Clarity On Overlapping Background Check Laws In Calif.

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On Aug. 20, 2018, the California Supreme Court issued its long-awaited order in Connor v. First Student Inc., finding the state's Investigative Consumer Reporting Agencies Act, or ICRAA, was not unconstitutionally vague as applied to employer background checks, despite overlap with the Consumer Credit Reporting Agencies Act, or CCRAA.[1]

The Supreme Court resolved a conflict between two courts of appeal which had left many consumer reporting agencies, or CRAs, wondering whether the ICRAA applied even if they did not obtain the information from personal interviews — the definition of "investigative consumer report" used under the Fair Credit Reporting Act to impose additional requirements under 15 U.S.C. §1681l similar to those included in the ICRAA. With this decision, CRAs providing consumer reports for employment and tenant screening will need to carefully review their products to assure compliance with the ICRAA and the CCRAA.

Relevant Legislative and Procedural History

Under California law, consumer reports are classified under the CCRAA and/or the ICRAA, depending largely on the means used to collect the information contained in those "consumer reports." The CCRAA has always been limited to consumer reports containing specific credit information, and it expressly excludes character information obtained through personal interviews. And, certain reports containing information gathered through personal interviews are subject to the ICRAA only. However, both statutes govern reports that contain information relating to character and creditworthiness, based on public information and personal interviews, that were used for employment background purposes. Further, both the ICRAA and CCRAA impose obligations on CRAs regarding disclosure to consumers when the agencies furnish reports, and also limit when and to whom those reports may be furnished and how such information must be verified before it is reported.

However, the specific obligations and limitations, and the remedies for violations of each act are different. The ICRAA, for instance, imposes stricter requirements and penalties than the CCRAA. Under the ICRAA, an investigative consumer reporting agency (or user of information) may be liable to the consumer who is the subject of the report if the agency (or user) fails to comply with any requirement under the ICRAA in an amount equal to $10,000 or actual damages sustained by the consumer, whichever is greater, plus the cost of the action and reasonable attorney's fees.

In Connor, which has been pending since 2010, a class of current and former bus drivers alleged that the defendant employers and consumer reporting agencies violated the ICRAA when the employers obtained background checks on the drivers without providing them notice and without obtaining the drivers' prior written authorization to obtain such reports as required by the ICRAA. The defendant employers moved for summary judgment claiming that the ICRAA is unconstitutionally vague because it overlaps with the CCRAA and fails to provide adequate notice to regulated entities as to whether the statute governs its conduct, and that, in any event, the employers' notice satisfied the requirements of the CCRAA.

The trial court granted the defendants' motion, finding that consistent with state court precedent (see Ortiz discussed below), the ICRAA was unconstitutionally vague and impressibility overlaps with the CCRAA, such that person of common intelligence cannot determine which statute governs its conduct.

The Court of Appeal in Connor reversed in 2015, finding that "[t]here is nothing in either the ICRAA or the CCRAA that precludes application of both acts to information that relates to both character and creditworthiness." The Court of Appeal further stated that under California law, "[a]n agency that furnishes a report containing both creditworthiness information and character information, and the person who procures or causes that report to be made, can comply with each act without violating the other. And despite the overlap between the CCRAA and the ICRAA … there remain certain consumer reports that are governed exclusively by the ICRAA (those with character information obtained from personal information), because each act expressly excludes those specific reports governed by the other act."

The Court of Appeal decision in Connor affirming the constitutionality of the ICRAA was itself contrary to a competing 2007 decision from the Court of Appeal in Ortiz v. Lyon Management Group Inc.,[2] which held that the ICRAA was unconstitutionally vague, as applied to tenant screening reports containing unlawful detainer information, as the court in Ortiz held that there was no "rational basis to determine whether unlawful detainer information constitutes creditworthiness information subject to the CCRAA or character information subject to the ICRAA." Thus, given this split in authority, the issue was ripe for review by the California Supreme Court.

