
FCRA Focus: Innovative Jury Strategies and the Power of Preparation

Guest: Jason Manning

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Dave Gettings:

Hey, everyone. Welcome to another edition of *FCRA Focus*, the podcast that discusses all things credit reporting.

Today, we're going to take a little bit of a different turn. Although the focus on the podcast is typically the FCRA, we tend to dabble from time to time in other areas of consumer litigation that our FCRA clients may find interesting. Today, we're going to give some recent practice pointers for trying a consumer case in front of a jury.

To help do that, I've invited Jason Manning to the podcast. He is one of my partners at Troutman who just got back from a week-long jury trial in a consumer case in Maryland. Jason and the team got a complete win, which the client was pretty pumped up about, and I understand the reward for that win was Jason then buying the client dinner, which we're always happy to do.

Some cool things about Jason because he is not only one of my best Troutman friends, he is one of my best life friends, Jason had a dog named Judge, who he named Judge just so he could tell the dog what to do and feel good about himself. For those who know Jason, he has recently upped his wardrobe game because his wife told him he needed to buy nicer clothes.

Jason, hopefully, I didn't embarrass you too much in the intro to this podcast. Without further ado, can you please introduce yourself?

Jason Manning:

Longtime listener, first-time caller, Dave. Happy to be here. I am Jason Manning, and Dave is accurate. I had a dog named Judge, and he still didn't listen to me. I've tried to up the wardrobe, but I'm still not a cool dad, according to my daughters. You can hope for the best.

Dave Gettings:

All right, Jason. We will dive right into the podcast. Talk a little bit about your jury win from – I guess it was last week. We're going to do our best to describe no names and no numbers, so we don't have any conflict issues in the podcast. Real high level, what was the case about? If you can at least create some sort of segue to credit reporting so that it belongs on this podcast, that would be helpful.

Jason Manning:

Yes, very good. Very high level, it was a week-long federal jury trial, consumer plaintiffs, and a financial institution defendant. It really had to do with primarily state and federal claims related to loss mitigation. What made the case a little tricky was consumer was a military veteran and was challenging the client's VA loan program. Although it wasn't a realistically big-dollar case, under \$500,000, it was potential negative press because of the nature of the parties and the program. I was pleased that the client was still willing to go forward and even more pleased with the result.

Dave Gettings:

We're just going to skip over all pre-trial and just have a basic intro question of how did the case get to trial. In other words, most cases settle. Most of our clients like to settle, unless they're pushed to not settle. Is that what happened here? Again, no numbers.

Jason Manning:

Yes, yes. Good question. I think I may have already violated your rule. But the motion for summary judgment, we won probably 80% of it. The remaining claims went forward. They're highly factual consumer claims. The legal standard was essentially anything that tends to mislead the least sophisticated consumer. If you know loan servicing, you know there's a lot of potential fact disputes.

That remaining claim had to go to a jury. The demand remained unchanged, despite the 80% victory on summary judgment, which made it, frankly, an easy call to go forward because the other side was being unreasonable. The only connection to the Fair Credit Reporting Act is that plaintiff did have a bunch of alleged credit reporting, credit harm, credit denial damages, which he was really hanging a lot of his actual harm on. There's also a component of emotional distress.

The court during the pre-trial granted our motion in limine on that issue. So the FCRA relevance is we used it as a sword, and we basically said, look, you can't bring state claims for credit harm without a FCRA claim. The court agreed. Congress had occupied the entire field. You don't get to even talk about it, none of it.

Dave Gettings:

All right. Well, that satisfies the segue. One of the goals on this podcast is to help our clients, frankly, whether it's summary judgment, whether it's case analysis, whether it's a jury trial. I thought it'd be good to just talk about some of your takeaways, now that they're fresh. I know you've had a chance to think about it before our podcast. What was your biggest takeaway from the jury trial, and how can it help our clients?

Jason Manning:

Yes. I've done a bunch of trials. Every trial is different. The facts and the law you know, like the back of your hand going into it. The wild card ends up being things like how's the witness going to present, what kind of jury do I get, and what's the judge like when presiding over the trial. Those can vary greatly. The pre-trial conference is really your best indicator of how the judge is going to handle the trial. Then, obviously, the voir dire is when you're going to get your look at the pool.

