

# Key Takeaways From the New Onslaught of FCRA Filings

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Following an unprecedented year, lawsuits under the Fair Credit Reporting Act continue to be filed with ever-increasing frequency and consequence.

The past year saw an important Article III standing decision from the [U.S. Supreme Court](#), a pending sovereign immunity split, preemption litigation and enlightening furnisher decisions.

The significant decisions below address such overarching issues as subject matter jurisdiction, sovereign immunity and willful violations of the law.

There was also substantial authority addressing common FCRA claims, including those relating to disputes, disclosure and authorization forms, and balance reporting. Many of these decisions provided clarity, while others deepened circuit splits. An explanation and analysis follows.

## Article III Standing In [TransUnion v. Ramirez](#)

Take, for example, the June 25, 2021, [TransUnion LLC v. Ramirez](#)<sup>[1]</sup> [decision](#) in the U.S. Supreme Court. This rare FCRA case, in which a certified class action went to trial, resulted in a \$60 million jury verdict.

On appeal, a split panel in the [U.S. Court of Appeals for the Ninth Circuit](#) reduced the punitive damages award, but otherwise affirmed.

The case stemmed from TransUnion reporting the named plaintiff, Sergio Ramirez, as a “potential match,” according to the Supreme Court opinion, for a government terrorist watch list, causing him to be denied a car loan.

At issue before the Supreme Court was whether class members who were similarly identified as potential matches in TransUnion’s database, but whose consumer report was never disseminated to a third party, had suffered a concrete injury sufficient to support Article III standing.

The Supreme Court held they did not. First, the high court emphasized that:

Under Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation in federal court.

Recognizing that history and tradition guide its concrete injury assessment, the high court viewed the alleged harm as bearing a close relationship to defamation actions for reputational harm. Third-party publication is critical.

The Supreme Court rejected the argument that class members whose information was not disseminated had standing due to a risk of future harm. Those class members lacked standing because they "did not demonstrate that the risk of future harm materialized" or "that they suffered some other injury (such as an emotional injury) from the mere risk that their credit reports would be provided to third-party businesses."

Justice Clarence Thomas, in a dissenting opinion, warned that Ramirez may be a "pyrrhic victory" for TransUnion because it does not prohibit Congress from creating statutory rights, but only holds that federal courts lack jurisdiction to enforce them absent a concrete harm. In other words, state courts, unbounded by Article III, may now be the sole forum for such cases.

Ramirez is now front and center in standing arguments lodged in federal court nationwide. Ramirez is a potentially far-reaching opinion, with impact well beyond the FCRA, the implications of which are sure to be debated in the coming months in the lower courts.

After Ramirez, it is clear plaintiffs need more than a statutorily created right — public or private — and cause of action to make their way into federal court.

Whether that statutory right can find a sufficient common law foundation to give to a concrete injury, or whether an informational or other form of concrete injury can be established, will be debated by litigants by reference to Ramirez and the Supreme Court's many other standing decisions.

The impact of the Ramirez decision will be widely debated across numerous substantive areas of the law, including consumer protection claims, data breach cases and privacy matters. Going forward, however, it is also clear that it is the judiciary, not Congress, that is charged with determining whether a concrete harm exists, based on a historical inquiry.

In other words, given the facts relevant to the larger class in Ramirez, which fall short of the "concrete harm" standard, Congress could not rewrite the FCRA in such a way that would confer standing. The opinion clearly shifts power from Congress to the judiciary; the extent of that shift is still to be seen.

### **Article III Standing in *Fillinger v. Third Federal Savings and Loan Association***

Also take, for example the Nov. 16, 2021, *Fillinger v. Third Federal Savings and Loan Association*[2] holding from the [U.S. Court of Appeals for the Sixth Circuit](#) that an alleged loan denial is a sufficient injury to confer Article III standing.

Judy Fillinger filed a loan application with Third Federal Savings and Loan Association in 2020. The application disclosed that Third Federal had foreclosed on a previous loan.

Fillinger provided documentation of a bankruptcy case that discharged her debt in 2009, along with three foreclosure cases in 2010, 2012 and 2014 confirming she had no obligation on the debt. Third Federal still denied the loan.

