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A Practical Approach to Defending Fair Credit Reporting Act Class Actions in Federal Court

By Timothy St. George and David Anthony

Over the past decade, civil litigation under the Fair Credit Reporting Act (FCRA) has surged, and putative class actions brought under the FCRA are increasing in frequency. The FCRA is a complex, highly technical statute that allows recovery of statutory damages, actual damages, punitive damages, and attorney's fees and has resulted in significant jury verdicts. For these reasons, the FCRA has become a favorite vehicle for putative class actions and often threatens outsized liability even when a plaintiff's chance of success on the merits is slim. The class certification battle is therefore the decisive point of the litigation in many cases.

However, the technical aspects of the FCRA that make it such an attractive vehicle for class actions also provide a basis for defendants to contend that no class should be certified, using an increasing number of judicially accepted defenses. This article explains some of those defenses, which provide a starting point for any assessment of the prospects of defeating certification in an FCRA class action.

An Overview of the Fair Credit Reporting Act

According to the Federal Trade Commission in its report, *40 Years of Experience with the Fair Credit Reporting Act, an FTC Staff Report with Summary Interpretations* (July 2011), the FCRA governs the collection, assembly, and use of consumer report information in the United States. Enacted in 1970, the FCRA has since been amended several times. The two most extensive amendments were the Consumer Credit Reporting Reform Act of 1996 (the 1996 Amendments) and the Fair and Accurate Credit Transactions Act of 2003 (FACT Act).

The FCRA regulates the practices of consumer reporting agencies (CRAs) that collect and compile consumer information into consumer reports for use by credit grantors, insurance companies, employers, landlords, and other entities in making eligibility decisions. The FCRA was enacted to: (1) prevent the misuse of sensitive consumer information by limiting recipients to those who have a legitimate need for it; and (2) improve the accuracy and integrity of credit reporting systems. Under the FCRA, CRAs are required to establish procedures to ensure accuracy and legitimacy in reporting, disclose information in their files to consumers, and investigate disputed items.

The 1996 Amendments expanded the duties of CRAs, particularly in regard to disputes, by establishing a time frame for investigations, mandating written notice of the results, and adding restrictions on the reinsertion of deleted items. The 1996 Amendments also increased the obligations of "users" of consumer reports, particularly employers. Most significantly, they imposed duties on a new class of entities by introducing requirements related to accuracy and dispute resolution by furnishers of information to CRAs. (The ensuing years brought a number of more modest revisions, the most significant of which was a 1999 amendment that specifically authorized the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, Office of Thrift Supervision, and National Credit Union Administration to promulgate regulations under the FCRA.)

The FACT Act bolstered protections against identity theft and its effects. It also ordered agencies to promulgate rules governing the proper disposition of consumer report information, granted consumers the right to request free annual reports, and required businesses to provide copies of relevant records to identity-theft victims.

Under these provisions, sections 1681n and 1681o of the FCRA impose liability for willful noncompliance and negligent

noncompliance, respectively. In the case of negligent noncompliance, the consumer can recover actual damages, costs, and attorney's fees. In the case of a willful violation, the consumer can also recover statutory damages between $100 and $1,000, plus punitive damages.

Consider Challenges to Plaintiff's Standing

The Supreme Court's 2016 decision in *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540 (2016), provides new potential grounds for defendants to move to dismiss FCRA lawsuits, including class actions, where plaintiffs allege a procedural violation of the FCRA.

The *Spokeo* court considered whether Congress may confer Article III standing by authorizing a private right of action based on the violation of a federal statute alone, even if a plaintiff suffered no concrete harm from an alleged procedural violation. The court found that alleging a mere technical violation "does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." The *Spokeo* court cited examples of nonconcrete, statutory violations:

> A violation of one of the FCRA's procedural requirements may result in no harm. For example, even if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate. In addition, not all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.