What was interesting about the jury selection is it almost took half a day because the nature of some of the issues in the case. You've got allegations of debt collection. Americans got debt, right? Everybody's got experiences with debt collectors. You've also got very strong opinions about military and police. We were in a large city, and those varied widely. The judge and the parties actually struck seven jurors for cause, which is the most I've had in any recent trial. Then, of course, there were a number excused for conflicts and then the six peremptory, three each side.

Dave Gettings:

Did the judge do the voir dire questioning, or did the lawyers do the questioning?

Jason Manning:

Yes, good question. In this situation, we had prepared and the judge basically compiled a compromised position of questions. Then he actually asked the juror first in the form of a written questionnaire. If they answered yes, they were brought in to be further questioned by the parties in front of the judge individually. For example, do you have any connection to the military or police, which was the plaintiff's circumstance in this case. Then we would be able to ask questions about that further. Once that juror was removed, then we could either move to strike for cause or notate that we may have a peremptory.

Dave Gettings:

My favorite jury selection story, because I'm going to sprinkle this podcast with fun trial stories, is we were trying a case. This was probably six years ago. We're doing the voir dire, and one of the jurors gets up in the questioning and says, "Your honor, I have a question. I own an adult store in town, and a bunch of the jurors on this panel are my clients. Is that a potential problem?" Everyone kind of laughed and looked around. The judge said no, and she actually turned out to be the foreman. You never know the type of jury you're going to get and what's going to happen.

Jason Manning:

How about that? Yes. Actually, that's another interesting point. The judge was the one who selected the foreperson in this jury trial, which is the first time I've seen that happen. Oftentimes, it comes naturally out of the jury themselves. This time, we had two jurors who had significant

prior jury experience. One of which had been on three juries, and so the judge actually nominated her. I think that was wise because she's got a lot of experience.

Dave Gettings:

Did you have any takeaways as to how to help figure out what matters to the jury? I know one of your grand takeaways was what matters to the jury is so important. How did you manage that? Any practice pointers for the clients?

Jason Manning:

Yes. I guess the biggest takeaway for me is it really comes down to who do the jurors like, and who do they believe? There's a lot of nuances that lawyers like to argue about and fight about, but those are the big-picture takeaways. That was confirmed in this case by the judge who actually interviewed the jurors after the verdict. Now, he did this privately in the jury room, but then he recounted a summary of that to the parties and their counsel. That, again, was just confirmed that, ultimately, they just didn't believe the plaintiff, and it was a credibility issue.

The biggest takeaway for me is the witness presentation. As you know, I mean, obviously, you're going to prep your corporate representative multiple times. The thing that stood out to me is we were anticipating our rep would be called adverse because of the nature of the case. There's a lot to cover that only our side could cover, so we had kind of doubled down on the prep. It really went exactly as planned. He was called adverse. He was on for a day and a half. The vast majority of the case came out through our witness.

Dave Gettings:

Was your witness deposed prior to the case, prior to the trial?

Jason Manning:

Yes, he was and consistently testified according to that. There was one attempt to impeach him based on the deposition, which was ineffective because it just didn't go as planned for the plaintiff's attorney.

Dave Gettings:

Yes. Do you think your witness was super believable, just because he or she had that aura about him or the delivery was genuine, the facts were good? I mean, what do you think stood out?

Jason Manning:

Yes. He had been in the industry not just as a corporate rep but actually worked in the industry for 15 years. I know it varies by client, but some have designated corporate witnesses, and others draw from a particular department. This representative is currently a designated corporate witness, but he had served in different divisions of different companies at different

times in the last 15 years. Not only was he drawing on his experience preparing for this case, but he was drawing on personal knowledge and was able to testify very credibly for that reason.

Dave Gettings:

Did the plaintiff's counsel try to suggest that he was just a corporate designee witness and that was his job?

Jason Manning:

Yes. He said, well, you just go around testifying in trials, right? Well, no. I actually do the examination, evaluation, and analysis of root-cause issues. I have a lot of experience before I entered this role, serving in other capacities and in the division of loss mitigation as a processor. It went really well.

Dave Gettings:

Okay. Anything else about the jury before we move on?

