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10 Key FCRA Decisions and Why Companies Should Care About Them

WRITTEN BY

David N. Anthony | Scott Kelly | Timothy J. St. George

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The case law surrounding the Fair Credit Reporting Act (FCRA) is ever-changing, and staying up to date on certain, key statutory definitions is a core compliance task for any company subject to the FCRA.

The FCRA is a frequent driver of litigation, so courts have had numerous opportunities to weigh in on many of the unanswered questions that remain in litigation almost 50 years since the statute was first enacted, including lingering questions about statutory definitions. Here, we highlight 10 key FCRA cases and developments in 2019 and early 2020.

FCRA Definition of a Consumer Reporting Agency

The FCRA defines a consumer reporting agency (CRA) as (1) "any person which … regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers" and (2) "for the purpose of furnishing consumer reports to third parties." In 2019, three significant decisions clarified this definition and the scope of liability for CRAs versus users or furnishers.

1. Kidd v. Thomson Reuters[1]

On May 30, 2019, the Second Circuit considered the specific question of "[w]hether, to qualify as a 'consumer reporting agency' under the FCRA, an entity must specifically intend to furnish a 'consumer report.'" In affirming the district court's decision, the Second Circuit found that to determine an entity's intent, a court must consider "the totality of a defendant's actions."

Here, the plaintiff applied for a position with the Georgia State Department of Public Health, which then conducted a background check on the plaintiff using Thomson Reuters's research platform, Consolidated Lead Evaluation and Reporting (CLEAR). CLEAR is primarily used to grant government agencies access to public records for investigative purposes, but the product includes numerous prohibitions and warnings that it is not to be used for impermissible purposes under the FCRA.

The plaintiff sued Thomson Reuters, arguing that Thomson Reuters was acting as a CRA, and thereby subject to the FCRA, which it then violated by including inaccurate information on the background report. The Second

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Circuit, in affirming summary judgment on behalf of Thomson Reuters, found "that because it is undisputed that Thomson Reuters took numerous — and effective — measures to prevent CLEAR reports from being utilized as 'consumer reports,' no reasonable juror could conclude that Thomson Reuters intended to furnish such reports, and therefore it is not a 'consumer reporting agency' under the FCRA."

2. Zabriskie v. Federal National Mortgage Association[2]

On January 9, 2019, the Ninth Circuit addressed whether the Federal National Mortgage Association (Fannie Mae) was a CRA, and thereby could be held liable under the FCRA for violations of 15 U.S.C § 1681e(b), which requires a consumer reporting agency to follow "reasonable procedures to assure maximum possible accuracy" of consumer information.

The Ninth Circuit, in reversing the district court held that Fannie Mae was not a CRA because, "even if it assembles or evaluates consumer information," it does not do so to furnish that information to third parties.[3] Rather, the Ninth Circuit found that Fannie Mae offered tools to mortgage lenders so that they could evaluate mortgage loan applicants only "to determine a loan's eligibility for subsequent purchase."[4]

3. Frazier v. First Advantage Background Services[5]

On September 23, 2019, the U.S. District Court for the Eastern District of Virginia dismissed a putative class action against First Advantage Background Services Corporation (FADV) based on alleged violations of the FCRA. The decision marked a clear distinction between CRAs and the users of their reports in the hiring context, where a CRA applied employer-provided hiring criteria to background screenings for prospective employees.

The plaintiffs alleged that FADV, a CRA, violated 15 U.S.C. § 1681b(b)(3)(A) by failing to provide a copy of the consumer reports and FCRA summaries of rights to the plaintiffs before taking an adverse employment action — the adverse action being the application of the eligibility score to the report before providing it to the employer.

The court found that "the allegations in the Second Amended Complaint do not demonstrate that First Advantage acted beyond its role as a CRA when it marked Plaintiffs as ineligible," and thus held that the plaintiffs failed to state a claim for a violation of § 1681b(b)(3). Rather, the court found that only the employer who was actually making the decision could be held liable under § 1681b(b)(3).

Because the employer had defined the eligibility criteria for FADV, even though FADV marked the candidates as ineligible on the report, the employer was ultimately responsible for the hiring determination. And under the FCRA, only "the person intending to take such adverse action" must provide the requisite notice to the applicant.

No Liability for Furnishing Accurate Reports

This past year featured a couple of significant decisions providing clarity that CRAs could not be held liable for providing accurate information on consumer reports.

4. *Humphrey v. Trans Union*[6]

On January 8, 2019, the Seventh Circuit affirmed judgment in favor of the national consumer reporting agencies, rejecting a plaintiff's attempt to impose FCRA liability upon the CRAs for reporting information the furnisher had verified as accurate. The *Humphrey* decision represents a significant victory for CRAs facing collateral attacks of the accuracy of the accounts they report.