The implications of *Spokeo* are just beginning to be addressed by courts across the country. Based on the Supreme Court's holding, however, purely technical claims under the FCRA (e.g., those that challenge wording of consumer file disclosures under section 1681g(a), authorization forms under section 1681b(b), etc.) appear to be susceptible to attack. See *Smith v. Ohio State Univ.*, 191 F. Supp. 3d 750, 753, 757 (D. Ohio 2016) (finding a lack of standing: "Plaintiffs were both hired by OSU but allege that they were injured by having their privacy and statutory rights violated [under § 1681b(b)]."). Even if the claims of the named plaintiff survive a jurisdictional attack, *Spokeo* can likely be leveraged by defendants to challenge the standing of absent class members. See, for example, *Sandoval v. Pharmacare US, Inc.,* 2016 U.S. Dist. LEXIS 140717, at *22 (S.D. Cal. June 10, 2016) (denying class certification under *Spokeo*, holding: "Whether characterized as problems with overbreadth, commonality, typicality or Article III standing . . . [t]he Court concludes that class certification is not proper to the extent that Plaintiffs raise claims and theories they do not have standing to raise, and to the extent that the class includes consumers who have no cognizable injury . . . ."). For these reasons, a defendant facing an FCRA action, and particularly a class action, should carefully review any Article III issues with respect to the claims asserted to determine whether a motion to dismiss under Rule 12(b)(1) due to a lack of standing may defeat the claim.

Consider Availability of Individual, Binding Arbitration

A threshold consideration with respect to any FCRA class action should be a thorough examination of whether the defendant has a basis to move to compel arbitration under the Federal Arbitration Act (FAA) for the claim(s) pled, either as a party to a contract with the consumer or as an assignee.

The Supreme Court's recent holdings are consistent with the FAA's general policy in favor of arbitration in the area of consumer law and squarely favor defendants. The landmark decision, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), held that state law may not invalidate an arbitration agreement solely because the agreement prohibits the use of class procedures in arbitration. *Concepcion* has since been cited in hundreds of opinions and has been applied broadly to uphold individualized arbitration of state-law claims.

In a more recent case, *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013), the Supreme Court held that class waivers in arbitration agreements are enforceable, even if the plaintiff's cost of arbitrating her federal statutory claim exceeds her potential recovery. *Italian Colors* should allow companies to compel individual arbitration—and avoid class arbitration—if the agreement at issue clearly prohibits class procedures.

Thus, defendants should assess the possibility of moving to compel binding individual arbitration at the earliest possible stage of the case to avoid any possible claim that the defendant's right to compel arbitration has been waived.

The Standards for Class Certification

Against this perhaps unfamiliar statutory landscape lies the well-worn jurisprudence surrounding Fed. R. Civ. P. 23, the federal class-action vehicle. A class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011). Plaintiffs are required to affirmatively prove their ability to satisfy each element of Rule 23(a)—"numerosity of parties, commonality of factual or legal issues, typicality of claims and defenses of class representatives, and adequacy of representation"—and one of the three subparts of Rule 23(b) before the district court will certify a class. *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 318 (4th Cir. 2006). Therefore, a court may not "simply . . . accept the allegations of a complaint at face value," *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365 (4th Cir. 2004), and to properly evaluate a motion for class certification, it is often "necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982). These standards, although no doubt familiar to experienced federal court litigators, should be continually reinforced in any opposition to a motion for class certification.

FCRA-Specific Class-Action Defenses

Various defenses exist that can be asserted against a putative FCRA class action. Although the following list of defenses is not exhaustive by any means, they have garnered recent positive reception from federal courts.

Ascertainability/Class Definition Issues

Although not mentioned in Rule 23, "[i]t is well-accepted that class action suits brought pursuant to Rule 23(b)(3), where individual damage claims are likely, must concern a class that is currently and readily ascertainable based on objective criteria." *Brooks v. GAF Materials Corp.*, 2012 U.S. Dist. LEXIS 150717, at *11 (D.S.C. Oct. 19, 2012). Hence, a class should not be certified "unless the class description is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." *Solo v. Bausch & Lomb Inc.*, 2009 U.S. Dist. LEXIS 115029, at *4 (D.S.C. Sept. 25, 2009). Thus, if determining class membership would require a person-by-person adjudication, the class should not be certified. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

Limitations on identifying absent class members. At least two distinct trends have emerged as potential defenses in the context of consumer claims. First, courts have repeatedly held that when a court is unable to determine potential class membership from a defendant's records, a class is unlikely to be certified. In *In re Wal-Mart Stores, Inc. Wage & Hour Litig.*, 2008 U.S. Dist. LEXIS 14756, at *1–2 (N.D. Cal. Feb. 13, 2008), the putative class of former Wal-Mart employees allegedly received their final pay late, in violation of California law. To trigger the relevant state law, however, the employee had to provide notification of termination and come to the store to receive final pay. Wal-Mart's databases did not provide records of either termination dates or the dates that employees made themselves available for final pay. Thus, the court held that "where nothing in the company's databases shows or could show whether individuals should be included in the proposed class, the class definition fails."