Jason Manning:

Yes. One key takeaway from the jury at the end was what turned out to be a pivotal time in the case was during the cross-examination of the plaintiff and his wife, there were a couple clean admissions that went against their case. But I think the more damaging was when we confronted them with specific evidence, and it was bad evidence for the plaintiff, they wouldn't own it. They gave kind of wishy-washy answers, dodged it. That was one of the things that the judge shared with us about credibility. That I know as attorneys, we always want the clean admission, right? Sometimes, presenting the question and seeing how the witness is unable to answer it simply, credibly, quickly, is enough for the jury to say, "I'm just not buying this story."

Dave Gettings:

Yes. I guess a related takeaway there, and I don't know if you had any of these in your case, but if we've got bad facts on our side, own them and ensure credibility by owning them.

Jason Manning:

Yes. There was a key issue in this case that had to do with whether certain documents were forwarded on by our client to the VA or not. We just took it head-on, and we said their case is based on the theory that this document made the difference. We're going to hear testimony about that. Then at the conclusion, we're going to talk about it. I couldn't really get into it on opening, but I previewed it right from the beginning. Then at closing, I was able to explain how the testimony and the evidence matched up with that penultimate question and why the plaintiff's theory of the case wasn't credible.

Dave Gettings:

You're the first person to ever say penultimate on the podcast, so I want you to know that. We've done a lot of recordings. After this call, I'm going to go look that up.

Jason Manning:

That's fortuitous, Dave.

Dave Gettings:

All right. Okay. Moving on, next takeaway, I know we talked pregame about what defenses worked as a takeaway. What were your thoughts on that?

Jason Manning:

Yes. I'll start by saying what didn't work. We had a set-off defense, which was really designed to get in testimony and evidence about the non-payment of this mortgage over a long period of time, and that was not permitted because of a standing issue. Different entities have different roles, and so we weren't able. But, the one that did stick was failure to mitigate damages, and it got us to the same place, which was we're able to bring in all the evidence of what occurred after the alleged allegations in the case to demonstrate that the plaintiff had not mitigated his damages. As you'd expect, there's a dispute over well, I tried to pay, you didn't take my payments you rejected my payments, et cetera, which all was anticipated and very fun on cross because that's where you really get to dig into, okay, well, let's talk about that.

Dave Gettings:

Do you think the failure to mitigate damages, again, just goes back to the likability and the equity? Ultimately, as a legal issue, do you think the jury cared that much about failure to mitigate versus what this guy should have done? What would have been the right, quote unquote, "thing" to do?

Jason Manning:

Yes, very much the latter. It was, in essence, enabling us to say, look, this just isn't fair. What we're here about is a claim under a statute that plaintiff believes entitles him to money. But look how he's managed his money, and we went through bank records, for example. One of plaintiff's theories as I could have afforded this modification, if only you had given it to me. We were able to go through the bank records and say, well look, you're spending more than you're taking in each month, and that's without paying your mortgage."

We just kind of let that - you can't go that next step because then you get the denial and an explanation - you just kind of leave it, and then you wrap it up in the closing. Ultimately, it was equity, right? The jury just didn't think it was fair to award this person more money when they hadn't been paying on their contractual obligation.

Dave Gettings:

That is actually a reasonable analog to trying FCRA cases and credit reporting cases because so often we have really technical claims. For example, what does it matter if this trade line was inaccurately reported as charged off if you also have 10 other delinquencies on your credit report? It's always a nerve-wracking experience about whether the jury will say, "You're right. It doesn't matter at all. It's not a big deal." Or whether the jury will say, "Yes, but you had a duty to conduct a reasonable investigation. You didn't, and we're going to hammer you for punitive damages." It's really just tough to predict how it's going to come out in any given case.

Jason Manning:

I think that goes right into your question about do you take it head-on. I think the answer is yes. I mean, you point out, okay, this is what we did or didn't do. Now, let's talk about why that matters where it doesn't because, otherwise, I think the jury's left questioning whether or not you're being straight with them. So we just took that issue of this supporting documentation that wasn't sent. I mean, it just wasn't. The issue was it didn't matter. It was not relevant to the VA's decision. As a result, I think the jury appreciated that.

Dave Gettings:

Yes, it's a good point. All right. Moving on from what defenses worked, what would you do differently?

Jason Manning:

One is just a practice pointer. The plaintiff's wife was not a party, nor was she a knowledgeable party, so we chose not to depose her. In hindsight, that gave me quite a bit of trepidation taking it to trial with her as a witness because I wasn't sure how she was going to present. I wish we had done that, if only because it would have made my job easier. It didn't make a difference this time because we knew enough based on the phone call recordings, the notes, and the correspondence about what type of witness you would present as.