The plaintiff filed FCRA and Equal Credit Opportunity Act claims against Third Federal, which moved to dismiss for lack of standing under Article III. The [U.S. District Court for the Northern District of Ohio](#) agreed and dismissed.

On appeal, the Sixth Circuit vacated and remanded, holding that the complaint alleged a concrete injury: the loan denial. The court also found the injury:

- Was caused by Third Federal when it committed the alleged FCRA and ECOA violations; and
- Could be redressed through a favorable judicial decision based on the remedies requested in the complaint.

Fillinger represents one of the first appellate decisions issued post-Ramirez. Read narrowly, Fillinger reaches an unsurprising result: A loan denial can confer standing, as a financial injury is generally regarded as the paradigmatic form of Article III injury.

Perhaps more broadly, given the reversal the case shows that federal courts will continue to determine their own standing in ways that will likely differ across circuits, post-Ramirez.

### **Willfulness Standard in *Shimon v. Equifax***

Also take, for example, the April 9, 2021, *Shimon v. Equifax Information Services LLC* holding from the [U.S. Court of Appeals for the Second Circuit](#).

The appellate court weighed in on the willfulness standard previously articulated by the U.S. Supreme Court in the 2007 *Safeco Insurance Co. v. Burr*[3] decision in the U.S. Supreme Court, which says that a defendant does not act in “reckless disregard” of the FCRA if its “reading of the statute ... was not objectively unreasonable.”

The case involved Equifax’s handling of a judgment that was “dismissed after trial.” In response to the plaintiff’s dispute, Equifax changed the reported “judgment” to “judgment satisfied,” while the plaintiff argued the reference should have been removed entirely. Among other allegations, the plaintiff claimed Equifax willfully violated Title 15 of the U.S. Code, Sections 1681g and 1681i.

The Second Circuit held that Safeco’s “reasonable interpretation” defense applies regardless of whether a defendant actually and contemporaneously relied on that interpretation at the time of the allegations.

Emphasizing the Supreme Court’s instruction that willful FCRA violations must be assessed objectively, the court reiterated that evidence of subjective bad faith is insufficient.

In other words, if a defendant’s FCRA interpretation, viewed retrospectively, was not objectively unreasonable, assessing the defendant’s actual motivation “would introduce just the sort of subjective inquiry whose relevance the Safeco Court rejected.”

Shimon is significant in that it represents yet another circuit court of appeals' determination that the assessment of "willfulness" is an objective one that does not hinge on the subjective intent of a defendant at the time of the violation.

Although certain district courts still adhere to the contrary view, appellate court guidance is increasingly robust in favoring this defendant-friendly interpretation, which can lead to dismissals of willfulness claims at the pleadings stage.

### Preemption in [Consumer Data Industry Association v. Frey](#)

Also take, for example, the October 2020 *Consumer Data Industry Association v. Frey*<sup>[4]</sup> decision in the [U.S. District Court for the District of Maine](#). The federal court held that the FCRA preempts burdensome credit reporting restrictions imposed by the Maine Fair Credit Reporting Act.

The Maine Legislature passed two amendments to the Maine FCRA in 2019 prohibiting consumer reporting agencies from reporting:

- Medical debts less than 180 days old;
- Medical debts that have been settled or paid; and
- Debts that are the product of economic abuse, on consumer reports.

Both laws required a credit reporting agency to engage in additional, extensive investigations of the underlying circumstances, conditions and status of a consumer's debts to determine whether those debts are reportable.

The CDIA filed suit against the Maine Attorney General and the Superintendent of the Maine Bureau of Consumer Credit Protection, seeking declaratory judgment that both laws were preempted by the FCRA.

The District of Maine agreed, rejecting a narrow construction advocated by the state of Maine that would limit preemption to the specific types of information already regulated by the FCRA.

The court instead held that the FCRA preempted any state regulation of information contained in consumer reports — rejecting the more narrowed approach offered by the state of Maine. Because the Maine Amendments place additional prohibitions on the kind of information that may be included in a consumer report, they concern the exact subject matter expressly preempted by Congress.

