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Eleventh Circuit Affirms $250K Compensatory Damages Award and Allows a $1 Million Punitive Damages Award in Individual Mixed-File FCRA Action

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On January 9, 2020, the United States Court of Appeals for the Eleventh Circuit issued its decision in *Williams v. First Advantage Lns Screening Solutions*, a case watched closely by the background screening industry. In *Williams*, the Court affirmed a $250,000 compensatory damages award and reduced a $3.3 million punitive damages award to $1 million in an individual mixed-file claim brought pursuant to 15 U.S.C. § 1681e(b) of the Fair Credit Reporting Act (FCRA). The decision addressed a basic legal requirement in the background screening industry: connecting background information to common names. The matching procedures involved in *Williams* are similar to those recently scrutinized by the CFPB in another notable FCRA action that we highlighted in the Southern District of New York. In that action, the CFPB also addressed procedures in attributing public records to persons with common names when other definitive unique identifiers, particularly a Social Security number, are absent, coming to similar conclusions as the *Williams* court.

Background

In *Williams v. First Advantage*, Plaintiff Richard Williams sued Defendant First Advantage for alleged violations of the FCRA in connection with twice attributing the criminal background information of another individual to Plaintiff. In two criminal background reports developed a year apart, Defendant reported to Plaintiff's potential employers criminal background information related to a "Ricky Williams."

In its description of the background of the case, the *Williams* Court focused heavily on Defendant's procedures for connecting criminal background information with individuals with common names. In order to attribute criminal background information to an individual with a similar name, Defendant's employees preparing the report were required to attempt to locate three identifiers, such as name, date of birth, Social Security number, or a driver's license number. Where the employee was unable to locate a third identifier, he or she must note that they were unable to do so and obtain approval by a supervisor prior to releasing the report. Evidence at trial showed that in both instances, Defendant's employees preparing Williams's reports relied on only two identifiers.

Further, Plaintiff disputed the criminal information contained in the first report, which was later removed. However, *different* criminal background information related to "Ricky Williams" appeared on Plaintiff's second criminal background report developed a year later. Importantly, the employees who developed the second report lacked access to information pertaining to the disputed criminal history in the first.

At trial, Plaintiff argued that he suffered lost wages of $78,272 and suffered additional emotional and reputational

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harm as a result of the reporting. The jury found Defendant willfully failed to follow procedures to assure the maximum accuracy of the information in Plaintiff's consumer report, as required by § 1681e(b) of the FCRA. The jury awarded Plaintiff $250,000 in compensatory damages and an astonishing $3.3 million in punitive damages. After the trial court entered judgment in favor of Plaintiff, Defendant filed a motion for judgment as a matter of law, which the trial court subsequently denied. Defendant appealed.

Decision

Defendant raised three arguments on appeal. The first two arguments related to its motion for judgment as a matter of law. ***First***, it argued that the jury's award of $250,000 should be vacated because the Plaintiff failed to show reputational harm. ***Second***, it argued that Plaintiff had failed to establish a willful violation of the FCRA. ***Third***, Defendant argued that the $3.3 million punitive damages award was unconstitutional under the Due Process Clause.

In a brief analysis, the Court affirmed the district court's denial of Defendant's motion for judgment as a matter of law with respect to Plaintiff's showing of reputational harm and willfulness under the FCRA. The Court's analysis with respect to willfulness is particularly notable, considering the extent to which Defendant's procedures were scrutinized. The Court recognized that despite having a policy requiring use of a third identifier for screenings involving common names absent supervisor approval for use of two, evidence in the case indicated this did not occur in common practice. Defendant's Vice President of Operations stated at trial that locating a third identifier was "king of aspirational." The Court understood this to infer that Defendant consciously disregarded a known risk of violating the FCRA. The Court further pointed out Defendant failed to follow its own procedure during the preparation of both reports related to Plaintiff. Finally, the Court looked to Defendant's lack of a procedure for flagging disputed criminal background information to avoid repeat occurrences. It found this evidence sufficient to support a willful violation of the FCRA.

The Court spent the majority of its seventy-seven-page opinion analyzing the constitutionality of the jury's $3.3 million punitive damages award. The ratio of punitive damages to compensatory damages in *Williams* was 13:1. The Court noted the Supreme Court has previously found an award of punitive damages with a 4:1 ratio is "close to the line" of unconstitutionality, and an award that exceeds a single-digit ratio is likely a violation of the Due Process Clause. However, after a lengthy review of relevant case law, the Court determined in candor that it is "ultimately up to the reviewing court to eyeball the punitive damages award and, after weighing the egregiousness of the particular misconduct and the harm it caused, decide whether the award is grossly excessive."

In the end, the Court ruled that a 4:1 ratio was appropriate in this case and reduced the jury's punitive damages award to $1 million based on the amount of compensatory damages awarded and its assessment of the reprehensibility of Defendant's conduct. The Court's reprehensibility analysis focused primarily on Defendant's use of only two identifiers when attributing the criminal history of Ricky Williams to Plaintiff, as well as its failure to flag this information once alerted to its inaccuracy to avoid future mispairing.

Based on two concurring opinions filed with the majority decision, the $1 million award was a compromise by the three-judge panel. One judge on the panel would have affirmed the $3.3 million award, while another opined that $500,000 was the proper figure. As one of the judges noted, "[t]he only way to resolve such a disagreement is to meet in the middle—as we have done."

In its punitive damages analysis, the Court noted the tension between competing analyses of Defendant's error rate with respect to mispairing individuals with criminal background history and the extent to which this placed Defendant on notice of its conduct. Based on evidence at trial, the national rate for all errors in reporting raised through Defendant's dispute resolution process between 2010 and 2013 was .38%—less than one half of one percent. In mitigating the alleged reprehensibility of its conduct, Defendant argued that this figure was rather low.

Plaintiff, on the other hand, argued that based on the high number of reports issued by Defendant, errors still affected some 13,000 individuals. Importantly, however, Plaintiff did not show the extent to which those 13,000 individuals had similar experiences to the Plaintiff. The Court concluded that the extent to which the Court could determine that Defendant was on notice was limited because Plaintiff "failed to bore down into the numbers." Indeed, the court expressly stated that a high frequency of related experiences would be something the "Plaintiff should have seized on and proved at trial if he wanted to justify an award of extraordinarily high punitive damages."

The decision comes on the heels of a Complaint filed by the CFPB against Sterling Infosystems, Inc. in the United States District Court for the Southern District of New York alleging violations under the FCRA and a simultaneously filed Proposed Stipulated Final Judgment and Order. In the Complaint, the CFPB appeared to stake out a position that matching a criminal record to an individual with a common name based solely on a first and last name and date of birth was inadequate.

Challenges to matching procedures utilized by the background screening industry continue to be an area of focus in FCRA litigation. The Eleventh Circuit's *Williams* decision represents a noteworthy development on that front.

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