more instances where they would take just nothing or they'd go away or they had a bad case. They seemed to be drawn a line in the sand and even wanted to be paid for those kinds of cases. All in all, they've gone up. I think a lot of it does depend upon what courts you're in, who the plaintiff's counsel are, but trending it is exceeding the pace of inflation right now.

Chris Willis:

Let me get in on the questioning too, if you guys don't mind. And David, since you talked last, I'll just direct this one to Cindy, too. I felt like when the pandemic hit and the CARES Act was passed, we thought there was going to be kind of an explosion of COVID-related credit reporting cases, but we haven't really seen that. Do you think that's still in the offing or is that something that's just not going to materialize?

Cindy Hanson:

I think we could still see it. I still think there's a lot of furnishers suppressing a lot of accounts and so I don't think we've fully come out of it. The other thing I would say is there's really a lag between when furnishers change how they're reporting and when the suits start happening. I mean, there can be as much as a year lag, consumers will start to dispute. I think plaintiff's attorneys have to see more than just one or two consumers come in with it. I think it could still happen. I think we're just potentially in a holding pattern waiting for enough critical mass to form before you see those happening.

David Anthony:

Yeah, I echo that with a slightly different answer. I think there certainly is the lag. I think the timing just is not quite there yet. There continues to be suppression, but I live in Richmond, there was an article in the paper here locally last week that said there's basically a backlog of some huge number of evictions that are on the horizon because the local Legal Aid Society was coming in to help out. I think the machinery for say evictions and foreclosure hasn't completely gotten back on track and so I think until you start to see more evictions and more foreclosures and that gets back to normal, I think the FCRA litigation will probably lag that a little bit. I do think it's going to happen just because I think that there is credit reporting in this space and they will continue to be credit for in this space and it will be dicey to transition to post-COVID reporting in that space. I suspect there will be ambiguity, confusion, problems, and litigation.

Dave Gettings:

Talking about forbearance, I think another thing we may start seeing too is an explosion of cases related to student loans because we've seen much like COVID-19 forbearances, you've got student loans that are in deferral or forbearance and that will end at some point and then

COVID-19 forbearances, you'll have a little bit of lag, but it wouldn't surprise me if end of 2023 we start seeing more student loan credit reporting cases because I think it's the next wave. Do y'all think we'll see those coming?

Cindy Hanson:

I would agree. I think anytime you have a situation where a whole bunch of the furnishers have had to change the way they're going to report and then there's now going to be a change back, you have the potential for some kind of a glitch, for some kind of a mistake for some even a difference of opinion between the furnisher and the plaintiff's party as to what should happen. I tend to think those cases are coming.

David Anthony:

Yeah, I do too. I think it's just such a large dollar value that you know you're going to have that. I will say that it's my impression that the plaintiff's bar is far more geared up naturally to deal with mortgage credit issues, debt collection credit issues than student loan credit issues. We just generally see less student loan cases than we see other loan cases, but that's maybe just a matter of time until that catches up.

Chris Willis:

Let's shift to the next topic that really seemed to start to play out over 2022 and David, I'm going to come to you first with this one. It's the issue between factual and legal FCRA disputes. That's an issue that you've seen plaintiffs try to assert that legal disputes over their obligation constitute a valid dispute under the FCRA. A lot of courts have rejected that, but then you've seen the CFPB come in and file amicus brief saying basically legal disputes should be perfectly actionable under the FCRA. What do you think is going to happen in 2023 with this legal versus factual issue?

David Anthony:

I think the trend line will be to see more of these issues. I've noticed a trend of this over the last probably three to five years where there's been more of these than used to be the case. There's been more instances where the plaintiff's counsel will want to go up and down the chain and go to the original creditor for the underlying credit transaction as well as the CRA, as well as a debt collector and anybody and everybody. I do think there is a distinction between the party who originated the credit transaction and the factual illegal circumstances surrounding that versus a CRC receiving information and being asked to adjudicate as between the plaintiff and the furnisher as who's right legally and whether or not there was fraud on the showroom floor by the auto finance company. CRA's never going to be able to determine that.