The defendants filed an appeal to the [U.S. Court of Appeals for the First Circuit](#), with a decision expected in 2022.

Similar preemption challenges have been filed in numerous states that have enacted credit reporting related restrictions.

Frey demonstrates that courts will not hesitate to preempt state-level restrictions on the content of consumer reports. While the First Circuit will also review the issue, national trends appear to be consistently vindicating preemption arguments lodged by industry associations on similar bases.

## **Sovereign Immunity in *Mowrer v. U.S. Department of Transportation***

In the Sept. 24, 2021, *Mowrer v. U.S. Department of Transportation*<sup>[5]</sup> decision, the [U.S. Court of Appeals for the District of Columbia Circuit](#) held that government immunity is waived under the FCRA.

In recent years, the U.S. Courts of Appeals of the Fourth, Seventh and Ninth circuits have dealt with whether sovereign immunity is waived under the FCRA. Both the Fourth and Ninth circuits have found immunity is not waived, while the [U.S. Court of Appeals for the Seventh Circuit](#) has ruled in favor of immunity.

The D.C. Circuit's opinion furthers the divide by finding a waiver of sovereign immunity under the FCRA. In coming to a decision of whether the drivers could seek recovery from the [Federal Motor Carrier Safety Administration](#) under the FCRA, the court first addressed whether Congress intended for the FCRA to apply to governmental entities.

The court reasoned that Congress intended to waive immunity by zeroing in on how the FCRA defines "person" within the statutory text. The court noted the FCRA explicitly defines person as "any individual, partnership, corporation, trust, estate, cooperative e, association, government or governmental subdivision or agency, or other entity."

Agreeing with the Seventh Circuit's reasoning, the court concluded that the FCRA had textually waived sovereign immunity through the broad definition of "person."

This deepening circuit split may portend ultimate review by the U.S. Supreme Court. Until then, the ability to sue government agencies under the FCRA may well depend on which circuit the case is filed in.

## **Disclosure and Authorization Forms in *Walker v. Fred Meyer***

Finally, take the 2020 *Walker v. Fred Meyer*<sup>[6]</sup> decision in the U.S. Court of Appeals for the Ninth Circuit.

Plaintiff Daniel Walker applied for employment with defendant [Fred Meyer Inc.](#) Walker was later dismissed from his position following an unsatisfactory result on his background check. He then sued Fred Meyer, arguing that the disclosures given to him describing the background check process violated the FCRA.

The [U.S. District Court for the District of Oregon](#) initially granted partial summary judgment to Fred Meyer, holding that:

- Fred Meyer's disclosure notice was clear and conspicuous as required under the FCRA; and
- Fred Meyer's failure to comply with the FCRA's standalone requirement was not willful.

On appeal, the Ninth Circuit examined as a matter of first impression what information may be included in the disclosure. The court held that beyond a plain statement disclosing that a consumer report may be obtained for employment purposes, it may also include some concise explanation of what that phrase means, such as describing what a consumer report is, how it will be obtained and the type of employment purposes for which it may be used.

The court held that additional information regarding Walker’s rights under federal and state law — although likely included by Fred Meyer in good faith — was extraneous.

The court remanded to the District of Oregon to determine, however, whether the remaining language of the disclosure was “clear and conspicuous.”

The district court ultimately concluded that Fred Meyer’s disclosure was both clear and conspicuous because it was reasonably understandable and noticeable to the consumer.

The court also held that Fred Meyer’s failure to comply with the FCRA’s standalone requirement was not willful — or objectively unreasonable at the time the plaintiff applied — as the Ninth Circuit’s prior decision remanding the case defined the term “disclosure” for the first time.

Further, the Ninth Circuit’s determination that Fred Meyer’s disclosure failed to comply with the standalone requirement was based on a 2019 Ninth Circuit decision, which was decided after Fred Meyer provided the disclosure to Walker.

Although Fred Meyer succeeded in demonstrating to the district court that its noncompliance in this case was not willful due to the intervening development of the law and its good faith, employers utilizing background screening should note that the Ninth Circuit’s jurisprudence more generally currently provides notice that strict compliance with the FCRA’s standalone requirement is vitally important.