Courts have reached similar conclusions in consumer cases where evidence may have theoretically been available to determine the members of the class, but where such an undertaking would require extensive "mini-trials." See, for example, *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012) ("[I]f class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate."). Defendants should thus consider any temporal or substantive limitations of their recordkeeping systems in identifying potential class members, and assert those limitations as a defense to certification. (Of course, from the time that litigation is anticipated, companies must enact adequate document retention and preservation policies. Moreover, to the extent possible, expert testimony can be helpful in identifying the limitations in a defendant's data.)

Judicial rejection of fail-safe classes. A second line of ascertainability analysis rejects what has been termed as a "fail-safe" class, or a class that "cannot be defined until the case is resolved on the merits." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012). See also *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012) (a fail-safe class is "one that is defined so that whether a person qualifies as a member depends on whether the person has a valid claim. Such a class definition is improper because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment."). As the court in *Brazil v. Dell Inc.,* 585 F. Supp. 2d 1158 (N.D. Cal. 2008), framed the issue, "the proposed classes include California persons or entities who purchased Dell computer products that 'Dell falsely advertised.' To determine who should be a member of these classes, it would be necessary for the court to reach a legal determination that Dell had falsely advertised."

Two main problems with a fail-safe class render it defective from the outset. First, because the members of the class will not be known until the case is resolved on the merits, notification is unmanageable. See *Kamar v. Radio Shack Corp.*, 375 F. App'x 734, 736 (9th Cir. 2010) (noting that fail-safe classes are not only "palpably unfair to the defendant," but are "also unmanageable—for example, to whom should the class notice be sent?"). Second, a fail-safe class presents an unfair Catch-22 for a defendant: "Either the class members win or, by virtue of losing, they are not in the class and, therefore, not bound by the judgment." *Randleman v. Fidelity Nat'l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011). See also *Mazzei v. Money Store*, 288 F.R.D. 45, 55 (S.D.N.Y. 2012) (explaining that because "[t]he merits of Mazzei's claim depend on whether the fees 'were not permitted' . . . if the trier of fact decided that any or all of the fees were permitted under the form loan agreements, there would immediately be no members of the class for those fees."). For these reasons, nearly every circuit to address the issue has determined that fail-safe classes are impermissible. See *Young*, 693 F.3d at 538; *Messner*, 669 F.3d at 802; and *Kamar*, 375 F. App'x at 736.

These decisions invite close attention to the proffered class definition and provide defendants facing an FCRA class action with a firm basis to resist any claim that attempts to build a legal conclusion into the class definition itself.

"Accuracy"/"Completeness" Issues Related to Procedural Violations

Several procedural requirements of the FCRA, such as sections 1681k(a) and 1681(e)(b), make it particularly tempting for plaintiff's counsel to turn an alleged FCRA violation into a class action. Courts are increasingly willing to hold, however, that even if the FCRA-mandated procedure was not followed, no actionable claim can exist under the FCRA unless the consumer can demonstrate the information transmitted was "inaccurate" or "incomplete." See, for example, *Jones v. Sterling Infosystems, Inc.*, 317 F.R.D. 404 (S.D.N.Y. 2016); *Farmer v. Phillips Agency, Inc.,* 285 F.R.D. 688, 699–700 (N.D. Ga. 2012); *Haro v. Shilo Inn, Bend LLC*, 2009 U.S. Dist. LEXIS 65562, at *8–*9 (D. Or. July 24, 2009) ("[A]bsent a showing that the information obtained from OJIN was inaccurate or incomplete by omit-

ting final disposition of the charge, plaintiff's claim under § 1681k(a) must fail."); *Obabueki v. Choicepoint, Inc.*, 236 F. Supp. 2d 278, 283–84 (S.D.N.Y. 2002), *aff'd,* 319 F.3d 87 (2nd Cir. 2003).

This element of inaccuracy or incompleteness provides defendants with a firm basis to contend that class certification is improper as a matter of law. As the *Farmer* court recently held (considering a claim under section 1681k(a)):

> To sustain a claim, each consumer will need to prove that the adverse information in the report defendant furnished about that consumer was either incomplete or not up to date. This will entail an individual inquiry into the contents of each consumer report issued by defendant. The scope of this individual inquiry will require a variety of evidence specific to each case—such as the production of the actual up-to-date version of the public record at the time the report was issued. . . . [This] will require the presentation of significant amounts of new evidence for each putative class member. Thus, it is clear that the predominance requirement is not met and this class cannot be certified.