We've seen claims along those lines. I think the case law has been pretty consistent to making those cases tough for the plaintiff's counsel to go outside the provider. As it relates to going after companies like the debt collectors and things like that, I do think that these kinds of transactions suit them. There also can be indemnification agreements and stuff like that that tend to muck it up. I think going in the other direction makes a lot more sense. I've seen those cases be knocked down drag outs over it. I've seen some judges who have no interest in them, particularly where the CFPB is perhaps taking sides in this. I suspect that's only going to

increase that. I think this dovetails with the conversation we had from the very beginning, which is the value of cases, how they're coming on an increasing in settlement value.

I think genuinely a lot of plaintiff's counsel are not sure whether they can bring these claims or not. But you know what? Let's try. And I'll bring the case and worst-case scenario, maybe I enter into a settlement agreement where you agree to delete the trade line. I think it's another tool in the arsenal and it's the plaintiff's counsel trying to end run the normal process because I think they think that they can get there faster. I suspect we will have more and more of those. I don't think it'll be dominant, but I think we'll have more than we had in 2022.

Dave Gettings:

Another follow up on the CFPB and this is unscripted. The worst thing in podcast is to go unscripted, right? And maybe this is a question for Chris Willis, too. Because I know he really has thoughts about the CFPB or as Cindy would call it, the "CFPB" because we know she likes sounding out the words. What is the CFPB's endgame? We've seen them get really active in terms of amicus briefs, in terms of advisory opinions, in terms of issuing other guidance. Do you think the goal of the organization, at least in this regard is to change the perception of the law so that, all of a sudden, you've got the potential for willfulness findings because companies are violating CFPB guidance? Do you think it's just to guide judges and hopefully judges move a little bit more towards the CFPB's perspective? Do you think it's a concerted strategy or do you think the CFPB is just wanting to get its name out there? I mean, what do you think is behind the activism we've seen from the CFPB?

Chris Willis:

Can I just choose all of the above is my answer?

Dave Gettings:

Yes.

Chris Willis:

Because I think that's actually what it is. And one of the things that's remarkable about today's CFPB as a distinction from the way that it's been in the past is that the bureau is very actively trying to increase the enforcement prospects of state regulators. And I think the amicus and other programs that you're talking about are designed to foster and encourage that as well as to make private litigants more successful in making FCRA claims, and to raise the agency's profile along the way. I believe that is the basic thrust of what the bureau's doing, but there's no question that the bureau isn't merely focusing on its own enforcement efforts or its own interpretations of the law when it's doing supervisory exams, but it's out there actively trying to influence courts to side with it through amicus briefs, et cetera, and actively trying to encourage state regulators to bring claims under the FCRA, which of course they have the authority to do.

Cindy Hanson:

I think the most interesting thing about the CFPB and this particular issue about legal disputes is they really have not had much success so far. In 2022 we saw several circuit court opinions siding with the defendants on this issue that illegal dispute is different from a factual dispute.

The CFPB's participation in amicus, at least on this issue, doesn't seem to be swaying the appellate courts.

David Anthony:

And I would echo both comments. From my perspective, Chairman Chopra has been pretty obvious in saying, "I don't like rulemaking and I'm going to go ahead and go out there." And I think there are consequences for that because I do think getting to Cindy's point, the sort of just expressions out of left field when you haven't gone through a process and heard from both sides personally, I think looks partisan. It looks not well thought out, it doesn't look democratic and it looks like you are making a law.

And I think that courts have an issue with that, and this isn't the only agency like that, but we're seeing this in other agencies as well. They can't help themselves but to continue to carve out new territory. And I predict that given the Supreme Court, we're going to continue to see shaving back of these assertions of what the law is or what it should be without going through some processes being beyond their scope. I understand the reasons why it's something that our clients are having to deal with, but I personally think that the CFPB is overplaying its hand in terms of the long-term strategy.

Dave Gettings:

Yeah, we'll see how it turns out and always got to keep coming back to the willfulness analysis of, "Is it authoritative guidance?" And I think our clients certainly have a good argument that advisory opinions are not necessarily authoritative guidance in terms of the willfulness analysis. One question we talked about every year at least since *Ramirez* has and its predecessors is standing. How did y'all see standing playing out in FCRA cases in 2022 and how big a feature in defense strategy do you think it'll be in 2023

Cindy Hanson:

Standing remains an issue that you think about in every case. I think the courts are still trying to find the edges of standing. What is concrete harm? What is enough to say in a pleading? I do think it is part of the strategy in every case. One interesting thing that I think it's going to cause to happen is I think it might result in the development of standing law in state courts because some of these FCRA cases, it's clear at this point there is no standing. There's enough case law that there would not be federal standing.