## **Dispute-Related Litigation**

Another continuing trend in 2021 involved lawsuits involving previously disputed accounts that the consumer claimed were no longer disputed.

Following the requirements of Section 1681s-2(a)(3) of the FCRA, furnishers respond to disputes by marking the account and including an appropriate compliance condition code.

The consumer then decides — and sometimes — notifies either the credit reporting agency and the furnisher that they no longer dispute the account/reporting. The consumer then files a lawsuit alleging that the account is inaccurately being reported as being in dispute.

The “no longer in dispute” theory has also failed to gain traction with the federal appellate courts. In the Dec. 23, 2021, *White v. Equifax Information Services LLC* ruling, the [U.S. Court of Appeals for the Eleventh Circuit](#) affirmed the dismissal of a case where the plaintiff failed to inform the data furnisher that she no longer disputed her account.

Instead — like many cases — the plaintiff had only sent a dispute to the credit reporting agency, stating that the dispute notification on her credit report was erroneous. The court noted that the furnisher met its obligations under the FCRA when it investigated the dispute and determined that the plaintiff had previously disputed the account, and never informed the furnisher that dispute was resolved.

Notably, the court also rejected the plaintiff's arguments that the furnisher was required to reach out to her as part of its investigation. Despite little traction in the courts, the plaintiffs bar continues to raise the "no longer in dispute" claims, despite continued scrutiny by federal judges over the generic, recycled complaints being filed on this issue.

### **Scheduled Monthly Payment Reporting After Account Closure or Charge-Off**

Last year saw a continued stream of cases involving the reporting of scheduled monthly payments on charged-off or paid and closed accounts.

Two typical fact patterns underlie these scheduled monthly payment cases. One set of cases concerns the reporting of scheduled monthly payments on an account that has been charged-off — i.e., the creditor was written off the debt as a loss — while the other concerns accounts that have been paid and closed. In both circumstances, consumers are focused on whether it is inaccurate or misleading for furnishers to report a scheduled monthly payment amount because it suggests an ongoing financial obligation.

Many courts have taken a holistic approach when considering the credit reporting that contains a scheduled monthly payment on charged-off or paid and closed accounts.

For example, in the Oct. 27, 2021, *Young v. Equifax Information Services LLC* decision, the [U.S. District Court for the District of New Jersey](#) found that the inclusion of a scheduled monthly payment amount in a furnisher's reporting was not inaccurate or misleading when viewed in the context of other information reported.

Specifically, the furnisher reported that the consumer's account had a zero balance, the account was closed, and the last payment occurred more than five years before the dispute at issue was raised. The court concluded that when the account was viewed as a whole, it was undeniable that there was no ongoing financial obligation.

The takeaway from these cases is that the propriety of reporting a scheduled monthly payment on a charged-off or paid and closed account likely turns on whether the other information reported with the scheduled monthly payment. If the reporting, as a whole, demonstrates that the scheduled monthly payment is historical information, rather than an indication of an ongoing payment obligation, it is not inaccurate or misleading. The importance of clarifying/contextual information cannot be understated when reporting a scheduled monthly payment amount on charged-off or paid and closed accounts.

### **Conclusion**

FCRA litigation filings continued their meteoric rise in 2021. With increased caseloads comes increased precedent, and going forward, we continue to expect to see more and more published FCRA decisions, including potentially more state court actions and federal court cases analyzing the standards articulated in Ramirez.

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[1] 141 S.Ct. 2190 (2021).

[2] No. 21-3088, 2021 U.S. App. LEXIS 34005 (6th Cir. Nov. 16, 2021).

[3] 994 F.3d 88 (2d Cir. 2021).

[4] No. 1:19-cv-00438, 2020 U.S. Dist. LEXIS 187061 (D. Me. Oct. 8, 2020) and Me. Rev. Stat. Ann. tit. 10, §§ 1310-H(4), 1310-H(2-A) (2019).

[5] 14 F.4th 723 (D.C. Cir. 2021).

[6] No. 3:17-cv-01791-YY, 2021 U.S. Dist. LEXIS 178019 (D. Or. Aug. 13, 2021).

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