In *Humphrey*, the plaintiff submitted multiple disputes with the CRAs, who then sent the furnisher Automated Credit Dispute Verifications. Each time, the furnisher confirmed to the CRAs that the information reported was accurate. The Seventh Circuit rejected the plaintiff's argument that the CRAs could face liability under the FCRA by continuing to report the debt even though the plaintiff claimed he had no obligations to make payments. Like other courts before it, the Seventh Circuit recognized that an attack on the validity of a debt is not the CRAs' fight to fight, ruling "a consumer may not use the Fair Credit Reporting Act to collaterally attack the validity of a debt by challenging a CRA's reinvestigation procedure."

5. *Cowley v. Equifax Info. Servs., LLC, et al.*[7]

On November 7, 2019, the U.S. District Court for the Western District of Tennessee held it was not a violation of the FCRA for a creditor to report a charged-off account with a monthly payment due.

The court rejected Cowley's requests to consider the CDIA's Credit Reporting Resource Guide (CRRG) to determine whether the account was reported inaccurately. Cowley argued that it was inaccurate to report a charged-off account with a monthly payment due of $72 because the CRRG requires a creditor who has charged off an account to report the balance due as "$0.00." The court rejected this as an attempt to use inadmissible hearsay. The court further noted that the CRRG contained industry guidelines, "not legal authority like regulations, laws or cases." Hence, Cowley could not use the CRRG to show that the creditor inaccurately reported her charged-off account.

Next, the court held that the tradeline was reported accurately. To bring a valid FCRA claim, Cowley needed to show that her tradeline was reported inaccurately. She failed to do so. The court noted that it was undisputed that Cowley was obligated to make 24 monthly payments, each in the amount of $72.04. Since this is what was reported, the tradeline was accurate.

The court further noted that Cowley also failed to show that the tradeline was materially misleading because she "submitted no proof that the report misled a creditor." Because Cowley failed to meet her burden, the court granted summary judgment against her.

Damages

A significant case came this year involving the damages available under the FCRA, including punitive damages, as well as the due process limits of such damages.

***6. Williams v. First Advantage LNS Screening Solutions*[8]**

On January 9, 2020, the Eleventh Circuit issued a decision in a mixed-filing screening case out of the U.S. District Court for the Northern District of Florida. Plaintiff sued for twice attributing criminal background information of another individual to Plaintiff, with two reports being generated a year apart for an individual named "Ricky Williams." While their policies and procedures ostensibly required three identifiers, in practice Defendants' only sought two identifiers to match reports. The jury found the company's practices and procedures inadequate and awarded Plaintiff $250,000 in compensatory damages and $3.3 million in punitive damages.

The Eleventh Circuit upheld the jury verdict and the compensatory damages award, but reduced the punitive damages to $1 million, as the initial award violated the Due Process Clause. The court did an in-depth analysis of similar cases in finding that a 13-1 ratio of punitive damages to compensatory damages was unconstitutionally excessive, and finding that while "Defendant's protocols were markedly lackluster, Defendant quickly corrected both of its reports" when informed of the error, and therefore reduced the award to a 4-1 ratio.[9] While the ultimate reduction of the damages award was significant, this case shows that even individual actions can result in large damages awards.

More Clarity in Background Screening Definitions

2019 featured significant decisions and provided some clarity for definitions under the FCRA regarding background screening. The Ninth Circuit stated that the seven-year reporting ban begins during the initial charge, and the Seventh Circuit ruled that "convictions" also include guilty pleas. Another court addressed the question of whether hiring an independent contractor qualifies as "for employment purposes" under the FCRA.

7. *Moran v. The Screening Pros*[10]

On May 14, 2019, the Ninth Circuit Court of Appeals held that the FCRA's seven-year reporting period for certain adverse actions runs from the "date of entry" of those actions, rather than from the "date of disposition." The decision poses new compliance challenges for consumer reporting agencies determining which records to include in consumer reports.

In a 2-1 decision, the Ninth Circuit held that the seven-year period runs from the "date of entry" of an adverse item rather than the "date of disposition." In so holding, the Ninth Circuit reversed the lower court's ruling that the dismissal of the charge triggered the seven-year reporting period. The circuit court found that the tenant screening report's inclusion of a 10-year-old charge (and the six-year-old dismissal of that charge) could establish a *prima facie* case under the FCRA.