These cases are being filed in state court and remaining in state court and now state courts who, particularly in states that typically have a very broad, greater than article three jurisprudence on standing, they're trying to find their own edge of standing. A recent decision in California, which actually held that the plaintiff in an FCRA case had no standing, that decision was a little bit surprising because everybody assumed that there really was no edge in California. As long as you could plead a violation of the statute, nothing more was required. I think one of the interesting things might be that you start to see the development of case law upstanding in state court that had probably been undeveloped up until this point in time.

David Anthony:

From my observation, standing is in every case. I think the sort of low hanging fruit standing issues where a plaintiff's counsel would simply plead, there's a violation, therefore I win. Particularly where you have the case law seems to be developing where there's no particular harm. Those cases seem to be lessening. We still have some folks that will pop up who seem to have ignored the 20 cases on a certain issue and they file something anyway. I do think that we're seeing more careful language and complaints where the plaintiff's counsel are trying to plead that. I also think that courts are looking at this — the courts who are not crazy about these cases are using this as an easy way out. I think the judges who like these claims, it's something else that they have to wrestle with. I think that the biggest issue that I see in standing deals in the class context and the courts really have not finalized all the issues relating to that.

For instance, does each class member have to have standing? And if so, how do you establish that? If you're going to award some kind of class settlement, how can you ensure that someone that doesn't have standing doesn't get a check? There's still some dicey issues that go along with that. Courts are not all on the same page about that. But I would simplistically say, if you look at *Spokeo*, which is I think six years ago and now *Ramirez*, we now are facing year six, year seven of more thoughtful standing analysis and I think we'll continue to see that over the next couple of years as the issues and sub-issues become a little bit more refined. It's a potent issue in the consumer finance space and it's one that I know as well as on the mind of every plaintiff's counsel to make sure that they don't get a case booted because they don't have standing.

Dave Gettings:

Yeah, it's a good point, David. And Cindy, your point about state law I think is pretty interesting. We're actually testing that in New York right now. In New York State Court, we had a plaintiff bringing in FDCPA, I know I'm saying it on the *FCRA Podcast*, I mean, the "*FCRA*" *Podcast*, we had a plaintiff bring an FDCPA claim, he removed it. The plaintiff then moved to remand saying the plaintiff has not suffered any injury. In fact, they're only alleging a statutory claim with no injury. At which point the Federal Court remanded it, which is sort of remarkable on its own right when it's a federal claim, and now we've moved to dismiss in New York State Court. We said, "What are we doing here? This plaintiff has said they've absolutely suffered no injury." And we're waiting to see a decision. I'm optimistic, at least I should say hopeful, that you'll start seeing some increased standing jurisprudence in state court saying even though we might not have Article III requirements because it's not the U.S. Constitution, you shouldn't be bringing cases where there's literally no injury whatsoever except the technical violation of a statute.

David Anthony:

Just as a reminder to everybody that each state constitution is not exactly mirroring Article III, and a lot of folks think that they get out of Federal Court and somehow the case goes away and that may or may not be the case. Being in state court may not be the silver bullet that goes along with that. There's some plaintiff's counsel that are very adept at being in state court and others don't want to be there for anything in the world.

Dave Gettings:

Yeah, totally agree. Chris, I think we're going to wrap up with one question for you. You didn't realize you'd be getting questions on your own crossover podcast. Sort of circling back to the CFPB and its increasingly active role, the CFPB recently issued some guidance on preemption and the CFPB's narrow view of preemption under the FCRA, I frankly found some of the issues to be a little bit like a Dr. Seuss book. It's a little bit of a tongue twister when you try to figure out what they think is preempted and what's not. What are your thoughts on the CFPB's view?

