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Big News for Background Screening: New Appellate Ruling Says FCRA Permits Reporting Unmatched Criminal Records

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Addressing a recurring issue bedeviling the background screening industry, the U.S. Court of Appeals for the Eleventh Circuit confirmed on December 4 that it is not inaccurate for a consumer reporting agency (CRA) to report a criminal or sex-offender record without matching the record to a subject consumer, so long as the CRA notifies the user that the record needs further investigation before being attributed to an individual.

This seemingly technical ruling under the Fair Credit Reporting Act (FCRA) goes to the heart of criminal background screening by CRAs in the U.S. since criminal records in the United States, in a great majority of cases, do not contain definitive identifying information such as social security numbers or even specific dates of birth. This means that many providers of criminal background screenings provide records in response to a screening without matching to a specific individual, leaving it to the user of the data to conclude whether the record applies to a given individual. This practice has been challenged across the country in private lawsuits; now, the Eleventh Circuit has weighed in, and validated that reporting unmatched results can comply with the FCRA.

In reaching this ruling, the Eleventh Circuit paradoxically rejected a lenient legal test regarding the standard for "inaccuracy" in favor of a more stringent one accepted by a plurality of other federal appellate courts. Nevertheless, the court held that the report containing unmatched records passed muster even under that more stringent test.

This precedential decision may become a leading case defining the duties of CRAs and users of unmatched criminal records under the FCRA.

The case is styled *Erickson v. First Advantage Background Services Corp.*, No. 19-11587 (11th Cir. Dec. 4, 2020), and can be found here.

Background

While applying to coach his son's Little League team, Keith Erickson consented to a background check prepared by First Advantage Background Services Corporation. At the time of his application, Erickson's name was "Keith Dodgson" — a name he shared with his long-estranged father. Unfortunately for Erickson, his namesake was a

registered sex offender in Pennsylvania. Further complicating matters, Pennsylvania only records the birth *year* of registered sex offenders, rather than a full date of birth. First Advantage's policy in such cases is to search by name only, inform the report's user that any matched record is based on the name alone, and instruct the user to conduct further research before taking action against the subject of the report.

Erickson's background check uncovered his father's sex-offender record. First Advantage sent a report, including the record to Little League, explaining that the record was a name-only match and that Little League's "further review of the State Sex Offender website is required in order to determine if this is your subject." First Advantage also sent a letter to Erickson, informing him that his background check revealed he shared a name with a registered sex offender. The letter emphasized that Little League was "aware this record may not be yours" and would investigate further. Erickson immediately disputed the record with both First Advantage and Little League. Humiliated, he voluntarily chose not to coach his son's team. He and his wife even went so far as to change their family name to avoid any future association with his father.

Erickson filed suit in federal court, claiming First Advantage violated the FCRA's requirement that a consumer reporting agency "follow reasonable procedures to assure maximum possible accuracy" of information included in a consumer report. First Advantage initially disputed the applicability of the FCRA in a summary judgment motion, which the district court denied, and the case moved to trial. After Erickson presented his case at trial, the court granted judgment as a matter of law in favor of First Advantage. The court held Erickson failed to show either that the report was inaccurate or that he was harmed, two essential elements of his claim. Erickson appealed.

On appeal, First Advantage did not challenge the district court's denial of its summary judgment motion, so the threshold question of the FCRA's applicability was not an issue. Addressing the inaccuracy element of Erickson's claim, the Eleventh Circuit first discussed the problem of unmatched records in background screening generally. The court acknowledged it is not uncommon for screening databases to include a sex-offender record without an underlying record of conviction, and that some state sex-offender registries, like Pennsylvania's, include only the offender's name and year of birth. This sets the stage for background screeners to regularly face the problem of imperfectly matched records.

First Advantage deals with this problem in three ways. First, in instances where a state registry includes only a birth year, First Advantage conducts a search based on the subject's name only, completely avoiding any partial-birth-date matches. Second, it notifies the user at the outset that searches in these jurisdictions are based on name only. Third, when a name-only match is found, First Advantage includes it in the report but also instructs the user that further research is required to confirm whether the record belongs to the subject.

Court adopts "factually correct and free from potential misunderstanding" standard of "inaccuracy"

The court grappled first with the meaning of "maximum possible accuracy" under the FCRA, a thorny question that has been evaluated by several other circuits. The court rejected a more lenient standard followed by some courts requiring only "technical accuracy." The technical accuracy standard requires only that the information in the report not be factually incorrect. Under this standard, so long as the report does not contain any objective untruth or inaccuracy, there can be no liability.

A plurality of the circuit courts — including the Fourth, Fifth, Sixth, and Ninth Circuits — hold that "maximum possible

accuracy" means more than mere technical accuracy. These courts typically describe the standard as requiring a report to be neither factually inaccurate nor "materially misleading." The Eleventh Circuit chose to follow this course, finding the statutory text "demands" more than mere technical accuracy. The court focused on the literal definitions of the phrase "maximum possible accuracy" and concluded "information must be factually true and also unlikely to lead to a misunderstanding" to meet that standard.

Importantly, the Eleventh Circuit emphasized that whether a report is potentially misleading is an *objective* inquiry. A reviewing court must "look to the objectively reasonable interpretations of the report." A report that is "objectively likely to cause the intended user to take adverse action" is objectively misleading, whereas one "that some user somewhere could possibly squint at . . . and imagine a reason to think twice about its subject" is not. The focus on the "intended user" of the report means the court must consider the reasonable expectation and understanding of a person in the position of that user to determine if the user would likely be misled.

The Eleventh Circuit holds that CRA's report met its articulated standard because a reasonable user would understand that the record was not matched

After defining this standard, the court held "the only objectively reasonable interpretation of [First Advantage's] report was one that was *not* misleading." The report never claimed the record was a certain match; instead, it explained it was a name-only match, and "cautioned that the record might not be Erickson's at all." Furthermore, a reasonable user of the report in Little League's shoes would not be so misled as to take adverse action based on the report alone. Adding further support for this conclusion was the fact that First Advantage's report reminded Little League that "further review of the State Sex Offender Website" was required. Because "the only reasonable understanding" of the report was that "someone with Erickson's name was a registered sex offender in Pennsylvania," no reasonable user would be misled.

The court was careful to caution that a CRA cannot "caveat [its] way out of liability" for a clearly misleading report simply by providing a fine-print disclaimer or "vague equivocations." But where the language of the report makes clear what the report is and what it is not, and where it is prepared "consistent with the expectations of the requester," such a report is not misleading.

Key takeaways

The key message of this decision is that it is not inaccurate for a CRA to report unmatched records — so long as a reasonable user would understand that the records are, in fact, unmatched. This decision also provides some potential compliance tips for CRAs seeking to assure "maximum possible accuracy." CRAs can note, for example, the notifications First Advantage gave to the users of its reports, which the court found to be clear.

On the flip side, the decision implies that the argument that a "technically accurate" report can give rise to inaccurate understandings will not pass muster under the FCRA, according to the Eleventh Circuit, if a reasonable user would not be misled.

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