Thus, defendants can persuasively argue that when a showing of inaccuracy is required for liability, no class should be certified. See *Williams v. LexisNexis Risk Mgmt., Inc.*, 2007 U.S. Dist. LEXIS 62193, at *4 (E.D. Va. Aug. 23, 2007) ("Asserting a § 1681e(b) claim for [an] entire class would render the class-action device useless . . . because it would require an assessment of whether or not each class member's report was, in fact, inaccurate."); *Owner-Operator Indep. Drivers Ass'n, Inc. v. USIS Commercial Svcs., Inc.*, 537 F.3d 1184, 1194 (10th Cir. 2008) (holding that "the accuracy of each individual's [report], an essential element of a § 1681e(b) claim, required a particularized inquiry"); *Lanzarone v. Guardsmark Holdings, Inc.*, 2006 U.S. Dist. LEXIS 95785, at *13–14 (C.D. Cal. Sept. 7, 2006) ("Because the Court would have to address each of these issues on a one by one basis for all of the officers in the proposed class, Plaintiff cannot meet his burden under Rule 23(b)(3).").

Because of this authority, any defendant facing a putative class that asserts a procedural violation of the FCRA should consider advancing an "individualized-accuracy" argument against class certification.

Typicality/Commonality Issues When Practices Vary over Time

Typicality "goes to the heart of a representative['s] ability to represent a class"—*Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006)—thus, a named plaintiff's "interest in prosecuting [her] own case must simultaneously tend to advance the interests of the absent class members." Courts have applied the typicality requirements in the context of FCRA claims in a manner that provides certain defendants with an additional basis to defend against certification. In particular, variations in a defendants' method(s) of data collection and/or data furnishing can prevent class certification or (at the very least) can help to narrow the scope of the proposed class.

For instance, in *Soutter v. Equifax Info. Servs., LLC*, 498 F. App'x 260 (4th Cir. 2012), the district court certified a class of persons whose judgment information allegedly was inaccurately reported, despite the company's supposed knowledge of flaws in its data and reporting system. Seeking only statutory and punitive damages, the plaintiff alleged that Equifax violated 15 U.S.C. § 1681e(b) by issuing inaccurate credit reports and not maintaining reasonable procedures to assure maximum possible accuracy.

The Fourth Circuit held that the plaintiff had failed to show "typicality" under Rule 23(a)(3), which the court noted also bled into the "commonality" and "ascertainability" inquiries. "While Soutter's claim need not be 'perfectly identical' to the claims of the class she seeks to represent, typicality is lacking where the variation in claims strikes at the heart of the respective causes of action." Soutter's claim failed because it had "meaningful differences" from the class, highlighted by the fact that Equifax's records vendor "used in-person review for the circuit court records while employing at least three different means of collecting general district court records during the class period."

In circumstances where a defendant's methods of data collection or data furnishing have varied over time, the *Soutter* decision provides a compelling basis for defendants to argue that the FCRA violation at issue is not a common issue "capable of classwide resolution . . . in one stroke." The *Farmer* court also recognized this issue at 285 F.R.D. at 703, holding that given the "broad range" of defendants' data sources, under section 1681k(a), "the court would need to determine the source of each piece of adverse information in a consumer's report and then evaluate the quality of that source. This will necessarily entail individualized inquiry for many reports, even if some of the record sources may be common to many potential class members and thus susceptible to classwide proof." Accord *Harper v. Trans Union, LLC*, 2009 U.S. Dist. LEXIS 12760, at *8 (E.D. Pa. Feb. 19, 2009) (an assessment of the reasonableness of a defendant's procedures under § 1681e(b) "will require highly individualized proofs"). Therefore, defendants should also consider this line of analysis when the particular circumstances of the case so warrant.