The opinion provides a detailed analysis of how to properly report charges — specifically, when the reporting window begins to run, and whether a dismissal of an earlier charge constitutes an independent, reportable adverse item. The court stated that a "charge is an adverse event upon entry so it follows that the date of entry begins the reporting window." The decision also clarifies that a dismissal of a charge, even if within the seven-year window, is not independently reportable as a separate adverse item.

8. *Aldaco v. RentGrow, Inc.*[11]

On April 16, 2019, the Seventh Circuit ruled that the definition of "conviction" under the FCRA should be

interpreted under federal law, not the law of the state where the criminal record is generated. The appellate court affirmed the holding that a guilty plea resulting in a sentence of supervision qualified as a "conviction" under federal law, including the FCRA.

Plaintiff argued that RentGrow, Inc. violated the FCRA by disclosing the 1996 battery record, which was over seven years old. Importantly, the FCRA prohibits disclosure of arrest records and other adverse items more than seven years old, but it permits the reporting of convictions without limitation.[12] Aldaco argued that "conviction" under the FCRA meant "as defined by state law" and that her sentence of supervision was not a "conviction" under Illinois law. The district court held that RentGrow was entitled to summary judgment, concluding that "conviction" should be interpreted under federal law, and that definition encompassed Aldaco's 1996 battery charge.

In a short opinion penned by Judge Frank H. Easterbrook, the Seventh Circuit ruled that: (1) federal law, not state law, supplies the meaning of "conviction," and (2) as a matter of federal law, a guilty plea without a formal judgment is a conviction.

According to the Seventh Circuit: "As far as we can tell, the word 'conviction' in federal statutes has been defined according to state law only with explicit direction from Congress."

9. Walker v. RealHome Services and Solutions, Inc.*[13]*

On August 9, 2019, the U.S. District Court for the Northern District of Georgia joined several other district courts in finding consumer reports obtained for independent contractors do not trigger the protections applicable for consumer reports obtained for "employment purposes" under the FCRA.

The plaintiff alleged REALHome Services and Solutions, Inc. (RHSS) violated the FCRA's "stand-alone disclosure" requirement by including a liability waiver in his background check consent form. He also alleged RHSS violated the FCRA's pre-adverse action requirements by failing to provide him with a copy of his report or summary of his rights before rescinding his job offer. The defendant moved to dismiss his position was that of an independent contractor and thus not subject to the FCRA's protections at issue.

The magistrate judge recommended dismissing the complaint, concluding that "it is clear that the provisions of the FCRA urged by plaintiff here do not apply when consumer reports are obtained on persons seeking positions as independent contractors." The district court agreed, holding that, when interpreting the phrase "an employee" in the FCRA, the court was "required to apply the common law meaning of employment, which does not include independent contractors." The court found it was "undisputed that Plaintiff applied for an independent contractor position."

Evidence of Net Worth If Willfulness Is Not at Issue

One court addressed the question of whether, when willfulness is not at issue at trial, if evidence of a company's profit and earnings is admissible.

10. *Dodgson v. First Advantage Background Servs. Corp.**[14]*

On March 7, 2019, the U.S. Court for the Northern District of Georgia first denied summary judgment on the plaintiff's willfulness claim. Then, before trial, the defendant filed a motion *in limine* to exclude evidence of financial worth on the basis that punitive damages should not be available because there was no willful violation based on the technical accuracy of the report, even if the reporting could support a negligence case based on a claimed tendency to mislead. The court agreed, concluding that "because the report is technically accurate and thus may not serve as the basis for willful FCRA violation, punitive damages are not available and evidence regarding Defendant's current net worth or financial condition is irrelevant."

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[1] 925 F.3d 99 (2nd Cir. 2019).

[2] 940 F.3d 1022 (9th Cir. 2019).

[3] *Id*. at 1027.

[4] *Id*.

[5] No. 3:17-cv-30, 2019 WL 4601616 (E.D. Va. Sept. 23, 2019).

[6] 759 F. App'x 484 (7th Cir. 2019).

[7] No. 2:18-cv-02846, 2019 WL 5847851 (W.D. Tennessee, Nov. 7, 2019).

[8] 947 F.3d 735 (11th Cir. 2020).

[9] *Williams*, 947 F.3d at 765.

[10] 923 F.3d 1208 (9th Cir. 2019).

[11] 921 F.3d 685 (7th Cir. 2019).

[12] *See* 15 U.S.C. § 1681c(a).

[13] No. 1:18-cv-03044, 2019 WL 7944337 (N.D. Ga. Aug. 9, 2019).

[14] No. 1:16-cv-1894, 2019 U.S. Dist. LEXIS 93646 (N.D. Ga. Mar. 7, 2019).

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