The second thing is it was actually just a fortunate circumstance. The very first day of the trial had a delayed start, and that was just because of snow, unanticipated. We had that little bit of extra prep in person with the corporate representative in the mindset of trial to practice potential questions, how he's going to answer certain issues. In hindsight, I would strongly recommend an in-person day just prior to the trial with your corporate representative because it went so well. I feel like that was a big part of why.

Dave Gettings:

Yes. Trying to do it just like it's going to be the day of trial, right?

Jason Manning:

Yes, exactly. You got your game face on. It's not just Zoom. It's not just phone. You're actually in person, and you're practicing as if it's the live deal.

Dave Gettings:

Yes. Is that your only what would you've done differently, or are there more?

Jason Manning:

No. Those are just the two. Jury instructions took another about half a day to fight through, just because we were trying to get one-word changes, things like instead of just reliance, reasonable reliance. Instead of just tends to mislead, knew or should have known, tends to mislead. None of that really is anything that I would have done differently. I just wish we had one more of it. In hindsight, it didn't matter because the jury just wasn't buying the plaintiff's testimony. But the legal standards are tough and very important.

Dave Gettings:

Was this a court where the jury brought the instructions back with them? Often, the judge just reads them, and they don't get to bring them back.

Jason Manning:

That's right. They were not permitted to bring them back, but the judge did hand out a copy to each of the jurors while he was reading them into the record. I thought that was helpful. I saw the jurors flipping through the handbook of instructions, while the judge was going through it. I mean, it's long. I mean, it took a solid 15 - 20 minutes just to get through the instructions. I think the jurors having something to flip through, which is purely the judge's preference, enabled them to be more engaged.

Dave Gettings:

Yes. Yes, that makes sense. Well, we're getting close to the end, so any last-minute overarching practice pointers for our clients? Or do you think we've exhausted all of it?

Jason Manning:

There was a couple of problematic call recordings. Call recordings are very important. Some can be really good. Some could be really bad.

Dave Gettings:

Well, especially in this day and age with media, people are used to seeing videos. They want to see recordings, absolutely.

Jason Manning:

Yes. Having call recordings evaluated very early in the case. In this case, we knew what they were. We had transcribed them very early in the case. For example, when we were doing that final prep with the witness, we played the ones that we knew were problematic, and he heard them again. They were fresh in his mind, and he practiced responding to mock questions. That was very helpful.

The second thing was the actual presentation of evidence. Our side did it all electronically from an iPad, and that was one of the things that the jury really appreciated. It allowed us to call out and highlight things. Each juror had a monitor. So, it was very easy for the jury to follow along with our presentation of exhibits. I would strongly recommend using that.

Dave Gettings:

Now, going along with that, what about demonstratives? Did you have anything that you found particularly effective, especially with – you've been there at trial. It can get boring after a while, especially listening to deposition designations, if that ever happens. Did you have any demonstratives that you thought were effective?

Jason Manning:

I mean, we only had two demonstratives that were like big blow-up poster boards to break up some of the monotony of just, I mean, frankly, some of the long-winded recitation of facts or deposition. One of the things that I always tried to do is before I got up to talk is just to say in kind of like a more casual way like, "Anybody need a break," which isn't within my right to say, right? But just kind of break up that formality. It's up for the judge to decide, and the judge is like, "No, Mr. Manning. You can go ahead." I was like, "Okay, great. I'll be quick." So that I can like, "Everybody, wake up. Something important is about to happen." I did see jurors lean forward, and I did keep my promise. I kept my closing about half of the other side's.

Dave Gettings:

Nice. Takeaways, make yourself likable, make the witness likable, make the witness believable, and try to keep people's interest.

Jason Manning:

Every case that goes to draw has something that's problematic. Take it head-on, don't bury the lead, and just be prepared for it.

Dave Gettings:

All right. Well, we are out of time today, but thank you to our listeners for again listening to another edition of *FCRA Focus*. Don't forget to read more about all things credit reporting and other consumer litigation at our blog, ConsumerFinancialServicesLawMonitor.com, and please make sure to subscribe to this podcast wherever you get your podcasts. Have a great day.

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