Defenses to "Statutory Damages Only" Class Actions

Under Rule 23(b), certification of a class action requires the identification of common issues that cannot only be answered on a class-wide basis, but also that decide the case for all class members, making individualized actual damages claims practically impossible to pursue in a large-scale class action. (The Supreme Court recently doubled down on its landmark *Dukes* decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 24 (2012). In *Comcast*, the majority reaffirmed the position that *all* of Rule 23's requirements must be met via a "rigorous" analysis at the class-certification stage, which often overlaps with the merits of the claim. The court made clear that certification required plaintiffs to "satisfy through evidentiary proof" at least one of the provisions of Rule 23(b). For the Rule 23(b)(3) class in *Com-*

cast, this required an evidentiary showing that classwide damages could be calculated. *Comcast* strongly suggests that a class of any meaningful size cannot be certified if it includes members with no damages along with members with damages.) Therefore, FCRA plaintiffs typically frame their class theories around the statutory damage claim available under 15 U.S.C. § 1681n, which allows for damages between $100–$1,000 per consumer without having to offer individualized proof of harm.

Defendants, however, still have a strong basis to contend that the amount of statutory damages any given class member should receive is an individual issue. At least one appellate court recently held that calculating statutory damages per consumer is an *individual* issue by nature, focusing on the individual circumstances of the putative "class members," and that "statutory damages . . . typically require an individualized inquiry." *Soutter,* 498 F. App'x 265. See also *Gomez v. Kroll Factual Data, Inc.*, 2014 U.S. Dist. LEXIS 51303, at *13 (D. Colo. Apr. 14, 2014) ("The individualized nature of an FCRA claim—particularly one seeking statutory damages—has led most courts to deny class certification in these types of cases."); *Campos v. ChoicePoint, Inc.*, 237 F.R.D. 478, 486 n.20 (N.D. Ga. 2006) (individual issues precluding class certification included "the determination of the proper amount of statutory damages to impose for each violation").

Thus, defendants can contend that the statutory damages measure will vary for each consumer based on class-member-specific considerations, meaning that a statutory damages class should not be certified. Nor should plaintiffs be able to avoid this challenge to typicality because class members with actual damages can opt out of the class. Class certification precedes the opt-out process, and the named plaintiff must be adequate and typical, even if no class member opts out. See *Colindreas v. QuietFlex*, 235 F.R.D. 347, 376 (S.D. Tex. 2006) ("Providing class members notice and opt-out opportunity may alert class members that they can pursue individual damages claims, but are not a substitute for the adequate, conflict-free representation required under Rule 23(a)(4)."); accord *Gardner v. Equifax Info. Servs., LLC*, 2007 U.S. Dist. LEXIS 57416, at *6 (D. Minn. Aug. 6, 2007). Thus, any need to rely on class members with actual damages to opt out underscores the impermissibility of certification.

Superiority Considerations under the FCRA

Under Fed. R. Civ. P. 23(b)(3), superiority requires that use of a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy." Superiority "requires the court to find that the objectives of the class-action procedure really will be achieved." *Stillmock v. Weis Mkts., Inc.*, 385 F. App'x 267, 274 (4th Cir. 2010). "The court must compare the possible alternatives to determine whether Rule 23 is sufficiently effective to justify the expenditure of the judicial time and energy . . . and to assume the risk of prejudice" to putative class members not before it.

Defendants can argue that the class-action mechanism is not a superior method of adjudication for FCRA claims for many reasons. Multiple provisions of the FCRA make individual suits a practical alternative to a sprawling class action. Rather than limiting plaintiffs to actual damages, Congress also provided for a range of statutory damages under 15 U.S.C. § 1681n(a)(1)(A), anticipating that amounts will vary with consumer-specific evidence. Congress further incentivized individual FCRA actions by authorizing attorney's fees for plaintiffs in "any successful action" and providing for punitive damages for willful violations. 15 U.S.C. §§ 1681n(a)(2), (a)(3); 1681o(a)(2); *Harper*, 2009 U.S. Dist. LEXIS 12760, at *10 ("I am further persuaded by defendant's argument that the FCRA, by providing for the award of attorneys' fees, already provides an incentive for the putative class members to bring individual claims.").

Courts have consistently held that the availability of punitive or statutory damages and fee-shifting can demonstrate the viability of "individual actions in the absence of a class action." *Thorn*, 445 F.3d at 328 n.20. See also, for example, *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 420 (5th Cir. 1998) (statutory damages and attorney's fees "eliminate[d] financial barriers that might make individual lawsuits unlikely"). Therefore, defendants can contend that the FCRA's scheme ensures that individual suits are a meaningful alternative to class actions. Indeed, not only are individual FCRA actions "costless" for consumers, they may produce substantial recoveries. For example, the Fourth Circuit has affirmed a jury award of $1,000 in statutory damages and $80,000 in punitive damages in an individual FCRA action against a bank that furnished information to a CRA. *Saunders v. Branch Banking & Trust Co.*, 526 F.3d 142, 145 (4th Cir. 2008).