Chris Willis:

Well, sure, a couple things. First off, you have the bureau taking this very narrow view of preemption, which is consistent with what we were talking about earlier, that the bureau is trying to promote other law enforcement and other laws related to credit reporting. The bureau wants to give carte blanche to state legislatures, for example, to pass credit reporting legislation that the bureau has blessed in advance as saying is it preempted? First, it's just sort of reflective of the idea that I think the bureau understands, or the current leadership of the bureau understands that there's a significant opportunity for the bureau's philosophy about enforcement and preemption and things like that to swing back and forth between administrations. They're trying to put something in that will be more permanent at the state level. And I think the other aspect of it, at least my view of it, is the bureau's taken a really aggressive position here and every time it does that, it's risking courts disagreeing with it because the preemption provision in the FCRA is quite a bit different than the preemption provision in most other federal consumer protection statutes, which are quite limited.

The FCRA one is more expansive, and I think it's very possible for courts to disagree with the bureau's position on this, particularly when we're in an era now where the Supreme Court seems to be signaling less deference to administrative agencies and their interpretations of statutes. I'd love to hear though what Cindy and David think about this from a litigation standpoint because surely, they're going to run into it.

David Anthony:

Yeah, I'll talk a little bit about it. We've been involved in some litigation up in the First Circuit assisting the Trade Association writing amicus brief, where courts are wrestling with this. There sort of is the simplicity of the preemption argument, which is you either are going to have a national system or you're not. And if you have a national system except you've got a state system, that's not exactly a national system. I personally think that preemption analysis tends to be in the eye of the beholder and philosophically some folks are in favor of expanding the rights under the Fair Credit Reporting Act and are not looking to find a conflict, I think. There also is a 60,000-foot view talking about the case that we were involved in that if the state of Maine says that you can't report medical debt and says that you can't report debt that was generated as a byproduct of domestic violence, and 50 states have their own iteration of all that, it's hard to say that's not going to gut the current system, which I frankly think is one of the goals of the CFPB.

The second issue is I'm a believer that there's always a yang for the ying, right? If there is complexity here in the state court system, that will impact underwriting criteria and the banks aren't going to just lose money by giving credit to folks based upon essentially removing all of the things that can be considered, that's not how it's going to work. I'm not sure how that is going to play out, but it will play out. And I think that, again, I echo Chris's points 100%. The CFPB is being aggressive here. There was no call out to the industry to provide your comments on this. It's really a call to arms to the state legislatures, which again is offensive to me. That's not what a federal regulator should be doing, but that's what this one's doing.

Cindy Hanson:

And I also agree that this call will go out to plaintiff's counsel. I think, generally, the plaintiff's bar has shied away from claims if they thought there was a legitimate preemption argument because I don't think they wanted to fight that fight. I'm seeing more claims where they're willing to push claims that I think in the past they would have just assumed were preempted and now they're with the CFPB's backing saying, "Let's go try one of these out."

Dave Gettings:

It's kind of remarkable. It's like a self-licking ice cream cone because we've done FOIA request before in response to CFPB advisory opinions and guidance, and what you'll see sometimes is plaintiff's counsel pushing the CFPB to issue advisory opinions and guidance, and then the plaintiff's bar using that guidance to then advanced litigation strategy. It really is the self-licking ice cream cone of consumer protection, so to speak.

Chris Willis:

Yeah, I love that analogy, by the way. And I think the other thing too is I think the bureau's leadership understands that the prospects for substantive changes to the Fair Credit Reporting Act in Congress are basically zero for the time being, and so the only place you're going to see a change in legislation would be at the state level in states like California or New York or places like that. They're trying to facilitate that by opinions like this. Let me just close out the episode by thanking Dave for you co-hosting this crossover episode and allowing us to put it on *The Consumer Finance Podcast*, and of course, also thanking Cindy and David for being our expert guests on today's podcast as well.

And of course, let me thank all our audience for listening to today's episode. Don't forget to visit our blog, ConsumerFinancialServicesLawMonitor.com, and hit that subscribe button so that you can see all of our daily updates about the world of consumer finance. And while you're at it, head on over to Troutman.com and add yourself to our Consumer Financial Services email list so that you can get alerts that we send out and notices of our industry only webinars. And of course, stay tuned for future episodes of both [FCRA Focus](#) and [The Consumer Finance Podcast](#). Thank you all for listening.

Dave Gettings:

And I'll just sign off by saying thank you for listening to *FCRA Focus*, as Cindy likes to call it. If you liked listening to David talking about year review, I direct you over to the firm's website and the CFS page specifically under [Related Insights](#). You can listen to David's year in review

webinar, which will be similar to today, just he'll be talking with slides, so it's even more exciting. Thanks very much for listening.

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