The California Supreme Court's Decision

Before the California Supreme Court, the defendant employers in Connor raised two principal contentions. First, the defendants argued that the CCRAA and the ICRAA were initially intended to be exclusive of each other and that the ICRAA's subsequent amendment in 1998 to expand its scope to include character information obtained under the CCRAA or "obtained through any means" was not intended to abolish that distinction. The Supreme Court rejected the argument, holding that while the legislature amended the ICRAA to expand its scope, it did not concurrently amend the CCRAA to limit its scope.

Thus, the Supreme Court found that potential employers could comply with both statutes without undermining the purpose of either. "In interpreting ICRAA and CCRAA, we agree with the Court of Appeal and find that potential employers can comply with both statutes without undermining the purpose of either ... If an employer seeks a consumer's credit records exclusively, then the employer need only comply with CCRAA. An employer

seeking other information that is obtained by any means must comply with ICRAA. In the event that any other information revealed in an ICRAA background check contains a subject's credit information and the two statutes thus overlap, a regulated party is expected to know and follow the requirements of both statutes, even if that requires greater formality in obtaining a consumer's credit records (e.g. seeking a subject's written authorization to conduct a credit check if it appears possible that the information ultimately received may be covered by ICRAA)." In this manner, the Supreme Court held that the prior decision in Ortiz was "inconsistent with [its] own precedent governing the interpretation of overlapping statutes."

The defendants in Connor also argued that if the legislature intended the ICRAA to apply to employment screening reports that previously were exclusively subject to the CCRAA, then it would have amended the CCRAA to conform to this understanding. However, the Supreme Court found that the limiting language of the CCRAA obviated the need to amend the statute in response to the changes it made to the ICRAA. Thus, the Supreme Court confirmed that the ICRAA is also applicable in the employment screening context, despite its overlap with the CCRAA. And, by overruling Ortiz, the Supreme Court likewise confirmed that the ICRAA is also applicable in the tenant screening context, and more generally when its threshold definitions are satisfied.

The Supreme Court ultimately held that: (1) because partial overlap between two statutes does not render one superfluous or unconstitutionally vague; (2) the ICRAA and CCRAA can coexist, as both acts are sufficiently clear; and (3) each act regulates that information that the other does not, which supports concurrent enforcement of both statutes.

Practical Impact of the Decision

As a practical matter, the Supreme Court's decision removes the cloud of uncertainty regarding whether the ICRAA is enforceable against consumer reporting agencies preparing reports in California. Companies that fall under the purview of the ICRAA must comply with its provisions, regardless of whether the report also triggers the requirements of the CCRAA.

The ICRAA contains a number of distinct technical requirements that should be the subject of a compliance review after the decision in Connor. To use but one example, under the ICRAA, "public record" information (e.g., civil actions, tax liens and outstanding judgments) cannot be included unless the background checking agency has verified the accuracy of the information during the 30-day period before the report is issued. That requirement counsels in favor of the implementation of procedures to address any delay of 30 days or more in receiving public records updates from the providers of such records.

The decision in Connor will also have indirect ramifications for other open questions regarding the preparation of consumer reports in California. For instance, the matter of Moran v. Screening Pros LLC,[3] is currently on appeal to the Ninth Circuit. Moran, however, was stayed pending this decision in Connor. The Moran case concerns the issue of what dates must be used to calculate the temporal limitations on reporting of criminal records that do not result in a conviction under the federal Fair Credit Reporting Act.

Presumably, that case will also now move forward to resolution.

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[1] See Connor v. First Student Inc., No. S229428, – P.3d –, 2018 Cal. LEXIS 6266 (Cal. Aug. 20, 2018).

[2] 157 Cal. App. 4th 604 (2007).

[3] No. 2:12-CV-05808-SVW, 2012 U.S. Dist. LEXIS 189350 (C.D. Cal. Nov. 20, 2012).