Statute-of-Limitations Issues

Depending on how the class claim is pled, defendants may also possess a procedural defense based on the statute of limitations. Section 1681p of the FCRA sets forth a "hybrid" limitations period:

> An action to enforce any liability created under this title may be brought . . . not later than the earlier of—(1) 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or (2) 5 years after the date on which the violation that is the basis for such liability occurs.

Because of the peculiar nature of this limitations period, plaintiffs will often plead a five-year class to maximize potential exposure. However, under the plain language of the statute, no class member whose claim was discovered within a two-year period can properly be included in such a class.

The Fourth Circuit has noted that even when the limitations period analysis has the mere potential for giving rise to individual inquiries, class certification is erroneous. As the court noted in *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir. 1998), if a defendant's limitations period defense "depend[s] on facts peculiar to each plaintiff's case," such as what each plaintiff "knew about Meineke's operation . . . and when he knew it," then "class

certification is erroneous." In a subsequent decision, *Gunnells v. Healthplan Servs.*, 348 F.3d 417, 438 (4th Cir. 2003), the same appellate court emphasized the categorical nature of its holding in *Broussard*:

> [W]e have *flatly held* that "when the defendants' affirmative defenses . . . may depend on facts peculiar to each plaintiff's case, class certification is erroneous." *Broussard*, 155 F.3d at 342. . . . *Although it is difficult to determine with any precision*, it appears that here the Agents' affirmative defenses are not without merit and would require individualized inquiry *in at least some cases*. (emphases added).

In short, *Gunnells* explains it is established that class certification is improper even when a statute of limitations defense "may depend" on individual facts "in at least some cases."

Accordingly, courts nationwide have rejected attempts to certify five-year FCRA classes dues to the two-year discovery period. See *Molina v. Roskam Baking Co.*, 2011 U.S. Dist. LEXIS 136460, at *14 (W.D. Mich. Nov. 29, 2011) (because the FCRA two-year discovery period "turns on the individual question of when certain class members 'discovered' or 'should have discovered' [d]efendant's alleged misconduct, a class action is not the best method of trying the suit."). These holdings are subject to particular emphasis when defendants are confronted with a proposed class representative who himself has discovered the purported classwide violation well in advance of the expiration of the five-year period of repose. See also *Holman v. Experian Information Solutions, Inc.*, 2012 U.S. Dist. LEXIS 59401, at *42–43 (N.D. Cal. Apr. 27, 2012) (limiting proposed FCRA class to two years because to assess "liability to . . . more than 4,000 putative class members whose credit reports were disclosed more than two years before January 12, 2011, would require a determination of whether the class member . . . learned of Experian's disclosure."); but see *McPherson v. Canon Bus. Solutions, Inc.*, 2014 U.S. Dist. LEXIS 21081, at *14–15 (D.N.J. Feb. 20, 2014) (refusing to strike five-year class allegations at the Rule 12 stage). Therefore, any defendant faced with a purported five-year FCRA class can and should move on the pleadings to have the class period limited to two years.

Conclusion

Given the highly technical nature of the FCRA, as well as the magnitude of recent awards under the statute, the FCRA is a dangerous statute for defendants. That danger is exponentially more acute in the context of a putative class action. Because of this, substantial attention to potential certification defenses is necessary from the very outset of the action, and defendants can then use the discovery process as a tool to substantiate any factual bases necessary to resist class certification. Simply put, any delay in planning a class-certification defense in an FCRA action jeopardizes the outcome of that critical ruling.

Timothy St. George is a partner at Troutman Sanders LLP. He focuses his practice on financial services litigation and consumer litigation, and he has represented clients in a wide variety of litigation matters involving contracts, class actions, mass actions, torts, and federal and state consumer protection laws.

David Anthony is a partner at Troutman Sanders LLP. He focuses his practice on financial services and consumer litigation, including class action and individual lawsuits. Mr. Anthony regularly represents clients in claims involving the FCRA, FDCPA, and TCPA among other consumer financial statutes in federal and state courts.